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ORDER PROHIBITING PUBLICATION OF THE JUDGMENT AND ANY PART OF THE PROCEEDINGS (INCLUDING THE RESULT) IN NEWS MEDIA OR ON THE INTERNET OR OTHER PUBLICLY AVAILABLE DATABASE UNTIL FINAL DISPOSITION OF TRIAL. PUBLICATION IN LAW REPORT OR LAW DIGEST PERMITTED.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA751/2014
[2015] NZCA 241

BETWEEN	SATYAM SIVAM CHETTY Appellant
AND	THE QUEEN Respondent

Hearing:	10 March 2014
Court:	Stevens, Asher and Williams JJ
Counsel:	S J Lance for Appellant P D Marshall for Respondent
Judgment:	15 June 2015 at 3.30 pm

JUDGMENT OF THE COURT

A The application for leave to appeal is granted.

B The appeal is allowed.

C The order made in the High Court pursuant to s 101 of the Criminal Procedure Act 2011, that the latter part of the interview from 2.14 pm conducted between Mr Chetty and the police on 28 March 2014 is admissible, is quashed.

D Order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet or other publicly available database until final disposition of trial. Publication in law report or law digest permitted.

REASONS

STEVENS J

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Introduction

[1] This is an appeal from a judgment of Gilbert J in the High Court granting an application by the Crown concerning evidence to be led at the trial of the appellant, Mr Chetty.[1] The Judge ruled that the challenged portion of the appellant's DVD

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[1] Under s 101 of the Criminal Procedure Act 2011.

interview with police was admissible.[2] Leave to appeal against the decision is sought.

[2] The appellant faces two charges of sexual violation. The appellant unsuccessfully sought exclusion of admissions, contained in the latter part of his DVD interview, as improperly obtained. He claims the interviewing officers departed from the Practice Note on Police Questioning (the Practice Note) during the interview in two respects.[3] First, he claims some of the questioning amounted to cross-examination. Secondly, there was a 25 minute period after the conclusion of the official interview, but prior to the challenged admissions, not recorded on DVD. As a result, he submits that the admissions were unfairly and therefore improperly obtained and should be excluded.[4]

[3] On appeal, Mr Marshall, counsel for the respondent, accepts there were departures from the Practice Note. He contends such departures were limited and had little, if any, causal connection to the admissions made. He submits the challenged evidence was not, contrary to the High Court's conclusion, obtained unfairly. However, even if it was improperly obtained in breach of s 30(5)(c) of the Evidence Act 2006 (the Act), exclusion would be disproportionate to the limited impropriety, given the reliability of the evidence, its centrality to the Crown case and the need for an effective and credible system of justice.

[4] The application for leave is to be determined under the Criminal Procedure Act 2011.[5] Leave to appeal is not opposed and is granted accordingly.

Background

[5] The background is not in dispute. One evening the complainant met the appellant in a bar in central Auckland. The complainant and her cousin accepted a ride home from him. The complainant was heavily intoxicated. En route, the appellant stopped his car at a service station to buy petrol. The complainant's cousin

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2 *R v Chetty* [2014] NZHC 3010 [High Court judgment]. By the same judgment an order was made severing Mr Chetty's trial in respect of allegations of sexual offending against a second, separate complainant.

3 Practice Note – Police Questioning (s 30(6) of the Evidence Act 2006) [2007] 3 NZLR 297.

4 Evidence Act 2006, s 30(3)–(6).

5 Criminal Procedure Act 2011, s 217(2)(b).

got out of the car. The Crown case is that the complainant was unconscious inside the car. Seeing an opportunity, the appellant left her cousin at the service station and drove to a nearby carpark. The Judge succinctly described what followed:

> [18] The complainant's next recollection is waking up in a car with Mr Chetty lying on top of her having sexual intercourse with her. She remembers telling him to get off her. She looked out the window and it appeared to her that they were in an empty parking lot. She recalls that he withdrew his penis from her vagina and then pushed her head down in an attempt to get her to perform oral sex on him. She says that her next memory is being at the top of her driveway and getting out of the car at about 3.30 am.

[6] A brief chronology of the interview follows. The appellant was arrested on 28 March 2014 and advised of his rights. When interviewed by the police, the appellant accepted he had sex with the complainant. He said she was awake and consented. The interview continued (including some breaks of about 30 minutes) over a period of some three hours. During that time the appellant was advised of his rights on two further occasions. The DVD was turned off at 1.50 pm. After recording ceased, the officers continued to speak with the appellant. During this time the appellant admitted that the complainant had been unconscious when he began having sex with her. The DVD recording was then resumed at 2.14 pm and the appellant was again advised of his rights. He then repeated the admissions on DVD recording.

[7] With respect to the 25 minute period during which the DVD recording was turned off, Gilbert J made the following findings, which were not challenged on appeal:

> [31] … there is no dispute that one or other of the detectives made statements to Mr Chetty along the following lines:
>
> (a) On what they knew of the circumstances, and based on complainant 2's account and Mr Chetty's version of events, they believed that he had raped complainant 2.
>
> (b) He would be charged with rape (they also explained the process that would be followed).
>
> (c) Rape is a very serious offence and the maximum penalty is 20 years' imprisonment.

[32] Detective Woodhams said that he told Mr Chetty "You're on your own now". He said in his evidence:

> I made that comment, meaning that we'd done everything we could to get an account from him and get as much detail and give him the chance to offer an explanation during the interview. It's during that time that he said, "Okay, okay," or something along the lines of, "I'll tell you the truth," or, "I'll tell you what happened".

[8] When the DVD recording was reactivated Detective Blake summarised what had occurred while the DVD was off. Immediately following this outline, and having again been advised of his rights, the appellant indicated he accepted Detective Blake's summary of what had happened during the 25 minute period. He also confirmed to Detective Woodhams that the officers had not "influenced" him "at all".

[9] In the latter part of the interview (of some 12 minutes duration) the appellant gave a different version of events. He said that he noticed the complainant was unconscious while at the petrol station. When her cousin got out of the car, he "saw the opportunity", took the complainant to a car park and had sex with her "even though she was unconscious". When asked what was "going through [his] head at that point", he said:

> … I was with her all this time and then in a sense and I, I wanna do it with her because she was like sexy and everything so I just took and [sic] opportunity and I did it. That's about it.

[10] The appellant explained that when the complainant woke up, he got off her and then drove her home. The appellant did not, however, accept the complainant's account of events in its entirety. Although he initially appeared to admit pulling her head towards his penis, he later made it clear he had not done so.

High Court judgment

[11] In the High Court, the appellant contended there had been two departures from the Practice Note. The first concerned some of the questioning, said to amount to cross-examination in breach of cl 3 of the Practice Note. The second concerned the 25 minute period when the DVD was turned off contrary to cl 5.

[12] On the first issue, Gilbert J found that the detectives had "crossed the threshold of impermissible cross-examination".[6] Although the questioning breached the Practice Note, the appellant's confession was not obtained as a direct consequence.[7] The Judge also found the failure to record what occurred in the 25 minute period amounted to a breach of cl 5. This left the Court "in the unsatisfactory position of not being able to determine accurately what occurred during the 25 minute interval".[8] However, having heard the evidence, Gilbert J found that, contrary to Mr Chetty's contentions, the police did not tell him anything to the effect that if he did not confess, he would receive 20 years' imprisonment. This was not challenged on appeal (see at [7] above).

[13] The Judge concluded that when told he would be charged with rape the appellant's demeanour changed from being "calm and good-humoured to being worried and stressed".[9] This led the appellant to make certain admissions to the officers.[10] These were recorded on DVD in the latter part of the interview.

[14] Having regard to all the circumstances the Judge concluded under s 30(5)(c) of the Act that the confession had been improperly obtained on the ground of unfairness. He stated:[11]

> The combined pressure of cross-examination and the statements of the detectives during the interval led Mr Chetty to believe that unless he told the detectives what they wanted to hear, he would face 20 years' imprisonment.

[15] Therefore, Gilbert J resolved the factual dispute as to the period when the interview was not recorded. An important feature of the Judge's findings was that the police did not tell Mr Chetty he would receive 20 years' imprisonment if he did not confess. However, Gilbert J did accept that, as a combined result of the circumstances, Mr Chetty subjectively believed that to be the case. In that sense he was misled.

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6 High Court judgment, above n 2, at [44].
7 At [45].
8 At [46].
9 At [33].
10 At [48].
11 At [49].

[16] The Judge then considered the balancing process under s 30(2)(b) of the Act. Given the seriousness of the offence charged, lack of deliberateness or bad faith on the part of the officers, the direct relevance of the evidence and the comparatively low level of impropriety, the Judge ruled the statement admissible.[12]

[17] There are two issues on appeal. The first is whether this Court accepts the Judge's determination that the conduct in this case ought to have been characterised as having been improperly obtained because it was unfairly obtained. Second, was the Judge correct in his approach to the balancing process under s 30(2)(b) of the Act.

Improperly obtained evidence?

[18] For the respondent, Mr Marshall challenges the Judge's conclusion that the challenged evidence was improperly obtained. The main focus of his argument concerns the nature and effect of the non-compliance with the Practice Note. He submits that neither singly nor in combination do the departures from the Practice Note in question reach the point where they caused the evidence to be obtained "unfairly".[13] If the evidence is found to have been unfairly obtained, then the nature and gravity of that unfairness will be relevant to that part of the balancing process considering the seriousness of the intrusion on any right breached.[14]

[19] Mr Marshall accepts the police officers failed to comply with the Practice Note in two respects. First, a small portion of the interview involved cross-examination of the appellant contrary to cl 3 of the Practice Note. Second, at the conclusion of the interview the officers failed to record (as required by cl 5) a 25 minute period during which the appellant made certain admissions. However, he submits a mere failure to comply with one or more guidelines in the Practice Note is not necessarily determinative of unfairness.[15] Mr Marshall submits the departures were not significant. They did not cause the appellant to make the later admissions.

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12 At [51]–[52].

13 Hence, did not meet the statutory threshold of being improperly obtained under the Evidence Act 2006, s 30(5).

14 Under s 30(3)(a) and (b).

15 Citing this Court in *Waipuka v R* [2012] NZCA 526 at [21].

Causation, he argues, is a "critical step" in the assessment.[16] Here, causation was absent.

[20] I commence consideration of the first issue by discussing the applicable legal principles. This is to place this challenge to the confessional statements in context within the scheme of the Act.

Scheme of the Act

[21] The challenge in this case was brought under s 30 of the Act. This is one of three sections of the Act under which a confession may be excluded. The others are ss 28 and 29. Gilbert J acknowledged that the "interaction" between these sections is relevant. Reference is made below to the scheme of this part of the Act, which this Court in *R v Hawea* described as taking a "three-tiered approach".[17]

[22] Section 29, governing the exclusion of a defendant's statements influenced by oppression, is the most serious of the grounds for objection to admissibility of statements of this kind. It applies where there is an evidential foundation for oppressive, violent, inhumane or degrading conduct towards, or treatment of, the defendant or a threat of such conduct or treatment.[18]

[23] Next, s 28 provides for the exclusion of unreliable statements. Where the prosecution offers or proposes to offer a defendant's statement in evidence, the defendant may raise an evidential foundation for challenging the reliability of that statement, or the Judge may raise the issue. If so, the Judge must exclude the statement, unless he or she is satisfied on the balance of probabilities that the circumstances in which it was made were not likely to have adversely affected its reliability.[19] This Court has emphasised the focus of the section is to protect the accused from the admission of statements obtained in circumstances likely to have adversely affected the reliability of the statement.[20]

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16 Citing *Boskell v R* [2014] NZCA 497 at [9].
17 *R v Hawea* [2009] NZCA 127 at [31].
18 Section 29(5).
19 Sections 28(1) and (2). In determining whether to exclude the statement, s 28(4) is relevant.
20 *R v Cameron* [2007] NZCA 564 at [61] and *Roper v R* [2012] NZCA 568 at [68].

[24] In contrast to ss 28 and 29, s 30 is of more general application and applies to all kinds of evidence. If the prosecution proposes to offer evidence in respect of which the defendant raises an evidential foundation as to whether the evidence was improperly obtained, the Judge must determine whether or not, on the balance of probabilities, the evidence was improperly obtained. For the purposes of s 30 evidence is improperly obtained if it is obtained in consequence of a breach of any enactment or rule of law (s 30(5)(a)), in consequence of a statement made by a defendant that is or would be inadmissible if it were offered in evidence by the prosecution (s 30(5)(b)), or unfairly (s 30(5)(c)). In deciding whether a statement obtained by a member of the police has been obtained unfairly under s 30(5)(c), the Judge must take into account guidelines set out in the Practice Note.[21]

[25] If the evidence is found to have been improperly obtained, the Judge must conduct a balancing process to determine whether or not the exclusion of the evidence is proportionate to the impropriety involved.[22] Under s 30(3) the Judge may also have reference to a number of other factors. I return to these later.

[26] Sections 28, 29 and 30 of the Act thus codify much of the previous law governing the admissibility of confessional statements. The bases for exclusion of confessional statements prior to the Act were described by this Court in *R v Wilson*.[23] The reliability of the confessional evidence obtained in breach of the defendant's rights was seen to give rise to concerns that use of the evidence at trial would be unfair.[24] This Court returned to the theme of reliability in *R v Williams* when William Young P and Glazebrook J stated:[25]

> It may well be that confessional evidence generally is in a special category, especially where any breach of rights throws doubt on the reliability of the evidence. This will certainly be the case under the new Evidence Act, where s 28 provides that confessional evidence must be excluded unless the Judge is satisfied on the balance of probabilities that the circumstances in which the statement was made were not likely to have adversely affected its reliability. …

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21 Section 30(6).
22 Section 30(2)(b).
23 *R v Wilson* [1981] 1 NZLR 316 (CA) at 322–324.
24 *R v Shaheed* [2002] 2 NZLR 377 (CA) at [151], as discussed in *R v Haapu* (2002) 19 CRNZ 616 (CA) at [27]–[29].
25 *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 (CA) at [108].

[27] This Court in *Wichman v R* has discussed the concept of unfairness, in the context of a police "scenario technique".[26] Relevantly, the Court said:

> [40] Self-evidently fairness is a flexible standard which cannot and should not be reduced to a code.[27] However, courts have been careful not to set the standard so low as to undermine the legislative policy behind ss 28 to 30, which allow courts to exclude evidence that is unreliable or which was obtained by oppression or by violating rights.[28] The rights concerned are principally those conferred under the New Zealand Bill of Rights Act or under the Evidence Act and the Practice Note. Those rights, speaking very generally, are limited to police conduct after an officer decides that there is enough information to charge a suspect, or when the suspect has been arrested or is otherwise detained. The legislature has not extended the duty to caution, for example, to other things that the police may do to investigate crimes.
>
> [41] Accordingly, unfairness normally requires that police conduct should "undermine the justice of the trial"[29] or otherwise violate the community's expectations of the criminal justice system. Those expectations include propriety from state agents, but also that the guilty should be convicted. The courts reject sporting metaphors of fair play and level playing fields,[30] and recognise that fairness does not preclude deception.[31]
>
> …
>
> [43] That said, the jurisdiction in s 30(5)(c) may be employed to fill gaps which exist in the other provisions.[32] Suppose that a confession was induced by threats or promises but cannot be excluded under s 28 because the inducements were not, to the suspect's knowledge, offered by a person in authority. The confession may be unreliable nonetheless: manifestly, reliability depends on the likely effect of the threat or promise, not the official status of the person who offered them. If it is unreliable because it was induced by such means and the police were responsible, it likely was obtained unfairly. Similarly, a confession may be excluded for unfairness, subject to s 30(5), where it was obtained by means calculated to evade the suspect's rights.[33]

[28] The definition and content of "fairness" in s 30(5) is an amorphous concept.[34] The absence of clear content and bright lines reflects the fact it captures the previous common law discretion to exclude evidence on the basis of fairness, however that

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26 *Wichman v R* [2014] NZCA 339, [2015] 2 NZLR 137 (CA).
27 *R v Horsfall* [1981] 1 NZLR 116 (CA) at 121.
28 *R v Ioane* [2014] NZCA 128 at [46]; *R v Ahamat* CA143/00, 19 June 2000 at [11].
29 *R v Sang* [1980] AC 402 (HL) at 456.
30 *R v Hines* [1997] 3 NZLR 529 (CA) at 584; *R v Jelen* (1990) 90 Cr App R 456 (CA) at 464.
31 *R v Rothman* [1980] 1 SCR 640 at 697; *R v Barlow* (1995) 14 CRNZ 9 (CA) at 46.
32 Bruce Robertson (ed) *Adams on Criminal Law – Evidence* (online looseleaf ed, Brookers) at [EA30.10].
33 *R v Collins* [2009] NZCA 388 at [43].
34 Bruce Robertson (ed), above n 32, at [ED5.10(3)].

may arise. Historically, the Practice Note (and its predecessor, the Judges' Rules) has constituted a fertile ground for challenges to evidence and admissions on the basis of unfairness. Two points bear emphasis. First, it is settled that a breach of the Practice Note alone does not inevitably constitute unfairness within s 30(5)(c), a point confirmed by this Court a number of times.[35]

[29] Secondly, where a confession is obtained unfairly, an important additional inquiry is into the causal nexus between the unfairness and the evidence. In a case such as the present, establishing a breach of the Practice Note does not, of itself, dispense with the requirement that there be a causal link between the unfairness and the evidence obtained. The nature of the causal nexus with the impropriety is relevant to the assessment of the gravity of the impropriety. Where the causal nexus is loose, weak or indirect, the gravity of the impropriety diminishes. This is consistent with the requirement in s 30(2)(b) to take proper account of the need for an effective and credible system of justice. Actions taken to preserve such a system of justice require a careful examination and weighting of the causal link to the wrong alleged.

[30] Moreover, whilst s 30 requires a fact-specific analysis of the potential unfairness in each case (where breaches of the Practice Note are concerned), analogous cases provide useful guidance. The Practice Note prescribes a set of guidelines, but the nature and seriousness of any breach of those will necessarily be informed by a relative assessment.

Unfairness – evaluation

[31] The starting point is that the Judge emphasised that there was no suggestion that the confession is unreliable or obtained through oppression.[36] Mr Lance for the appellant confirmed on appeal that there was no basis for contending the challenged statements were obtained in breach of the principles in either s 28 or s 29 of the Act.

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35 *Waipuka v R*, above n 15, at [21]; *Graham v R* [2014] NZCA 581 at [27]–[29]; *Richards v R* [2014] NZCA 520 at [19]–[21]; and *Bloomfield v R* [2010] NZCA 222 at [22]–[25]. See further Bruce Robertson (ed), above n 32, at [EA30.10] and Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (3rd ed, Brookers, Wellington, 2014) at [EV30.10].

36 High Court judgment, above n 2, at [39].

[32] Next the Judge found there was no suggestion the appellant's rights under the New Zealand Bill of Rights Act 1990 (NZBORA) were breached, or that the police exceeded their statutory authority.[37] Neither proposition was disputed before us. The main focus was on the unfairness challenge relying on the two departures from the standards for police questioning in the Practice Note. It is in this context that the impact on the appellant of the reference to the maximum penalty for rape when the charging process was explained to him must be considered.

Cross-examination

[33] Clause 3 of the Practice Note provides:[38]

> Questions of a person in custody or in respect of whom there is sufficient evidence to lay a charge must not amount to cross-examination.

[34] Cross-examination is not defined in the Practice Note or in the Act. However this Court has developed relevant principles regarding police questioning of suspects in relation to rule 7 of the Judges Rules.[39] For example, in *R v Latuselu*, it was said:[40]

> … There is not unfairness in questioning suspects in respect of serious crime and going beyond merely seeking to clarify ambiguity. The authorities relied on by the Judge (*R v Admore* [1989] 2 NZLR 210; (1998) 3 CRNZ 550 (CA) and *R v Dally* [1990] 2 NZLR 184; (1990) 5 CRNZ 687 at p 188; pp 689–690) are clear that testing explanations offered by questions in the nature of cross-examination is not objectionable.

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37 At [40].

38 Practice Note – Police Questioning, above n 3. Rule 7 of the Judges' Rules was in similar terms: "A prisoner making a voluntary statement must not be cross-examined, and no questions should be put to him about it except for the purpose of removing an ambiguity in what he has actually said. For instance, if he has mentioned an hour without saying whether it was morning or evening, or has given a day of the week and day of the month which do not agree, or has not made it clear to what individual or what place he intended to refer in some part of his statement, he may be questioned sufficiently to clear up the point".

39 This Court has accepted the Practice Note superseded the protections afforded in the Judges' Rules: *R v Bain* [2009] NZCA 1 at [160]. In *Edmonds v R* [2012] NZCA 472 at [20] this Court confirmed that the Practice Note takes priority if there is any difference between it and the Judges' Rules. For the particular ways in which the Practice Note strengthens the protections in the Judges' Rules, see Bruce Robertson (ed), above n 32, at [ED5.03]–[ED5.10].

40 *R v Latuselu* (2003) 20 CRNZ 70 (CA) at [11].

[35] There is nothing inherently objectionable in an interviewing officer refusing to accept a suspect's explanations or denials of the offending.[41] The police have a duty to ask a suspect questions in order to ascertain the true facts. Accordingly it may be unreasonable to expect an officer to accept that suspect's explanations, particularly when they are clearly inconsistent with the available evidence.[42]

[36] In a different context[43] the Supreme Court in *Hannigan v R* has held that cross-examination involves a "substantial attempt to break down [a witness'] account of events" and "rhetorical flourishes".[44] By contrast a person is not cross-examined when the questions seek to "explore (for instance, by seeking an explanation for) ambiguities in the evidence of a witness or apparent inconsistencies between the evidence of that witness and other evidence which is, or will be, before the court".[45]

[37] In a challenge based on cl 3 of the Practice Note the overall touchstone is fairness. The critical issue is whether the questioning has amounted to oppressive or overbearing cross-examination. This Court has made it clear cross-examination accompanied by a confrontational and overbearing style, where the suspect is given no opportunity to answer the allegations, is unacceptable.[46] The courts endeavour to achieve a proper balance between two competing policies. On the one hand there is the requirement for the protection of accused persons from inquisitorial attack and on the other the need to allow investigating officers a proper degree of freedom in pursuing their investigations.[47] A factor to consider will be whether the suspect gave evidence that his or her will was overborne by the style of questioning or by the

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41 *R v Z* [2008] NZCA 246, [2008] 3 NZLR 342 at [101] and [103]. This case referred to authorities applied before the Practice Note came into effect, concluding that police questioning amounting to cross-examination is not objectionable, as long as the process is not oppressive, overbearing or unfair. The majority left open the question as to whether the earlier approach under the Judges' Rules now applied to the Practice Note. This question cannot be resolved here. Whichever approach is adopted, my conclusion would remain the same.

42 See *R v Admore* [1989] 2 NZLR 210 (CA) and *R v Dally* [1992] 2 NZLR 184 (HC).

43 Namely discussion of the limits on leading questions under s 89 of the Evidence Act.

44 *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612 at [106].

45 At [107]. See also *F (CA541/09) v R* [2010] NZCA 520 at [73], which confirmed there is no unfairness in strongly questioning suspects in respect of serious crime and going beyond merely seeking to clarify ambiguity.

46 *L v R* [2010] NZCA 131 at [30]–[31]. Contrast *Lockhart v R* [2013] NZCA 549 at [51] (where the Court concluded the officer's questioning was merely assertive). See also *R v Z*, above n 41.

47 *R v Ali* CA253/99, 8 December 1999 at [43] (citing *R v Tuhua* CA272/88, 22 November 1988), cited with approval in *R v Panoff* [2008] NZCA 188 at [30] and in *F (CA541/2009) v R*, above n 45, at [75].

approach used by the investigating officer. In *R v Panoff*, for example, the police officer engaged in persistent questioning but did not utilise an overbearing or oppressive manner.[48] At the other end of the scale is *R v Hunt*, where the questioning was both persistent and overbearing, and constituted overreaching.[49] In *R v Latuselu*, the questioning was described as repetitive, constituting a very detailed examination of the suspect's state of mind, including "very pointed questions".[50]

[38] This Court in *R v Mitchell* emphasised that the Judges' Rules and Practice Note are not rules of law to be strictly applied.[51] Not all departures from proper standards of police questioning result in unfairly or improperly obtained evidence as a matter of course.

[39] As noted above, it is also relevant whether the nature of the questioning to which a given suspect is subjected is causative of any unfairness – in the sense of overbearing the suspect and inducing a confession in circumstances where sustained, inquisitorial examination ought not to have been conducted. As this Court has said in *Boskell v R*, causation is an important consideration in determining whether evidence is improperly obtained:[52]

> [9] Proof of a causative link between the unfair police conduct and the making of a statement is an essential element of the admissibility inquiry at the threshold stage. The requirements of s 30(5)(a) and (b) are expressed in directly causative terms – the defendant must prove that the evidence was obtained "in consequence of" either a statutory breach or an inadmissible statement. The shorthand requirement in s 30(5)(c) of proof that the evidence was obtained unfairly is to the same effect. In terms of all three situations provided by s 30(5) the statement can only be obtained or come into existence as the result of a process which has an operative cause or causes, whether impropriety by the state or the defendant's decision to speak.

[40] As to the nature of the questioning in the portion of the interview up to 1.50 pm, I have viewed both the actual DVD recording and considered the written transcript provided of the interview. I consider the Judge was correct to conclude the officer's questioning of the appellant on the issue of whether the complainant was unconscious or asleep when he had sexual intercourse with her was "persistent".

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48 *R v Panoff*, above n 47, at [33].
49 *R v Hunt* CA178/00, 26 September 2000 at [19].
50 *R v Latuselu*, above n 40, at [10].
51 *R v Mitchell* [1996] 3 NZLR 302 (CA) at 305.
52 *Boskell v R*, above n 16 (footnotes omitted); followed in *Richards v R*, above n 35, at [18]–[19].

[41] However, the Judge made no finding that the questioning was overbearing, oppressive, aggressive or contained rhetorical flourishes specifically intended to whittle down the appellant's story. It was none of these. The appellant did not suggest in his evidence that his will had been overborne by the officers. Indeed he could not so claim as the appellant maintained his stance throughout the initial interview that the complainant was fully conscious when sexual intercourse took place. Further, cl 4 of the Practice Note places a positive obligation on police officers not to mislead defendants as to the nature and quality of evidence they have against the individual, and to misrepresent those circumstances to them. This provision was clearly not triggered by the circumstances of Mr Chetty's interview.

[42] The interviewing officer's persistence involved returning to the topic of the complainant's state of consciousness four times in the latter part of the initial interview. The officers' revisiting of this issue in this manner was interspersed with questions and discussion on different topics. I accept, though, the consciousness of the complainant was of importance to the investigation. The officer was right to refuse to accept the appellant's denials.[53]

[43] The questioning in the initial stages of the interview is therefore in a rather benign category of "cross-examination".[54] It did not contain a number of the usual indicia the Court looks for to measure impermissible cross-examination. I therefore doubt Gilbert J's finding that "the detectives crossed the threshold of impermissible cross-examination in the initial interview".[55] This is one of the points on which I depart from the majority, who consider Gilbert J could have gone further. As to causation, I agree with Mr Marshall's submission emphasising the Judge's finding that the appellant's "confession was not obtained as a direct result".[56]

[44] I consider there to have been a technical breach of the cl 3 of the Practice Note, which cannot in the circumstances be said clearly to have elicited the ensuing admissions. What can be said is that the questioning on the topic of the

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53 There is nothing inherently objectionable in an interviewing officer doing so – *R v Z*, above n 41, at [101]–[103].

54 I note, however, the principle in *Hannigan v R*, above n 44, that what constitutes cross-examination may vary greatly from context to context.

55 High Court judgment, above n 2, at [44].

56 At [45].

complainant's consciousness left the appellant in no doubt as to the particular issue in which the officers were interested.

Failure to record

[45] The Judge found there was a breach of cl 5 of the Practice Note, which provides:

> Any statement made by a person in custody or in respect of whom there is sufficient evidence to charge should preferably be recorded by video recording, unless that is impractical or unless the person declines to be recorded by video. …

[46] Where a clause of the Practice Note is breached, s 30(6) of the Act provides that "the Judge must take into account [the] guidelines". Plainly, the guideline in cl 5 is important in protecting the transparency and integrity of a criminal investigation.

[47] This Court has explained the significance of the requirement in cl 5 of the Practice Note in *R v Atonio*:[57]

> Departures from that practice are to be deplored. When the preferred video procedure cannot feasibly be complied with, there are equally obvious reasons for complying with the final three sentences. Failure to do so places a grave impediment in the way of due process, compelling judges of first instance to make factual findings as to the credibility of police officers and appellate courts to reflect on why, if the truth has been told, such simple precautions were not taken.

[48] I accept that departures from cl 5 are to be discouraged. I also accept, however, that in this case the departure was, to some extent, explicable. The circumstances in which the DVD recording equipment was turned off are not in dispute. The Judge found as a fact that the officers had completed and did not expect to resume the interview.[58] The officers continued to speak with the appellant in the interview room without the DVD recorder operating for approximately 25 minutes. No contemporaneous notes were made as to what was discussed. This meant the Judge was required to hear evidence as to what was said during this time. Despite the conflict of evidence, Gilbert J held there was no bad faith in the officers failing to

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57 *R v Atonio* [2009] NZCA 359 at [46].
58 High Court judgment, above n 2, at [51].

record and that the police did not tell Mr Chetty he would be faced with 20 years' imprisonment if he did not confess.

[49] Mr Marshall acknowledges the finding that there has been a breach of cl 5 of the Practice Note. He submits, however, that it involved little impropriety. This was because the officers thought the interview had finished and the focus had turned to their "post-interview procedures". When it became apparent the appellant wished to make a further statement, the officers obtained his permission to resume the DVD recording. Mr Marshall submits the breach of cl 5 did not result in the later admissions that were recorded on DVD being unfairly obtained,[59] and that the gap in the DVD recording caused the appellant no prejudice.[60]

[50] The context lies in the Judge's findings. First, one or other of the officers stated to the appellant that on what they knew of the circumstances, and based on the complainant's account and the appellant's version of events, they believed he had raped the complainant. It followed that he would be charged with rape. Second, the officers explained the process that would be followed when he was charged. Third, one officer said rape is a very serious offence carrying a maximum penalty of 20 years' imprisonment. Fourth, one of the officers commented to the appellant that "you're on your own now", meaning that the officers had done everything they could to get an account from him and had given him a chance to offer an explanation during the interview. It was this latter comment that led the appellant to say to the officers words to the effect "okay I'll tell you what happened". The appellant does not challenge the accuracy of these findings as to the substance of the exchanges in this unrecorded period. Nor is there any evidentiary basis to infer any other substantive comments were made. That is clear from the evidence, the trial record and the Judge's findings.

[51] The officers accepted that when these things were said, the appellant's demeanour changed markedly. As the Judge found, the appellant went "from being

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[59] To the extent there was any dispute regarding what the officers said to the appellant, Gilbert J (at [48]) accepted the appellant's evidence.

[60] As the Judge's conclusions – outlined at [12] and [13] above – demonstrate.

calm and good humoured to being worried and stressed".[61] It seems clear the prospect of being charged with rape came as a surprise to the appellant.

[52] The appellant agreed to resume the DVD interview at 2.14 pm. At the commencement of the resumed interview one of the detectives said:

> … we have kicked the interview back off because what's taken place since turning the interview off is we've had a discussion we've said that you're going to be charged with rape and we've advised you what's going to happen with this DVD interview and the fact that should this go to trial this DVD will be shown before a jury. Em we've told you that essentially at that point where we charge you, [our] job finishes and it's up to the court and the prosecution process what happens then em and we've said this is your opportunity to tell the court and the jury the truth and em you've indicated that there is something that you want to talk about em and there is something that you want to raise in respect of some problems that you have, okay so before I throw that over to you I'm just going to give you your rights again. …
>
> Q. We just want to make sure that em that is fair for you. We don't want to, we want to make sure that we are transparent in that there isn't any influence to make you say, you've made some comments but is that a fair representation of what's happened so far.
>
> A. Yep.
>
> Q. We haven't influenced, have we influenced you at all?
>
> A. Nah.
>
> Q. Em so yeah that's what I want to cover off.
>
> …
>
> Q. I'll throw it over to you mate, what what do you want to talk about.
>
> A. Em I want to talk about after the Mobil, whatever happened, is em she was unconscious and when the cousin got off I saw the opportunity and I said, it's, cause after what happened in the [strip club] and all that like I was horny so I just got out of the Mobil, got into car park and I had sex with her even though she was unconscious. That's about it. And then I dropped her home.

[53] The failure to record events during the 25 minute period occurred shortly after the officers began explaining the charging procedure to the appellant. It fell for the Court to determine accurately what took place. The uncertainty was resolved largely in the appellant's favour. This is apparent from the following findings:[62]

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[61] At [33].
[62] At [48].

> I accept Mr Chetty's evidence that he understood from what the detectives told him during the interval that they considered that he was lying, that they had sufficient evidence to prove that he was guilty of rape and that he would be imprisoned for 20 years. The detectives conveyed the impression that they had been trying to help him during the interview but that he had failed to take advantage of that opportunity and would now be on his own and left to face the consequences. Because of the earlier cross-examination, Mr Chetty knew precisely what the detectives had wanted him to say. He understood that this is why they were frustrated; having done everything they could to help him, they said "you're on your own now".

[54] Gilbert J found the absence of a recording of the content (and the admitted failure of the police to follow the Practice Note in this respect) did not independently cause, or exacerbate, the unfairness relating to Mr Chetty's being misled. His factual findings in Mr Chetty's favour, in some sense, filled the recording gap.

Unfairness or not?

[55] The unfairness found by Gilbert J lay in the combination of impermissible cross-examination (revealing to the appellant the answers the officers were seeking) and statements that led the appellant to believe that there was sufficient evidence to prove he was guilty of rape, for which the maximum penalty is 20 years' imprisonment. As the Judge said, it was the combination of cross-examination and the statements of the detectives during the interval which led Mr Chetty to believe that unless he told the detectives what they wanted to hear, he would face 20 years' imprisonment.

[56] Mr Marshall submits the pressure so found needs to be considered in context. The appellant chose not to challenge the reliability of his statement under s 28 of the Act. Mr Marshall submits this is understandable because, to the extent pressure was placed on him, it was limited. It lay in the fact the maximum penalty for rape was mentioned by one of the officers in the period when he thought post-interview procedures had begun. Reference to a maximum penalty is not on its own impermissible and can be a short-hand means of explaining that the charge is serious. This is particularly so when the misleading effect of the pressure was found by the Judge solely to be generated on the part of Mr Chetty.

[57] Mr Marshall refers to the appellant's acceptance that he was told he could speak with a lawyer. He also knew he did not need to provide any statement. Nor, for example, did the officers mislead him as to the evidence, indicate that a confession would result in less serious charges being laid,[63] or imply that confessing would avoid him going to prison.[64] Mr Marshall submits the officers merely indicated that they believed he had raped the complainant, would be charged with that offence and made reference to the maximum available penalty. Mr Marshall also contends the pressure as found had little discernible impact. He therefore contends no finding of unfairness ought to have been made in this case.

[58] A separate provision in the Practice Note imposes a positive obligation on police to represent accurately to suspects information in their possession and the case against them. This is to protect interviewees against improper police conduct and trickery, intending to elicit confessions during questioning. The fact that neither ss 28 nor 29 were invoked, nor this provision of the Practice Note in respect of making a misleading representation to a suspect is relied upon, emphasises the different nature of the facts in this case to other cases concerning breaches of the Practice Note.

[59] However, I consider (along with the majority) the Judge's conclusion as to the unfairness in this case was correct. The Judge in so finding was assessing the impact of what took place on the appellant. I accept it was the combination of circumstances that led to the statements in the latter part of the interview being made. Considered in the round, I am satisfied these circumstances had the effect of placing pressure on the appellant. This pressure, the Judge held, "contributed to [the appellant's] decision to recant his earlier evidence".[65] I accept therefore there was at least some causal nexus between the cross-examination, the unrecorded statements, and Mr Chetty's admission.

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63 Compare *R v Fatu* [1989] 3 NZLR 419 (CA) at 429 (the Police told suspects that "that in the absence of admissions to causing death accidently (which would be manslaughter) [they] stood a serious risk of being charged with murder"). This Court upheld the admissibility of the partial admissions that followed on the basis that the means used "were not in fact likely to cause an untrue admission of guilt", under the old Evidence Act 1908, s 20 (at 430–431).

64 Compare *R v Haapu*, above n 24, at [15] where the police told the 18 year old suspect who had never been to prison that, if he went to prison, he was likely to be raped.

65 High Court judgment, above n 2, at [51].

[60] As to the degree of pressure involved, I do not consider mentioning the maximum penalty for rape is decisive of unfairness or causation leading to admissions. There is no guideline or other requirement (statutory or otherwise) preventing an officer, after a decision has been made to charge, from stating the maximum penalty.[66] In other circumstances, this will be routine and part of the post-interview process. It was the particular effect of the statement on the appellant because of the particular circumstances prior to the statement that is important in this case.

[61] I have taken some care to describe the nature and detail of the factors that contributed to the unfairness in this case. In the end, despite Mr Marshall's careful and comprehensive submissions on this issue, I would uphold the Judge's finding of unfairness. The nature and quality of this unfairness, however, will still be relevant in relation to the balancing process to which I now turn.

Balancing process

Statutory provisions

[62] The balancing process is conducted under s 30(2) of the Act. The Judge must:

> …
>
> (b) if the Judge finds that the evidence has been improperly obtained, determine whether or not the exclusion of the evidence is proportionate to the impropriety by means of a balancing process that gives appropriate weight to the impropriety but also takes proper account of the need for an effective and credible system of justice.

[63] Under s 30(4) the Judge must exclude any improperly obtained evidence if the Judge determines, under subs (2) that its exclusion is proportionate to the impropriety. This is not the exercise of a judicial discretion.[67]

[64] When making a determination under the balancing process the court may under s 30(3) have regard, among any other matters, to the following:

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66 A similar statement was made by the officer in *R v Boskell*, above n 16, at [5].
67 See *Hodginson v R* [2010] NZCA 457 at [47].

> (3) For the purposes of subsection (2), the court may, among any other matters, have regard to the following:
>
> (a) the importance of any right breached by the impropriety and the seriousness of the intrusion on it:
>
> (b) the nature of the impropriety, in particular, whether it was deliberate, reckless, or done in bad faith:
>
> (c) the nature and quality of the improperly obtained evidence:
>
> (d) the seriousness of the offence with which the defendant is charged:
>
> (e) whether there were any other investigatory techniques not involving any breach of the rights that were known to be available but were not used:
>
> (f) whether there are alternative remedies to exclusion of the evidence which can adequately provide redress to the defendant:
>
> (g) whether the impropriety was necessary to avoid apprehended physical danger to the police or others:
>
> (h) whether there was any urgency in obtaining the improperly obtained evidence.

The High Court judgment

[65] The Judge correctly identified the statutory test required under the balancing process.[68] His determination on the question of exclusion was as follows:

> [51] The offence which Mr Chetty faces is very serious. The evidence in question is of direct relevance to what is expected to be the critical trial issue. While this evidence was only obtained because of the pressure which the detectives placed on Mr Chetty, I accept that the detectives did not act deliberately or in bad faith. The level of impropriety was comparatively low. The detectives had terminated the interview and were not expecting to resume it. They were explaining to Mr Chetty that he would be charged and what the process would be. They went too far in making the comments they did and I am satisfied that this contributed to Mr Chetty's decision to recant his earlier evidence. However, when the interview resumed, Mr Chetty was again given his rights. He was asked whether they had influenced him during the interval and he agreed that they had not.

[66] The Judge therefore considered the exclusion of the evidence would be disproportionate to the impropriety which occurred.[69] The latter part of the interview was ruled admissible.

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[68] High Court judgment, above n 2, at [50].

[69] At [52].

Submissions

[67] For the appellant, Mr Lance submits the Judge erred in his determination under the balancing process. In particular he submits the Judge did not adequately focus on considerations raised by s 30(3)(a). He emphasises the importance of the right breached by the impropriety, the seriousness of the intrusion on the right, particularly the fact the appellant was a suspect being questioned in custody at the time. While acknowledging the seriousness of the offence concerned, Mr Lance submits the impropriety involved conduct on the part of the investigating officers clearly acting deliberately and in bad faith.

[68] Mr Marshall supports the Judge's reasoning. He emphasises that when the DVD recording resumed, the appellant agreed the officers had not influenced him. Moreover, while he accepted the complainant was unconscious when intercourse began, he did not simply adopt her account of events or other propositions put to him by the detective. The appellant continued to deny forcing the complainant's head onto his penis or drugging her. He also maintained the complainant remained awake throughout the journey home. The appellant also volunteered an explanation for his conduct and provided details beyond those given by the complainant.

Evaluation

[69] The balancing process involves a weighing of whether exclusion of the evidence (found to have been improperly obtained through unfairness) is proportionate to the impropriety in question. The Judge is required to give "appropriate weight" to the impropriety. In addition the Judge is to take proper account of the need for an effective and credible system of justice.

[70] This latter concept was considered by the Supreme Court in *Hamed v R*.[70] Tipping J (with whom Elias CJ, Blanchard J and McGrath J agreed) said:[71]

> [229] The proportionality spoken of is to be assessed by means of a balancing exercise that gives appropriate weight to the impropriety but also takes appropriate account of the need for an effective and credible system of

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70 *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305.

71 Footnotes omitted. And see Elias CJ at [58], Blanchard J at [187] and McGrath J at [258].

> justice. The concept of giving appropriate weight to the impropriety is not, as a concept, of any particular difficulty. There is, however, greater conceptual complexity in interpreting and applying the concept of the need for an effective and credible system of justice. This concept is apparently contrasted with giving appropriate weight to the impropriety by the words but also". It would, however, be a mistake to take the view that the need for an effective and credible system of justice is solely a counterpoint to the impropriety involved in gaining the evidence. The reference to an effective and credible system of justice involves not only an immediate focus on the instant case but also a longer-term and wider focus on the administration of justice generally.
>
> [230] The admission of improperly obtained evidence must always, to a greater or lesser extent, tend to undermine the rule of law. By enacting s 30 Parliament has indicated that in appropriate cases improperly obtained evidence should be admitted, but the longer-term effect of doing so on an effective and credible system of justice must always be considered, as well as what may be seen as the desirability of having the immediate trial take place on the basis of all relevant and reliable evidence, despite its provenance.

[71] I turn now to consider the various factors to which the Court may have regard, among any other matters, as set out in s 30(3). I agree with Mr Lance that Gilbert J did not adequately carry out the balancing process. In particular, the Judge failed to address expressly the considerations raised by s 30(3)(a). Accordingly it is necessary to carry out an analysis of the balancing process. This is where I depart from my colleagues.

[72] In this context, the nature and seriousness of unfairness arising from breaches of the Practice Note as compared with other cases concerning analogous circumstances will assist the analysis.

Importance of the right breached

[73] This was not a breach of a right under the NZBORA.[72] I have already described the nature of the guidelines breached, bearing in mind such impropriety occurred in relation to a confessional statement. Whilst the guidelines are not rights

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[72] Nor is this a breach of any rule or enactment of law. To the extent the majority rely on *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 as to the importance of the right breached, I consider the circumstances of compulsion discussed in that case are distinguishable from those here (see below at [126]–0). The passage referred to by my colleagues, [47], forms part of a broader discussion about the principled considerations in balancing the policy incentives that ought to be created for an accused to plead guilty and the countervailing protections of that accused's fundamental rights. That is a materially different consideration. I do not think the importance of those circumstances can be extrapolated to fit the circumstances here.

as such, they still impose important standards for officers undertaking investigative questioning. A suspect has an expectation he or she will be questioned in accordance with the guidelines.

[74] This Court has previously considered the importance of breaches of guidelines in the Practice Note. In *Hennessey v R* this Court noted such a breach does not necessarily involve a breach of right adding:[73]

> Nevertheless, compliance with these guidelines is important, as the purpose of the guidelines is to ensure that police questioning is conducted in a fair and proper manner. The Guidelines promote the affording and protection of rights articulated in ss 23 and 24 of the New Zealand Bill of Rights Act 1990. It is possible that in this case the departure has not resulted in a false confession, but the risk of such conduct is that it will. And of course, a civilised society cannot tolerate confessions being extracted by improper means. There is then considerable public interest in maintaining compliance with the standard of conduct set out in the Guidelines.

[75] However, failure to comply strictly with the guidelines does not automatically mean that a confessional statement has been obtained unfairly.[74] And in turn, where a finding that a breach of the Practice Note has caused evidence to be obtained unfairly, it must still be ascertained through the balancing process that exclusion is a proportionate remedy. The existence of a breach is one of the factors the Court is required to take into account in determining whether the police have obtained the statement unfairly.[75]

[76] The extent of the departures from the guidelines has been addressed earlier.[76] Taking the departures together, I accept (as did Gilbert J) the oral statements of the officers during the 25 minute unrecorded period the DVD likely misled the appellant leading him to confess. In terms of the protections offered by the Practice Note, the appellant was entitled to be interviewed in an appropriate manner and to have that interview recorded.

[77] Previous cases decided by this Court have suggested the protections offered by the Practice Note differ in importance. Specifically, some elements of the

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73 *Hennessey v R* [2009] NZCA 363 at [30].
74 *Bloomfield v R*, above n 35 and the further authorities listed therein and at [28] above.
75 *Richards v R*, above n 35, at [16].
76 Set out at [33]–[53] above.

Practice Note were inserted to strengthen their protections of NZBORA rights.[77] Departure from these practice requirements may be more serious than departure from others. Examples of serious breaches include not expressly explaining to a defendant it is not compulsory for him/her to answer questions and implying it is mandatory,[78] questioning a suspect in circumstances where the police had already received information from other individuals and failing to disclose that to the suspect,[79] and continuing with an interview after a suspect has repeatedly asked to stop and seek legal representation and advice.[80] These examples involve intrusions into protections contained in ss 23, 24 and 27 of the NZBORA. The relevant clauses in the Practice Note are geared towards preventing breaches of this nature and departure from these is, therefore, likely to be more serious.

[78] It is of course important that suspects are not misled during an interview. Even if the appellant were in part responsible for having been misled, that does not detract from the importance of the right. The second limb of this inquiry is, however, the seriousness of the intrusion into that right. I cannot conclude this case was as serious or in the same category as some of the other examples noted above. The circumstances of this case, to my mind, may at worst be characterised as a moderate intrusion.[81] This is particularly so given the protective procedure that followed Mr Chetty's admission: his rights were given to him again, the police asked on camera whether he had been influenced in his admission, and the confession was then recorded. The appellant acknowledged both and proceeded to answer further questions. In this context Gilbert J found the breach was the result of the combined pressure of cross-examination and the statements of the officers when the DVD was off. That is what led Mr Chetty to believe that unless he told the officers what they wanted to hear he would face 20 years imprisonment.

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77 This is particularly the case in respect of the right to legal representation and the right to remain silent: cls 1–2 and 4; New Zealand Bill of Rights Act 1990, s 23.

78 *R v PK* [2012] NZHC 1045 at [46]; see further *Strangman v Police* [2014] NZHC 526 at [28].

79 *R v Witoko* HC Rotorua CRI-2007-063-5128, 3 March 2009.

80 *R v Collins*, above n 33, at [42].

81 I leave open for an appropriate case the question of whether the nature of the content of the Practice Note makes breaches of certain provisions inherently more serious. For present purposes, I consider the transgressions of the Practice Note were themselves moderate, regardless of whether the right it protects is or is not more or less important than others.

[79] It is relevant that the causal nexus in this case between the fact Mr Chetty was misled and the statements that followed was weak. First, as just noted, Mr Chetty was given his rights for the fourth time. Second, the statement that resulted in Mr Chetty being misled – the mention of the maximum sentence for rape – was not of itself improper. Third, the "cross-examination" was relatively benign. Fourth, the conduct of the officers was, as I later explain, of limited effect.

[80] I am therefore satisfied the intrusion into the right concerned was at worst, moderate. However, such intrusion must then be balanced against other factors.

Nature of impropriety

[81] After hearing and seeing the witnesses at the pre-trial hearing, Gilbert J found the "detectives did not act deliberately or in bad faith". I see no good reason to disturb that finding and indeed, I can see no evidentiary basis on which to do so. If bad faith, recklessness or deliberate impropriety in obtaining the evidence were being alleged on the part of the officers, then it was incumbent on counsel for the appellant (at the pre-trial hearing) to put such allegations squarely to the officers in cross-examination. That was not done. The Judge's findings are therefore unsurprising and I would uphold them.

[82] With respect to Mr Lance's submission on appeal that there was bad faith or deliberate conduct on the part of the officers, in circumstances such as this, it is inappropriate for the appellate Court to look behind the primary findings at first instance, unless the finding was "plainly not open" to the first instance judge on the evidence.[82] These findings were open to Gilbert J and I agree with them.

[83] The impropriety of the police officers must be considered in light of the nature of the intrusion. It is clear the questioning was persistent – and the interview conducted in breach of two of the guidelines. However, I accept this was neither intentional nor done in bad faith. It resulted in two fairly technical breaches of the Practice Note, which together created a misleading context in which Mr Chetty confessed. And it is relevant that the context was an unchallenged finding by

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[82] *Kueh v R* [2013] NZCA 616 at [32].

Gilbert J that the officers (contrary to Mr Chetty's evidence) did not say anything to the effect that if he did not confess, he would receive 20 years' imprisonment.[83] Thus, while the circumstances featured impropriety, the impact of the officers' conduct was limited, as the Judge found.

Nature and quality of the evidence

[84] There is no doubt the evidence is likely to be highly probative.[84] It comprises oral confessional statements on an important issue requiring proof at trial. Comments made by the appellant himself in a DVD interview are likely to carry weight with a jury. I would agree with the Judge's conclusion that the evidence in question is of direct relevance to what is expected to be a critical trial issue of consent. The evidence is likely to be important to the Crown case.

[85] The Judge found there was no suggestion the confessional statements made by the appellant were unreliable. I am also satisfied the statements were reliable and there appears no evidentiary basis to find otherwise. I would uphold this finding. They were consistent with other information known to the police and were logical in the light of other available evidence. Significantly there has been no challenge to the evidence under s 28 of the Act.

Seriousness of the offence

[86] The offence with which the appellant has been charged is very serious. On the scale of sexual offending, sexual violation by rape is self-evidently at the upper end of seriousness.

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83 See above at [12].

84 Whether or not the centrality of the evidence to the Crown case is still a factor to be considered post-*Shaheed* is unclear – *Hamed v R*, above n 70, at [236]–[237] per Tipping J, doubting that was still the case, but at [201] per Blanchard J, disagreeing and [260]–[270] per McGrath J, also finding it would still be relevant. The weight of Court of Appeal authority appears to have followed Blanchard and McGrath JJ: *Shirtliff v R* [2012] NZCA 336 at [18]–[19]; *Tye v R* [2012] NZCA 382 at [35]; *Hoete v R* [2013] NZCA 432 at [44]; *Lin v R* [2014] NZCA 47 at [18](f); *Holdem v R* [2014] NZCA 546 at [28](d). The factor is not determinative here, but I note for completeness this evidence would be central to a future Crown case.

Other factors

[87] With respect to the other factors to be considered in s 30(3)(e) to (h), there are no matters of particular relevance, or they are all neutral. I accept there are no alternative remedies to the exclusion of evidence, which could adequately provide redress for the appellant. There was no urgency in seeking to extract a confession. Neither was the impropriety necessary to avoid apprehended physical danger to the police.

[88] In terms of other matters the Court might weigh in the balance (as anticipated by the opening words of s 30(3)) I have regard to the following:

(a) The events in question arose at the end of a lengthy and detailed interview involving two officers.

(b) The context involved the turning off of the DVD recording after which there was ongoing discussion on matters of obvious substance.

(c) The question of causation was finely balanced. Gilbert J found that Mr Chetty was misled because of departures from the Practice Note and the repetitive nature of the questioning that caused the unfairness.

Overall balance

[89] Having regard to the matters set out in s 30(2) and (3), I am satisfied that exclusion of the challenged evidence would be disproportionate to the impropriety which occurred. Taking together the contributory nature of the causal nexus between the departure and resulting unfairness, the low level of impropriety and the seriousness of the offending, exclusion would be out of proportion to the gravity of the unfairness suffered by Mr Chetty. In particular, it was the fact that Mr Chetty confessed in misleading circumstances that has led to the upholding of Gilbert J's finding of unfairness. It would be detrimental to the effective administration of justice for that alone to be a touchstone of admissibility of evidence in circumstances such as this. Further, where technical breaches of the Practice Note are at issue, it

would not be a proportionate response (and would be contrary to Parliament's intent in enacting s 30) to exclude that evidence wholesale.

[90] To find differently would, to my mind, involve the expansion of categories of unfairness to include a form of subjective unfairness (in the sense of the appellant claiming he was misled) in circumstances where the causal link to the conduct of the officers is undoubtedly weak. Exclusion of evidence on the basis of what effectively amounts to a suspect's own characterisation of being misled would, in my view, undermine a system of effective and credible justice.

[91] I consider, therefore, that the factors in s 30(3)(b), (c) and (d), together with the other factors mentioned, make exclusion of the evidence disproportionate to the impropriety. The particular (and somewhat unusual) circumstances of this case have necessitated a careful and thorough evaluation. While the questioning approach used by the officers was inappropriate, I am satisfied that exclusion would do damage to the need for an effective and credible system of justice.

[92] I would grant the application for leave to appeal, but dismiss the appeal and uphold Gilbert J's decision. However, in accordance with the views of the majority, with whom I respectfully disagree, the appeal will be allowed.

ASHER AND WILLIAMS J

Introduction

[93] In this appeal we have, with respect, been unable to agree with Stevens J, and have concluded that the statement of Mr Chetty should have been ruled inadmissible. In our view the contested part of the appellant's statement was improperly obtained. A balancing process under s 30(2)(b) of the Act leads to a determination that that evidence must be excluded. We would, therefore, allow the appeal.

[94] The background facts have been fully set out in Stevens J's judgment.[85] The appellant, Mr Chetty, had been arrested on 28 March 2014 and taken to the

[85] Above at [5]–[10].

Henderson Police Station where he was interviewed by two police officers. The interview concerned an alleged rape of a young woman earlier in March 2014. She complained that Mr Chetty had sexual intercourse with her after she had fallen asleep in his car, and while she was unconscious.

[95] The interview commenced at 10.19 am and concluded at 2.27 pm, four hours and eight minutes later. Mr Chetty through the initial three hours and 31 minutes of the interview, repeatedly denied that the complainant had been unconscious, and asserted that she had willingly consented to sex. At 1.50 pm, the video recording the interview was turned off. In the following 24 minutes there was a discussion between Mr Chetty and the two police officers who were interviewing him. This was not recorded. The video was then turned on again at 2.14 pm, and after the officer had repeated to Mr Chetty his rights, Mr Chetty asserted without prompting that the complainant was indeed unconscious when he had sex with her.

[96] Mr Chetty was charged with sexual violation of the complainant, and other charges. He challenged the admissibility of the latter part of the police interview, contending that the admission that the complainant was unconscious was improperly obtained and should be excluded.

[97] Stevens J has summarised the High Court judgment.[86] Gilbert J found that the detectives had crossed the threshold of impermissible cross-examination and breached cl 3 of the Practice Note.[87] The Judge also found that the failure to record what occurred in the 24 minute period amounted to a breach of cl 5 of the Practice Note. He concluded that the confession, in terms of s 30(5)(c), had been improperly obtained as it was obtained unfairly. He then carried out the balancing process under s 30(2)(b) of the Act and ruled the statement admissible.

[98] Stevens J has identified the two issues on appeal. The first is the Crown's challenge to the Judge's determination that the officers' conduct in the case ought to have been characterised as unfair. In this respect we agree with much of Stevens J's analysis in finding the Police conduct unfair, although we disagree with him on the

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86 At [11]–[16].
87 High Court judgment, above n 2.

gravity of the unfairness. The second issue is whether the Judge was correct in his approach to the balancing process under s 30(2)(b) of the Act, and his ultimate determination under that section, and we differ from Stevens J on that point.

[99] The key to our decision that the statement was unfairly obtained and that there was serious impropriety is this finding by Gilbert J:[88]

> The combined pressure of cross-examination and the statements of the detectives during the interval led Mr Chetty to believe that unless he told the detectives what they wanted to hear, he would face 20 years' imprisonment.

[100] Although 20 years is the maximum term for rape, Mr Chetty did not face that sentence but at worst a sentence of about half that length. Gilbert J's findings meant that Mr Chetty was misled by what the police said while the video recorder was turned off. Following the interval, after the video recorder was turned back on, Mr Chetty reversed his previous assertion that the complainant was conscious when they had sex, and volunteered without being asked a question by the police that she was unconscious. Gilbert J found that Mr Chetty's mistaken belief was causative of his admission, and did not suggest that Mr Chetty's belief was unreasonable.

The evidence was obtained unfairly

[101] There were three elements of the interview of Mr Chetty that raised fairness issues. These were first, whether the questioning amounted to cross-examination; second, the failure to record a crucial part of the interview; and third, the misleading of Mr Chetty on a matter of importance. We turn now to discuss each of these.

Cross-examination

[102] Under s 30(6) of the Act, the Judge must take into account guidelines set out in the Practice Note in deciding whether a statement has been obtained by a member of the police unfairly. Clause 3 of the Practice Note prohibits cross-examination of a person in custody, or in respect of whom there is sufficient evidence to lay a charge.

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[88] At [49].

[103] In the part of the interview leading up to the camera being turned off, and the ultimate confession, Gilbert J found that the police officers had crossed the threshold into impermissible cross-examination.[89] He observed:

> They wanted Mr Chetty to acknowledge that complainant 2 was asleep when he had sexual intercourse with her. They returned to this issue again and again throughout the three and a half hour initial interview and their questioning about it was persistent and repetitive. They also repeatedly accused Mr Chetty of lying about this issue.

[104] Some of the flavour of the cross-examination and the pressure it put on Mr Chetty is captured in this short extract in the latter stages before the video was turned off, after in excess of three and a half hours of questioning (with breaks):

> Q. This is your opportunity to tell the truth, tell the truth.
>
> A. Yep right.
>
> Q. We've given you this one opportunity.
>
> A. Yep I, whatever you say I've done it yes.
>
> Q. And if you want to make a change you need to tell the truth.
>
> A. Yep.
>
> Q. So if there's any element of what you told us so far that you are lying about, for example, [complainant 2's] ...
>
> A. Nah not lying.

The Judge set out further similar extracts in his judgment.

[105] We agree with Gilbert J that this sort of exchange crossed the line between permissible exploration and the putting of inconsistencies, and impermissible cross-examination. It went beyond the firm exploration of inconsistencies, and involved overall "a substantial attempt to break down" Mr Chetty's account of events.[90] However, at the end of this part of the three and a half hour initial interview, Mr Chetty was not showing signs of particular stress or anxiety and had maintained his position that the complainant was conscious.[91]

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89 At [44].
90 See *Hannigan v R*, above n 44, at [106].
91 High Court judgment, above n 2, at [45].

[106] The breach must nonetheless have led to Mr Chetty feeling uncomfortable and under pressure. The two officers obviously disbelieved him and said to him "if you want to make a change you need to tell the truth", by which they clearly meant, "you need to agree she was unconscious". As the Judge observed, the confession was not obtained as a direct consequence of cross-examination. On its own, it did not result in evidence being obtained unfairly, and would not warrant exclusion. However, there was a build up of pressure, and in the light of later events, the cross-examination is a relevant factor in assessing overall unfairness.

Failure to record

[107] The police officer primarily carrying out the interview set out what transpired when the video was turned off after the initial three and a half hours. After stopping the video recording he advised Mr Chetty that his role was to investigate and gather information, and that based on what he had heard from the complainant and Mr Chetty he believed Mr Chetty had raped the complainant. The officer advised Mr Chetty that he would be charged with rape. So far so good, but then he said he outlined to Mr Chetty the maximum penalty, and went on to say:

> I told him it was important that, I usually outline the maximum penalty and at that point he asked me what would happen and I've got here noted that I told him, "If it was important that if there was anything he had left out of his account he needed to tell me as he wouldn't get another opportunity to talk with Detective Woodhams and myself. At that point he advised me that there was more to tell. He said that at the moment he left the Mobil station [the complainant] had fallen unconscious; he saw his opportunity and pulled into the car park. He assumed she consented because of the bathroom incident which was an incident discussed on the DVD during the interview earlier. He began to have sex with her while she was asleep. At this point I asked [C] if he was happy to go back onto the DVD and have what he had told me recorded on the DVD. [C] said that he was and the DVD recording was restarted at that point.

[108] It is clear from this evidence that after he turned off the video recorder, the officer chose to speak to Mr Chetty about the maximum term for rape and what Mr Chetty should "now do", rather than deal only with procedural matters. Still off video, he then took a statement from Mr Chetty on the crucial issue of whether the complainant was unconscious. We are unable to accept the submission of Mr Marshall for the Crown that the officers thought the interview had finished, and they were focusing on "post-interview procedures". By encouraging Mr Chetty to

confess, the police officers were plainly returning to the interview process and Mr Chetty then did proceed to confess with the recorder still off.

[109] Clause 5 of the Practice Note provides that any statement by a person in custody or in respect of whom there is sufficient evidence to lay a charge, should preferably be recorded by a video recording unless that is impractical, and where not so recorded, it must be recorded permanently on audio tape or in writing. The person making the statement is to be given the opportunity to review the tape or statement. Clause 5 covers any material remarks by the interviewing officer to a person, when that person is in custody or where there is sufficient evidence to charge him or her,[92] as well as any statements by that person. The importance of cl 5 of the Practice Note was explained in *Bloomfield v R*:[93]

> The reason the Practice Note expresses a preference for videotaping a suspect during interview is to enable a complete visual and aural record of the interview so that any suggestion of improper conduct by the Police can be accurately assessed. By doing so, the interests of both the Police and the suspect are protected.

[110] The video camera should have been turned on again when the officers started discussing with Mr Chetty the maximum penalty and what he should do. Gilbert J found that when they turned off the video recorder the officers had completed the interview and did not expect to resume it.[94] However, he found that there was no reason why the discussion that followed could not have been recorded on video, and that the failure to record what happened in the interval was a breach of cl 5.[95] We agree.

[111] As soon as issues of substance were raised the officers should have immediately stopped any further discussion and put the video camera on. Something happened while the camera was off that led Mr Chetty to reverse three and a half hours of absolute denials. The police officer's evidence did not explain why the video recorder was left off when substantive discussions began in earnest, and the Judge had to reconstruct what had happened.

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92 *Bloomfield v R*, above n 35, at [23].
93 High Court judgment, above n 2, at [24].
94 At [51].
95 At [46].

[112] There was therefore a second breach of the Practice Note. The breach lasted for a considerable period of time – some 24 minutes, and concerned issues critical to the charges. The lack of any explanation as to why the police made such a mistake created a difficulty in assessing this alleged impropriety on its own.

Mr Chetty was misled

[113] The Judge heard evidence as to what was said during the period when the video recorder was turned off. He faced a conflict of evidence. The officers denied saying to Mr Chetty that unless he admitted what they wanted him to admit, 20 years' imprisonment would be his sentence. However this was what Mr Chetty asserted they had said to him, as this extract from his cross-examination indicates:

> Q. What were Detective Woodham's exact words to you?
>
> A. That, um, "If you're not going to tell us the right things we want to know you're going to get 20 years."
>
> Q. Is that the way he said it?
>
> A. Yep.

[114] The Judge found that as a consequence of what was said when the video recorder was turned off, Mr Chetty's demeanour "changed markedly from being calm and good humoured to being worried and stressed".[96] He made no direct finding as to which of the two conflicting narratives he preferred. Instead, having recorded that he was in the "unsatisfactory position"[97] of being unable to determine accurately what occurred during the 25 minutes the camera was turned off, observed:

> [48] I accept Mr Chetty's evidence that he understood from what the detectives told him during the interval that they considered that he was lying, that they had sufficient evidence to prove that he was guilty of rape and that he would be imprisoned for 20 years. The detectives conveyed the impression that they had been trying to help him during the interview but that he had failed to take advantage of that opportunity and would now be on his own and left to face the consequences. Because of the earlier cross-examination, Mr Chetty knew precisely what the detectives had wanted him to say. He understood that this is why they were frustrated; having done everything they could to help him, they said "you're on your own now".

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96 At [33].
97 At [47].

[115] Gilbert J then proceeded to make his important finding that the combined pressure of cross-examination and the statements of the detectives during the interval led Mr Chetty to believe that unless he told the detectives what they wanted to hear, he would face 20 years' imprisonment.

[116] In our view it follows from Gilbert J's findings that the detectives indicated or implied, off video, that a confession would reduce penalty. This is accurate and innocuous advice when seen in isolation, but it was the juxtaposition of that proposition and the maximum sentence comment that caused Mr Chetty to become so concerned about what would happen to him if he did not co-operate that he confessed. That concern arose because it followed from the way it was put that unless he said what the officers wanted him to say, he would go to prison for 20 years. This was incorrect, as Mr Chetty was not facing a sentence approaching 20 years. Any likely sentence in the circumstances of this case, even following a not guilty plea, was likely to be less than half the 20 years, but the police made no mention of this.

Was the evidence obtained unfairly?

[117] It is now necessary to consider whether this course of conduct involving the cross-examination, taking a statement while the video recorder was turned off, and Mr Chetty being misled, meant that the last part of the statement was obtained unfairly. It is significant that s 30(6) of the Act requires a Judge to take into account Practice Note guidelines in deciding whether there has been unfairness.

[118] We do not accept Mr Marshall's submission that the pressure had little discernable impact. Gilbert J stated that given the course of conduct he was satisfied, on the balance of probabilities, that this evidence was unfairly obtained in terms of s 30(5)(c). The Judge found that the confession was "only obtained because of the pressure which the detectives placed on Mr Chetty", while observing that the officers did not act deliberately or in bad faith. In this sense the comments "contributed" to Mr Chetty's decision to recant his earlier evidence,[98] and the police

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[98] At [51].

misconduct was directly causative of the confession. There is nothing in Gilbert J's findings indicating that he considered Mr Chetty's belief to be unreasonable.

[119] Not every technical breach of the Practice Note will lead to a finding of unfairness. Nor will every detainee's subjective claim of being pressured into confessing. The Court must be satisfied that there was real unfairness, and this unfairness caused the confession.

[120] The real unfairness here was that Mr Chetty was misled into thinking that if he did not confess he would receive a sentence of 20 years' imprisonment. Of course, as Gilbert J found, the police did not deliberately mislead Mr Chetty. This state of affairs was instead the result of a combination of factors: a long interview involving questions in the nature of cross-examination that made it clear what evidence the officers wanted from Mr Chetty, and the mention of a 20 year maximum sentence alongside an indication that a confession would reduce that penalty. A lack of bad faith does not retrieve the position. The crucial fact is that Mr Chetty was misled by the way the police conducted the interview. This caused him to confess out of fear of an outcome that was never in prospect.

[121] In addition, in our view the fact that the camera was not turned on adds to the unfairness because, as Gilbert J observed, it leaves a Judge in the event of a later assessment in the unsatisfactory position of having no accurate account of the interview. That is the position that cl 5 of the Practice Note was designed to avoid. When the recorder was turned back on, the officers had the chance to say that they had told C about the 20 years' imprisonment, but did not do so.

[122] We agree with Gilbert J's conclusion that the evidence was obtained unfairly, and would reject the Crown's challenge to his conclusion.

Should the evidence be excluded – the balancing exercise

[123] We turn to the balancing process required by s 30(2)(b) and whether exclusion of the confession is proportionate to the impropriety, taking proper account of the need for an effective and credible system of justice. Gilbert J considered that

exclusion would be disproportionate to the impropriety which occurred, having regard to the s 30(3) factors.

[124] It was stated by this Court in *Wichman v R* that when considering exclusion under ss 27–30 of the Act the Court focuses not on whether a given statement is true, but on whether the circumstances in which it was obtained are likely to have affected its reliability, and whether it was "influenced by" pressure and whether it was "improperly obtained".[99] The word "improperly" in s 30(1) can be seen as including both the importance of the right breached by the impropriety, the seriousness of the intrusion, and the nature of the impropriety.[100] It was observed in *Hamed v R* there is conceptual complexity in interpreting and applying as a separate consideration the need for an effective and credible system of justice:[101]

> It would, however, be a mistake to take the view that the need for an effective and credible system of justice is solely a counterpoint to the impropriety involved in gaining the evidence. The reference to an effective and credible system of justice involves not only an immediate focus on the instant case but also a longer-term and wider focus on the administration of justice generally.

An effective and credible system of justice requires police interviews of detainees to be conducted fairly.

The importance of any right breached and the seriousness of the intrusion

[125] The Practice Note does not create rights but it can be seen as setting standards that must be followed to ensure that those who are detained are not subjected to improper pressure. The Practice Note also reduces the likelihood of the Police obtaining statements whose reliability may be subject to question. It sets out how the Police must conduct themselves and requires a record to be created. It was stated in *R v Hennessey*:[102]

> The Practice Note contains the guidelines for police conduct in relation to questioning during the course of an investigation. A breach of the Guidelines does not necessarily entail a breach of a right, and it has not on this occasion. Nevertheless, compliance with these guidelines is important,

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99 *Wichman v R*, above n 26, at [46]; citing *R v Bain* [2009] NZSC 16, [2010] 1 NZLR 1 at [63].
100 Evidence Act, s 30(3).
101 *Hamed v R*, above n 70, at [229] (footnotes omitted). This is cited by Stevens J above at [70].
102 *R v Hennessey*, above n 73, at [30].

> as the purpose of the guidelines is to ensure that police questioning is conducted in a fair and proper manner. The Guidelines promote the affording and protection of rights articulated in ss 23 and 24 of the New Zealand Bill of Rights Act 1990. It is possible that in this case the departure has not resulted in a false confession, but the risk of such conduct is that it will. And of course, a civilised society cannot tolerate confessions being extracted by improper means. There is then considerable public interest in maintaining compliance with the standard of conduct set out in the Guidelines.

[126] In *Wichman v R* concerns about the unfairness and the scenario technique led this Court to observe:[103]

> The combination of substantial inducements and interrogation also raises serious doubts about the confession's reliability. We acknowledge Collins J's finding that the statement was reliable, but we have disagreed with some of his reasons; notable, we consider that the technique was apt to induce a false confession in this case, having regard to its nature and scale and evident impact on the appellant. We accept that the account which the appellant gave [the police officer] was plausible, but this is not a case in which the Court can take comfort from independent evidence which confirms the likely truthfulness of the confession.

[127] Both *R v Hennessey* and *Wichman v R* involved defendants being misled into confessing. For the reasons we have set out the latter part of Mr Chetty's statement was improperly obtained because it was obtained unfairly in terms of s 30(5)(c). There was no specific breach of any enactment or rule of law of the type listed under s 30(5)(a). However, as was pointed out in *Hessell v R*, all persons who have been charged have the right not to be coerced into admitting wrongdoing.[104] The Supreme Court observed:[105]

> The Bill of Rights Act also protects the right of a person charged not to be compelled to confess guilt. As Professor Ashworth points out, this right requires the prosecution to prove its case without recourse to either evidence coerced from an accused or admissions in circumstances analogous to coercion.

This was in the context of defendants being incentivised to plead guilty because of the prospects of a discounted sentence, but we nonetheless consider the principle to be of general relevance.

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103 *Wichman v R*, above n 26, at [80].
104 *Hessell v R*, above n 72; New Zealand Bill of Rights Act, s 25(d).
105 At [47].

[128] Although Mr Chetty had not been charged at the time of his confession, it seems to us to be self-evident that a detainee such as Mr Chetty being interviewed by the police should not be led to believe that unless he confesses he will receive the maximum sentence on conviction, when there is no chance of such a severe sentence. Such a person is being subjected to improper and unfair pressure in order to extract confessions. Such confessions can undermine an effective and credible justice system.

[129] Therefore, when the three errors of cross-examination, not turning on the video, and the misleading of Mr Chetty are considered together, the intrusion into the expectation of fair practice by the police was in our view serious.

The nature of the impropriety

[130] In assessing the nature of the impropriety in relation to turning off the video recorder, the observation of this Court in *R v Atonio* is relevant:[106]

> Departures from that practice are to be deplored. When the preferred video procedure cannot feasibly be complied with, there are equally obvious reasons for [keeping tape or written records]. Failure to do so places a grave impediment in the way of due process, compelling judges of first instance to make factual findings as to the credibility of police officers and appellate courts to reflect on why, if the truth has been told, such simple precautions were not taken.

[131] Gilbert J faced this impediment of no contemporaneous record of what led to the confession. On appeal, we are unable to understand why the simple required precaution of turning the recorder on was not taken by the officers at the moment they returned to matters of substance. The Judge found that the police officers did not act deliberately or in bad faith.[107] We can understand why that finding was made, as it was not put to the officers in the course of cross-examination in any express way that they had deliberately set Mr Chetty up, or had deliberately misled him or set out to keep the video recorder off.

[132] However, the breach of cl 5 was serious and unexplained, and while the recorder was turned off Mr Chetty was indeed misled by what the police officers

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106 *R v Atonio*, above n 57, at [46].
107 High Court judgment, above n 2, at [51].

said. The mitigatory effect of inadvertence is thus reduced. While the Judge found they did not act "deliberately" (which we assume meant that they did not deliberately deceive Mr Chetty), the officers undoubtedly deliberately cross-examined Mr Chetty, deliberately continued with his statement when the video recorder was off, and deliberately told him the maximum penalty was 20 years' imprisonment and that a confession would lead to a reduction in sentence.

[133] Under s 30(3)(b) the impropriety must be measured not only against the specified particulars of recklessness, deliberateness or bad faith of the police conduct. The nature of the impropriety or improprieties must be assessed on an overall basis, and if there is more than one impropriety the collective impropriety must be considered. We disagree with Gilbert J's characterisation of this impropriety as "comparatively low".[108] The three factors considered together indicate a moderate to serious level of impropriety.

[134] When the interview resumed Mr Chetty was again given his rights. He was asked whether the police had influenced him during the interval and he agreed that they had not. This is not in the circumstances a factor which significantly ameliorated the impropriety. Given that Mr Chetty believed that he had to tell the police officers what they wanted to hear or face a 20 year term of imprisonment, he was hardly likely to have changed his mind or say he was being pressured. He had decided before the camera was turned on that he had to confess or face 20 years' imprisonment, and his state of mind is demonstrated by the way the last part of the interview unfolded. As soon as the formalities were over Mr Chetty volunteered without any question that the complainant had been unconscious.

The nature and quality of the improperly obtained evidence

[135] Mr Lance on behalf of Mr Chetty acknowledged that he did not seek exclusion on the basis of s 28 of the Act relating to unreliable statements, but submitted that in a general sense the reliability of the confession had to be in doubt because of the police conduct and Mr Chetty being misled. We accept that the fact that s 28 was not invoked does not mean that the reliability of a confession cannot be

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[108] At [51].

taken into account in the balancing process. The nature and quality of evidence obtained through improper pressure should be considered under s 30(3)(c).

[136] On its face Mr Chetty's confession has probative value and appears to be credible. However, Mr Chetty made the confession under pressure. In the voir dire he said that his confession was false and was made to avoid going to prison for 20 years. A Court will not just accept a defendant's claim that a statement made was unreliable because of pressure or other police error. However where, as here, it is found that a defendant has been genuinely misled by police pressure about an important matter, the circumstances are apt to produce a false confession. The nature and quality of the confession is affected. As was indicated in *R v Hennessey*[109] the issue is not whether the departure has resulted in a false confession, but rather whether the circumstances in a more general sense create the risk of such a result.

Other factors

[137] In relation to the other factors set out in s 30(3)(d)–(h), Mr Chetty was facing a serious charge, and this weighs in favour of admission. There are no obvious alternative remedies to the exclusion of the evidence which would adequately provide redress for Mr Chetty. As Stevens J observes there was no urgency in seeking to extract a confession, and the impropriety was not necessary to avoid apprehended physical danger to the police. There was an obvious and easy investigatory technique available that complied with the Practice Note, namely interviewing with the video recorder on, and as already outlined, this weighs against admission.

[138] Although it is not a factor set out in s 30(3), we turn to the strength of the Crown case. The admission is not the only evidence available to the Crown. There will be the complainant's evidence as to what happened, and that she was unconscious and awoke to find Mr Chetty having sex with her without her consent. There may be some propensity evidence as to a tendency, and there may be evidence from other background witnesses about the condition of the complainant. It cannot be said that the Crown case is weak if the evidence is excluded.

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[109] *R v Hennessey*, above n 73.

The overall balance

[139] There was a serious failure by the police to follow fair practice. The effect of the police impropriety was to overcome Mr Chetty's denials and obtain a confession from him. The compound effect of the two breaches of the Practice Note and Mr Chetty being misled meant that there was a moderate to serious degree of impropriety in the police conduct, when considered overall. When there is an unexplained failure to record a statement, and disagreement as to what was said, it is appropriate that this work against the party responsible in the balancing exercise. Such a practice must be firmly discouraged.

[140] The nature and quality of the improperly obtained evidence must be in question, given Mr Chetty's decision to say under wrongly induced pressure what the police wanted him to say. There is a clear causal nexus between the unfair conduct of the police and the statement, starkly illustrated by the complete reversal of Mr Chetty's previous position when the camera was turned on again and his immediate confession. Other factors are balanced, but some weigh for admission.

[141] An effective and credible system of justice is not undermined when such a serious impropriety leads to exclusion. In our view it is reinforced. Exclusion is proportionate giving weight to the impropriety. It follows from this assessment that we are unable to agree with the assessment of Gilbert J, and we consider the last part of the statement containing the admission should be excluded.

Result

[142] The application for leave to appeal is granted.

[143] The appeal is allowed.

[144] The order made in the High Court pursuant to s 101 of the Criminal Procedure Act 2011, that the latter part of the interview from 2.14 pm conducted between Mr Chetty and the Police on 28 March 2014 is admissible, is quashed. That part of the interview is not admissible.

[145] For fair trial reasons, an order is made prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet or other publicly available database until final disposition of trial. Publication in law report or law digest permitted.

Solicitors:
Crown Law Office, Wellington for Respondent