CRIMINAL LAWYERS ASSOCIATION OF THE NORTHERN TERRITORY

The Admissibility of Inculpatory & Exculpatory Statements

by David Grace QC
Victoria

10th Biennial Conference

Bali Hyatt Hotel, Sanur Beach, Bali
Saturday 2 July – Friday 8 July 2005

"I SHOT THE SHERIFF, BUT I DID NOT SHOOT THE DEPUTY"

THE ADMISSIBILITY OF INCULPATORY AND EXCULPATORY STATEMENTS

By DAVID GRACE QC *

I Shot the Sheriff
(written by Bob Marley)

I shot the sheriff, but I did not shoot the deputy
I shot the sheriff, but I did not shoot the deputy

All around in my home town
They're trying to track me down
They say they want to bring me in guilty
For the killing of a deputy
For the life of a deputy
But I say:

I shot the sheriff, but I swear it was in self-defence
I shot the sheriff, and they say it is a capital offence

Sheriff John Brown always hated me
For what I don't know
Every time that I plant a seed
He said, "Kill it before it grows"
He said, "Kill it before it grows"
I say:

I shot the sheriff, but I swear it was in self-defence
I shot the sheriff, but I swear it was in self-defence

Freedom came my way one day
And I started out of town
All of a sudden I see sheriff John Brown
Aiming to shoot me down
So I shot, I shot him down
I say:

I shot the sheriff, but I did not shoot the deputy
I shot the sheriff, but I did not shoot the deputy.........*

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*The Author, based in Melbourne, practises as a legal practitioner in all States and Territories of Australia,and is a Practitioner of the High Court of Australia. This paper was presented to the Tenth Biennial Conference of the Criminal Lawyers Association of the Northern Territory, Bali, Indonesia, 2-8 July 2005. The author gratefully acknowledges the assistance given by Martine Marich, LL.M, Lecturer-in-Law, Monash University, Clayton, Victoria, Australia, in the preparation of this paper

THE ISSUES

What parts of the song would be admissible in the trial of the singer for his alleged crimes? Are the exculpatory parts capable of excision from the statement in a way that would preserve the import of the inculpatory parts? If all parts are admissible do they carry the same weight if the accused does not give evidence? What directions or comments could a trial judge give to the jury about the inculpatory or exculpatory parts if the accused does not give evidence?

BACKGROUND

The motivation for this paper stems from the circumstances that gave rise to a grant of Special Leave to Appeal by the High Court of Australia from a decision of the Court of Criminal Appeal of the Supreme Court of Western Australia in *Mule v The Queen* in 2004.[1] At the time of writing, the Appeal has been argued before the High Court but the decision remains reserved.[2]

In *Mule*, the accused did not give or call evidence. He stood charged with the possession of 27 ecstasy tablets with intent to sell or supply them, contrary to Section 6 of the *Misuse of Drugs Act 1981 (WA)*. He did not deny possession of the drugs, however, in a record of interview tendered by the prosecution in evidence, he said words to the effect of "*they're mine but for my own personal use*". That was the defence case.

In the course of his summing up to the jury, District Court Judge Fenbury directed the jury, in relation to the right to silence and as to the use that could be made of the accused's record of interview, as follows:

> *"[H]is silence in this case is not evidence against him and does not amount to an admission by him and it cannot be used to fill in any gaps in the evidence tendered by the prosecution if you feel there are some. It may not be used as a makeweight in assessing whether the prosecution has proved its case beyond reasonable doubt. The exercise of a right to silence cannot be held against a person and if you think about it it would be bizarre if the law gave a person a right and then permitted the exercise of the right to be held against the person........*
>
> *[In addition to certain admissions,] the video also contains other matters that the accused person relies on in his case and he relies on his denials of police allegations and also his assertions, for example, his assertion that he intended only personal use. He relies on those statements in the video. Of course, his denials of police allegations and his assertions, such as his assertion of intending personal use, are disputed by the prosecution.*

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[1] [2004] WASCA 7. The court comprised Templeman, Wheeler and McLure JJ

[2] 27th April 2005

The denial - his denials and the assertions that he makes, are not supported by evidence from him on oath in the witness box and therefore those matters do not have the same weight as evidence, as his admissions or confession, if you like, of possession, for example, against interest, doesn't have the same evidential weight, but the accused's denials and his assertions are still matters for you to consider. They are before you and you give them what weight you see fit."

On his Appeal, Mr. Mule contended that in the last quoted paragraph above, the trial judge had erred in law by directing (cf. commenting to) the jury in that way, thereby usurping the jury's function as the tribunal of fact and undermining Mr. Mule's right to remain silent at trial. The Appeal was dismissed.

SUBMISSIONS IN THE HIGH COURT

Mr. Mule contended that a trial Judge is not permitted to direct, and should not be permitted to comment, that exculpatory statements made during a record of interview which also contains admissions or confessions (a "mixed" interview) carry less weight than the inculpatory components of the interview. It was submitted that the exculpatory parts of a mixed interview are admitted in proof of their truth in an established and justifiable exception to the hearsay rule contrary to the decision of the Court of Criminal Appeal.[3]

It was further contended that the direction given and countenanced by the Court of Criminal Appeal, was contrary to authority. Even if the words were viewed as a judicial comment rather than a direction, it should be considered improper and unfair, as usurping the accusatorial nature of trial by drawing adverse attention to the exercise by the accused of his right to silence at trial. Albeit such a comment may be permitted in jurisdictions other than Australia such as the United Kingdom (and within Australia, the inferior courts having followed these precedents), there are fundamental differences between jurisdictions governing (1) the judicial acceptance of exceptions to the hearsay rule, and (2) the jurisprudence authorising (and circumventing) judicial comment on the right to silence at trial, justifying divergence between the approach to be taken in the United Kingdom and in Australia.

In reaching her conclusion that the appeal should be dismissed, McLure J stated that:

"If considered in isolation (and assuming that the jury understands the technical legal concept of "weight" to be accorded to evidence), the first sentence may have erroneously led the jury to believe that it was bound to give less weight to the appellant's exculpatory evidence than to his admission of possession or to exculpatory evidence given on oath. However, such an impression is immediately contradicted in the final sentence of the paragraph complained of where the trial Judge says that the accused's denials and his assertions that the drugs were for his personal use are "before you and you give them what weight you see fit."[4]

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[3] Mule v R [2004] WASCA 7 at [13] per Templeman J, Wheeler J agreeing, cf at [28] per McLure J (who agreed with the majority that the appeal should be dismissed)

[4] Mule v R [2004] WASCA 7 at [34] per McLure J:

Her Honour further cited two instances in which the Learned Trial Judge had "pointed out to the jury" that it was the sole judge of the facts. Her Honour was thereby satisfied that the jury would not have been left with any impression that they were bound to accord less weight to the self-serving out of court exculpatory statements.[5]

However, it was further contended by Mr. Mule that such a conclusion presumed that the jury disregarded the Learned Trial Judge's direction, and in so doing disregarded his general direction to them that his job was "to tell you what the law is that you must apply, and you have to accept what I say about the law even if you disagree with it." Therefore this was not a case for the application of the proviso because one could not second guess what qualifications were comprehended by the jury to the Learned Trial Judge's specific and clear directions about the exculpatory parts of the record of interview, even if one assumes that a qualification was made to those comments (which was not conceded). The qualification(s) in fact were circumscribed by the colour of the clear directions given and were therefore undermined.[6]

The Respondent, the Director of Public Prosecutions for the State of Western Australia, contended, as follows. A trial Judge is permitted to both direct and comment that exculpatory statements made during a record of interview which also contains admissions or confessions (a "mixed" interview) will carry less weight than the inculpatory statements of the interview.At present Australian courts permit the admission into evidence of both the exculpatory and the inculpatory parts of a mixed interview as an established and justifiable exception to the hearsay rule. Generally what an accused person says out of course is inadmissible. Very often the prosecution can prove statements against interest or in the nature of the admissions, as an exception to the general rule. Where confessional statements are tendered by the prosecution and also contain assertions of fact favourable to an accused, the favourable material is admissible as evidence as well.[7] The material contained in a mixed interview may provide an evidentiary basis for a defence, thus requiring a judge to direct as to it. In Spence v Demasi (1988) 48 SASR 536 Justice Cox pointed out that:

> *"A modern statement of the practice is found in the judgment of the English Court of Appeal in R v Duncan (1981) 73 Cr App R 359 at 365. "It is, to say the least, not helpful to try to explain to the jury that the exculpatory parts of the statement are something less than evidence of the facts they state. Equally, where appropriate, as it usually will be, the judge may, and should, point out that the incriminating parts are likely to be true (otherwise why say them?, whereas the excuses do not have the same weight. Nor is there any reason why, again where appropriate, the judge should not comment in relation to the exculpatory remarks upon the election of the accused not to give evidence."*[8]

[5] Mule v R [2004] WASCA 7 at [35]-[37] per McLure J:
[6] Criminal Code Act Compilation Act 1913 (WA), section 638
[7] *Queen Caroline's Case* (1982) 1 Dt Tr (NS) 949.
[8] *R v Williamson [1972] 2 NSWLR 281*
R v Karpany [1937] SASR 377 at 379
Spence v Demasi (1988) 48 SASR 536 at 540-541.

The Director further contended that even if the words were viewed as a direction rather than a judicial comment, it would not be considered improper and unfair. He submitted that the matter did not bear adversely on the exercise by the accused of his right to silence at trial. Such a comment is clearly permitted in Western Australia (and within the entirety of Australia) and in other jurisdictions such as the United Kingdom.

These then were the competing arguments. The answers are somewhat elusive.

HISTORICAL CONSIDERATIONS – THE ACCUSED AS A WITNESS

Until the 19th century, the accused was not competent to give sworn evidence at trial on his own behalf, based upon (1) his/her position as a person interested in the outcome of the proceedings and therefore providing a motive for telling less than the truth under oath, and (2) *"an illogical application of the maxim nemo tenetur prodere seipsum"*.[9]

At common law, an accused could offer a statement without oath. [10]

In the 19th century, the legislatures in a number of Australian states introduced legislation which governed the position of the accused at trial; included was the provision to an accused of the right to give evidence under oath in his or her own defence. The common law right to provide an unsworn (or "dock") statement, was recognised and replaced in statutory form, though by virtue of different legislation dependent upon whether the accused was being tried summarily or upon Indictment[11]

The unsworn statement could carry evidentiary weight (in proof of its truth). *"The proper [jury] direction to be given ... is this: that the jury should take the prisoner's statement as prima facie a possible version of the facts and consider it with the sworn evidence, giving it such weight as it appears to be entitled to in comparison with the facts clearly established by evidence."*[12]

The accused's statutory right to give unsworn evidence has been abolished in all Australian jurisdictions. Self-evidently, the two options remaining for an accused are to given sworn evidence, or to exercise his right to remain silent at trial.[13]

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[9] J.D. Heydon, *Cross on Evidence* (7th Australian Edn, 2004), [13025]
[10] *R v Stuart* [1959] SASR 144 at 148-151
Law Reform Commissioner Victoria, *Unsworn Statements in Criminal Trials* (Report No 11, 1981, Melbourne), 2.08
[11] See, for example:
Summary Hearing
Evidence Act 1890 (Vic), section 52
Upon Indictment
Criminal Law Amendment Act 1883 (NSW), section 470
Criminal Law Amendment Act 1892 (Qld), section 3
Accused Persons Evidence Act 1882 (SA)
Crimes Act 1891 (Vic), section 34
[12] *Peacock v R* (1911) 13 CLR 619 at 640-1 per Griffiths CJ; see also at 645-649 per Barton J and at 647 per O'Connor J
[13] *Evidence Act 1995* (Cth and ACT), section 21
Evidence Act 1995 (NSW), section 21
Criminal Code (NT), section 360
Evidence Act 1929 (SA), sections 18(e) and 18A

Pursuant to the *Evidence Act 1995* (Cth and NSW) and the *Evidence Act 2001* (Tas) (the "uniform Evidence Acts") and in South Australia, the defendant is competent and compellable for the defence (subject to the express proviso in South Australia that he shall not be called as a witness except upon his own application), but is not competent to given evidence as a witness for the prosecution. In Queensland and Victoria, the accused is competent, but not compellable, for the defence. In the Northern Territory and Western Australia, the accused is a competent but not compellable witness for both the defence and the prosecution.[14]

THE RIGHT TO SILENCE AT TRIAL - AUSTRALIA

Judicial comment

As mentioned previously, a number of Australian state legislatures in the 19th century introduced legislation governing the position of the accused at trial. In all states except Queensland, the prosecutor was restricted by these statutes from commenting to the jury upon the exercise of the right to silence, to protect the accused from adversarial exploitation of the decision to refrain from giving evidence.[15]

In Victoria and New South Wales, in addition to the prosecutor, the trial Judge was similarly prohibited from making comment on the exercise of the right to silence.[16]

The policy of the provisions in Victoria and New South Wales was articulated by Isaacs J in *Bataillard v R*:

> *The legislature appears to have taken the very words "comment" and "refrained" from the Privy Council's judgment in [Kops v R; Ex parte Kops (1894) AC 650], and, reading the legislation by the light of that judgment, it appears to me to be plain. A new opportunity had been afforded to a prisoner to establish his innocence if he could. But reasons other than a sense of guilt, such as timidity, weakness, a dread of confusion or of cross-examination, or*

Evidence Act 2001 (Tas), section 21
Evidence Act 1958 (Vic), section 25
Evidence Act 1906 (WA), section 97(2)
[14] *Evidence Act 1995* (Cth and ACT), sections 12 and 17
Evidence Act 1995 (NSW), sections 12 and 17
Evidence Act (NT), sections 6 and 9
Evidence Act 1977 (Qld), sections 6(a) and 8(1)
Evidence Act 1929 (SA), sections 15(a) and 18(1)(a)
Evidence Act 2001 (Tas), sections 12 and 17
Crimes Act 1958 (Vic), section 399(1)
Evidence Act 1906 (WA), section 8(1)
[15] *Evidence Act 1929* (SA), section 18
Evidence Act 1910 (Tas), section 85(1)IV; *Criminal Code Act 1924* (Tas)
Evidence Act 1906 (WA), section 8(1)(c)
[16] *Crimes Act 1891* (Vic), section 34
Evidence Act 1898 (NSW), amended by the *Accused Persons Evidence Act 1898* (NSW); repealed and replaced by the *Crimes Act 1900* (NSW), section 407, modified following the decision in *Kops v R; Ex parte Kops* (1894) AC 650; replaced by the *Evidence Act 1995*, section 20(2), which only prohibited the making of comment by the prosecutor

even the knowledge of a previous conviction, certainly in a summary proceeding, and perhaps in the case of a trial for an indictable offence, might easily prevent the accused person from availing himself of the new means permitted by law. Hence the legislature determined to prevent the enactment, if not used by the prisoner, from being employed as a means of inculpation.[17]

In *Bataillard v R*, Isaacs J considered that the prohibition contained in section 407(2) of the *Crimes Act 1900* (NSW) did not change the law permitting comment either that the prisoner has not made any unsworn statement, or that the statement, if made under it, is not on oath, and therefore may not be considered as weighty as the evidence of witnesses under oath, provided however, no reference, *"direct or indirect, and either by express words or the most subtle allusion, and however much wrapped up, is made to the fact that the prisoner had the power or right to give evidence on oath, and yet failed to give, or in other words, "refrained from giving," evidence on oath ..."*.[18]

In *Jackson v R*, the High Court considered whether the statutory prohibition against comment upon the exercise of the accused of the right to silence proscribed comment in circumstances where the accused had made an unsworn, or dock statement. The Applicant (for special leave to appeal to the Court) argued that, to tell a jury, who must be taken to know that it is competent for an accused person to give evidence on oath, that an unsworn statement is not subject to test by cross-examination was tantamount to commenting upon the fact that he has not given evidence on oath. Accordingly, it was contended, the jury could not be told that the statement of the accused is not as weighty as if it were made under oath, because it in substance informed the jury that the accused has not gone into the witness-box and been sworn, thereby violating the prohibition. This argument was rejected, the court deciding that the jury could be informed that the unsworn statement was *"not in itself evidence in the same sense as the statement of a witness given upon oath; it is not subject in any way to test by cross-examination."* [19]

This direction expanded upon the direction previously proposed by Griffiths CJ in *Peacock v R*: in such circumstances, the jury should be directed to *"take the prisoner's statement as prima facie a possible version of the facts and consider it with the sworn evidence, giving it such weight as it appears to be entitled to in comparison with the facts clearly established by the evidence."*[20]

The relevance of this discussion to the issues raised at the outset is that, self-evidently, there are similarities between this direction and the direction given in Mule's case, that *"his denials and the assertions that he makes, are not supported by evidence from him on oath in the witness box and therefore those matters do not have the same weight as evidence, as his admissions or confession, if you like, of possession, for example, against interest, doesn't have the same evidential weight, but the accused's denials and his assertions are still matters for you to consider. They are before you and you give them what weight you see fit."* [21]

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[17] *Bataillard v R* (1907) 4 CLR 1282 at 1290-1291 per Isaacs J
[18] *Bataillard v R* (1907) 4 CLR 1282 at 1291 per Isaacs J (special leave to appeal rescinded)
[19] *Jackson v R* (1918) 25 CLR 113 (application for special leave to appeal refused)
Approved in *Bridge v R* (1964) 118 CLR 600 at 604
[20] *Peacock v R* (1911) 13 CLR 619 at 640-1 per Griffiths CJ
[21] see above

In Victoria and the Northern Territory, it remains the case that neither the trial judge nor the prosecutor may comment upon the accused's exercise of the right to silence at trial. In jurisdictions subject to the uniform evidence legislation, the trial Judge or any party (other than the prosecutor) may comment on a failure of the defendant to give evidence, provided that, unless the comment is made by another defendant in the proceeding, the comment does not suggest that the defendant failed to give evidence because the defendant was, or believed that he or she was, guilty of the offence concerned. In South Australia and Western Australia, the prosecution is not permitted to comment upon a failure to give evidence, but a trial Judge is not subject to (statutory) restrictions as in the jurisdictions the subject of uniform evidence legislation (*"the comment must not suggest that the defendant failed to give evidence because the defendant was, or believed that he or she was, guilty of the offence concerned"*). In Queensland, there is no statutory restriction upon (judicial or prosecutorial) comment.[22]

The common law supplements these provisions and provides further guidance to a trial judge as to the limit of appropriate comment to the jury (or jury direction) as to the exercise by the accused of the right to silence.[23]

THE RIGHT TO SILENCE AT TRIAL – THE UNITED KINGDOM

In 1898, the *Criminal Evidence Act* (UK) was enacted, containing similar provisions to those outlined above in the Australian jurisdictions. The accused became a competent witness in his or her own defence. As in a number of Australian States the prosecution could not comment upon the exercise by the accused of the right to silence.

In recent history, there has been marked disparity between the treatment of the right to silence in the United Kingdom and Australian. In the United Kingdom, the Criminal Law Revision Committee, in 1972, and the Home Office Working Group on the Right to Silence, in 1989, advocated the abolition of the right. Conversely, the Royal Commission on Criminal Procedure, in 1981, and the Royal Commission on Criminal Justice, in 1993, recommended its retention.[24]

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[22] *Evidence Act 1995* (Cth and ACT), section 20(2)
Evidence Act 1995 (NSW), section 20(2)
Evidence Act (NT), section 9(3)
Evidence Act 1929 (SA), section 18(1)(b)
Evidence Act 2001 (Tas), section 20(2)
Crimes Act 1958 (Vic), section 399(3)
Evidence Act 1906 (WA), section 8(1)(c)
[23] *Weissensteiner v R* (1993) 178 CLR 217
RPS v R (2000) 199 CLR 620
Azzopardi and Davis v R (2001) 205 CLR 50
[24] Roger Leng, '*The Right-to-Silence Debate*', in David Morgan and Geoffrey M Stephenson (eds.), *Suspicion and Silence – The Right to Silence in Criminal Investigations* (1994), 18, 19-21
Law Reform Commissioner Victoria, *Unsworn Statements in Criminal Trials* (Report No 11, 1981, Melbourne), 3.02
Criminal Law Revision Committee, *Eleventh Report: Evidence (General)* 1972, (Cmnd 4991)
Royal Commission on Criminal Procedure, *Report* (Cmnd 8092) (1981)
Home Office, *Report of the Working Group on the Right to Silence* (1989)
Royal Commission on Criminal Justice, *Report* (Cm 2263) (1993)

The *Criminal Evidence (Northern Ireland) Order 1988* permitted adverse inferences to be drawn against accused persons in certain prosecutions, where those accused had exercised their right to silence at trial. By the operation of the *Criminal Justice and Public Order Act 1994*, the breadth of circumstance in which adverse inference could be drawn was extended considerably (and commensurately with the recommendations of the Criminal Law Revision Committee in 1972).[25]

THE ADMISSIBILITY OF PRE-TRIAL STATEMENTS MADE BY AN ACCUSED

Hearsay and non-hearsay use

As one consequence of the incompetence of an accused at common law, statements made by an accused extra-judicially could be admitted in favour of their maker. Such evidence, admitted to prove its truth (notwithstanding variations in the weight to be attached to that evidence), was admitted for a hearsay purpose (though one can also conceive of statements that may have been admitted as original evidence of the accused person's state of mind, or to assert the fact of a statement having been made).[26]

"Legal historians are divided between those who ascribe the development of the [hearsay] rule predominantly to distrust of the capacity of the jury to evaluate it, and those who ascribe it predominantly to the unfairness of depriving a party of the opportunity to cross-examine the witness." It must be acknowledged in this context that the policy of an accused not being competent at common law was in acknowledgement of his status as a person interested in the outcome of the proceedings; pre-trial assertions (or dock statements, for that matter), were thereby the best evidence available to the jury, of the accused's defence.[27]

It is relevant to the present discussion to note the divergence between the approach taken by Australian and United Kingdom courts, in entertaining new common law exceptions to the hearsay rule. As is now well-established, in *Myers v Public Prosecutions* the House of Lords indicated that new exceptions to the rule should be left to the legislature. The High Court of Australia has adopted a different approach and has been prepared to recognise new common law exceptions to the hearsay rule.[28]

Confessions and admissions

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[25] See Mark Berger, '*Reforming Confession Law British Style*: a Decade of Experience with Adverse Inferences from Silence', (2000) 31 *Columbia Human Rights Law Review* 243
See Carol A. Chase, '*Hearing the "Sounds of Silence" in Criminal Trials: a Look at Recent British Law Reforms with an Eye Toward Reforming the American Criminal Justice System*' (1996) 4 *University of Kansas Law Review* 929
[26] *Subramaniam v Public Prosecutor* [1956] 1 WLR 965 at 969
Walton v R (1989) 166 CLR 283 at 288-289 per Mason CJ, at 300-303 per Wilson, Dawson and Toohey JJ
Pollitt v R (1992) 174 CLR 558 at 564 per Mason CJ, at 572 per Brennan J, at 602-603 per Dawson and Gaudron JJ, at 609 per Toohey J
Lee J.W. Aitken '*The Admissibility of Self-exculpatory Statements*' (1991) 15 *Criminal Law Journal* 42, 44
[27] J.D. Heydon, *Cross on Evidence* (7th Edn, 2004), [31015]
[28] *Myers v Public Prosecutions* [1965] AC 1001 at 1021 (upheld in *R v Kearley* [1992] AC 2 AC 228 at 250-261 and 276-277)
Walton v R (1989) 166 CLR 283 at 293 per Mason CJ, at 308 per Deane J
Pollitt v R (1992) 174 CLR 558 at 565 per Mason CJ, at 594-596 per Deane J (cf at 573-574 per Brennan J)

The out of court confessions or admissions of an accused are admitted to prove their truth, as a well-established exception to the hearsay rule.

The rationale for admissibility derives from the unlikelihood that a person would make a statement against interest without it being true. The first factor tainting hearsay evidence, referred to above (ie the distrust of the capacity of the jury to evaluate the statement) is therefore not as compelling, given the (presumed) reliability of the evidence.[29]

As to the second factor referred to above, Emeritus Professor J.C. Smith endorses the view that a defendant cannot complain of the lost entitlement to cross-examine the maker of an inculpatory statement.[30]

Interviews / statements that are wholly exculpatory

Of course, a wholly exculpatory statement made prior to trial ordinarily lacks the reliability ascribed to inculpatory statements, accordingly interviews with suspects that do not contain admissions, in theory, cannot be tendered to prove their truth, unless they fall within another exception to the hearsay rule such as *res gestae*.[31]

The position in jurisdictions governed by the uniform evidence legislation is that evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation, unless it falls within a statutory exception. The particular exception relevant to this discussion is:

> **81 Hearsay and opinion rules: exception for admissions and related representations**
>
> The hearsay rule and the opinion rule do not apply to evidence of an admission.
>
> (2) The hearsay rule and the opinion rule do not apply to evidence of a previous representation:
>
> (a) that was made in relation to an admission at the time the admission was made, or shortly before or after that time, and
> (b) to which it is reasonably necessary to refer in order to understand the admission.[32]

[29] J.D. Heydon, *Cross on Evidence* (7th Edn, 2004), [33440]
[30] J.C. Smith, '*Exculpatory Statements and Confessions*' [1995] Crim.L.R. 280, 281
[31] *R v Kochnieff* (1987) 33 A Crim R 1 (CCAQ)
R v Haycock [1989] 2 Qd R 56
Walton v R, Ibid
Pollitt v R, Ibid
Lee J.W. Aitken '*The Admissibility of Self-exculpatory Statements*' (1991) 15 *Crim.L.J.* 42, 49 f/n 35
[32] See also: *Evidence Act 1995* (Cth and ACT), sections 59(1), 60, 61(2), 66, 85 and Dictionary Part 1
Evidence Act 1995 (NSW), sections 59(1), 60, 61(2), 66, 85 and Dictionary
Part 1 *Evidence Act 2001* (Tas), sections 3(1), sections 59(1), 60, 61(2), 66 and 85

If Mule's trial was held in a jurisdiction where section 81 applied, the exculpatory part would be admissible as to its truth.

Where the Crown, in an instant case, tenders a wholly exculpatory interview, it may render the interview admissible to prove its truth by reason of the failure to object, as will be discussed. This would not be the case if the defence tendered the statement, without calling the accused to give evidence, as the Crown could legitimately object to the tender. [33]

A purely exculpatory statement made out of court may also have relevance for a non-hearsay purpose (for instance, a denial of a violent assault might be relevant, as a fact affecting credibility, if there were a plea of self-defence at the trial), or where it is relied upon as a false denial to evidence consciousness of guilt.[34]

An unsworn statement that was wholly exculpatory could also be given by the accused in proof of its truth, though it was a matter for the jury as to the weight to attach to such a representation.[35]

Exculpatory statements made in a 'mixed' interview

Where confessions or admissions are contained in a recorded interview with police, exculpatory statements made in the same record of interview do not fall within the same exception to the hearsay rule, nonetheless the courts have permitted their admission into evidence.

There are a number of justifications (or reasons) for the admission of exculpatory statements in records of interview between accused and police, for instance:

(a) the Crown, as a matter of course, does not raise objection to their admissibility;
(b) as "a rule of fair play".[36]

Author Lee J.W. Aitken suggests that the genesis of this principle antedates the difficulties of the hearsay rule.[37]

In *R v Higgins* [1829] 3 C & P 603 at 604, Parke B said:

> *"What a prisoner says is not evidence, unless the prosecutor chooses to make it so, by using it as part of his case against the prisoner, however, if the prosecutor makes the prisoner's declaration evidence, it then becomes evidence for the prisoner as well as against him. "*

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[33] *R v Higgins* [1829] 3 C & P 603 at 604
Lee J.W. Aitken *'The Admissibility of Self-exculpatory Statements'* (1991) 15 Crim.L.J. 42, 50-51
[34] *R v Christie* [1914] AC 545 at 560
John Goldring, *'Can Exculpatory statements be admissions?'* (2004) 25 *Australian Bar Review* 1

[35] Lee J.W. Aitken *'The Admissibility of Self-exculpatory Statements'* (1991) 15 *Crim.L.J.* 42, 50 f/n 37

[36] *Jack v Smail* (1905) 2 CLR 684 at 695 per Griffiths CJ
[37] Lee J.W. Aitken *'The Admissibility of Self-exculpatory Statements'* (1991) 15 *Crim.L.J.* 42, 45 and 46

This statement has been adopted and applied many times.

The purpose for which the exculpatory statements are tendered appears to be evidence of their truth. In Cross on Evidence, the author contends that where self-serving statements are rendered admissible by the opponent's conduct of the case, an exception to the hearsay rule is created.[38]

In Australia, the position has been, consistently, that self-serving statements forming part of admissions, once tendered, become evidence of their truth, ie they are admitted in exception to the hearsay rule (*Lopes v Taylor* (1970) 44 ALJR 412 at 421 per Gibbs J). Gibbs J's reasoning provided that the court was not bound to accord the same weight to all parts of the statement. [39]

However, as noted by Lee J.W. Aitken, Gibbs J's statement could be construed as obiter. Furthermore, it must be recalled that the decision in *Lopes v Taylor* was delivered prior to the abolition of dock statements, at a time when similar judicial comment accompanied their making in an individual case.[40]

The English position as to the status of self-serving statements in a mixed interview, has wavered. Traditionally, they were received *"to show the attitude of the accused at the time when he made it"*, ie for a non-hearsay purpose akin to original evidence. [41]

However, in *Duncan v R*, the accused was charged with murder, and had admitted the killing prior to trial, but asserted provocation. He maintained his right to silence at trial, and the trial Judge excised the exculpatory portions of the pre-trial statements. This ruling was challenged successfully before the House of Lords. The House of Lords overturned previous authority and adopted the Australian position that such statements, once in evidence, should be left to the jury as evidence of the facts. The rule was said to be *"adopted in the interests of simplicity and justice, it being thought to be unhelpful to suggest to juries that the exculpatory parts are something less than the evidence of the facts."*[42]

This was followed in the New Zealand Court of Appeal in *R v Tomkins* [1981] 2 NZLR 170.

In 1984, in *Leung Kam-Kwok* (involving a murder trial of an accused who admitted, out of court, that he had killed the deceased, but denied that the consequence was intended), the Privy Council apparently overlooked the decision of the House of Lords in *Duncan*, and held that *"explanation or excuse"* proffered in the course of an

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[38] J.D. Heydon, *Cross on Evidence* (7th Edn, 2004), [33455]
[39] *R v Williamson* [1972] 2 NSWLR 281 at 294-296
Spence v Demasi (1988) 48 SASR 536, 540-546
R v Callaghan [1994] 2 Qd R 300 at 302
R v Lewis and Baira [1996] QCA 405 at 12

[40] Lee J.W. Aitken, '*The Admissibility of Self-exculpatory Statements*' (1991) 15 Crim.L.J. 42, 47
[41] *Pearce v R* (1979) 69 Cr App R 365 at 369
See also eg R v Sparrow [1973] 2 All ER 129; R v Thompson [1975] Crim LR 35; and R v Barbery (1975) 62 Cr App R 248
[42] *Duncan v R* (1981) 73 Cr App R 359 at 365
Gerald Orchard, '*An accused's self-serving statements*' [1988] *New Zealand Law Journal* 221, 221.

account containing admissions was not evidence of its truth, but admitted to show context.[43]

Then, in *R v Sharp*, the House of Lords affirmed its reasoning in *Duncan*, returning to the position that exculpatory accounts provided in a "mixed" interview could be used as evidence of their truth (notwithstanding the reluctance of the English courts to countenance new exceptions to the hearsay rule). The English and Australian positions are now therefore analogous.[44]

In *Mule* , Templeman J (Wheeler J agreeing, McLure J dissenting on this point though concurring that the appeal be dismissed) in the Court of Criminal Appeal held that the basis for a jury direction that exculpatory statements do not have the same weight as admissions lay in the fact that *"although both the admissions and the exculpatory statements are hearsay, evidence of an admission or confession is admissible as an exception to the hearsay rule. But by long established custom, such exculpatory statements are also admitted into evidence. ... However, the fact that such statements are admitted does not change their character as hearsay."* It was contended before the High Court however, that the exculpatory statements were also admissible as an exception to the hearsay rule, and were admitted to prove their truth.[45] If this were not the case, there, would be no basis of defence to the deemed intent (due to quantity) under the relevant legislation.[46]

Self-serving statements given in qualification of admissions should therefore be admissible as proof of their truth, consistent with established authority and policy, in a reasoned exception to the hearsay rule. The reliability of the inculpatory portions of a statement, by virtue of their being against interest, may be considered to extend to the qualifications expressed in exculpation, else it is difficult to contemplate why an accused would offer the admissions. The qualifications may be considered part of the *res* of the admissions, particularly where made spontaneously.[47]

In respect of judicial comment as to the use to be made of the exculpatory parts of a mixed statement, whilst it may be consistent with previous obiter of Gibbs J that the jury may be told that different weight may attach, it is contended that the elimination of the dock statement, and recent developments in jurisprudence as to comment on the right to silence, indicate that such a comment is no longer justifiable or appropriate.

Severance of exculpatory statements from a 'mixed' interview?

There is no mandate for severance of explanations or excuses from an interview also containing admissions. This is so for a number of reasons:

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[43] *Leung Kam-Kwok v R* (1984) 81 Cr App R 83
Gerald Orchard, *'An accused's self-serving statements'* [1988] New Zealand Law Journal 221, 221-222
[44] *R v Sharp* (1988) 86 Cr App R 274

[45] *Mule v R* [2004] WASCA 7 at [13]:
[46] *Singh v R*, unreported; FCt SCt of WA; Library No 6002; 18 September 1985 at 12-13
[47] *Li Siu Lam v R* (unrep, CAHK, 28 June 1989), cited in Lee J.W. Aitken *'The Admissibility of Self-exculpatory Statements'* (1991) 15 *Crim.L.J.* 42, 50-51
R v Lewis and Baira [1996], Ibid

Firstly, where admissions and qualifications are inextricably bound together, it would be entirely misleading for the jury to be made aware only of the inculpatory part. If a distinction was drawn between inextricable and extricable excuses or explanations, the analysis could become ad hoc and would depend largely upon the style of questioning adopted by police or investigators.[48]

Secondly, it may lead to a divergence between states subject to the uniform evidence legislation, in which the hearsay rule does not apply to evidence of a previous representation *"to which it is reasonably necessary to refer in order to understand the admission"*, and other states.[49]

Thirdly, it is contended that the accused's response to police questioning is entirely different to that of the dock statement, which was a reasoned response to the Crown case (which had been elucidated in full by that stage of the proceedings), made without the pressure of police interrogation.

Fourthly, where an accused has provided a statement against interest in an interview by police, the reliability of the qualifying parts of the interview may be enhanced, by reason of the accused's candour.[50]

Certainly, there must be some nexus between the admissions and the exculpatory portions of the interview. Accordingly, this Court may view "excuses" (in the sense of a legal defence) differently from "explanations". For instance, a case in which a suspect conceded that he killed the victim but denies possessing the requisite intent, or offers the basis of a defence of self-defence, provocation, or mental impairment, may be viewed differently from an accused who concedes that he or she was in the vicinity when a crime was committed, but denies committing the act.

Fifthly, and finally, the onus of proof is always on the State. The State brings the charges and it bears a responsibility to adduce all relevant evidence bearing upon guilt or innocence. Explanations given in the context of immediately following admissions are relevant.

JUDICIAL DIRECTIONS / COMMENTS WHERE AN ACCUSED HAS EXERCISED HIS RIGHT TO SILENCE AT TRIAL, BUT HAS GIVEN A 'MIXED' STATEMENT PRIOR TO TRIAL

Judicial comments permitted in previous cases

As mentioned above, Gibbs J (as he then was) in *Lopes v Taylor*, stated that self-serving statements forming part of admissions, once tendered, become evidence of their truth, although the court is not bound to accord the same weight to all parts of the statement. (emphasis added)[51]

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[48] *Gardner v Duve* (1978) 19 ALR 695 at 702 per McGregor J (Fed Ct)
[49] Uniform Evidence Acts, section 81
[50] *R v Lewis and Baira* [1996] QCA 405 at 12
[51] *Lopes v Taylor* (1970) 44 ALJR 412 at 421
Accepted in *R v Williamson* [1972] 2 NSWLR 281 at 295

Leaving to one side the chequered history of the reception by English courts of the exculpatory portions of a mixed statement, and for the purpose of present discussion, in *Duncan v R*, the Court reasoned:

> *"It is, to say the least, not helpful to try to explain to the jury that the exculpatory parts of [a mixed] statement are something less than evidence of the facts they state. Equally, where appropriate, as it usually will be, the judge may, and should, point out that the incriminating parts are likely to be true (otherwise why say them?), whereas the excuses do not have the same weight. Nor is there any reason why, again where appropriate, the judge should not comment in relation to the exculpatory remarks upon the election of the accused not to give evidence."*[52]

Lord Lane's comment from *R v Duncan* implicitly adopts the reasoning of Gibbs J in *Lopes v Taylor*, that the court is not bound to accord the same weight to all parts of a mixed statement, but extends the application of the reasoning so as to permit the jury to be advised of the distinction (by way of judicial comment). This was subsequently adopted in *R v Sharp* (1988) 86 Cr App R 274. Lord Havers in *R v Sharp* suggested that the principal reason for the comment was to assuage the fear that juries might give undue weight to evidence the truth of which could not be tested by cross-examination.[53]

As noted by Lord Havers in *R v Sharp*, this comment was made in the context of the House of Lords overturning previous authority, and endorsing the approach that the self-serving statements could be admitted to prove their truth.

This reasoning of Gibbs J (and the reasoning, more recently, of the House of Lords in *Duncan* and *Sharp*) has been followed in different jurisdictions in Australia.

> *"The whole interrogation (or narrative statement, as the case may be) goes before the jury and it is for them to decide what parts, if any, they will act upon in reaching their verdict. They may give different weight to different parts. The failure of the accused to give evidence may well influence their attitude to the self-serving answers."*[54]

However, in following the reasoning in *Duncan* and *Sharp*, the Australian State Courts have failed to acknowledge that those cases were decided in a jurisdiction that has (1) exhibited particular reluctance to countenance any new exceptions to the hearsay rule, and (2) permitted juries to be directed that adverse inferences may be

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[52] *Duncan v R* (1981) 73 Cr App R 359 at 365 per Lord Lane CJ
[53] *R v Sharp* [1988] 1 All ER 65 at 67-68 per Lord Havers (Lord Mackay of Clashfern LC, Lord Keith of Kinkel, Lord Bridge of Harwich, and Lord Griffiths concurring)
[54] *Spence v Demasi* (1988) 48 SASR 538 at 540 per Cox J
See also:
M v R (1994) 62 SASR 364 at 369
R v Callaghan [1994] 2 Qd R 300 at 302
R v Su, Katsuno, Asami and Honda [1997] 1 VR 1 at 65
Rowbottom v R (2003) 142 A.Crim.R 513 at 514
Middleton v R (1998) 19 WAR 179 at 190

drawn from an accused's absence from the witness box. By reason of these fundamental differences in policy, caution should have been adopted prior to the adoption by the Australian courts of the English reasoning, that a trial Judge could (or should) comment to a jury in an individual case that excuses do not carry the same weight at admissions.[55]

It is contended that a direction or comment that *"denials and the assertions that he makes, are not supported by evidence from him on oath in the witness box and therefore those matters do not have the same weight as evidence"* undermines an accused's right to remain silent at trial; its corollary is that where an accused has provided a mixed record of interview, he or she must forego the right to silence at trial else a jury, in observance of its instructions, will discount the explanations or excuses vis-à-vis the admissions. Such reasoning conflicts with the reasoning of this Court in *Weissensteiner v R* (1993) 178 CLR 217, *RPS v R* (2000) 199 CLR 620, and *Azzopardi and Davis v R* (2001) 205 CLR 50 (as will be discussed below)

<u>Should a Trial Judge be permitted to direct, or comment, in the terms used in *Mule*?</u>

In *Weissensteiner*, the High Court held that the failure of an accused to testify was a circumstance which could bear upon the probative value of evidence which had been given, and which the jury was required to consider; accordingly the jury could be so directed.[56]

Subsequent to the decision in *Weissensteiner*, the High Court in *RPS*, and *Azzopardi and Davis* provided clear guidance that a trial Judge should refrain from instructing a jury as to how they may reason towards a verdict of guilt, where an accused has not given sworn evidence.[57]

It is noted that in *RPS*, and *Azzopardi and Davis*, section 20(2) of the uniform evidence legislation applied; accordingly in applicable jurisdictions, *"[t]he judge ... may comment on a failure of the defendant to give evidence but ... the comment must not suggest that the defendant failed to give evidence because the defendant was, or believed that he or she was, guilty of the offence concerned"*." (There is no such caveat upon judicial comment on the exercise of the right to silence by the accused in Western Australia). However, the reasoning of the court in *RPS* was expressly stated not to depend upon the particular provisions of section 20 of the *Evidence Act*. *"At the level of principle, those reasons centre on what is usually described as the "right to silence"."*[58]

In *Azzopardi and Davis*, the High Court commented, in relation to an accused's failure to give evidence at trial, that *"as with all judicial comments on the facts in a jury trial, it will often be better (and safer) for the judge to leave the assessment of the facts to the determination of the jury in the light of the submissions of the parties.*

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[55] *Myers v Director of Public Prosecutions* [1965] AC 1001 at 1021, cf *Walton v R* (1989) 166 CLR 283 *Criminal Justice and Public Order Act 1994* (UK), section 35, cf *Weissensteiner v R* (1993) 178 CLR 217
[56] *Weissensteiner v R* (1993) 178 CLR 217 at 229 per Mason CJ, Deane and Dawson JJ
[57] *RPS v R* (2000) 199 CLR 620 at [41]-[43] per Gaudron A-CJ, Gummow, Kirby and Hayne JJ *Azzopardi and Davis v R* (2001) 205 CLR 50 at [49]-[52] per Gaudron, Gummow, Kirby and Hayne JJ
[58] *RPS v R* (2000) 199 CLR 620 at [22] per Gaudron A-CJ, Gummow, Kirby and Hayne JJ

Unnecessary or extensive comments on the facts carry the well-recognised risks of misstatements or other errors and of blurring the respective functions of the judge and jury.".[59]

A direction, or even a comment, that pre-trial denials and assertions carry less weight [than elements of the prosecution case such as admissions] because they were not made on oath in the witness box, is tantamount to an invitation to a jury to draw an adverse inference from an accused's failure to testify at trial. Even where the jury is instructed of the accused's right to silence at trial, such further direction draws the jury's attention, with judicial imprimatur, that the accused could (and, implicitly, should) have provided an account on oath.

In *Mule*, Templeman J (Wheeler J agreeing) dismissed the Appellant's argument that the relevant parts of the summing-up infringed the decisions of the High Court in *Weissensteiner*, *RPS*, and *Azzopardi and Davis* as the jury direction *"bore no resemblance to the kind of direction given in the three cases referred to above: that in all the circumstances, the jury might more readily accept the prosecution case because the accused had not given evidence to contradict it. Thus the observations of the High Court about the way in which a trial Judge should direct a jury in the circumstances with which those cases were concerned have no present relevance."* McLure J did not refer to these cases in her reasons for decision.[60]

However, such a conclusion misinterprets the matters of principle enunciated by the High Court in *RPS*, and *Azzopardi and Davis*. If the comments in those cases has been intended to apply only to the specific facts of those cases they would not have been described thus. The reasoning should apply equally to *Mule*, because the effect of the trial judge's direction was not that inferences could more safely be drawn from the prosecution case, but that the accused's explanation could be "discounted" vis-à-vis the prosecution case, by reason of his election not to give evidence.

In light of the decisions in *RPS*, and *Azzopardi and Davis*, the earlier persuasive authorities authorising judicial comment to a jury in relation to the exculpatory remarks upon the election of the accused not to give evidence, should be overturned. It is fundamentally a matter for the jury to decide what weight they will attach to the various parts of a mixed statement. In *Mule*, the trial judge effectively directed the jury, as a matter of law, that the accused's very defence to the charge did not carry the same weight as his admissions.

CONCLUSION

The decision of the High Court in *Mule* is keenly awaited. It will have important ramifications for the conduct of prosecution and defence cases, not only in jurisdictions which are not subject to the uniform evidence Act. The issue of appropriate directions or comments by a trial judge concerning "mixed" statements, will have universal application, however. The balancing of comments or directions without impacting upon the exercise of the right to silence will continue to present a challenge to trial judges.

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[59] *Azzopardi and Davis v R* (2001) 205 CLR 50 at [51]-[52] per Gaudron, Gummow, Kirby and Hayne JJ
[60] *Mule v R* [2004] WASCA 7 at [18]

The trend in Australia evidenced by the uniform evidence Act, is to favour the admission into evidence, as truth of their contents, exculpatory statements, (or "previous representations") which are contextually necessary to better understand and consider inculpatory statements or admissions. This common sense approach better allows a jury to weigh the evidence with appropriate directions or comments from a trial judge. Where exculpatory statements are not made contextually in relation to inculpatory statements and are independent, they ought to remain inadmissible as hearsay.

Problems will arise however in relation to anything other than straight-forward representations. Bob Marley's statements ought all to be admissible, for example under this simple test. Similarly statements admitting to sexual intercourse but claiming consent, which are common in relation to allegations of sexual assault. However, one can imagine examples where the dividing line is difficult to place. A complex ASIC investigation which requires questioning in relation to a myriad of corporate transactions may present great difficulty in excising exculpatory parts. Prosecutorial fairness may require considerable latitude being given favouring admissibility of the whole interview in such circumstances.

The impending decision of the High Court will be an important development for the administration of justice throughout Australia.