CASE NOTES

DRISCOLL v. R.[1]

The evidentiary status which should be accorded to an unsigned record of interview containing admissions of relevant facts purportedly made by the accused, has long troubled the courts in their endeavour to balance the ideals of individual and societal justice. Though perhaps not warranting the somewhat grandiose description of having "opened a new chapter in the administration of the criminal law",[2] the recent decision of the High Court of Australia in the case of *Driscoll* v. *R.*[3] represents a significant advance in both the recognition and analysis of the competing priorities which pervade this area of evidence, and which must guide the future discretion of the courts in relation thereto.

Put simply, the decision seeks to arrest and reverse an emerging trend (most prevalent in New South Wales)[4] of judicial reluctance to exercise the overriding discretion to reject technically admissible,[5] though highly prejudicial, unsigned records of interview as independent documentary exhibits.

The applicant, Linus Patrick Driscoll, had been convicted in the Supreme Court of New South Wales for the murder of John Patrick Maloney in 1972. Upon failure of an appeal to the Court of Criminal Appeal, he sought special leave to appeal to the High Court.

It was submitted on behalf of the applicant that a number of irregularities had occurred in the conduct of the trial which, in turn, had led to a miscarriage of justice. One such irregularity was stated to be the admission of exhibits of unsigned records of interview arising out of interrogations conducted by the police upon apprehension of the applicant. Though there was prosecution evidence that the applicant conceded the authenticity of such records and only refused to sign them, he denied their accuracy in his testimony and objected to their tender as exhibits made available to the jury for their perusal during deliberation.

Upon a related point, it was submitted that evidence of the applicant's solicitor regarding the alleged refusal by police to permit his presence

1 (1977) 15 A.L.R. 47.
2 *Sydney Morning Herald,* 11/8/77, p. 2, c. 4.
3 (1977) 15 A.L.R. 47. See also *Wright* v. *R.* (1977) 15 A.L.R. 305, 322, where Aickin J. concurred with the sentiments expressed by Gibbs J. in *Driscoll's* case regarding the danger of putting unsigned confessions in evidence as exhibits.
4 See, e.g. *R.* v. *Ragen* (1964) 81 W.N. (N.S.W.) (Pt. 1) 572; *R.* v. *Vandine* [1968] 1 N.S.W.R. 417; *R.* v. *Harris* (1970) 91 W.N. (N.S.W.) 720; *R.* v. *Daren* [1971] 2 N.S.W.R. 423. Cf. *R.* v. *Clarke* [1964] Q.W.N. 8.
5 For the technical requirements for admissibility, see *R.* v. *Kerr* (No. 1) [1951] V.L.R. 211; *R.* v. *Lapuse* [1964] V.R. 43.

during interrogation was wrongly excluded as being relevant only to the credibility of the police witnesses. Rather, the failure to allow attendance further impeached the reliability of the unsigned record of interview itself, and gave greater justification for the exercise of the judicial discretion to exclude such evidence.

In reasserting the vitality of this discretion by deciding that the document should not have been tendered as an exhibit, both Gibbs J.[6] and Murphy J. favoured the view that the discretion should generally be exercised against the admission of an unsigned record where the accused disputes either its authenticity or accuracy.[7] Rather, a lesser evidentiary status should be accorded to such documents, namely as mere aids to recollection by those giving oral testimony of the circumstances of the admission. In so deciding, the Court took cognizance of both the potential for falsification of a record or the requisite "adoption" thereof, and the additional psychological jury impact deriving from the tender of the record itself as a buttress to the credibility of oral police testimony. In juxtaposition with such factors was the "interest of the Crown as representing the community in the conviction by due and fair process of those who break the law".[8] The compromise sought to be achieved by the High Court thus represents an attempt to balance these competing interests and considerations—the utilization of the judicial discretionary device is sought to facilitate flexibility in circumstances where the general compromise is inappropriate.

1. "ADOPTION" AND THE DISCRETION RELATING TO UNSIGNED STATEMENTS

Much of the difficulty which confronts a court in its consideration of both the admissibility of, and discretionary power to reject, legally admissible records of interview derives from the prerequisite of "adoption" of an unsigned statement by the accused.[9] In so far as the legal admissibility of a written confession will depend upon whether it can be said that, though not signed by the accused, he has personally adopted the record in some way, the subsequent denial of authenticity by the accused casts into issue both the reliability of the statement itself *and* the assertion by police of its non-signatory adoption. If unreliability be the basis for the rejection of the former in the absence of some extrinsic indicia of adoption, then the assertion of such indicia by either oral testimony or within the statement itself must necessarily fall victim to the same rationale. A statement in a document "I have read this document and affirm that it is true—though I don't wish to sign it", has no greater validity or reliability than the content which it purports to verify. If the absence of a signature

[6] With whom Mason and Jacobs JJ. agreed. See also Aickin J. in *Wright's* case, fn. 2.

[7] (1977) 15 A.L.R. 47, at pp. 66-9. Though not considering that the instant case disclosed an irregularity in the trial, Barwick C.J. expressed very similar sentiments with respect to the general principles: see pp. 52-3.

[8] Ibid. p. 53. See also *Wright* v. *R.* (1977) 15 A.L.R. 305, per Barwick C.J., pp. 307-8.

[9] See fn. 5.

requires recourse to alternate modes of adoption in order to ensure that fabrication has not occurred, then the possibility of fabrication of a requisite form of attestation must be non-existent. Where this is not the case, the alleged adoption can never be seen to enhance the reliability of the primary statement and cannot justify its reception as an exhibit.

Though this would appear to be a seemingly basic proposition, the courts have not sought to so limit the concept of "adoption". Rather, it has been held sufficient to constitute adoption if the accused can be "associated with the piece of paper" by reading it himself and acknowledging its truth—albeit that such adoption is attested to by those seeking admission of the document.[10] The reliability of both the record and the purported act of association thus remains dubious—the incentive for those attempting to secure a conviction by evidence of alleged admissions to buttress such evidence by manufactured indicia of adoption is obvious.

In this regard, it is perhaps regrettable that the High Court in *Driscoll's* case sought primarily to rely upon the existence of the overriding discretion to reject technically admissible evidence, than to engage in a more detailed analysis of the bases upon which such admissibility is presently founded. By retaining the unqualified rule regarding the prerequisites for non-signatory adoption, the legal admissibility of documentary evidence may continue to be founded upon essentially unreliable sources, and may remain conducive to official fabrication. In *Wright* v. *R.*,[11] Barwick C.J. stated that there was considerable danger in the generalization that, because on occasions unsigned records of interviews have proved false, all such records are suspect and all officers who support the making of them are "of doubtful credibility".[12] However, in so far as the rule precluding admissibility of unsigned statements which are not "adopted" is prefaced upon the possibility of unreliability deriving from fabrication, the concept of adoption must logically be narrowed to ensure reliability by virtue of the proven acts of the accused. As Gibbs J. stated

> "The mere existence of a record is no safeguard against perjury. If the police officers are prepared to give false testimony as to what the accused said, it may be expected that they will not shrink from compiling a false document as well."[13]

However, his apparent lack of faith in the constabulary did not extend to the exclusion altogether of evidence which—for reasons identical to those which apply to an unsigned statement—is capable of fabrication. Rather, his Honour held that the mere fact that a police officer has sworn that the accused has adopted the record, makes it legally admissible—the issue for the jury being merely the credibility of the deponent.[14]

It is respectfully submitted that to rely purely upon the discretion of the court in such circumstances, rather than to seriously question the

[10] Ibid., see also fn. 4.
[11] (1977) 15 A.L.R. 305, 307-8.
[12] Ibid.
[13] (1977) 15 A.L.R. 47, 68.
[14] Ibid. p. 68.

basis which presently founds legal admissibility, is extremely unfortunate. Though the practical outcome in most cases may be identical—namely the exclusion of unsigned exhibit evidence in all but the most reliable circumstances[15]—the scope for individual injustice remains. Moreover, the incentive for official fabrication is merely dampened, and the scope for greater sophistication in such activities remains. If non-signatory adoption is to be retained as the criterion for legal admissibility, such adoption must be made subject to the identical rationale which underlies the exclusion of non-adopted unsigned statements. To do otherwise is to significantly detract from the policy base of the primary rule.

2. THE IMPACT OF DOCUMENTARY EXHIBITS UPON THE JURY

A second basis for the decision in *Driscoll's* case may be seen to be a recognition by the Court of the relatively negligible addition to probative evidence constituted by the tender of a written record of interview—in addition to oral police testimony (which may be stimulated by such documents)—and the considerably inflated value which may be attached to such an exhibit by a jury who has it before them. In this regard, the utilization of the record to merely refresh recollection was regarded by the court as the "preferable use".[16] Barwick C.J. stated his opinion thus

> "Tendered, the record may have an undue influence in the consideration of the jury who, in general, do not have before them in their room the transcript of the oral evidence. . . . I would regard it as better practice to use the contemporaneous record as a means of refreshment of recollection. . . . Such a practice is more likely to keep the jury's mind on the central question, namely, whether the police officer is credible. . . ."[17]

Such a view contrasts with that expressed by McClemens J. in the case of *R.* v. *Ragen*[18] where he favoured the tender of the exhibit, rather than the regurgitation of police testimony. However, it is respectfully submitted that the view of the High Court is to be preferred. The document only develops its individual reliability or unreliability from those responsible for its compilation—the failure to hear oral testimony and to enable cross-examination relegates all such records of interview to a state of homogeneity which is entirely artificial. Moreover, though one cannot accurately assess the relative impact of various forms of evidentiary matter upon a jury, it would seem reasonable to conclude that a written record may—purely by virtue of its physical presence in the jury room—assume an evidentiary proportion far beyond that which it may really add to similar oral testimony. In these circumstances, the expressed judicial

[15] Ibid. p. 68, e.g. if it had been acknowledged by the accused in the presence of some impartial person, or if the manner in which the trial had been conducted on behalf of the accused made it necessary to admit the record.
[16] Ibid. pp. 53, 67.
[17] Ibid. p. 53.
[18] (1964) 81 W.N. (N.S.W.) (Pt. 1) 572, 574.

preference for according a lesser evidentiary status to such documents is to be applauded as having proper regard to their true probative value.[19]

3. Conclusion

The judicial shift effected by *Driscoll's* case away from the previous position of almost automatic admission upon tender of unsigned records of interview shown to have been adopted by the accused, towards a rejection of such documents pursuant to the judicial discretion in these matters, is a desirable trend. Though it is perhaps regrettable that a similar result was not reached by a re-evaluation of the logical inconsistency between the rationale of the primary exemption rule and the exception constituted by the adoption concept, the practical effects are essentially the same—the circumstances in which the jury may be enabled to attribute undue weight to an unsigned confession tendered as an exhibit have been significantly reduced, the likelihood of police being unable to secure convictions because of the new rules would seem doubtful, and the possibilities for fabrication of documentary evidence are minimized, if not eliminated.

Brent M. Young*

OGILVIE v. RYAN[1]

Ogilvie v. *Ryan*[1] is one of those odd cases produced by circumstances of unfriendly precedent on the one hand[2] and a deserving cause on the other. A decision was handed down by Holland J. that appeared to do perfect justice *inter partes* but has the potential to create nothing less than havoc if applied generally. The facts are of particular interest, in that if it cannot be assumed that the usual relationship of mistress and paramour prevailed, it may be possible therefore to conclude that the decision would be applicable to other kinds of relationships.[3]

In 1955 a man, Mr Ogilvie, came to live with the defendant, Miss Ryan, at a cottage she rented from a company of which Mr Ogilvie was the managing director. He paid board of £10.0.0. per week. Seven years later, when Miss Ryan's mother (who had also lived in the cottage) died, the couple began to live as "man and wife". Probably out of regard for delicacy in such matters, the defendant was not asked to explain in detail what she meant by describing her relationship in these terms. In 1969, the

[19] It may be noted that Gibbs J. acknowledged that the prosecution may support their version of the interrogation by use of audio-visual devices which would not be open to the same objection: ibid. p. 68.

* B.Juris. (Monash University).

[1] [1976] 2 N.S.W.L.R. 504.

[2] *Maddison* v. *Alderson* (1883) 8 App. Cas. 467, 479.

[3] For example, a homosexual relationship. Such extension of the general principles was of course foreshadowed by a number of earlier English decision including that of Lord Denning M.R. in *Cooke* v. *Head* [1972] 2 All E.R. 38, 41.