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IMPERMISSIBLE QUESTIONS ASKED IN RECORDS OF INTERVIEW AND BY PROSECUTORS IN CROSS EXAMINATION

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I: QUESTIONING IN RECORDS OF INTERVIEW

Police may ask questions as part of the investigative process. Whether those questions have in fact any basis to be introduced into evidence at trial is a different matter: *Graham v The Queen* (1998) 195 CLR 606 at 616-617.

For this reason records of interview should always be examined carefully, as they usually contain questions which are inadmissible in evidence at trial.

In formulating objections to questions and answers given in a record of interview, it must be kept in mind that:

- There is a need to distinguish, on the one hand, between the right of the police to put questions to a suspect who is willing to be questioned, and on the other hand, the admissibility of evidence of what was said on such occasion.

- The formulation of propositions relating to an accused person's right to silence needs to be precise.

- There is a need to distinguish in submissions between evidence which is relevant and therefore admissible, and evidence which, although admissible because of its relevance, ought to be excluded in the exercise of the court's discretion.

These principles are set out in *R v Plevac* (1991) 84 A Crim R 570.

1. The admissibility of records of interview

Records of interview can contain admissions, partial admissions and partial denials, or denials alone. In the first and second of these circumstances, the records of interview are admissible pursuant to s 81 *Evidence Act*¸ which states that the hearsay and opinion rules do not apply to evidence of admissions.

In *R v Rymer* (2005) 156 A Crim R 84 the Court of Criminal Appeal dealt with the admissibility of a record of interview that was comprised completely of denials by the appellant of allegations put to him and which were therefore exculpatory statements. The

Crown at the trial had refused to tender the record of interview, and this decision was upheld by the trial judge.

On appeal, Grove J (with whom the other members of the Court agreed) examined the admissibility of records of interview in relation to the common law as well as to the *Evidence Act*.

Grove J summarised the situation in relation to the use of record of interview in situations where the exculpatory statements were not admissible pursuant to the exception to the hearsay rule created by s 66 *Evidence Act*, as they were not fresh in the memory of the accused when he made the denials that he did at the time of questioning by police.

Grove J found that exculpatory statements are admissible as an exception to the hearsay rule. This is because the statements had dual purposes: they seek to demonstrate the asserted fact (that the accused did not commit the offences); and demonstrate credibility deriving from the accused's proclamation by plea that s/he is not guilty. By reason of the dual purposes (s 60 *Evidence Act*) the evidence would not be excluded by the credibility rule (s 103 *Evidence Act*).

Grove J concluded that, subject to the exercise by the presiding judge of power to reject evidence (in particular, but not limited to, s 137 *Evidence Act*) such evidence should be tendered by the Crown.

<u>The status of the record of interview once tendered</u>

An accused who has made a good record of interview which is tendered in evidence may wish to rely on the interview and not give evidence from the witness box. In such a case, the record of interview does have some weight, although the account given by an accused to police in the record of interview is far from being the equivalent of sworn evidence in a trial: *R v Davis* [1999] NSWCCA 15 at [50].

<u>To object to a record of interview or not?</u>

Although, as just discussed, records of interview which contain denials alone are admissible, you should consider in every case whether you want such material in evidence.

For example, before a jury, the record of interview is usually the last piece of evidence in the Crown case. As Leonie Flannery points out in her paper "Matters to Consider when Preparing and Conducting Sexual Assault Trials" the repetition of the allegations at the end of the Crown case (which tends to be when the record of interview is played) is not necessarily helpful to the accused regardless of how s/he dealt with the questions.

In certain cases involving solely denials therefore it may be worthwhile considering an objection to the whole of the record of interview. In such cases, your submissions will be that denials are not capable of being regarded as admissions: *Barca v The Queen* (1975)

133 CLR 82 at 107; *Straker v The Queen* (1977) 51 ALJR 690 at 694. They are irrelevant: *Graham v The Queen* (1998) 195 CLR 606 at 616.

2. The law in relation to questioning by police

In *R v Plevac* (1991) 84 A Crim R 570 at 579-581 the Court of Criminal Appeal set out this non exhaustive list of propositions relating to questioning by police:

> 1. Police may, in the course of investigation, interrogate a suspect who is willing to answer their questions, and that interrogation may include putting to the suspect the facts as the police know, or believe, or suspect them to be, in order to ascertain what, if anything, the suspect will say about them: *Grills* (1910) 11 CLR 400; *O'Neill* (1987-88) 48 SASR 51 at 56.
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> 2. Such questioning must be fair and must not amount to "intimidation, persistent importunity or sustained or undue insistence or pressure": *McDermott* (1948) 76 CLR 501 at 511; *Lee* (1950) 82 CLR 133 at 144; *Vandermeer* (1988) 82 ALR 10 at 36-37, but questioning is not to be regarded as unfair merely because it is persistent: *Regina v. Lawrence Thomas Taylor* (CCA, unreported 18 April 1995).
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> 3. Police should not persist with such an interrogation after the suspect has indicated that he or she does not wish to answer further questions: *Ireland* (1971-72) 126 CLR 321 at 331-332; although merely because a suspect says he does not wish to answer, or will not answer, any further questions does not render inadmissible answers to further questions which the suspect does answer provided the questions are fair and proper and the answers are otherwise admissible.
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> 4. The answers given by the suspect are admissible in evidence (and hence, so are the questions) if they are relevant; but not otherwise: *Grills* (supra at 413, 419); *Taylor* (supra at p.9).
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> 5. An answer (and the question to which it is given) is relevant if it is an admission, or is capable of being regarded as an admission, of guilt or of a fact relevant to the proof of guilt: *Regina v. Robert Ernest Astill* (CCA, unreported 17 July 1992 at pp.8-13).
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> 6. If an answer is not unequivocally an admission but is capable of being regarded as such, it is a question for the jury whether it is such. Subject to the exercise of the judge's discretion, the question and answer are admissible but it is necessary that the jury be clearly and fully directed that it is a question for them as to whether the answer does or does not amount to a relevant admission: *Astill* (supra at p.11-15).
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> 7. An answer which is not capable of being regarded as an admission is on the face of it irrelevant and therefore inadmissible: *Grills* (supra at p.413); *Taylor* (supra at p.9).

8. However, answers of that sort may yet be admissible if they form part of an interrogation in the course of which some answers do amount to admissions or are capable of being so regarded, where the question and answers which do not themselves contain admissions are relevant to set the other questions and answers in context, and/or to show that there was no impropriety on the part of the police in the conduct of their interrogation: *Taylor* (supra at pp.9-10); *Barca* (1975) 133 CLR 82 at 107; *Grills* (supra at pp.418-419); *Regina v. Helen Margaret Towers* (CCA, unreported 7 June 1993 at pp.10-11).

9. In such circumstances, the trial judge must always carefully consider whether questions and answers which are not capable of amounting to relevant admissions should be excluded because they are prejudicial: *Grills* (supra at pp.419-420); *Ireland* (supra at p.332); *Taylor* (supra); *Astill* (supra).

10. Where the questions and answers under consideration, although having in themselves no probative value but forming part of an interview and prima facie admissible as part of the context of that interview, do no more than place before the jury, in a hearsay form, assertions of fact which have already been established by other evidence or which clearly will be established by other evidence intended to be led by the Crown, their prejudicial effect will be minimal and would not ordinarily justify their exclusion: *Taylor* (supra at p.10).

11. Where, however, a question is asked, which contains a hearsay assertion of matter which the Crown is not in a position to prove, or which is inadmissible in evidence, and where the answer is not capable of amounting to an admission of the matter asserted by the questioner, there may be, depending on the nature of the matter stated and its relevance to the issues in the trial, very great prejudice, which may lead to the exclusion of the evidence, even if that means (because, in the context, the inadmissible material is inextricably interwoven with the admissible) that the Crown is deprived of some probative and admissible evidence: *Ireland* (supra at p.332); *Grills* (supra at p.419); but cf. *Harriman* (supra at pp.603-604).

See also *R v Clarke* (1997) 97 A Crim R 414 at 419 where the Court of Criminal Appeal considered the impact upon these principles of sections 85, 90 and 138 *Evidence Act.*

3. Examples of objectionable questioning in records of interview

In addition to those set out in the list above, there are a number of other areas of questioning in records of interview that are objectionable.

<u>Persistent questioning</u>

As referred to above, questioning is not to be regarded as unfair merely because it is persistent: see also *R v Lawrence Thomas Taylor* Unreported, Court of Criminal Appeal, 18 April 1995.

In *R v Clarke* (1997) 97 A Crim R 414 at 419 Hunt CJ at CL said:

> It should be kept in mind that a police officer is under a duty to ascertain the facts which bear upon the commission of a crime, whether from the suspect or not, and the officer is not bound to accept the first answer given; questioning is not to be regarded as unfair merely because it is persistent (*Smith* [1964] VR 95 at 97; *Lavery (No. 2)* (1979) 20 SASR 430 at 470; *O'Neill* (1988) 48 SASR 51 at 56). It is a question of degree as to whether persistence has crossed the line so as to render it unfair to use the answers in evidence.

It will always a matter of degree and fact as to whether police questioning has gone too far, recognising the duty of the investigating police officer on the one hand and the right of the suspect on the other hand.

Inadmissible questions at trial are inadmissible in a record of interview also

The fact that the question is asked in a record of interview does not make it admissible. Questions that are inadmissible at trial are, for the very same reasons, inadmissible in a record of interview. Therefore, if a question is not relevant, or is objectionable on any other basis, it will be inadmissible in a record of interview.

The test will be: is the question admissible at trial? If not, you should object and ask for the questions and answers to be taken out of the record of interview.

An example of questioning in a record of interview which would be inadmissible at trial is found in *R v Pritchard* [1991] 1 VR 84 at 93 where the Victorian Court of Criminal Appeal said as follows in relation to the manner of questioning in that case:

> The harm to him [the applicant] was that by the form of questions the police officer was able to convey to the viewer of the tape the undisguised ridicule and derision he entertained about the answers of the applicant given in an endeavour to extricate himself from what obviously were real difficulties. The police would not at the trial have been permitted to express their incredulity or total disbelief in the applicant's answers. Why should they be allowed to do so by the form of questions chosen to be put to the applicant which can be, as they were, so vividly reproduced before the jury at trial?

See also *Graham v The Queen* (1998) 195 CLR 606 at 616.

II: CROSS EXAMINATION BY PROSECUTORS

1. The manner of questions asked in cross examination

S 275A *Criminal Procedure Act* governs questioning in criminal trials. Section 41 *Evidence Act* no longer applies to criminal trials: s 275A(7).

Section 275A relevantly states:

> (1) In any criminal proceedings, the court must disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the court is of the opinion that the question (referred to as a "disallowable question"):
> (a) is misleading or confusing, or
> (b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive, or
> (c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate, or
> (d) has no basis other than a sexist, racial, cultural or ethnic stereotype.
>
> (2) Without limiting the matters that the court may take into account for the purposes of subsection (1), it is to take into account:
> (a) any relevant condition or characteristic of the witness, including age, education, ethnic and cultural background, language background and skills, level of maturity and understanding and personality, and
> (b) any mental, intellectual or physical disability to which the witness is or appears to be subject.
>
> (3) A question is not a disallowable question merely because:
> (a) the question challenges the truthfulness of the witness or the consistency or accuracy of any statements made by the witness, or
> (b) the question requires the witness to discuss a subject that could be considered to be distasteful or private.
>
> (4) A party to criminal proceedings may object to a question put to a witness on the ground that it is a disallowable question.
>
> (5) However, the duty imposed on the court by this section applies whether or not an objection is raised to a particular question.

Section 275A applies to criminal proceedings including committal proceedings, proceedings relating to bail, proceedings relating to sentencing, and proceedings on an appeal against conviction or sentence: s 275A(9).

Although s 275A was introduced to afford protection to complainants in sexual assault trials and to children (see the Attorney General's Second Reading Speech to the Criminal Procedure Further Amendment (Evidence) Bill in the NSW Legislative Assembly Hansard, 23 March 2005) the restrictions on questioning apply equally to questions asked by the prosecution. You may need to remind the Bench of this fact.

Other restrictions relating to the manner of questioning include:

- Section 26 *Evidence Act* - Court's control over questioning of witnesses.

- Section 29 *Evidence Act* – manner and form of questioning witnesses and their responses.

- Section 37 *Evidence Act* – the prohibition on leading questions except in certain circumstances.

- Section 42 *Evidence Act* – leading questions in cross examination.

2. Examples of objectionable questions

The following examples of questions occur in record of interview as well as in cross examination of accused in court.

1. Reversal of the onus of proof: "Why would the complainant/witness/co-accused lie?"

Questions are often asked as to why a complainant, witness or co-accused would lie. This is a frequent question in records of interview. Such questions, in the absence of motive being put forward by an accused, reverse the onus of proof.

In *Palmer v The Queen* (1998) 193 CLR 1 at 7 Brennan CJ, Gaudron and Gummow JJ said:

> It is one thing to permit cross-examination of a complainant in order to elicit, if possible, a motive to lie. It is another thing to permit cross-examination of an accused to show that an accused cannot prove any ground for imputing a motive to lie to the complainant. A complainant knows whether he or she has a motive to lie and, as a motive to lie is a fact that may be proved to impeach the complainant's credit, the complainant may be asked about it. But the fact that an accused has no knowledge of any fact from which a motive of the kind imputed to a complainant in cross-examination might be inferred is generally irrelevant. In general, an accused's lack of knowledge simply means that his evidence cannot assist in determining whether the complainant has a motive to lie."

Where there is no evidence of a motive to lie it is "imprudent and inadvisable" for the Crown to ask jury the question "Why would the complainant lie?": *Smith* [2000] NSWCCA 468. Such a question invites jury to infer that in the absence of any evidence to the contrary there is no motive to lie and therefore the complainant is telling the truth: *Uhrig* Unreported, Court of Criminal Appeal, 24 October 1996. See also *Rich* (1998) 102 A Crim R 165.

2. Breaching the right to silence

A person is entitled, apart from statute, to remain silent and refuse to answer questions asked by the police. The exercise of this right cannot provide a basis for inferring a consciousness of guilt. It is not an admission of guilt by conduct. It cannot fill in any gaps in the prosecution case. It cannot be used as a make-weight in considering whether the

prosecution has proved the accusation beyond reasonable doubt: *Petty v The Queen* (1991) 173 CLR 95; *RPS v The Queen* (2000) 199 CLR 620; *Azzopardi v The Queen; Davis v The Queen* (2001) 205 CLR 50.

The right to silence is contained in s 89 *Evidence Act*, which states:

> (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
> (b) to respond to a representation,
> put or made to the party or other person in the course of official questioning.
>
> (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.

Section 89 is discussed in *Jones v R* [2005] NSWCCA 443.

Questions that breach the right to silence generally do so in three ways:

A. No reply to police at the time of charging

An accused person can not be asked why s/he did not make any comment to the police at the time they were charged.

In *Petty v The Queen* (1991) 173 CLR 95 Mason CJ, Deane, Toohey and McHugh JJ said at 99:

> An incident of that right to silence is that no adverse inference can be drawn against an accused person by reason of his or her failure to answer such questions or to provide such information. To draw such an adverse inference would be to erode the right to silence or to render it valueless … [T]hat incident of the right of silence means that in a criminal trial, it should not be suggested, either by evidence led by the Crown or by questions asked or comments made by the trial judge or the Crown prosecutor that the accused's exercise of the right of silence

> may provide a basis for inferring a consciousness of guilt. Thus, to take an example, the Crown should not lead evidence that when charged, the accused made no reply.

See also *R v Reeves* (1992) 29 NSWLR 109.

B. Selective answering of questions in a record of interview

It cannot be put to an accused that s/he selectively answered questions because of a consciousness of guilt. If the jury are not entitled to draw adverse inferences from an exercise of the right to silence the position should be no different when the right has been exercised selectively: *R v McNamara* (1987) VR 855 at 868; *R v Bruce* (1988) VR 579 at 594.

Selective answering of questions is subject to the discretion to exclude prejudicial evidence which has little or no probative value: *R v Bruce* [1988] VR 579 at 593-594. This discretion is now contained in s 137 *Evidence Act*.

See also *R v Towers* Unreported, Court of Criminal Appeal, 4 November 1992; *R v Lawson* Unreported, Court of Criminal Appeal, 15 March 1993.

C. Defences raised for the first time at trial

If an accused is silent or does not mention a "defence" in a record an interview, this can form the basis of cross examination by the prosecutor as to why this earlier matter or defence was not raised.

This line of cross examination is impermissible, as it cannot be suggested that previous silence about a defence raised at the trial "provides a basis for inferring that the defence is a new invention or is rendered suspect or is unacceptable": *Petty v The Queen* (1991) 173 CLR 95 at 99.

3. Cross examination on the failure to call witnesses in the defence case

Prosecutors sometimes ask questions of accused similar to "Will this witness who you have referred to be giving evidence?" and in the absence of such witnesses make closing submissions that relevant witnesses in the defence case have not been called.

This line of questioning and closing submission relates to the rule in *Jones v Dunkel* (1959) 101 CLR 298. The rule enables a tribunal of fact to infer that if a party fails to call a witness that the evidence that witness could be expected to give would not help that party.

The application of the rule in *Jones v Dunkel* in criminal trials has been discussed in the recent High Court decisions of *RPS v The Queen* (2000) 199 CLR 620 at 632-633 and

Dyers v The Queen (2002) 210 CLR 285 at 327-328 and in subsequent decisions of the Court of Criminal Appeal.

The position is as Judge Goldring states in his article "Failure to Call or Question a Witness" (2006) 44(6) *Law Society Journal* 56: in criminal cases inferences can only be made in very rare cases when the Crown fails to call or question a witness. The rule does not extend to witnesses that may be called by an accused.

4. Evidence that was not cross examined on by an accused's lawyer

Prosecutors frequently question an accused if the accused's lawyer fails to put matters important to the defence case during cross examination. The prosecutor will ask questions similar to "Your lawyer never cross examined on that point, did s/he?" and put to the accused that the accused has made up evidence for the first time in the witness box. In such cases, the prosecutor's closing submissions will argue that this bears upon the accused's credibility.

This situation was discussed in *R v Birks* (1990) 19 NSWLR 677 at 691 where Gleeson CJ observed that it is legitimate to draw appropriate conclusions from counsel's failure to put in cross examination some matter to which his/her client or witnesses subsequently deposes, but it is a process of reasoning which is fraught with peril and should therefore be used only with much caution and circumspection.

Gleeson CJ listed these examples among the many explanations of the omission by an accused's lawyer to put a matter in cross examination:

- Counsel may have misunderstood his instructions.
- The witnesses may not have been fully co-operative in providing statements.
- Forensic pressures may have resulted in looseness or inexactitude in the framing of questions.
- The matter might simply have been overlooked.

Gleeson CJ stated that where the possibility of drawing an adverse inference is left to the jury, the jury should be assisted, generally speaking, by some reference to the sort of factors which he mentioned. Jurors are not familiar with the course of trial or preparation for trial and such considerations may not enter spontaneously into their minds.

Gleeson CJ added at 691-692:

> I would add that one particular matter which makes it difficult to use the conduct of counsel as a basis for drawing inferences of fact is that most jurors are unaware of the principles....relating to the wide discretion available to counsel as to the manner in which a trial may be conducted. It may be easy for a jury, unless given an appropriate warning, to assume that a barrister is merely some kind of 'mouthpiece' for the client, conducting the case in close conformity with the

> client's directions. For reasons that have already been explained, this is far from the truth.

All of these matters suggest explanations for a failure to cross examine on a particular matter which do not reflect upon the credibility of the accused.

5. Being asked to comment on the evidence of other witnesses/co-accused

Accused are asked to comment on the evidence given by another witness, be it the complainant or any other witness. They are often asked to do so in records of interview as well as in evidence.

It is impermissible for any witness to be asked to comment on the evidence another witness.

6. Questions must comply with the rules of evidence

It is important that questioning by prosecutors complies with the rules of evidence.

There are a number of areas of evidence where there are specific requirement. For example, tendency evidence has specific requirements of admissibility, notice and other requirements.

An example of a case that demonstrates how impermissible cross examination can infringe the rules of evidence is *R v Rose* [2002] NSWCCA 455.

The appellant was convicted of the murder of his wife following trial. One of the grounds of appeal was in relation to impermissible questioning by the prosecution. The appellant gave evidence and was cross examined about his use of alcohol and whether he had consumed alcohol on the day the deceased went missing.

The Court of Criminal Appeal held that that evidence was relevant to the nature of the relationship and why it had broken up. However, the evidence was used as propensity reasoning (tendency evidence). The Court held that the Crown went too far in its cross-examination of the appellant in respect of his use of alcohol and, in particular, as to whether he had consumed alcohol on the day the deceased went missing. Even if it was accepted that the evidence of the appellant's use of alcohol during the on-going relationship with the deceased was relevant to the nature of that relationship and why it had broken-up, it had no relevance to the issue of whether he was violent to the deceased on the day she went missing. The evidence as to whether the appellant had a problem with alcohol and had sought counselling in that respect had little, if any, relevance except perhaps to his credit but it carried the real risk of leading the jury into the propensity reasoning upon which the Crown relied in its final address.

7. Misleading or confusing questions

Questions that are misleading or confusing are specifically dealt with pursuant to s 275A(1)(a) *Criminal Procedure Act*.

8. Cross examination as to credibility

An accused is not to be cross examined as to credibility unless s 104 *Evidence Act* applies. Note that leave (s 192 *Evidence Act*) must be granted before such cross examination can occur.

III. DISCRETIONARY EXCLUSION OF ANSWERS IN RECORDS OF INTERVIEW AND CROSS EXAMINATION

In addition to the specific grounds referred to above that questions may be objected to, always consider whether questions can be excluded in the exercise of the Court's discretion.

Questions in records of interview and in evidence may be relevant and admissible at face value, but they may be prejudicial. In other situations, even though a record of interview may met the requirements for admissibility, it may contain questions that may be considered so prejudicial that an accused would not seek to put before the jury even self serving responses to such questions: *R v Rymer* (2005) 156 A Crim R 84.

Section 137 *Evidence Act* is the applicable section and concerns the exercise of the following discretion:

> 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 the defendant.

See *R v Graham* Unreported, Court of Criminal Appeal, 2 September 1997 at 9–10; *Graham v The Queen* (1998) 195 CLR 606 at 616–617.