# Chapter 5: Confessions in Criminal Proceedings

This chapter includes an examination of: the historical development of the laws relating to confessions; the *Evidence Act 2009* and fundamental legal rights; the relevant sections of the *Evidence Act*; the Judge's Rules; legal representation of an accused; and confessions of a co-accused.

**Historical Development of Laws Relating to Confessions**

The laws relating to the admissibility of confessions have developed over the centuries. They are intertwined with a number of fundamental legal rights including the right to silence, the presumption of innocence, the right against self incrimination, and the guarantee against inhuman and degrading treatment.

The law of confessions arose in the context of legal history marked by the use of torture to obtain confessions. Torture developed as part of the fact gathering process in jurisdictions applying Roman canon law. Common methods of torture included the rack and the thumbscrew.

In England, trial by ordeal was gradually replaced by trial by jury. The English courts did not initially require an accused to submit to trial by jury. The first Statute of Westminster in 1275 allowed those charged with capital offences who did not plead to be subject to '*peine forte et dure*' ('strong and hard punishment'). This involved placing progressively heavier stones on the chest of the accused until a plea was entered or death resulted. *Peine forte et dure* was not abolished by statute until 1772.

The gradual elimination of torture as an acceptable means of gathering evidence is described in leading United States case of *Miranda v Arizona*.[1] Chief Justice Warren, delivering the opinion of the Court, stated:

> Over 70 years ago, our predecessors on this Court eloquently stated:
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> 'The maxim nemo tenetur seipsum accusare had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which [have] long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, [were] not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so

[1] 384 US 436 (1966).

> painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton, and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.' *Brown v Walker*, 161 US 591, 596–597 (1896).[2]

Section 7 of Chapter II of the Solomon Islands *Constitution* follows the United States tradition by placing in its constitution a fundamental legal guarantee. It states:

> **Protection from inhuman treatment**
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> **7.** No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.

As jury trials became more common, the practice developed of assuming that the accused were not competent to give evidence on oath at their own trial. It seems that the principle was that an accused could not be expected to tell the truth and therefore had to be protected from committing perjury. Therefore an unsworn statement was permitted by some judges. The *Criminal Evidence Act 1898* (UK) gave an accused the right to give evidence on oath and preserved the unsworn statement. An accused person became competent but not compellable.

In 1912 the English Home Secretary asked judges to draw up rules to provide a guide to police for the taking of statements from accused people. In *R v Voisin* Lawrence J observed:

> These rules have not the force of law; they are administrative directions the observance of which the police authorities should enforce upon their subordinates as tending to the fair administration of justice. It is important that they should do so, for statements obtained from prisoners contrary to the spirit of these Rules may be rejected as evidence by the judge presiding at the trial.[3]

The Judges rules and how they operate in the Solomon Islands is discussed below.

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2 Ibid.

3 [1918] KB 531, 539.

**The Evidence Act and Fundamental Legal Rights**

The *Evidence Act* in the Solomon Islands preserves the common law so far as it is not inconsistent with the *Act*. Section 3 states:

> **3.** This Act shall not operate as a Code and the principles and rules of the common law in relation to evidence that are not inconsistent with this Act, are preserved.

The *Evidence Act* does not alter the principles enshrined in the common law in respect of confessions. In some ways it clarifies and strengthens the common law rights of an accused. The right to silence, for example, is not changed.

Chief Justice Muria in *Kim Kae Jun v Director of Public Prosecutor*, a civil case, drew on the *Constitution* to give further force to the fundamental legal right to silence:

> The right to remain silent is [a] constitutional right to which everyone in this country is entitled, citizens or non-citizens alike. Section 3 of the *Constitution* guarantees the protection of the right to life, liberty, security of the person and the protection of the law. Although not specifically mentioned, that provision, in its broad application, must accord a right to silence to an accused, detained person or a suspected person who is under interrogation. Once such person exercised his or her constitutional right to remain silent he or she cannot be compelled to give his statement to anyone unless otherwise ordered by the Court.[4]

The common law right against self-incrimination, which is an extension of the right to silence, is preserved and clarified in the *Evidence Act*, and it applies to both the police investigative stage and to court proceedings. The distinction between the right to silence and the right against self-incrimination extends to people who may be competent and compellable to give evidence at trial but are protected to the extent that they do not have to answer questions that may incriminate them. If courts had the power to insist that a witness incriminate themselves, then any confession would not be voluntary, and could be regarded as induced by the possibility that the court could hold them in contempt if they did not answer. Out of court, in most circumstances, all people have a right to silence: they do not have to be a person under suspicion to exercise the right.

Sections 146 and 147 of the *Evidence Act* provide for the right against self-incrimination, stating:

> **146.** (1) This section applies if –
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> (a) a person is (apart from this section) required to provide specific information –
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> (i) in the course of a proceeding; or

[4] [1999] SBHC 151.

(ii) by a person exercising a statutory power or duty; or

(iii) by a police officer or other person holding a public office in the course of an investigation into a criminal offence or a possible criminal offence; and

(b) the information would, if so provided, tend to incriminate the person under an offence punishable by a fine or imprisonment.

(2) A person –

(a) has a privilege in respect of the information and cannot be required to provide it; and

(b) cannot be prosecuted or penalised for refusing or failing to provide the information, whether or not the person claimed the privilege when the person refused or failed to provide the information.

(3) Subsection (2) has effect –

(a) unless a written law explicitly removes the privilege against self-incrimination either expressly or by necessary implication; and

(b) to the extent that a written law does not explicitly or by necessary implication, remove the privilege against self-incrimination.

(4) Subsection (2) does not enable a claim of privilege to be made –

(a) on behalf of a body corporate; or

(b) on behalf of any person other than the person required to provide the information (except by a legal practitioner on behalf of a client who is so required); or

(c) by an accused in a criminal proceeding in relation to information about a matter for which an accused is being tried.

**147.** No adverse inference is to be drawn because a person exercises the privilege against self incrimination.

Section 147 requires judges to exclude from their consideration any adverse inferences where an accused exercises the right to remain silent before or during trial. Obviously, a right to remain silent would have little meaning if as a consequence of exercising the right an accused suffered a penalty.

Another fundamental right is the presumption of innocence, until a tribunal of fact determines that the prosecution has proven its case beyond

reasonable doubt: *Woolmington v DPP*.[5] All accused are presumed innocent and the onus of establishing guilt beyond reasonable doubt stays immovably with the prosecution. This right is important when considering how suspects should be treated when they are under police investigation.

The *Evidence Act* provides another protection for an accused which is consistent with the right to silence. An accused cannot be compelled to give evidence at trial. Section 37 states:

> **37.** An accused in a criminal proceeding is not competent to give evidence as a witness for the prosecution and is not compellable as a witness for the defence in that proceeding.

**The Evidence Act and Confessions**

The *Evidence Act* at Part 14 provides some assistance for legal practitioners and magistrates and judges when deciding if a confession is admissible as evidence in a trial. Section 167 of the *Evidence Act* provides the definition of 'admission'. It states:

> **167.** A confession is an admission made at any time by a person accused of an offence stating or suggesting that the person committed the offence.

The first point to realise is that the word 'admission' means the same as 'confession', where the admission involves the commission of the offence by the accused.

A confession can be made at any time by a person accused of an offence. This means that the confession does not have to have been made at a time when a person was a suspect or had been charged with an offence. However, as examined below, the admissibility of a confession is affected if a suspect or accused person is not properly advised of their rights, or is improperly treated improperly when interviewed by the police.

Section 168 of the *Evidence Act* provides for confessions that are made to an 'investigating official' or another who is capable of influencing whether a prosecution should take place. The section allows such confessions to be found inadmissible if the court is not satisfied beyond reasonable doubt that they are voluntary. This states the common law position. An 'investigating official' can be a police officer, customs officer or a prosecutor; essentially, any person who has an official investigative role or who is part of the prosecution. Section 168 states:

> **168.** (1) This section applies only to a criminal proceeding and only to evidence of a confession made by an accused –
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> (a) to or in the presence of an investigating official who was at the time performing functions in connection with the

[5] [1935] AC 253.

investigation of the commission or possible commission of an offence; or

(b) as a result of an act of another person who is capable of influencing the decision whether a prosecution of an accused should be brought or should be continued.

(2) Evidence of the confession is not admissible unless the court is satisfied beyond reasonable doubt that the admission was voluntary.

(3) Without limiting the matters that the court may take into account for the purposes of subsection (2), it is to take into account –

(a) any relevant condition or characteristic of the person who made the confession, including age, personality, language and education and any mental, intellectual or physical disability to which the person is or appears to be subject; and

(b) if the confession was made in response to questioning –

(i) the nature of the questions and the manner in which they were put; and

(ii) the nature of any threat, promise or other inducement made to the person questioned.

Section 168(2) retains the common law position. In *Pitakaka v Regina*, Lord Slynn P, and McPherson and Ward JJA, state:

> It has long been established that the burden of proving that answers given in the interviews were voluntary lies on the prosecution. The burden does not shift to the accused. As with all matters that must be proved by the prosecution in a criminal trial, they must be proved beyond reasonable doubt and the judge must ask himself whether the prosecution has proved that they were voluntary to that standard; *Ibrahim v R* [1914] AC 599; *R v Sartori* [1961] Crim LR 397. It is true that the exercise of the judge's discretion to exclude a statement on the ground that its admission would be unfair is a matter of degree but the first and principal decision is whether the prosecution has proved it was voluntary; *R v Prager* [1972] 56 Cr App R 151.[6]

The fundamental question is whether the accused had a free choice as to whether or not to speak. In *Regina v Keke* Kabui J stated:

> It is a question of fact for the courts to establish whether any confession, when challenged, was obtained under the threat of prejudice, promise or inducement held out to the accused by any person in authority. In Australia, the High Court stated that the test is not to ask whether the police officer concerned had acted improperly, and if so, whether it would

[6] [2007] SBCA 16.

> be unfair to reject the statement of the accused. But rather to ask whether in the light of the conduct of the police officer concerned and in all the circumstances of the case, it would be unfair to use the statement of the accused against the accused. (See *R v Lee* (1950) CLR 133 cited in *R v Moses Haitalemae*, Criminal Case No 210 of 2001). Lord Salmon, in *DPP v Ping Lin* [1976] AC 574 at 606 said that the state of mind of the police officer doing the questioning is irrelevant in terms of controlling the question of whether the statement was made voluntarily or not. Whether the threat was gentle or promise or inducement was slight does not matter. His Lordship said it was the state of mind of the accused that mattered in deciding whether the statement being challenged was voluntary or not. The conduct of the police officer concerned together with the circumstances prevailing in any particular case were the things that would light up the mind of the trial judge so as to see which way the issue should be decided.[7]

In *Lam Chi-Ming v The Queen* the Board advised that wrongful acts by the police can render a confession involuntary:

> [T]he rejection of an improperly obtained confession is not dependent only upon possible unreliability but also upon the principle that a man cannot be compelled to incriminate himself and upon the importance that attaches in a civilised society to proper behaviour by the police towards those in custody.[8]

Section 169 of the *Evidence Act* deals with the admissibility of a confession where fairness is an issue. Unlike section 168(2) which makes it mandatory for the court to reject a confession where it is not satisfied beyond reasonable doubt that it was voluntary, section 169 allows the court to exercise its discretion whether or not to admit a confession on the ground of fairness. It adopts the common law position. The section states:

> **169.** In a criminal proceeding, the court may refuse to admit evidence of a confession, or refuse to admit the evidence to prove a particular fact, if –
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> (a) the evidence is adduced by the prosecution; and
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> (b) having regard to the circumstances in which the admission was made, it would be unfair to an accused to use the evidence.

The onus of proving that a confession is voluntary is on the prosecution. This is not the case where objection is made to the admission of a confession on the basis of fairness. In such a case the onus of proof shifts to the defence with the standard of proof being on the balance of probabilities. The decision to admit or reject a confession is a discretionary one exercised by the judicial officer. In *R v Lee* Latham CJ, McTiernan, Webb, Fullagar and Kitto JJ, stated:

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7 [2005] SBHC 40.
8 [1991] 2 AC 212, 220.

> The discretion rule represents an exception to a rule of law, and we think that it is for the accused to bring himself within the exception. We have called attention to the great breadth of the common law rule that a statement is not admissible unless it is proved to be voluntary. If it is proved to be voluntary then it is prima facie admissible. It is admissible as a matter of law unless reason is shown for rejecting it in the exercise of discretion.[9]

The common law position in respect of admissibility on the basis of fairness has most recently been acknowledged in the Australian High Court case of *Em v The Queen*.[10]

Section 170 of the *Evidence Act* governs improperly obtained evidence. It introduces the concept of weighing the desirability of admitting the evidence against the undesirability of admitting the evidence. It also provides a number of examples that the court can take into account in determining the desirability of admission. It states:

> **170.** (1) Evidence that was obtained –
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> (a) improperly or in contravention of any law; or
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> (b) in consequence of an impropriety or of a contravention of any law;
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> is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.
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> (2) Without limiting subsection (1), evidence of a confession that was made during or in consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been obtained improperly if the person conducting the questioning –
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> (a) did, or omitted to do, an act in the course of the questioning even though he or she knew or ought reasonably to have known that the act or omission was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning; or
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> (b) made a false statement in the course of the questioning even though he or she knew or ought reasonably to have known that the statement was false and that making the false statement was likely to cause the person who was being questioned to make an admission; or

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9 [1950] HCA 25; (1950) 82 CLR 133 at [26].
10 [2007] HCA 46.

(c) engaged in conduct, or threatened to engage in conduct that was violent, oppressive or degrading towards any person.

(3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account –

(a) whether the impropriety or contravention was contrary to or inconsistent with a right of a person; and

(b) the probative value of the evidence; and

(c) the importance of the evidence in the proceeding; and

(d) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and

(e) whether the impropriety or contravention was deliberate or reckless; and

(f) the gravity of the impropriety or contravention; and

(g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and

(h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of any law.

This section overlaps with the sections relating to voluntariness and fairness. Section 2(b) makes clear that inducements to provide a confession can lead to it being found inadmissible. It may be a matter of degree as to whether or not, for example, threatening conduct induced a confession in a way that was sufficient to cause it to be involuntary. In *R v Dixon* Wood J said in the New South Wales Court of Criminal Appeal that:

> [I]t remains open to the Crown to carry the onus of voluntariness by positive proof that the inducement did not procure the confession, or by proof that its effects had been dissipated or removed by the time of confession.[11]

The test for whether an inducement caused a confession is:

> The authorities are relatively settled that in determining whether the inducement tainted the confession, regard is to be had not on whether a reasonable person could have been affected by the inducement, but whether in the mind of the accused was affected by it.[12]

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11 (1992) 28 NSWLR 215, 226.
12 Ibid 226.

Section 171 requires a person under arrest to be cautioned before they answer questions. It relates, at least in part, to section 170 and provides that a statement made by an accused is improperly obtained if a caution is not administered. The section states:

> **171.** (1) For the purposes of this Part, evidence of a statement made or an act done by a person during questioning is taken to have been obtained improperly if
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> (a) the person was under arrest for an offence at the time; and
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> (b) the questioning was conducted by an investigating official who was at the time empowered, because of the office that he or she held, to arrest the person; and
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> (c) before starting the questioning the investigating official did not caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence.
>
> (2) Evidence of a statement made or an act done by a person during official questioning is taken to have been obtained improperly if –
>
> (a) the questioning was conducted by an investigating official who did not have the power to arrest the person; and
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> (b) the statement was made, or the act was done, after the investigating official formed a belief that there was sufficient evidence to establish that the person has committed an offence; and
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> (c) the investigating official did not, before the statement was made or the act was done, caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence.
>
> (3) The caution must be given in, or translated into, a language in which the person is able to communicate with reasonable fluency, but need not be given in writing unless the person cannot hear adequately.
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> (4) Subsections (1), (2) and (3) do not apply so far as any law requires the person to answer questions put by, or do things required by, the investigating official.
>
> (5) A reference in subsection (1) to a person who is under arrest includes a reference to a person who is in company of an investigating official for the purpose of being questioned if –

> (a) the official believes that there is sufficient evidence that the person has committed an offence that is to be the subject of the questioning; or
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> (b) the official would not allow the person to leave if the person wished to do so; or
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> (c) the official has given the person reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so.
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> (6) A person is not treated as being under arrest only because of subsection (5) if –
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> (a) the official is performing functions in relation to persons or goods entering or leaving Solomon Islands and the official does not believe the person has committed an offence against a law of Solomon Islands;
>
> (b) the official is exercising a power under any written law to detain and search the person or to require the person to provide information or to answer questions.

One way to determine whether the laws relating to police questioning have been complied with is to examine whether the procedures in the Judge's Rules of the Solomon Islands have been followed. These rules set out the procedures that are to be followed by police to assist in ensuring that confessions are voluntary and fair.

**The Judge's Rules**

The Judge's Rules applicable to Solomon Islands were issued by Daly CJ as '*Practice Direction No. 2 of 1982*'. These rules replaced the Judge's Rules of the English High Court Judges, and are titled: 'Rules by Chief Justice on Interviews in Connection with Crime'.

The Chief Justice commences the Rules by explaining their basis:

> Courts want to be fair to police officers who have a hard job to do in bringing cases to court but also to be fair to persons who are suspected and accused of crimes. The law says that if a man says something it may be brought up in court as evidence. But the court must be satisfied that the man said what he did of his own free will, that is, that he was not forced or threatened or promised something and he knew what he was doing. The following rules should be used in relation to interviews as then the court can see that a man was given the right warnings.

The Chief Justice goes on to identify four stages in the process of interviewing witnesses and suspects, stating that:

> These rules set out what a police officer or other person in authority shall do at each stage so that a court can see that the interview was kept fair. If

> the interview is not fair because these Rules have not been kept or some other reason the court may refuse to hear evidence of what a person said.

The first stage provides a police officer with the right to ask and record any questions and answers without providing any warnings about rights if the person is not a suspect. Of course, any person can refuse to answer police questions. Stage 1 is described in the following way:

> Stage 1:Interviewing Witnesses
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> A police officer has a right to ask and record any questions or answers or statements when interviewing witnesses. Before the police officer has strong evidence that a crime has been committed, and that the person interviewed has committed it, all persons are interviewed as witnesses. ('Strong evidence' here means strong evidence that could prove before a court that the person is guilty.)

Stage 2 covers interviewing suspects. This stage requires police to tell a suspect that they have a right to remain silent and to warn that anything said by them may be used in evidence. Advising a person that they have a right to remain silent relates directly to the caution that is required by section 171 of the *Evidence Act*. This stage also recognises that the caution needs to be given in language that can be understood. The Judge's Rules require the caution to be given in Pidgin, however, the *Evidence Act* section 171(3) requires the caution to be 'given in, or translated into, a language in which the person is able to communicate with reasonable fluency'. It should be noted that there are 31 languages other than Pidgin or English spoken in the Solomon Islands, with at least 98 distinctive dialects, and there are many people who are not reasonably fluent in Pidgin or English.
Stage 2 of the Judge's Rules state:

> Stage 2:Interviewing Suspects
>
> When a police officer has strong evidence that a person has committed an offence he shall warn him to be careful of what he says. All warnings should be in a language easily understood by the person warned. All persons under arrest or in custody shall be so warned. This is so a court will know that the person was talking seriously and understood what he was doing. This warning given to suspects shall be –
>
> (Suspect Interview Warning)
> If you want to remain silent you may do so. But if you want to tell your side you think carefully about what you say because I shall write what you say down and may tell a court what you say if you go to court. Do you understand?
>
> In Pidgin:
> Sapos in laek fo stap kwaet no moa iu save duim. Bat sapos in laek fo tell aot stori blong iu iu tink hevi nao long wannem nao iu tellem. Bae mi ratem kam samting nao iu tellem. Sapos iu go long court bae maet me tellem disfella court toktok blong iu. In minim?

> Questions and answers should be recorded either during the interview or very shortly after it and agreed by all police officers present. The date and time when questioning began and finished should be written down together with the names of all present.
>
> The best thing is for the suspect to also agree and sign the record but this is not essential.

The conscientious practitioner will note that the recording and endorsement requirements contained in the last two paragraphs of Stage 2 do not meet best practice standards. Questions and answers should be recorded contemporaneously and the record should be adopted by the suspect if it is to be admitted into evidence. There is little doubt that the Judge's Rules need to be further developed. This has been acknowledged in a number of cases. In *Osifelo v R* Savage and Palmer JJA, in their joint judgment, commented:

> For passing we express the view that it would be desirable that the Solomon Islands Judge's Rules be reviewed and the position made clear as to when persons in custody may properly be interrogated, and the nature of such interrogation.[13]

Futher, Kirby P, in *Osifelo v R* provides detailed reasons why there needs to be vigilance when considering cautioned statement.[14] He stated:

> Reasons for vigilance in cautioned statements
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> First, it is important to remember that, in this case, there were no eye witnesses to the murder of the deceased. Nobody has ever been found. No weapons were ever recovered to implicate the accused. No forensic or other objective evidence was available to link any of the accused to the crime. The case against the accused did not even establish a clear motive for the killing, although it was suggested that it arose out of revenge for some past wrong done or imagined on the part of the deceased. None of these considerations is determinative. Murder and like serious crimes are often committed in secret. Bodies and weapons are frequently disposed of. Motives are often obscure. But the absence of such evidence requires that courts of trial and, on appeal, courts such as this, should scrutinise the prosecution evidence with particular care. Secondly, in the case of Mr Osifelo , the evidence against him was substantially his caution statement. That is why the ruling at the conclusion of the voire dire challenge to the admissibility of his statement was crucial for the first appellant. Once the caution statement was admitted, there was ample evidence which, if believed, would sustain the conviction of the accused. The absence of objective, external evidence (save for the confessional out-of-court statements of the co-accused which were also contested - to the extent that they could be used against Mr Osifelo ) made it particularly important in this case that the primary judge should scrutinise the caution statement with great care. It is clear from his ruling on the voire dire that Muria CJ

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13 [1995] SBCA 11.

14 Ibid.

understood this. This court must apply a similar rigour to the performance of its task in the appeal.

Thirdly, decisions in many courts of the Commonwealth, with growing insistence in recent years, have reinforced the long-stated anxiety of the common law about the reception into evidence of confessional statements to police. This anxiety arises, in part, from the preference of the common law for an ounce of real evidence to an abundance of confessional statements. This preference dates back to the days of the Star Chamber when confessions were extracted by torture. It also arises as an encouragement by the courts to the collection by law enforcement agencies of objective evidence, where it is available, rather than confessions. In part, the reservations expressed by judges of high authority arise from the belief of the common law that persons in police custody, especially for long periods, may be prone to have their will eroded and their appreciation of their basic right to remain silent diminished, simply because they are in the unfamiliar and potentially threatening or frightening environment of official custody.

In this jurisdiction, the common law has now been reinforced by constitutional requirements: see s 5(3) of the Constitution of the Solomon Islands 1978. But it is important to remember the fundamental reason which lies behind this constitutional provision and its common law predecessor. People in official custody, especially for long periods, are at risk that their will will be sapped and the exercise of their fundamental rights diminished by the impact upon them of the unfamiliar and potentially oppressive environment in which they are held.

Fourthly, as a number of still more recent decisions of high authority around the Commonwealth shows, cases do arise involving the actual misuse of police authority to extract confessions from suspects by violence, threats, tricks and promises. Accused persons before, at and after trial frequently make allegations of such tactics against police. It is the common experience of courts, as Muria CJ observed, that accused persons often repent their confessions and wish that they had not made them when they realise fully the punishment which acceptance of the confession, following conviction, will bring. Yet the fact remains that accused persons are often at a serious disadvantage in contesting their confessions to police. Until recently there has been a general reluctance on the part of the judiciary to accept the proposition that police would falsify confessions or use unfair or oppressive conduct to extract them. Notorious cases in many other Commonwealth jurisdictions have lately made the courts more vigilant to prevent, so far as they can, the risk of conviction on unreliable confessional statements to police. It has led to a re-enforcement of earlier judicial statements about the authority of judges to reject confessions which are unsafe or unfairly procured: see *McDermott v R* [1948] HCA 23; (1948) 76 CLR 501. Today, in many Commonwealth jurisdictions, as a result of unfortunate experiences and grave miscarriages of justice proved to have arisen from the use of confessions later found to have been unsafe, judicial authority typically requires independent corroboration of the voluntariness, fairness and accuracy of confessional statements to police.

Confirmation may be provided, in cases of contest, by sound and even

> video recording of such confessions, by the taking of such confessions before judicial officers or other independent persons or the corroboration of the confession by other independent evidence: see comments of Palmer J in *R v Tofola* (SI Crim case No 20/92, unreported) p 4. But in the absence of such affirmative assurance of the voluntariness, fairness and accuracy of the alleged confession it will ordinarily be rejected, however apparently probative it might otherwise appear to be. This is not so much out of distrust of police or their methods of *Osifelo v R* (Kirby P) their appreciation of their basic right to remain silent diminished, simply because they are in the unfamiliar and potentially threatening or frightening environment of official custody. It is the recognition of these realities which lies behind the insistence of the common law that accused persons should be transferred, without undue delay following their arrest, from the custody of the Executive branch of government (represented usually by police who are generally committed to securing a conviction if convinced of the accused's guilt) to the independent judicial branch of government (represented by magistrates and judges) who will ensure that the accused's rights are respected and a fair trial had securing confessions, as because of the high store which our system of justice places upon the avoidance of the risks of a miscarriage of justice based upon confessions above: see *McKinney v R* [1991] HCA 6; (1991) 171 CLR 468 at 476. The more serious the crime, and hence the longer the potential deprivation of liberty following conviction, the more scrupulous will courts of trial, and of appeal, be to exclude confessional evidence which does not meet the high standards laid down by the judges. A beneficial consequence of the line of authority to which I have referred has been an improvement in police practice, a diminished reliance on confessions and the increased use of mechanical or electronic recording of such material to put the voluntariness, fairness and accuracy of caution statements beyond doubt. The court must consider these developments in other countries in the context of the realities and possibilities of policing in the Solomon Islands with their many remote outpost and limited resources. However, improvements in police resources will not be encouraged if this court is less rigorous than other Commonwealth courts have been. The risk of an unsafe conviction is no more tolerable in the Solomon Islands than in any other jurisdiction of the common law.[15]

Stage 3 of the Judges' Rules allows for an accused to make a written statement and requires a further caution. It also sets out procedures for the adoption of the statement by an accused. The adoption of the statement is meant to show the court that the confession was obtained fairly and voluntarily. The requirement that a confession be voluntary is contained in section 168(2) of the *Evidence Act*, and to be fair in section 169(b).

> Stage 3: Taking of written statement from suspect
>
> Again it is important that a person against whom there is strong evidence that could prove he has committed an offence should only make a written statement after warning of what he is doing.
>
> A. If he wishes to make a written statement this warning shall be given:–

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[15] Ibid.

(Suspect Statement Invitation)
If you wish to remain silent you may do so. If you wish to, you may give a written statement. You can write it or I will. That is up to you. If you give a written statement it may be produced to a court if you go to court. Do you wish to give a written statement?

In Pidgin:
Sapos iu laek fo stap kwaet no moa in save duim. Sapos iu laekem iu save givem stori blong iu long paper. Iu save raetem kam seleva o mi save raetem. Hemi saed blong iu. Sapos iu givvem wan fela stori long paper ia bae misfella save taken disfella paper long court for showem long court ia sapos iu go long court. Waswe, iu laek fo givvem stori blong iu long paper?

If the suspect agrees and asks the police officer to write the statement it should start –

(Suspect Statement Start)
I agree to give this statement of my own free will. I want the policeman to write down my statement. I have been told I can remain silent. I know the statement may be used in court. It is true what I now put in the statement.

In Pidgin:
Mi seleva agree fo givvem stori blong mi long paper. Mi laekem policeman fo raetem kam stori blong mi. Olketa tellem mi finis mi save stap kwaet no moa. Mi save tu disfella paper ia might hem kamap long court. Stori bae me tellem hem turu wan.

(If the suspect writes the statement himself leave out the words 'I want the policeman to write down my statement' or their pidgin equivalent)

This should be signed first or the suspect's mark affixed and the statement then written by the suspect or told by him to the police officer who writes it down in the words used.

The suspect should be given a chance to read the statement or it should be read to him. He should be asked if he wants to alter anything, correct anything or add anything. If he says he does, alterations should be made as requested or he should make the alterations himself. There should then be added the following certificate;

(Suspect Statement End)
'I understand what is in the statement which I have read (or 'which has been read to me'). It is true.'

In Pidgin:
'Mi save gudfella wannem nao in saet long disfella paper ia. Mi readem finis (o 'olketa readem hem kam long me finis'). Evri samting hem turu noa.'

This certificate should be signed by the suspect (or his mark affixed to it) and signed by any persons present. If the suspect refuses to sign or affix

> his mark, this fact should be noted on the statement. The date and time when the statement is finished should be recorded.

Stage 4 of the Judge's Rules relates to the charging time.

> Stage 4: Charging of Accused Person
>
> When a person is charged, the charge should be read to him. Afterwards he should be warned as follows:–
>
> 'Do you wish to say anything about this offence which it is said you have committed? If so, I will write down what you say and the court may hear what you say. You may remain silent if you wish.'
>
> In Pidgin:
> Iu laek fo tellem eni samting about disfella samting ia wannem olketa say iu duim? Sapos iu tellem eni samting bae mi raetem and bae mi save tellem disfella samting long court. Sapos iu laek fo stap kwaet no moa iu save duim.'
>
> (Stage 4 is the formal charge when the case is ready to go to court. When a man is arrested he must be told why he is arrested but that is not the time when he is charged for this stage.)

In *R v Swaffield*, Kirby J dealt with the relevance of the Judges Rules as they apply to the fairness discretion:

> The practice of cautioning suspects when interviewed by police has generally been accepted as flowing from the Judges Rules (the rules) formulated in England in 1912 for the guidance of police officers and copied elsewhere throughout the world, including in Australia. … Whilst the rules have never had the force of law in England or in this country, they have continued to provide guidance as to the standards of fairness to be observed when a question later arises as to the admissibility of a confessional statement made to police. In *Van Der Meer* [1998] HCA 56; (1998) 82 ALR 10, Deane J observed 'their breach will not automatically mandate exclusion; nor will it's adherence to them necessarily prevent it'.[16]

In *Regina v Motui*, Palmer J used the fairness discretion to rule an interview inadmissible as a result of a breach of the Judges Rules.[17] His Lordship identified the areas in which the rules had not been complied with, and suggested police should consider using audio tapes when interviewing suspects. He stated:

> Unfairness
>
> This brings me to deal with the alternative argument, that the statement should be excluded in any event on the grounds of unfairness. A number of matters have been raised in support of this ground. The first of these is

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16 [1998] HCA 1at [139]; (1998) 192 CLR 159 (References omitted).
17 [1998] SBHC 89.

that the caution is defective or incomplete on the ground that it did not warn the 'A' that what he says may be used in evidence against him in court.

The evidence on this is quite clear. No such words were used. This in my respectful view is a material omission. It is important as standard police procedure that an 'A' is not only informed about his rights to remain silent but also that if he should elect to give a statement that it would be taken down in writing and may be used in evidence against him. The rationale for such warning is that it makes the 'A' aware of what may eventually happen to any statement that he might give and gives him the opportunity if he wants, to explain his involvement or part in the matter he had been arrested and charged for. One of the primary purposes of a statement obtained under caution is so that it may be used in evidence whether against the maker or in his favour. It is important therefore that the maker is aware of what may be done to his statement. It may be that had the 'A' been aware that the statement may be used in evidence, may refuse or say something different, despite the fact that the statement may have been voluntarily given.

The second omission raised was that the 'A' was not given the opportunity to certify that he had been cautioned. Again as standard procedure, the 'A', Interviewing Officer and Witnessing Officer(s) should sign below where the caution had been recorded to certify that it had been duly given as recorded and that the 'A' did understand what it meant. In this case this was not done. I do accept though that the Interviewing and Witnessing Officers have given oral evidence to the effect that the caution was duly given and confirmed by the 'A' in his oral evidence.

The third omission raised was that the 'A' was not given the opportunity to make any changes to his statement. This has not been denied by the Police Officers, who acknowledged that it was an oversight on their part. This in my respectful view is another material omission in that it gives further opportunity to the 'A' to confirm, after reading through what had been written or read out to him as correct and accurate and if not to say so. In this case this opportunity had not been given, despite the fact that the 'A' had read through his statement. Normally, the maker of a statement would point out straight away what is not correct or should be changed, but sometimes that does not happen and so as a rule of thumb, opportunity should be given in any event.

The fourth omission raised which is linked to third was that the 'A' was not given opportunity to agree to the contents of his statement before putting his signature on the statement. Again this has not been disputed. This is a material omission because until that is done, it is not clear if what was said had been recorded correctly. It dispels any possibility and allegations that might arise that the statement had been tampered with by the Police.

Finally, I repeat what I had said in earlier cases that the Police should now consider the use of audio tape equipment to assist in the taking of statements of accused persons.

When all the above omissions are taken into account, I find in the exercise

> of my discretion that the admission of this voluntary statement would be unfair to this 'A'.[18]

The Court of Appeal considered the application of the Judges' Rules in *Kwaimani v Regina*.[19] The court stated that the test of whether a person is a witness or a suspect must be an objective one and that the subjective opinion of the investigating officer can never be conclusive.

> The reference to 'strong evidence' was to the Judges' Rules in the Solomon Islands relating to the taking of statements by police officers. In broad terms those Rules provide that a witness becomes a suspect when there is 'strong evidence that a person has committed an offence.' The phrase is said to mean 'strong evidence that could prove before a court that the person is guilty.'
>
> Because the trial judge considered the police did not have strong evidence which would prove the appellant guilty he held the appellant was still only a witness as at 8 January and so no caution was required. Hence the statement of 8 January was admitted into evidence.
>
> The first ground of appeal attacked that ruling. On the appellant's behalf it was submitted he was at the material time a suspect and as he was not cautioned the statement should not have been admitted. Counsel for the respondent argued that Fox was entitled to regard the appellant as only a witness as at 8 January and that the learned trial judge was correct in his ruling.
>
> The test whether a person is a witness or suspect must be an objective one. The subjective opinion of the investigating police officer can never be conclusive. The over-riding consideration must be, as stated in the preamble to the Judges' Rules: '*Court want to be fair to Police Officers who have a hard job to do in bringing cases to court but also to be fair to persons who are suspected and accused of crimes*'. As is also said there: '*If the interview is not fair because these Rules have not been kept or some other reason the Court may refuse to hear evidence of what a person said*'.[20]

A useful summary of the principles of police questioning of witnesses can be found in *R v Plevac* where judges of the New South Wales Court of Criminal Appeal extract the principles from leading cases.[21]

When considering whether evidence can be admitted on a discretionary basis reference to section 138 of the *Evidence Act is* appropriate. It states:

> **138.** In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to an accused.

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18 Ibid.

19 [2009] SBCA 8.

20 Ibid.

21 (1995) 84 A Crim R 570.

This section is relevant to consideration of admissibility of confessions pursuant to sections 169, 170 and 171 of the *Evidence Act*.[22]

In *Sharp v Wakefield* Lord Halsbury made some relevant comments about the exercise of judicial discretion:

> [D]iscretion means, when it is said that something is to be done within the discretion of the authorities, that that something is to be done according to the rules of reason and justice, not to private opinion: *Rooke's Case*, 5 Co Rep 99b at p 100a; 77 ER 209; according to law, and not humour. It is to be not arbitrary, vague, and fanciful, but legal and regular, and it must be exercised within the limit to which an honest man, competent to the discharge of his office, ought to confine himself: *Wilson v Rastall* (1792) 4 Term R 753; 100 ER 1283.[23]

The ultimate determination of whether a confession is determined to be voluntary or fair will be based on the circumstances of each case and the subjective position of the suspect. In the case of children, for example, the rules of admissibility need to be stringently applied and additional safeguards implemented.

**Methods of Excluding Inadmissible Evidence**

The best method of removing inadmissible confessions is by prosecution and defence agreeing, prior to trial, to edit any inadmissible material from a record of interview and reaching agreement that it will not be orally led in evidence. In the event that agreement cannot be reached between the parties the court can apply section 174 of the *Evidence Act* which allows for editing of statement and records of interview to allow only admissible evidence to be considered by the court. It states:

> **174.** (1) If part of a statement is determined by the court to be inadmissible, the court may direct that a party who wishes to use an admissible part of the statement edit the statement to exclude the inadmissible part.
>
> (2) A party may not edit a statement under subsection (1) unless, in the opinion of the court, the inadmissible parts of the statement can be excluded without obscuring or confusing the meaning of the admissible part of the statement.

When objection is taken to the admissibility of a confession a *voir dire* should be held. During the *voir dire* the court can consider evidence about whether the confession was voluntary, fairly and properly obtained.[24] If the Court determines that a confession was not voluntarily given, it is not necessary to consider whether or not it would be fair to admit it.

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22 See also *Noor Mohamed* [1949] AC 182; and *Driscoll* (1977) 137 CLR 517.
23 [1891] AC 173, 179.
24 *MacPherson v R* [1981] HCA 46; (1981) 147 CLR 512.

**Tendering of Record of Interview**

The record of interview is tendered by the prosecution as an exception to the hearsay rule. In most circumstances the defence cannot tender the record of interview.[25] Occasions can arise when the prosecution wants to tender part of a record of interview rather than the whole. This can be because they wish to gain a forensic advantage or because they have lost part of the record of interview. However, the whole record of interview should be tendered unless the record of interview has been edited by consent, or the judicial officer has ruled certain parts of the record of interview inadmissible

In *R v Soma* Gleeson CJ, Gummow, Kirby and Hayne JJ, emphasised that the prosecution should present the evidence fully and fairly.[26] They state:

> If the prosecution case was to be put fully and fairly, the prosecution had to adduce any admissible evidence of what the respondent had told police when interviewed about the accusation that had been made against him. To the extent to which those statements were admissible and incriminating, the prosecution, if it wished to rely on them at the respondent's trial, was bound to put them in evidence before the respondent was called upon to decide the course he would follow at his trial. To the extent that an otherwise incriminating statement contained exculpatory material, the prosecution, if it wished to rely on it at all, was bound to take the good with the bad and put it all before the jury. And … the prosecutor's obligation to put the case *fairly* would, on its face, require the prosecutor to put the interview in evidence unless there were some positive reason for not doing so. The only reason proffered for not doing so in this case was, as the Court of Appeal rightly found, not sufficient.[27]

In *R v Cassell* Smart J provided additional reasons for the inclusion of a record of interview, stating:

> In Jack v Small [1905] HCA 25; (1905) 2 CLR 684, the only evidence adduced by the trustee A in insolvency, upon whom the onus of proof lay, was the deposition of the insolvent's wife. Griffiths CJ said (at 695):
>
> 'But, being used by the trustees as an admission, the trustees must take the deposition as they find it. They cannot select a fragment and say it bears out their case, and reject all the rest that makes against their case. They must take the deposition as a whole. That is the rule in criminal proceedings, and it was the rule in the Court of Chancery.'
>
> Barton J said (at 708):
>
> 'One essential principle is that, where an admission is put in evidence either in the civil or the criminal jurisdiction, the party relying on it is bound to take it as a whole, and cannot take those parts which are in his favour and reject the rest. It is clear this statement of the appellant is

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25 See *R v Calligan* [1994] 2 Qd R 300; 70 A Crim R 350.

26 [2003] HCA 13; 212 CLR 299; 196 ALR 421; 77 ALJR 849.

27 Ibid [31] (references omitted).

> evidence as an admission, and upon that principle the whole is evidence as an admission, that is to say, the effect of any portion of it cannot be taken without the qualifications upon it contained in the remainder.'
>
> The Crown was entitled to tender that portion of Cassell's evidence which was relevant to the prosecutions. It was not entitled to tender other evidence which was not so relevant. If Cassell gave any evidence that was exculpatory or watered down or affected or qualified the admissions on which the Crown relied, the Crown was bound to tender that material. Any material relating to admissions whether comprised in a statement or record of interview, affidavit, deposition or transcript must be taken as a whole.
>
> The correct procedure is for the accused, upon the tender by the Crown of alleged admissions, to tell the judge, if it be the case, of other .parts of his evidence which should be tendered to give the whole picture so far as the admissions go. The judge then rules in accordance with the principles in Jack v Small. If the judge is of the opinion that other parts of Cassell's evidence ought reasonably to be tendered by the Crown so as to give the whole picture as to the admissions and to enable the admissions to be taken as a whole and the Crown does not wish to tender these additional parts the Crown tender without those additional parts should be rejected. Cassell does not seem to have told the judge of any parts of his remaining evidence which he wished to be tendered so that the 'admissions' could be taken as a whole.[28]

**Legal Representation of an Accused**

There is nothing in the *Evidence Act* or the Judge's Rules that requires the police to allow an accused to have legal advice or representation at any stage before or during an interview. However, there is some case law on the point, and the denial of legal advice to an accused can be taken together with other factors to support an argument that a confession should be ruled inadmissible.

In *R v Keaviri*, Muria CJ refers to the *Constitution*, the right to silence and also the right to seek legal assistance:

> When one compares the rule as I outlined [being the warning that is to be given before the '*Taking of written statement from suspect*',] with the warning given by the police to the accused one sees the obvious difference. There is a clear omission of the warning that the accused has a [r]ight to remain silent. This part of the warning is important in this country for three reasons. Firstly, it must be remembered that … our Judge's Rules were made after 1978 and clearly the fundamental rights of a person suspected of a criminal offence as [protected] under the *Constitution* must be borne in mind. **Secondly the right to seek legal assistance is also that does not come easily in view of the limited manpower resources that we have. A suspect or an accused person must be given the opportunity to obtain legal advice or assistance.** It is important therefore to advise a suspect of his right to remain silent in order that he be given the opportunity to make use of his constitutional right to seek the assistance of a lawyer. Thirdly, an accused person who is in

[28] (1998) 45 NSWLR 325, 338.

> official custody is in an environment which is not familiar to him. There may not be any threat or actual violence exerted upon him while in that custody. But the potential for such an occurrence in such an environment cannot be simply ignored as far as the person in custody is concerned. In such a situation he must still be given the opportunity to appreciate his right to remain silent despite being in such an unfamiliar environment.
>
> It was the warning given to these accused upon which the fate of their caution statement now turns. The breach of the Rule as I see it in this case is not just a defect in the wording of the warning but a fundamental omission in the warning itself which has an impact on the fundamental rights of the accused to remain silent. The interviewing officer or authority must ensure that such a right should not be overlooked. It is both in the interest of the suspect or accused as well as the interviewing authority.
> …
>
> This court however is required by law to ensure that the rights of an individual, including those accused of committing crimes are protected. This it will do by ensuring compliance with the rules and other legal provisions in this regard. In this case the provisions of the Judges Rules to which I have already referred had not been complied with. **That non compliance in this case clearly offends section 10 of the Constitution and is therefore fundamental and as such it renders the caution statements though admissible taken in respect of each of these accused liable to be excluded in the exercise of the courts discretion**. That discretion I now exercise and I rule that the caution statement of each of these accused be excluded.'[29] (Emphasis added.)

In determining whether a record of interview is voluntary or fair it is important to consider whether the accused understood what was happening. The High Court of Solomon Islands has recognised the difficulties in cautioning suspects who are not familiar with the criminal justice system and who do not speak English as a first language. In *R v Cawa* reference was made to the Papua New Guinea approach, which requires the police to ask the accused person to explain their understanding of the caution:

> Justice McDermott spoke of the need for inquiry in the *State v Kiki Hapea* (1985) PNGLR 6, 9 where he stated:
>
> After almost 80 years of operation of one set of rules or another, one would hope that rules of this Court could now be formulated. The need to so do, is highlighted by the constitutional rights which overlay and are now applicable. The move in the United Kingdom towards the Code of Practice to be contained in subordinate legislation, see the Royal Commission on Criminal Procedure January 1981 and the development of relevant guidelines in the questioning of Aborigines in the Northern Territory, see Anunga Rules and R v. Anunga 1976 11 Australian Law Reports 412 particularly at 414 were Justice McDermott quoted the Anunga Rules at 3, 'Great care should be taken in administering the caution when it is appropriate to do so. It is simply not adequate to administer it in the usual terms and so, "Do you understand that" or "Do

[29] [1997] SBHC 103.

> you understand you do not have to answer questions?" Interrogating Police Officer having explained the caution in simple terms should asked the Aboriginals to tell them what is meant by the caution phrase by phrase and should not proceed with the interrogation until it's clear that the Aboriginal has apparent understanding of his right to remain silent. Most experienced police officers in the Territory already do this. The problem of this caution is a difficult one, but the presence of a prisoner's friend or interpreter and adequate and simple questioning about the caution should go a long way towards solving it.[30]

The provision of legal assistance prior to an interview would go some way to overcoming the problem of understanding legal consequences.

**Confessions and Co-accused**

Section 172 of the *Evidence Act* states:

> **172.** The common law relating to the admissibility of a confession by one accused against another should prevail.

This section does two things: first, it preserves the common law; and second, it requires that where there is any suggestion that another section of the *Evidence Act* changes the common law that section should be disregarded in favour of the common law.

Under common law, a confession made by one accused out of court cannot be used as evidence against another accused. For example, where defendant A confesses to police that he and defendant B committed the offence the confession can only be admitted at trial against A. The theory underpinning this rule is that although the two accused are being tried together they are in fact receiving separate trials and the evidence against each should be considered separately.

This situation changes where, for example, defendant A decides to give evidence at trial. In that case, the evidence given by defendant A can become evidence for all purposes and becomes admissible for or against defendant B.

An accused who decides to give evidence can be cross-examined by the prosecution or another accused.

Section 37 of the *Evidence Act* is relevant in the context of an accused giving evidence at trial. During the trial against the accused the accused cannot be made to give evidence by the prosecution (this states the common law position), and cannot be compelled to give evidence in a co-accused's case. An accused can decide whether to give sworn evidence, give a dock statement, or remain silent. The decision as to what an accused will do at trial is not open to influence or intervention by the co-accused, prosecution or judicial officer. Section 37 provides:

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30 [2006] SBHC 32.

> **37.** An accused in a criminal proceeding is not competent to give evidence as a witness for the prosecution and is not compellable as a witness for the defence in that proceeding.

**Summary**

The following principles summarise the rules underpinning the use of confession evidence in criminal trials:

1. An accused is not competent to give evidence for the prosecution.

2. An accused is competent but not compellable as a witness in his own defence.

3. An accused is competent but not compellable to give evidence against or for a co-accused.

4. An accused who gives evidence may be cross-examined by a co-accused even if the evidence given is not adverse: *Murdoch v Taylor* [1965] AC 574; *R v Hilton* [1972] 1 QB 421.

5. The evidence of one accused against another can be given in examination-in-chief: *R v Rudd* (1948) 32 Cr App R 138.

6. The evidence of one accused against another can be given in cross-examination: *R v Paul* [1920] 2 KB 183.

Section 40 of the *Evidence Act* 2009 is also relevant in that it allows an accused to be both competent and compellable in certain circumstances. It states:

> **40.** (1) Where an accused is charged with an offence jointly with any other person, the accused shall be a competent and compellable witness for the prosecution against the other person, and without the consent of that other person or for the defence of the other person at a stage of the proceedings, if –
>
> (a) the proceedings against the accused have been stayed, or the information against the accused withdrawn or dismissed; or
>
> (b) the accused has been acquitted of the offence; or
>
> (c) the accused has pleaded guilty to the offence; or
>
> (d) the accused is being tried separately.
>
> (2) When two or more persons are jointly charged with any offence, the evidence of any person called as a witness for the prosecution or the defence under this section may be received as evidence either for or against any of the persons so charged.

This section should be kept in mind by practitioners where they are representing a number of accused people. For example, if two accused are being represented by a single lawyer and one of the accused decides to plead guilty, it is possible for this accused to be called on by the prosecution to give evidence against the other accused. The range of possible conflicts is very wide if the provisions of section 40 are employed.

The common law position is stated in *Pitakaka v Regina* where Lord Slynn P and McPherson and Ward JJA state: 'the fundamental rule [is] that statements made by one accused are not evidence against his co-accused', unless an accused gives evidence at trial.[31]

The best practice for interviewing co-accused can be found in *Tofola v R*, in which the Court of Appeal stated:

> It is recognised that Rule 8 of the old Judge's Rules, which would have been applicable in these circumstances, no longer formally applies as a part of the guidelines that judges use in deciding upon fairness. The old Judge's Rules have been replaced by Rules made by the Chief Justice in, we understand, 1982. Those Rules, which for want of a better name may be referred to as the Solomon Islands Judge's Rules, do not contain an equivalent Rule to Rule 8 of the old Rules. It is our view, however, that in considering whether a challenge to a confessional statement made in circumstances to which the old Rule 8 would have applied, a Judge is likely to have regard to the approach taken by the old Rule since its purpose, and the reasons for it, still remain as sound as ever.'[32]
>
> Rule 8 of the old '*Judges' Rules of England*' as set out in (1930) 24 QJP 150 is as follows:
>
> When two or more persons are charged with the same offence, and statements are taken separately from the persons charged, the police should not read these statements to the other person charged, but each of such persons should be furnished by the police with a copy of such statements and nothing should be said or done by the police to invite a reply. If the person charges desires to make a statement in reply the usual caution should be administered.

Section 173 of the *Evidence Act* does not allow inferences of guilt to be drawn from the fact that an accused or another person refused to answer questions. It states:

> **173.** (1) In a criminal proceeding, an inference unfavourable to a party must not be drawn from evidence that the party or another person failed or refused –
>
> (a) to answer one or more questions; or

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31 [2007] SBCA 16.
32 [1993] SBCA 4.

> (b) to respond to a representation;
>
> put or made to the party or other person by an investigating official who was at the time performing functions in connection with the investigation of the commission or possible commission of an offence.
>
> (2) Evidence of that kind is not admissible if it can only be used to draw such an inference.
>
> (3) Subsection (1) does not prevent use of the evidence to prove that the party or other person failed or refused to answer the question or to respond to the representation if the failure or refusal is a fact in issue in the proceeding.
>
> (4) In this section, 'inference' includes –
>
> (a) an inference of consciousness of guilt; or
>
> (b) an inference relevant to a party's credibility.

There is a common law exception to out-of-court hearsay assertions that allows evidence of a conspiracy to be admissible against an accused. This exception is covered in Chapter 9.

There are some significant procedural areas relevant to confessional evidence that remain undeveloped in the Solomon Islands. For example, unlike other common law jurisdictions, the police are not required to electronically document records of interview. As a consequence, a wide scope for fabrication of confessions by the police remains. Additionally, the Judge's Rules have remained deficient in a number of respects and there is no legislation mandating procedures to ensure voluntariness and fairness. The next chapter deals with identification evidence, an area of law that is replete with examples of miscarriages of justice occurring as a result of the unreliable identification of an accused by witnesses who are 'certain' they are correct.