

Bashing Cunning Constables, Torching ERISP Interviews –

An Anarchist's Guide to Section 84 of the *Evidence Act 1995 (NSW)*

March 2017 Edition

“He’s a very cunning constable your Honour!”

Defence submission on the voir dire.

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This paper is written from the defence perspective. It represents something of a “cheat sheet”, “skeleton outline” or summary of the essential law pertaining to section 84 of the *Evidence Act 1995 (NSW)* for those contemplating challenging the admissibility of admissions made or allegedly made by an accused person in criminal proceedings.

For further information on this area of the law practitioners would consult the usual texts and online services. In addition, this author has also written an earlier paper on the topic entitled [“Oppressive Conduct and Section 84 of the Evidence Act 1995 \(NSW\) – A Case Study Concerning *R v Sumpton* \[2014\] NSWSC 1432”](#). That paper can also be found on the Evidence page of www.CriminalCPD.net.au.

Section 84 of the *Evidence Act 1995 (NSW)* reads as follows:

84 Exclusion of admissions influenced by violence and certain other conduct

- (1) Evidence of an admission is not admissible unless the court is satisfied that the admission, and the making of the admission, were not influenced by:
 - (a) violent, oppressive, inhuman or degrading conduct, whether towards the person who made the admission or towards another person, or*
 - (b) a threat of conduct of that kind.**
- (2) Subsection (1) only applies if the party against whom evidence of the admission is adduced has raised in the proceeding an issue about whether the admission or its making were so influenced.*

Definition of Oppressive Conduct

In *R v Sumpton* [2014] NSWSC 1432 Hamill J noted with approval the definition of “oppression” as found in *R v Fulling* [1987] 2 All ER 65. His Honour stated:

*“[128] The Court also referred to the case of *R v Fulling* (supra) and the differences between s 84 and the relevant provisions in s 76 of the PACE Act. It noted that in *R v Fulling* (supra) the Court adopted the dictionary definition of “oppression” namely “... [the] exercise of authority or power in a burdensome, harsh or wrongful manner; unjust or cruel treatment of subjects, inferiors etc.; the imposition of unreasonable or unjust burdens”*

“[129] The Crown accepts that this is an appropriate basis upon which to consider the question of whether the impugned admissions were influenced by “oppressive” conduct.”

His Honour went on to accept and apply this definition at [134]:

"[134] Having considered the matter anxiously, I have concluded that the accused was subjected to conduct that can properly be described as "oppressive". It involved the exercise of authority and power in a burdensome, harsh and wrongful manner and imposed on the accused unreasonable and unjust burdens."

Note that this is the ONLY decided case in NSW that provides a working definition for oppressive conduct for the purposes of section 84 of the *Evidence Act* at the time of writing (March 2017).

For a summary of the facts that were cumulatively held to amount to oppressive conduct in *Sumpton* see Hamill J at [135].

What Amounts to Oppressive Conduct May Not Be Any Single Factor, But May Be An Accumulation of Factors.

Simpson J in *R v Ye Zhang* [2000] NSWSC 1099 stated at [44]:

"...However, s 84 does not require the isolation of a single reason, or a single event or incident or instance of conduct provoking the confession; there may be a number of factors working together that, combined, cause the admission to be made..."

This statement was later approved of by the NSWCCA in *Higgins v R* [2007] NSWCCA 56 - see Hoeben J at [26] (Sully and Bell JJ concurring).

Oppressive Conduct Need Not Be The Only, Nor The Dominant Factor When The Issue Is Raised

In *Habib v Nationwide News Pty Ltd* [2010] NSWCA 34, 76 NSWLR 299 the Court in a joint judgment (Hodgson JA, Tobias JA and McColl JA) at [238] cited with approval the remarks of Simpson J in *R v Ye Zhang* [2000] NSWSC 1099 at [44]:

"If oppressive conduct on the part of police is one of those factors (or, more accurately, if the Crown has failed to negative such conduct as one of those factors) then the evidence is inadmissible."

Oppressive Conduct is Not Limited to Physical Acts and May Include Psychological or Emotional Pressure

Hoeben J in *Higgins v R* [2007] NSWCCA 56 stated at [26]:

"I also accept that there is no definition of "oppressive" in the Act and that the concept should not be limited to physical or threatened physical conduct but can encompass mental and psychological pressure."

The Issue of Oppressive Conduct Must Be Raised by the Defence

A reading of subsection (2) of section 84 indicates that the issue of oppressive conduct must be raised in the evidence by the accused.

The accused DOES NOT have to positively prove the facts relied upon in the evidence. For support from the decided cases see the passage from *R v Ye Zhang* [2009] NSWSC 1099 at [44] immediately below, as affirmed by the NSW Court of Appeal in *Habib v Nationwide News Pty Ltd* [2010] NSWCA 34, 76 NSWLR 299 at [229].

Once Raised the Issue Must Be Negated By the Prosecution on the Balance of Probabilities

In *R v Ye Zhang* [2000] NSWSC 1099 Simpson J stated at [44]:

"[44]....If oppressive conduct on the part of police is one of those factors (or, more accurately, if the Crown has failed to negative such conduct as one of those factors) then the evidence is inadmissible."

This passage was approved of by the NSW Court of Appeal in *Habib v Nationwide News Pty Ltd* [2010] NSWCA 34, 76 NSWLR 299 at [229].

The need for the prosecution to prove that the evidence was not so obtained on the balance of probabilities arises as a result of section 142 of the *Evidence Act 1995 (NSW)* which states:

142 Admissibility of evidence: standard of proof

- (1) Except as otherwise provided by this Act, in any proceeding the court is to find that the facts necessary for deciding:
 - (a) a question whether evidence should be admitted or not admitted, whether in the exercise of a discretion or not, or*
 - (b) any other question arising under this Act,*have been proved if it is satisfied that they have been proved on the balance of probabilities.*
- (2) In determining whether it is so satisfied, the matters that the court must take into account include:
 - (a) the importance of the evidence in the proceeding, and*
 - (b) the gravity of the matters alleged in relation to the question.**

If Oppressive Conduct is Not Negated, There is No Discretion to Allow the Evidence

Section 84 does not provide a discretion to allow the evidence.

Should there be a need for authority in support of this proposition see Simpson J in *R v Ye Zhang* [2000] NSWSC 1099 at [44]. See also Hamill J in *R v Sumpton* [2014] NSWSC 1432 at [140]-[141] where his Honour stated:

"[140] I am not satisfied, as a matter of fact, that the confession was not influenced by oppressive conduct which is to say conduct whereby the accused was subject to the exercise of police powers that was wrongful, burdensome, unjust and harsh."

"[141] Having reached that conclusion, there is no discretion. The evidence must be excluded."

Causation – Voluntariness Is NOT the Test

In *Habib v Nationwide News Pty Ltd* [2010] NSWCA 34, 76 NSWLR 299 the Court (Hodgson JA, Tobias JA and McColl JA) stated at [237]

"[237] As we have said, under the common law voluntariness rule, the question was whether the will of the confessionalist was overborne by the allegedly improper conduct. This language is still used in some judgments. In Higgins v R [2007] NSWCCA 56 (at [28]) Hoeben J (Sully and Bell JJ agreeing) referred to the lack of evidence that "[the maker's] will was overborne in any way". However, as Adams J observed in R v Ul-Haque [2007] NSWSC 1251; (2007) 177 A Crim R 348 (at [120]), that is not the relevant test under s 84."

Causation – "Not Influenced By" IS the Test

In *R v Ul-Haque* [2007] NSWSC 1251, 177 A Crim R 348 Adams J at [120] stated:

*"[120] It was submitted that I should infer from the fact that there were occasions during the interviews when the accused did not accept a suggestion from the officers that he was therefore not really compliant and his will had not been overborne by what had earlier occurred. **Firstly, this is not the relevant test under s84 of the Evidence Act 1995. The question is whether the prosecution can show that the accused was not influenced by the oppressive conduct.**"*

This passage was approved of by the NSW Court of Appeal in *Habib v Nationwide News Pty Ltd* [2010] NSWCA 34, 76 NSWLR 299 the Court (Hodgson JA, Tobias JA and McColl JA) at [237].

What Does “Not Influenced By” Actually Mean?

In *Habib v Nationwide News Pty Ltd* [2010] NSWCA 34, 76 NSWLR 299 the Court (Hodgson JA, Tobias JA and McColl JA) stated at [238]

“[238] The Macquarie Dictionary Online defines “influence”, relevantly, to mean “modify, affect, or sway”, while the Oxford English Dictionary Online refers to “influence” as to “affect the mind or action or; to move or induce by influence” and also “to affect the condition of, to have an effect on”. Neither of these definitions evokes a particularly high test of causation.”

Causation - The Threshold is Not High

In *Habib v Nationwide News Pty Ltd* [2010] NSWCA 34, 76 NSWLR 299 the Court (Hodgson JA, Tobias JA and McColl JA) stated at [238]-[240]:

*“[238] The Macquarie Dictionary Online defines “influence”, relevantly, to mean “modify, affect, or sway”, while the Oxford English Dictionary Online refers to “influence” as to “affect the mind or action or; to move or induce by influence” and also “to affect the condition of, to have an effect on”. **Neither of these definitions evokes a particularly high test of causation.**”*

“[239] In R v Zhang [2000] NSWSC 1099 (at [44]), Simpson J held that:

“...s 84 does not require the isolation of a single reason, or a single event or incident or instance of conduct provoking the confession; there may be a number of factors working together that, combined, cause the admission to be made. If oppressive conduct on the part of police is one of those factors (or, more accurately, if the Crown has failed to negative such conduct as one of those factors) then the evidence is inadmissible.” (emphasis added)”

*[240] Hoeben J cited Simpson J’s statement with approval in Higgins (at [26]). Refshauge J cited Simpson J’s comments in R v JF (at [32]), as establishing that **“the test to determine the causal relationship between the conduct and the admission is not a stringent test”.***

Acknowledgments

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Also a huge shout out to Gordy, Big Kev & The Gang, as well as Jim and Gina’s “Spartan Takeaway” on Cobra Street (best pizzas EVER).

Need Help?

If you are a criminal defence lawyer with a headache concerning this area of the law I am happy to help. I am best caught on my mobile – **0408 277 374**. Please respect the “no fly zone” on my phone in the hour or so leading up to the commencement of the court day – I am busy sweating on my case too :-b. Other than that you are fine to ring anytime including out of hours if it is an urgent headache. Alternatively, you might wish to email me. I will almost always reply within 24 hours. My email remains:

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I have endeavoured to state the law of New South Wales as at 14 March 2017.

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