Confessions in the High Court

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Can it ever be unfair to use a reliable confession?

A woman complains to the police that she has been raped. The alleged rapist is picked up by the police and taken in for questioning. He confesses. At his trial the confession is admitted in evidence and a jury convicts him of rape. He appeals to the High Court on the grounds that the trial judge should have excluded the confession because the police failed to follow the statutory procedures for questioning suspects. The High Court allows the appeal. The man's conviction is quashed and a new trial ordered. Without the confession there is insufficient evidence to justify further prosecution. The man goes free.

Perhaps more than any other case I have taught in evidence this year, *Pollard v R* (1992) 110 ALR 385 aroused strong feelings in my students. Is it really proper — some wondered — for the High Court to suggest that a voluntary and apparently reliable confession to a charge of rape should be excluded on the grounds that its admission would be unfair to the accused? How would the victim of the alleged rape feel, they asked, about the fact that a man who admitted to having raped her went unpunished because the police failed to follow the correct procedure? And how could the court find that this result was tolerated, let alone required, by the 'public interest'?

In fact, *Pollard* is merely one part of a broader pattern of recent decisions in which the High Court has sought to strengthen traditional liberties, enforce safeguards for suspects in police custody, and give a broader meaning to the principle that an accused person has a right to a 'fair' trial. Several of these decisions relate to evidence of confessions, and it is these, and in particular *Pollard*, which I examine in this article.

A pattern of protection

Before turning to confessions, though, what happens when a suspect makes no confession, indeed says nothing at all? In *Petty v R; Maiden v R* (1991) 102 ALR 129 the High Court insisted that the right to remain silent would be meaningless if the exercise of that right — whether during the process of questioning by police, or at the committal proceedings — could be used in any way against the accused; even to undermine the credibility of a last minute defence.

Often, though, the dispute is about whether the alleged confession was made at all. In *Pollitt v R* (1992) 108 ALR 1 the court recognised the dangers of acting on the evidence of prison informers, evidence which has featured in several prominent miscarriages of justice, including the conviction of Tim Anderson. Like so many prisoners before him, Pollitt allegedly confessed to the late Raymond Denning, a man in whom prisoners apparently felt almost impelled to confide, despite the fact that he routinely betrayed their confidences in court. The court held that in all but exceptional circumstances a jury should be warned of the dangers of acting on the evidence of prison informers.

More radically, in *McKinney v R; Judge v R* (1991) 98 ALR 577 the High Court provided what may be the high point of institutional recognition of that which has been generally suspected but officially denied for years: that the police frequently fabricate confessions. As in *Pollitt*, the court's solution was to require the judge to warn the jury of the dangers involved in convicting an accused person where the main evidence against him or her is a confession allegedly made while in police custody, the making of which is not reliably corroborated.

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Tape recording

Unfortunately, one aspect of the court's decision in *Pollard v R* (1992) 110 ALR 385 may undermine the effectiveness of the Victorian Parliament's response to the same problem. This is the requirement that in order for a confession made by a person in custody to be admissible it must have been tape-recorded: s.464H(1) of the *Crimes Act* 1958 (Vic.). The practice of routine recording is now also common in New South Wales and Tasmania, and will no doubt eventually spread to all Australian jurisdictions, if for no other reason than to avoid the warning now required by *McKinney*.

The advantage of provisions like those in Victoria is twofold: first, they make it impossible for the police to fabricate confessions. Frequently, however, the accused does not deny making the confession, but instead claims that it was only made because of some improper police conduct during the questioning, such as the offering of an inducement. As will be seen below, if these allegations are accepted, then the confession may be inadmissible. The second advantage of tape-recording, then, is that it should help to resolve any dispute between the police and the accused as to what actually happened during police questioning, by providing an independent record of all that was said and done. It is this latter protection which *Pollard* undermines.

In *Pollard* — a rape case — the accused was brought in for questioning to Frankston police station and interviewed there for an hour and a half by a Detective Minisini. Pollard made certain admissions, but these were not recorded, and their admission not sought. He was then taken to the St Kilda police complex and interviewed again by Detective Minisini, who framed his questions so as to get Pollard to confirm the admissions he had already made. This interview was recorded.

A majority of the High Court held that the St Kilda interview was admissible. Where there is more than one discrete and separate interview, they held, then the entire process of questioning need not be recorded in order for one of those interviews to be admissible. It is surely not too cynical to suggest that the case will prove tempting to police: soften the suspect up in the first, unrecorded, interview with who knows what manner of impropriety; and then, when the suspect is ready to confess, turn on the tape-recorder.

The Supreme Court of Victoria's decision in *R v Heatherington* [1993] 1 VR 649 — which purports to be an application of the decision in *Pollard* — provides further substance for these concerns. There the 'separate' interviews took place at the same police station and were separated by only half an hour. What next: will it be a new interview every time the questioning stops for a cup of tea? Fortunately, *Heatherington* is in the process of being appealed, so the High Court may yet be able to undo the damage it did in *Pollard*.

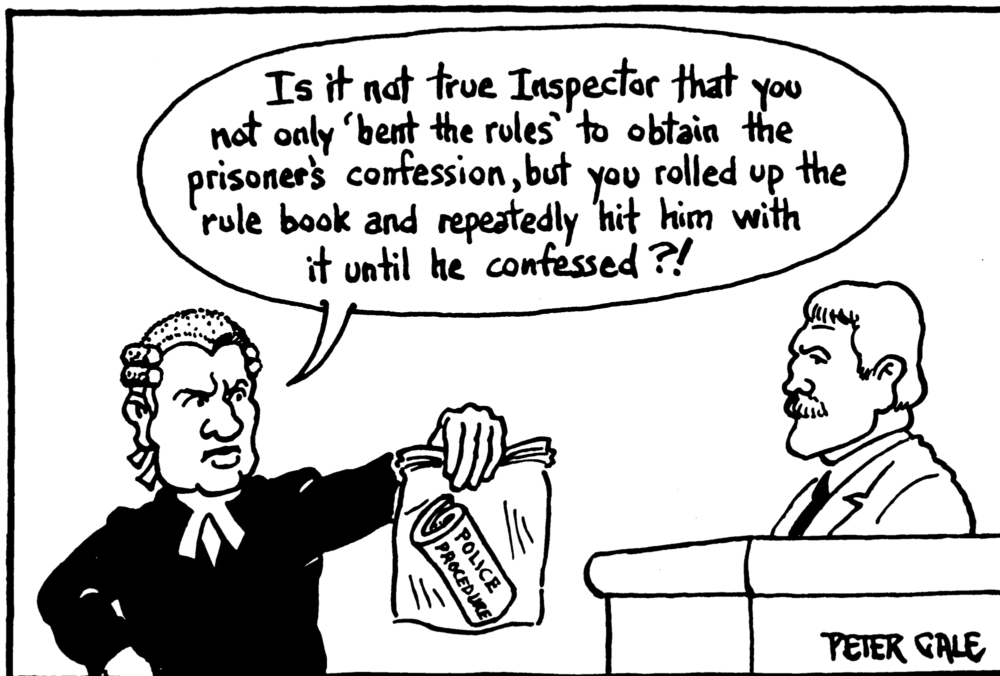
Rule and discretion

It is, however, on another — and better — aspect of *Pollard*, and on the even more recent decision in *Foster v R* (1993) 113 ALR 1, that I want to concentrate in this article. What these two cases suggest is that the High Court is moving towards a broader conception of what constitutes a fair trial, and that it is prepared to take more seriously its role of ensuring that those who are charged with enforcing the law — in particular the police — should themselves respect it. But before looking at what it is about *Pollard* and *Foster* which suggests these conclusions, it is necessary to briefly sketch the rules which govern the admissibility of evidence of an accused person's confession.

At common law a confession is inadmissible unless it was voluntarily made. It will be held to be involuntary if it was made as a result of oppressive conduct on the part of the police by a suspect desiring not to confess but unable to further endure the ordeal of interrogation; or if it was made as a result of inducements offered by the police, such as a promise not to oppose bail, or a threat to prefer further charges unless a confession is forthcoming. These common law rules have been modified by statute in several Australian jurisdictions.

Although the onus of proving voluntariness is on the prosecution, the accused will often be at a great disadvantage in that there may be no independent witnesses who can corroborate their allegations of unfair police treatment, or fabrication by the police of the confession. As will be seen, *Foster* goes a considerable way towards removing this disadvantage. It does so through its interpretation of the pair of discretions which exist alongside the rules of admissibility.

These discretions allow the trial judge to exclude a confession even if he or she has found that it was voluntarily made. The first discretion is commonly called the fairness discretion: it allows the judge to exclude a confession when its use at the trial would be unfair to the accused. The second discretion allows the judge to exclude illegally, improperly or unfairly obtained evidence — including



confessions — on the grounds that public policy requires this. *Pollard* and *Foster* are important for what they tell us about these two discretions.

The fairness discretion

A trial judge has a general discretion to exclude evidence in the interests of ensuring that the accused receives a fair trial. This discretion is usually formulated as a discretion to exclude legally admissible evidence where its prejudicial effect exceeds its probative value. The fairness discretion for confessions is also concerned with ensuring that the accused receives a fair *trial*. This is an important point: the discretion is not to be exercised merely because the accused was unfairly treated by the police during their investigation of the offence. But the means by which a confession is obtained may make it unfair to use it at trial: pre-trial unfairness in obtaining the confession may become at-trial unfairness if the confession is accepted in evidence.

But what is it about an unfairly obtained confession that makes it unfair to use? The usual answer has been that the circumstances in which the confession was obtained may suggest that it is unreliable; that is, that the accused may have falsely confessed. It is unfair to admit unreliable confessions for the same reason that it is unfair to admit evidence where its prejudicial effect exceeds its probative value: it may cause the jury to convict the accused on evidence which does not justify conviction.

There have been frequent statements by High Court judges suggesting that this reliability-based conception of fairness is the only form of fairness upheld by the fairness discretion. That is, unless the police improprieties are such as to call into question a confession's reliability, then there is nothing unfair in allowing its use at trial, no matter how unfairly it was obtained. But other members of the High Court have argued that there is more to fairness than just reliability. In *Duke v R* (1988) 83 ALR 650 at 653, for instance, Brennan J stated that:

> The unfairness against which an exercise of the discretion is intended to protect an accused may arise not only because the conduct of the preceding investigation has produced a confession which is unreliable but because no confession might have been made if the investigation had been properly conducted.

This is a far broader conception of at-trial fairness: it suggests that, in some circumstances, a trial may be unfair unless the judge excludes evidence of a voluntary and apparently reliable confession. For example, there may be at-trial unfairness in allowing the use of a confession which, but for the pre-trial unfairness, would not have been made. Clearly this may lead to the acquittal of an accused person whose confession shows him or her to be guilty. The decisions in *Pollard* and *Foster* suggest that this broader conception of at-trial fairness has now been embraced by a majority of the High Court.

In *Pollard*, as already noted, the accused was interviewed first at Frankston and then at St Kilda. Before any questioning began, the police were required by statute to administer a caution to the accused, essentially informing him of his right to remain silent (s.464A(3) of the *Crimes Act* 1958 (Vic.)), and to inform him of his rights to communicate with a friend or relative to inform them of his whereabouts, and to communicate with a legal practitioner (s.464C(1)). None of this was done. At St Kilda the police did caution him, and inform him of his rights, but did not defer the questioning for a reasonable time — as required by the Act — to allow him to exercise those rights.

It cannot be seriously argued — nor indeed was it — that any of these failings called into question the reliability of the confession made by Pollard. Nevertheless, Brennan, Dawson and Gaudron JJ held that these failings were relevant to the exercise of the fairness discretion — although they did not indicate how that discretion should have been exercised — while Mason CJ, Deane and McHugh JJ held that these failings were not only relevant to the fairness discretion, but that they should have resulted in the confession's exclusion. So what conception of fairness is operating here? In this author's view it is that which is often referred to as the 'protective' principle.[2]

This is, like the reliability-based conception of fairness, concerned with at-trial fairness; but it makes a different use of the pre-trial unfairness which led to the making of the confession. Where the reliability-based conception of fairness requires the court to consider whether the pre-trial unfairness was such as to render doubtful the truth of the confession, the protective conception of fairness requires the court to ask whether the rights of the accused have been infringed, and whether that infringement has led to any disadvantage.

The cat out of the bag

In *Pollard*, for instance, it is quite possible that the accused would not have made any admissions at Frankston if he had — as the statute required — been informed of his various rights before questioning commenced. Once 'the cat was out of the bag', however, Pollard could never be free of the psychological and practical disadvantages of having made those admissions: even if the Frankston admissions were not themselves admissible. Certainly, receiving the required warnings and information after having made the original admissions could not undo the disadvantage of having made them in the first place. Indeed, it seems unlikely that Detective Minisini intended them to do so: according to the High Court, the St Kilda questions were deliberately framed so as to get Pollard to confirm the admissions he had already made in Frankston.

A similar approach was — until recently — taken in the United States, although there it was based on the Bill of Rights. In *Oregon v Elstad* (1985) 470 US 298, 84 L Ed 2d 222, for instance, the facts were very similar to those in *Pollard*. The accused confessed to the police when arrested at his home on a charge of burglary. This confession was inadmissible because the accused had not been informed — as is required by *Miranda v Arizona* (1966) 384 US 436, 16 L Ed 2d 694 — of his constitutional rights, including the right to remain silent. Subsequently, he was taken to a police station where a *Miranda* warning was given; he then repeated his earlier confession. A majority of the Supreme Court used the case as an opportunity to water down the protection which previous Supreme Court decisions had given to an accused person.

In a strong dissenting judgment, however, Brennan J of the US Supreme Court argued that the majority judgment ignored basic psychological realities. These include the fact that a suspect who has confessed once to the police is likely to feel that he or she has nothing further to lose by repeating that confession. This reality is recognised, Brennan J noted, in standard police interrogation manuals which advise that 'the securing of the first admission is the biggest stumbling block', and that once obtained 'there is every reason to expect that the first admission will lead to others, and eventually to the full confession'.[3]

In other words, once 'the cat is out of the bag', it is out for good, and no amount of fair treatment by the police is likely to remove the disadvantage of the unfair treatment which led to the making of the initial confession. In Australia, where there is no Bill of Rights, the 'cat out of the bag' approach must instead be pursued by broadening the concerns of the fairness discretion from a solely reliability-based conception of fairness, to a protective one. It is this step which the High Court appears to have taken in *Pollard* and *Foster*.

It is a step which appears also to have been taken in England, judging by the Court of Appeal's exclusion of confessions in cases where the pre-trial unfairness did not appear to have affected the reliability of the confession so obtained. In *Mason* [1988] 1 WLR 139 the police falsely told the accused and his solicitor that the accused's fingerprints had been found on an incriminating object. In *Keenan* (1989) 90 Crim App Rep 1 the police breached statutory anti-verballing provisions. In both cases the court held that the confession should have been excluded in the exercise of a statutory at-trial fairness discretion created by s.78(1) of the *Police and Criminal Evidence Act* 1984 (UK).

Protective fairness

The concept of fairness which the High Court has now apparently adopted claims that the accused must be protected from any disadvantage flowing from the infringement of his or her rights. The disadvantage in the case of an unfairly obtained confession is the use of that confession at trial. The only way to protect the accused from this disadvantage, and thereby to uphold the rights of the accused, is to prevent the prosecution from making use of the confession. If this is not done, then the trial itself is unfair.

On the protective conception of fairness, if the police infringe one of the rights of a suspect in custody or any of the procedural rules designed to protect a suspect against unfair methods of obtaining evidence, the fact of this infringement should, prima facie, lead to the exclusion of any resulting confession on the grounds that it would be unfair to allow its use at trial. This is in fact precisely what McHugh J said, at least in relation to statutory safeguards such as those which were infringed in *Pollard.*

Most importantly, the confession should be excluded, on this view, even when it is perfectly reliable. The significance of this can hardly be over-stated: it is an approach requiring the courts to uphold the rights of a suspect in custody by excluding any confession obtained in breach of those rights. This sounds radical, and indeed it is; but the view that this really is what the High Court was saying in *Pollard* is strongly reinforced by the court's approach to the unedifying facts of *Foster*.

Foster

On 4 August 1987 the public high school in Narooma, a small New South Wales country town, was destroyed by arson. Ten days later, the police drove onto land owned by an Aboriginal co-operative at Wallaga Lake, a half-hour drive from Narooma, and made a highly public arrest of Stephen Foster. Foster, 21 years old and semi-literate, was ordered — in front of friends and family — to get into the caged section of a police truck, and then driven away to the Narooma police station. Although he initially denied any involvement in the arson, within less than an hour of his arrival at the Narooma police station he had signed a typed confessional statement. Apart from this statement, there was no evidence implicating Foster.

Foster's arrest and detention were undoubtedly unlawful. The police had no evidence against him, and arrested him solely for the purposes of obtaining, by questioning, some evidence implicating him in the arson: at common law, the police have no such power of arrest. Furthermore, it seems that the police would not have released him until they had obtained what they wanted; until, in other words, Foster had broken down and confessed. Nevertheless, the police claimed and the trial judge held, that Foster's confession was a voluntary response to his being told (falsely) that two other youths, who were also being questioned and who became his co-accused, had confessed in terms which implicated him, and to being shown their confessional statements.

Bizarrely, the trial judge felt himself able to hold that the confession was voluntary without actually deciding on the truth of certain allegations made by Foster. Foster claimed that when arrested he had asked if he could bring someone with him, and that this request had been denied. He also claimed that his 'confession' had been fabricated by the police, and that he had only signed it because the police threatened both to bash him and to charge his younger brother if he did not. If Foster's version of events was accepted, then doubt must have been cast on both the voluntariness of the confession and on its reliability.

Indeed, there would be some doubt on both these scores even if Foster's allegations were rejected. The manner in which Foster had been arrested would have made vividly clear to him that he was at the mercy of the police. This difference in power would have been exacerbated by Foster's isolation in the police station and lack of literacy. And the oppressiveness of police custody to a young Aborigine should not be underestimated: as Foster was aware, violence and death in police custody have been appallingly frequent. Even if the police were correct in claiming that Foster did make the confession, he may well have done so simply in order to secure his release.

Nevertheless, it was neither on the question of voluntariness or on that of reliability that the leading judgment in the High Court turned. Both of those questions might have required the court to determine whether or not the police made the threats alleged by Foster, a question falling outside their role as a court of appeal. Instead, in a joint judgment, a majority of the court — Mason CJ, Deane, Dawson, Toohey and Gaudron JJ — managed to hold that the judge should have exercised his fairness discretion in the accused's favour without even needing to consider the truth of Foster's allegations.

Although the majority agreed that there was a question of voluntariness, what concerned them most was the serious unlawfulness of Foster's arrest and detention, and, in particular, the fact that he had been deprived of any independent witness who could have corroborated his allegations. The court did not suggest that either of these things made the confession unreliable: but the fact that Foster had been wrongly deprived of any chance of corroborating his allegations placed him at a serious disadvantage at a trial in which he wished to contest the police version of events. Thus Foster did not need to show that the confession had been extracted as a result of improper or oppressive police conduct, as he had alleged; all he needed to show was that the manner of his detention made it impossible for him to prove the truth of his allegation.

This is the protective conception of fairness again: pre-trial unfairness created a disadvantage to the accused from which it was the duty of the trial judge to protect him by excluding the confession. That the confession's exclusion was not based on its unreliability is confirmed by the fact that McHugh J, the only judge in favour of dismissing the appeal, argued that it was not unfair to admit the confession because there had been no findings of fact which brought the reliability of the confession into question. What is significant is that he was the only member of the court who considered this to be relevant to the exercise of the discretion.

Public policy discretion

Following *Pollard* and *Foster*, the fairness discretion should become a powerful means of upholding, at trial, an individual accused person's pre-trial rights. The two cases also appear likely to increase the effectiveness of the public policy discretion as a means of protecting the rights of suspects in general. The public policy discretion — which English courts have refused to accept — was first recognised by the High Court in *R v Ireland* (1970) 126 CLR 321 and *Bunning v Cross* (1978) 19 ALR 641, and was extended to confessions in *Cleland v R* (1982) 151 CLR 1 and *Williams v R* (1986) 161 CLR 278.

The discretion is not concerned with fairness to an individual accused, but with balancing competing public interests. On the one hand, there is a public interest in seeing the guilty brought to justice. On the other hand, there are public interests in ensuring that those charged with enforcing the law themselves respect it, and that the courts are not demeaned by the uncontrolled admission of improperly obtained evidence. The discretion assumes that sometimes the latter public interests must prevail over the former, and that this can be achieved by excluding the improperly, unfairly or illegally obtained confession or other evidence.

By creating the discretion, the High Court has accepted the truth of what Barwick CJ said in *Ireland*: 'Convictions obtained by the aid of unlawful or unfair means may be obtained at too high a price'. The existence of the discretion is controversial, however, because to some people (basically those who also argue that the fairness discretion should only be concerned with reliability) the sole purpose of court proceedings is the pursuit of truth. In allowing a court to pursue other goals — such as expressing disapproval of police conduct — these people see the discretion as misguided.

Arguments about the propriety of the discretion have so far been kept within bounds, however, because it has only rarely been exercised to exclude a confession. This is partly because by the time a court comes to consider the public policy discretion, it will already have decided that the confession was voluntary, and that it would not be unfair to the accused to allow its use; but the relative rarity of exclusion on public policy grounds can also be traced to *Cleland*, where Gibbs CJ, Dawson and Wilson JJ indicated that it was only in exceptional circumstances that the discretion should be exercised in the accused's favour. *Pollard* and *Foster* suggest that in future the discretion may be exercised more liberally.

In *Pollard*, Brennan, Dawson, Gaudron and Toohey JJ said that the breaches by police of their statutory duties were relevant to the public policy discretion; Deane J stated that Detective Minisini's conduct amounted to a reckless disregard of statutory duties imposed for the protection of suspects, and that the confession should definitely have been excluded; Mason CJ agreed with Deane J, except to add that something less than reckless disregard would have sufficed for exclusion. In *Foster*, the majority again emphasised the deliberate and reckless disregard of the law by the police as a grounds for excluding the confession.

Conclusion

In *Pollard* and *Foster* the High Court has presented a challenge to trial judges and intermediate courts of appeal. They must now take seriously their role of guarding the rights of a suspect in police custody. If the police infringe the suspect's rights in a way which contributes to the making of an otherwise admissible confession, then, prima facie, fairness demands the exclusion of the confession.

If the infringement is reckless or deliberate, then the public interest may also require the confession's exclusion. Whether this approach will have any effect on police conduct remains to be seen: at the very least, though, it should drastically reduce the incentives for any police officer who is tempted to try and obtain a confession by unfair means.

References

1. See Flood, S., 'McKinney on Confessions — "If Walls Could Talk"', (1991) 15 *CrimLJ* 287.
2. See Ashworth, A., 'Excluding Evidence as Protecting Rights', (1977) *CrimLR* 723.
3. *Oregon v Elstad* (1985) 470 US 298 at 328, 84 L Ed 222 at 244 per Brennan J, quoting A. Aubry and R. Caputo, *Criminal Interrogation* (3rd edn, 1980) p.290. The reference to *Oregon*, and some of the information about *Pollard* and *Heatherington*, were helpfully supplied by Pollard's counsel in the High Court, Mark Weinberg, QC.

[Editors note: See p. 232 'Legal Studies Column' on this article.]

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