CASE NOTES

SUSPECT QUESTIONING: A REVIEW OF THE POLLARD *AND* HEATHERINGTON *CASES*[1]

Sections 464C and 464H of the Crimes Act 1958 (Vic.) have captured the judicial spot-light in a number of recent cases. Briefly, these sections require that suspects be informed of their rights to communicate with a friend, relative and legal practitioner before being questioned and that their confessions or admissions be tape-recorded. Two cases in particular deserve scrutiny: *Pollard v. The Queen*, handed down by the High Court on Christmas Eve 1992 and *The Queen v. Heatherington*, a decision of the Victorian Court of Criminal Appeal published on 18 March 1993. This article summarises those cases and offers some comments which may be useful to persons practising criminal law.

POLLARD'S *CASE*

Pollard was questioned at Frankston Police Station, where he was neither cautioned about his right to silence[2] nor advised of his rights to communicate.[3] The interview was not tape-recorded even though facilities were available to do so. Pollard was then transported to the St Kilda Road Police Complex and during the journey he made a significant admission. At the St Kilda Road complex he was cautioned and advised of his rights, following which he made several admissions during a tape-recorded interview. At trial the Crown tendered, over Pollard's objection, the St Kilda Road interview. Pollard was convicted and his appeal to the Court of Criminal Appeal was dismissed. He appealed to the High Court on the ground, *inter alia*, that the tape-recording of the St Kilda Road interview was inadmissible because the Frankston interview had not been recorded.

SECTION 464H AND INTERVIEWS AT TWO PLACES

Section 464H(1) states that evidence of a confession or admission is inadmissible against an accused unless:

> (d) if the confession or admission was made during questioning at a place where facilities were available to conduct an interview, the questioning and anything said by the person questioned was tape-recorded.
>
> . . .
>
> and the tape-recording is available to be tendered in evidence.[4]

'QUESTIONING'

The High Court had to interpret the word 'questioning' — does it mean questioning at both of two places of interview or just at the place where the

[1] *Pollard v. The Queen* (1992) 176 C.L.R. 177; *The Queen v. Heatherington* [1993] 1 V.R. 649.
[2] Crimes Act 1958 (Vic.) s.464A(3).
[3] See *infra* n.13-15 and accompanying text.
[4] Subject to Crimes Act 1958 (Vic.) s.464H(2), 'exceptional circumstances'.

confession was made? On the facts before them, four of the seven judges decided that only the questioning at St Kilda Road, the place where the admissions were made, had to be recorded.[5] As a precedent, however, this case is unsatisfactory. The majority did not decide that where there are two interviews at separate places it is never necessary to tape-record both interviews. Whilst this *may* have been the opinion of three of the judges,[6] Toohey J. specifically held that whether or not both interviews must be recorded is a question of fact to be decided in every case.[7] It may be that two interviews are so proximate in terms of time and place that they ought to be treated as the same 'questioning'. If so, both interviews would have to be recorded. In Toohey J.'s opinion, an important consideration was whether the recorded questioning was 'affected' by what took place earlier.[8]

In general, Mason C.J., Deane and McHugh JJ. said that only the questioning at the second place must be recorded. Such a rule has the advantage of not rendering a potentially reliable interview inadmissible simply because a single question was asked but not recorded earlier. On the other hand, the minority's dissent is strong. The aims of the package of legislation (including s.464 and s.464C) introduced as a result of the Coldrey Committees Report[9] will be achieved if all questioning is tape-recorded.

In my opinion, Toohey J.'s test strikes an admirable balance between these two competing views. Toohey J. would allow a later interview to remain in evidence only where its reliability is not affected by any earlier questioning. Further, Toohey J. imposes the safeguard of automatic exclusion where an investigator has deliberately ignored the requirements of s 464.[10] If it could be argued then that in order to gain an 'off-the-record' insight into what a suspect's version of events is likely to be, two interviews were deliberately separated, the trial judge should be persuaded to exclude the confession.

As some guidance for the future application of Toohey J.'s test, it can be noted that Pollard's trip from Frankston to St Kilda Road took approximately one hour. This was enough for Toohey J. to regard each interview as a separate 'questioning'.[11]

'FACILITIES TO CONDUCT AN INTERVIEW'

Of the judges who considered the phrase 'a place where facilities (are) available to conduct an interview', all interpreted 'facilities' to mean tape-recording equipment.[12] They noted, however, that paragraph (e) is thereby rendered uncertain.[13]

5 *Per* Mason C.J., Deane, Toohey and McHugh JJ., in separate judgments.

6 This is the way the judgments were dealt with in the C.L.R. headnote (*cf.* A.L.R. headnote: 110 A.L.R. 385). See 183 *per* Mason C.J. (although he indicated that there might be circumstances where a suspect makes one confession in the course of questioning at two places, in which case both interviews should be recorded. However, it is difficult to imagine what situations Mason C.J. had in mind), 198 *per* Deane J. (although he referred to a particular 'period' of questioning, and not a particular 'place') and 228-9 *per* McHugh J.

7 (1992) 176 C.L.R. 177, 219.

8 *Ibid.*

9 Report of the Consultative Committee on Police Powers of Investigation, *Custody and Investigation*, (Melbourne, 1986).

10 (1992) 176 C.L.R. 177, 219. See also 183 *per* Mason C.J.

11 *Ibid.* 219.

12 *Ibid.* 183 *per* Mason C.J., 191 *per* Brennan, Dawson and Gaudron JJ. and 217 *per* Toohey J.

13 The difficulty arises because para (e) refers to a questioning tape-recorded at a place where

SECTION 464C — RIGHTS TO COMMUNICATE

As stated, s.464C(1) requires that before any questioning, the suspect be informed of his or her rights to communicate with a friend or relative and with a legal practitioner. The judges were unanimous in finding that, for the purposes of this section, 'questioning' means *all* the questioning which has taken place.[14] A breach of s.464C before an earlier questioning will therefore infect a later questioning.[15]

Those judges who considered the question of what is required by s.464C(1) held that a mere recitation of the words in the section is insufficient.[16] McHugh J. stressed that the interviewer must ensure that the suspect understands his or her rights; in particular, that they may be exercised immediately or during (and possibly after) the interview.[17] Deane and Toohey JJ. emphasised that the questioning must actually be deferred for a reasonable time to enable the suspect to exercise, or attempt to exercise, his or her s.464C rights, even if the suspect does not ask to do so.[18] Here, a tiny pause after the question 'Do you understand these rights?' fell far short of what is required. The most prudent course for police to take is that suggested by Toohey J. An interviewer should at least inquire whether a suspect wants to exercise his or her rights. If the suspect says 'no', it may be assumed that the reasonable time required by s.464C has elapsed and questioning may begin.

DISCRETION UNDER s.464C

The judges refused to imply into the section an automatic exclusion of a confession obtained after a breach of s.464C.[19] Rather, the two common law discretions (with respect to confessions unfairly or illegally obtained) must be applied. Only three judges commented on the way in which a trial judge should approach the exercise of his or her discretion. A reckless disregard of the section would ordinarily result in exclusion according to Deane J.[20] Mason C.J. added that something less than reckless disregard could lead to the same result.[21] McHugh J. went even further: a breach of s.464C would raise a prima facie case of unfairness. Unless the prosecution rebuts this, the confession should be excluded.

facilities are not available. It is submitted that para (e) refers to the situation where a confession is recorded by means of a hand-held tape-recorder when the confession is made 'in the field'. See *ibid.* 191 *per* Brennan, Dawson and Gaudron JJ.

14 *Ibid.* 183-4 *per* Mason C.J., 196 *per* Brennan, Gaudron and Dawson JJ., 200 *per* Deane J., 220 *per* Toohey J. and 233 *per* McHugh J.

15 It was not clear whether Toohey J. decided that an earlier breach affects later questioning, although there was no need to decide this point. Note also that Deane J. thought that an earlier breach of s.464C may be remedied later so that any subsequent questioning will not be unlawful.

16 (1992) 176 C.L.R. 177, 200 *per* Deane J., with whom Mason C.J. agreed on this point; see also 221 *per* Toohey J. and 233 *per* McHugh J. See also Nathan J. in *Dorrington* (unreported, Victorian Court of Criminal Appeal, 30 October 1991) 12.

17 (1992) 176 C.L.R. 177, 233.

18 *Ibid.* 200 and 221 respectively. It is respectfully submitted that McHugh J.'s view that questioning need only be deferred if and when the suspect requests to exercise his or her rights (*ibid.* 231), was impliedly rejected by the rest of the Court.

19 *Ibid.* 183 *per* Mason C.J., 196 *per* Brennan, Dawson and Gaudron JJ., 200 *per* Deane J., 222-3 *per* Toohey J. and 234 *per* McHugh J.

20 *Ibid.* 204.

21 *Ibid.* 183.

It would be insufficient to show that the confession was voluntary or reliable or that the interview was otherwise fair: 'it is not for the courts to disregard a breach of s.464C by analysing the circumstances of the case by reference to general notions of fairness'.[22] The presumption would only be rebutted if the evidence showed, for example, that the breach was insignificant or was irrelevant to the obtaining of the confession. Quite clearly, the comments of McHugh J., which are not inconsistent with those of Mason C.J. and Deane J., should be seized upon by practitioners seeking the exclusion of a confession obtained in breach of s.464C.[23]

HEATHERINGTON'S CASE — TWO INTERVIEWS AT ONE PLACE

Finding a common thread in the *Pollard* judgments appeared to cause difficulties for the court hearing Heatherington's appeal.[24] In *Heatherington*, as in *Pollard*, there were two separate interviews. This time, however, the first interview occurred at the same place at which the confession was later recorded. Police officers questioned Heatherington some 45 minutes before the recorded interview, and damaging admissions were made. Although notes of these admissions were taken, the Crown did not seek to tender them. The same admissions were made during the later recorded interview. At trial, Heatherington failed in his attempt to have evidence of this later interview excluded on the basis that the earlier questioning had not been recorded. Thus the Court of Criminal Appeal was faced with the same task as in *Pollard*: the interpretation of 'questioning'. Here the issue was slightly different: are police officers required to record all the questioning which occurs at the place where the admission is made or just the particular interview on which the Crown seeks to rely?[25]

The Court was unanimous in deciding that recording only the particular interview containing the confession or admission was sufficient.[26] Marks J. decided that 'questioning' means 'that [questioning] which is relevant to the production of, or at least temporally related to, the making of the confession or admission'.[27] The 45 minute period between the first and second interviews was sufficient to separate them for the purposes of s.464H.[28] His Honour went on to suggest that 'there may be an issue whether the recorded questioning is only part of other unrecorded questioning which is in some relevant way connected'.[29] He indicated however that here, where the later interview was a 'discrete questioning properly to be considered to have a logical entirety', the two interviews were not connected.[30] But these observations beg the question: if a recorded interview is

[22] *Ibid.* 235. On this point, compare *Percerep* [1993] 2 V.R. 109 with *Bannon and Calder* (unreported, Victorian Court of Criminal Appeal, 21 September 1993).

[23] See now the important High Court decision in *Foster v. R* (1993) 113 A.L.R. 1. This case provides a close analysis of the illegality and unfairness discretions in relation to confessions. See also Coldrey J.'s ruling in *Li* [1993] 1 V.R. 671 (lack of understanding of right to silence may make confession involuntary or inadmissible under the fairness discretion).

[24] The Court of Criminal Appeal took the unusual step of referring its judgment to the Chief Parliamentary Counsel and the Attorney General, with a view to reforming the words of s.464H.

[25] As Marks J. notes ([1993] 1 V.R. 649, 652) this aspect of s 464H was not decided in *Pollard*.

[26] Marks, Southwell and Harper JJ. delivered separate concurring judgments.

[27] [1993] 1 V.R. 649, 653-4.

[28] Similarly, Harper J. (*ibid.* 662) said that the recording requirements related only 'to the particular period of questioning in which the relevant confession or admission was made'.

[29] *Ibid.*

couched in such a way that it appears to be a 'discrete questioning', could it ever be argued that it was 'connected' to an earlier unrecorded questioning? It seems possible that, as long as an interview appears to be 'self- contained',[31] any number of questions could be asked before recording begins without jeopardising the admissibility of a recorded confession.

Southwell J. adopted the test proposed by Toohey J. in *Pollard*:[32] was the recorded interview 'affected' by what took place earlier? Here the recorded interview was not affected because it did not appear to contain any questions which would not have been asked had there been no 'lead up' conversation.[33] The conclusion that a suspect, in making a later confession, is not affected by the fact that he or she had earlier made the same confession, is somewhat doubtful. Such a person will almost certainly act under the belief that his or her fate is already sealed.

Section 464H(1)(d) requires the tape-recording of 'the questioning and anything said by the person questioned'. Marks J. interpreted this phrase to mean 'the communication said to contain the confession'.[34] This is in itself ambiguous. Does it mean the questions and answers which make up the actual words of the confession? If this were the case, it would permit the police to record only the words 'Q: Did you commit the murder? A: Yes.'[35] The section must be given a wider operation than that. On the other hand, Marks J. identified the problem at the other extreme. If the police were required to record every single question asked of a suspect at the place where the interview is to occur an accused could have a recorded confession excluded simply by persuading a court that 'he or she had been asked a question, no matter how innocuous or irrelevant'.[36] It is for this reason that Toohey J.'s test is to be preferred, as long as it is properly applied.

Southwell J. found no magic in the fact that, in *Pollard*, the questioning occurred at two places.[37] Whether two interviews occurred at one place or two, the issue will still be whether they are the same questioning. Harper J. highlighted the fact that even though the trial judge in *Pollard* found the earlier interview enabled the police to obtain 'a valuable insight into the accused', this was not enough to satisfy a majority in the High Court that the two periods of questioning were in truth but one.[38]

The decision in *Heatherington* that a prior questioning need not be recorded may be difficult to reconcile with the decision in *Pollard*. It was unanimously decided in *Pollard* that a suspect must be informed of his or her rights before *any*

30 *Ibid.* 654. Southwell J. (*ibid.* 656) and Harper J. (*ibid.* 663) used similar reasoning.

31 *Ibid.* 663 *per* Harper J. Southwell J. appeared to think it relevant (*ibid.* 656) that the police regarded the interviews as separate and looked upon the likelihood that no caution was administered before the first interview as a factor favouring admissibility!

32 *Pollard* (1992) 176 C.L.R. 177, 219.

33 [1993] 1 V.R. 649, 656.

34 *Ibid.* 653.

35 Of course, this is unrealistic, but it is the logical conclusion of the reasoning employed. Is the reasoning therefore suspect?

36 *Ibid.* 654.

37 *Ibid.* 657.

38 *Ibid.* 663.

questioning whatsoever. Section 464G says that the giving of this information[39] *must* be recorded if practicable.[40] Surely it was not the intention of Parliament to require that the giving of the s.464C information and a later confession be recorded, but to allow an investigator to switch off the tape-recorder during an intervening period of questioning. This is apparently what the judgments in *Heatherington* foreshadow.

OTHER CASES

A number of other recent decisions have made the following important points in relation to sections 464C and 464H, and in relation to the questioning of suspects in general:[41]

- The tape recording requirements in s 464H(1) apply only when 'a confession or admission [is] made to an investigating official by a person who — (a) was suspected; or (b) ought reasonably to have been suspected — of committing an offence'. In *Heaney*[42] it was decided that it is the investigating official to whom a confession is made (and not some other investigator) who must hold, or ought reasonably to hold, that suspicion.
- There is no breach of s.464C where the suspect fails in an attempt to contact a relative or friend.[43]
- The discretion to admit a confession obtained in breach of s.464C should not be fettered by requiring the prosecution to show compelling reasons for the admission of such a confession.[44]
- Admissions by conduct do not fall within s 464H, even if a conversation forms part of that conduct.[45]
- Practitioners should be on the alert for cross- examination type questions asked during recorded interviews. If these questions carry overtones of scorn or disbelief, they are inadmissible.[46]

39 As well as the informing of the right to silence: Crimes Act 1958 (Vic.) s.464C.

40 An apparent breach of this section was seemingly overlooked by the Court of Criminal Appeal in *Heatherington*.

41 Given the brevity of this article, I cannot hope to do justice to these cases.

42 [1992] 2 V.R. 522. Special leave to appeal to the High Court was refused on 12 March 1993. See also *Raso* (unreported, Victorian Court of Criminal Appeal, 30 September 1993) and Hampel J.'s ruling in *Meyers* (unreported, Victorian Supreme Court trial ruling, 20 April 1993).

43 *Heaney*. Question whether this would apply where the suspect fails in his attempt to contact his solicitor, especially as *Heaney* was decided before *Pollard*. See *Percerep* [1993] 2 V.R. 99, where the suspect said it would be 'useless' to try and ring his solicitor at 1.00am, but that he was not happy to proceed with the interview without his solicitor. Continuing the interview in these circumstances was unanimously held to be a serious breach of s. 464C, and one which may very well have resulted in exclusion of the record of interview. The Court ultimately determined the appeal on other grounds.

44 *Heaney*, disapproving of Nathan J. in *Pollard* (1991) 56 A. Crim. R. 171 (Victorian Court of Criminal Appeal). Note once again that *Heaney* was decided prior to the High Court's decision in *Pollard*. See also *supra* n.23.

45 *Marijancevic* (1991) 54 A. Crim. R. 431 (Victorian Court of Criminal Appeal). The accused alleged that he had been mistreated during a police interview. Evidence of a later unrecorded conversation with the watch-house keeper was admitted to prove that the accused had made no complaint of mistreatment.

46 *Pritchard* [1991] V.R. 84 (unanimous decision of the Victorian Court of Criminal Appeal). A point not discussed is whether a confession obtained as a result of this type of questioning would be excluded as being unfairly obtained. Vincent J. seems to think so in ruling that a confession made after grossly improper questioning was inadmissible *Bayou* (unreported, Victorian Supreme Court trial ruling, 16 February 1993).

- There is growing support for Brennan J.s view in relation to the fairness discretion, expressed in *Duke*,[47] that a confession might be excluded in the exercise of the fairness discretion in circumstances where 'no confession might have been made if the investigation had been properly conducted'.[48]
- Two NSW Court of Criminal Appeal decisions have held that selective answering of questions is *not* a basis for an inference of guilt.[49]

CONCLUSION

In my opinion, we have not seen the last of s.464H.[50] Judicial, if not legislative, clarification is needed. If the High Court does not interpret the section in a fair and workable manner, the legislature may be forced to heed the call in *Heatherington* to reword the section. With respect, *Heatherington's* case leaves the issue in an unsatisfactory state of affairs by encouraging police to question a suspect in detail 'off the record' before tape-recording begins. The exercise of judicial discretion to exclude a confession obtained in breach of s.464C also remains unclear. There is still room to argue that it should almost always be exercised to exclude such a confession.

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47 (1989) 63 A.L.J.R. 139, 141.

48 See Teague J.'s ruling in *Arthur* (unreported, Victorian Supreme Court trial ruling, 18 August 1993 — assurances given to the accused that he was not a suspect) and Vincent J.'s ruling in *Lieu* (unreported, Victorian Supreme Court trial ruling, 22 March 1993 — accused with limited understanding of English not given proper access to legal advice).

49 *Towers* (unreported, NSW Court of Criminal Appeal, 7 June 1993) and *Tolmie* (unreported, NSW Court of Criminal Appeal, 2 August 1993).

50 I understand that an application for special leave to appeal to the High Court against the decision in *Heatherington* is to be heard in the first half of 1994.

* Jonathon Moore is an articled clerk. Thanks to Sally Hewitson for spending many hours assisting me rework an earlier draft of this article.