

DISCUSSION PAPER 2

Prisoners Action Group

HIGH COURT JUDGE WARNS OF "POLICE VERBAL"

Justice Deane in *Carr v R* High Court of Australia

27 Sept 1988

The problem of oral admissions

"It is undoubtedly the fact that a considerable number of persons make oral admissions to police which they are not prepared to authenticate in writing. In the context of modern inquiries and experience, however ...there is, throughout this country a real and substantial risk of fabrication of police evidence of the making by an accused of oral admissions in the course of his interrogation while held in police custody. That this should be so is, of course, regrettable and disturbing. It is not, however, completely surprising even if one disregards the possibility that particular members of a police force may actually be corrupted to the extent of being involved in ...organised crime."

The vulnerability of the accused in custody

"Evidence of an oral confession will ordinarily overcome deficiencies in 'real evidence' which otherwise would entitle an accused to an acquittal ...The attractions of such evidence, from the point of view of investigating police who are genuinely convinced of the guilt of an accused person, are obvious...An accused person who is questioned by police officers while he is held in their custody is in an environment over which he possesses little or no control. He has been deprived of any independent power to procure the presence of a non-police witness to attest to what he does and does not admit while under interrogation. He ordinarily will not enjoy the opportunity of obtaining or using any mechanical device to record his interrogation by the police. On the other hand, law enforcement agencies who hold an accused person in custody effectively control the environment in which they hold him. Subject to financial constraints, it lies within the power of such law enforcement agencies to obtain clear evidence of what was said by an accused in the course of any interrogation and thereby effectively preclude or substantially reduce the opportunity of either fabrication or false allegations of fabrication ...*If an effective video system for recording such an interrogation is thought to be too sophisticated or expensive for a modern police force, a \$100 tape recorder should be within the bounds of reasonable contemplation.*"

Inequality in court

"An accused person who is confronted, on his trial, with fabricated evidence of an oral confession is placed in an extraordinarily unfair predicament. The police witnesses are likely to be practised in giving evidence. The accused is not. The police will enter the witness box with the respectability of officialdom. The accused will enter it from the dock. The police evidence of an alleged oral admission is likely to appear to some jurors as being safe to act upon to an extent which those with greater experience of the administration of criminal law would know to be unwarranted. The area of effective cross-examination of those who give evidence that the alleged admissions were made or confirmed is limited.

"If the accused has a bad record, he or his counsel will be under further special constraints which, if disregarded, could in some cases effectively preclude the accused from the giving sworn evidence. If the evidence of the alleged oral confession is the main evidence against an accused, his denial that the confession was made may involve a real risk that the issue at the trial will effectively become whether the police witnesses have combined in a criminal conspiracy to pervert the due administration of justice by perjury. However carefully a trial judge may direct a jury about the real issues and about questions of onus of proof, some jurors may be predisposed to see a verdict of not guilty as an aspersion upon the police force or the police officers of their state, city or town... If there is other substantial evidence against the accused, his chances of successfully resisting fabricated police evidence of an alleged oral confession may be remote indeed since the jury may well see any evidence of his guilt as corroborating not only the contents but the actual making of the fabricated confession."

The dangers of not recording interrogations

"A person held in involuntary police custody is rendered peculiarly vulnerable to the risk of the fabrication of evidence of an oral admission of guilt and that risk is not, in this country, one which can be simply disregarded ...If the relevant governmental authorities have failed to institute an effective system for the mechanical recording of the interrogation ...there has been a failure to take reasonable steps to protect those persons from the risk of fabrication of evidence of an oral confession to which their involuntary custody exposes them."

Judges's warning to a jury is required

"Where police evidence of a disputed oral confession ...is relied upon by the prosecution on his trial, there is ordinarily a perceptible risk of an unfair trial and of a miscarriage of justice. That perceptible risk cannot as a matter of fairness to the accused, be simply disregarded by a trial judge in directing the jury. It should be dealt appropriate specific directions...I would recognise a *prima facie* requirement that (a warning to the jury of the difficulty of judging whether a practised witness is telling the truth or not) be given in any case where the prosecution relies upon police evidence of disputed oral admissions ...where the actual making of the admissions is unsupported by video or audio tapes, by some written verification by the accused, or by the evidence of some non-police witness. In addition ...in a case where uncorroborated police evidence of the making of a disputed oral confession is the only, or substantially the only evidence against an accused, (the judge should) include a further warning to the jury pointing to the danger involved in convicting upon the basis of that evidence alone...the jury should give careful consideration to the dangers involved in convicting an accused person in circumstances where the only (or substantially the only) basis for a finding that his guilt has been established beyond reasonable doubt is uncorroborated and disputed police evidence of oral admissions ...It should be pointed out to the jury that, in such a case, the detention in police custody and the failure of the relevant authorities to institute an appropriate system for the mechanical recording of what is said in the course of police interrogation combine to render an accused peculiarly vulnerable to fabrication of oral admissions."