relation to the Police questioning of Aboriginal suspects, that great care should be taken in formulating questions so that as far as possible "the answer which is wanted or expected is not suggested in any way". The Court said that "anything in the nature of cross-examination should be scrupulously avoided as answers to it have no probative value." The same observations may be made when such an Aboriginal witness is cross-examined in the course of a trial. In a paper published in the Criminal Law Journal[4] Mildren J discussed the problem of what he termed "gratuitous concurrence" and highlighted the need to "warn counsel for the accused about the need for leave before putting leading questions in cross-examination".

A further limitation on cross-examination centres upon how one approaches the witness who gives evidence which is contrary to that of another witness. It is clear that a witness ought not to be asked whether another witness is telling lies or has invented something[5]. The witness can be asked if he knows any reason why the other witness should be hostile to him, or should tell a false story about him, but he should not be asked to enter into the other witness' mind to express an opinion as to whether he thinks "the inaccuracy is due to invention, malice, mistake or any other cause."

It can be seen that the right of cross-examination is far from unfettered. The restrictions on what can be done in cross-examination are not limited and the matters I have discussed above are simply examples of some of the restrictions applicable. In preparing your cross-examination you will need to bear in mind that restrictions apply and to structure your cross-examination accordingly.

1 *GPI Leisure v Herdsman Investments (No.3)* (1990) 20 NSWLR 15 at 22; *NMFM Property Pty Ltd v Citibank Ltd* (1999) 161 ALR 581.

2 *Wakeley v The Queen* (1990) 64 ALJR 321 at 325.

3 *R v Sadaraka* (1981) 4 A Crim R 221 at 226-227; see also *R v Christopher Roy Bean* (1999) (25 May 1999 CCA Qld).

4 Redressing the Imbalance Against Aboriginal in the Criminal Justice System (1997) at 21 CLJ at 7.

5 *The Queen v Leak* (1969) SASR 172.

CASE NOTES

Mark Hunter

Jackson v Hales

Supreme Court No. JA90 of 1999

Judgment of Angel J delivered 7 March 2000

CRIMINAL LAW - MANDATORY SENTENCING - S.61 SUMMARY OFFENCES ACT

The appellant pleaded not guilty to having in his possession a car trailer reasonably suspected of having been stolen or otherwise obtained unlawfully, contrary to s 61 of the *Summary Offences Act*. This offence is included in a list of property offences for the purposes of the mandatory sentencing provisions of the *Sentencing Act* ("the Act").

In the course of the police investigation the appellant participated in an electronically recorded interview in which he explained how he came into possession of the trailer. He also gave sworn evidence.

The magistrate stated that under the *Summary Offences Act* the onus was on the appellant to "...persuade the court of his innocence...". Mr Wallace SM found that he could not be satisfied that the appellant had been truthful with the police. His Worship held that by virtue of this determination he was unable to give the appellant the benefit of s78A(6B) of the Act and decline to impose the specified mandatory sentence of 14 days imprisonment. This was because the appellant had failed to prove that he had "...co-operated with law enforcement agencies in the investigation of the offence" (s78(6C)(d) of the Act).

Mr Wallace SM accepted that the appellant had satisfied the three other pre-conditions specified in s78(6C) of the Act.

The appellant was convicted and thus sentenced. He appealed the 14 day mandatory sentence on the ground that he *had* co-operated with the police.

HELD

1. The appeal is dismissed and the sentence confirmed.

Angel J observed that the magistrate had not held that the appellant's answers to police were untruthful. His Honour interpreted the magistrate's remarks on sentence as meaning that the appellant's answers were "simply useless". His Honour commented:

"...Co-operation means at least working together for a common end, and to give answers, as found by the learned magistrate, the onus being on the appellant, that were not made out as *truthful and useful*, it seems to me, cannot constitute co-operation" (emphasis added).

Appearances

Appellant - Cox/Legal Aid Commission

Respondent - Austin/DPP

Commentary

Query whether the test now enunciated by the Supreme Court for the application of s78(6C) requires the interviewee's answers to be *actually* or only *potentially* "useful" to law enforcement agencies; and whether this test is limited in its application to s61 offences.

Case Notes is supplied by Mark Hunter, a barrister in Darwin.