Admissions to Police

ss84-86 & 138 Evidence Act (NSW) 1995

No one has to answer police questions beyond giving their name and address. Yet criminal defence lawyers are regularly confronted with cases where the police assert that the defendant has made admissions. Every defence lawyer needs to know how to apply to have these admissions excluded from evidence. This article seeks to assist legal practitioners appearing in the Local Court of NSW.

Admissions

The Dictionary of the Evidence Act defines this term as a previous representation that is:

> (a) *made by a person who is or becomes a party to a proceeding (including a defendant in a criminal proceeding), and*
> *(b) adverse to the person's interest in the outcome of the proceeding.*

There are four bases to apply to have such statements excluded from evidence in a criminal hearing. They are:

1. The ban on written statements that have not been adopted,
2. Admissions affected by violence or threats,
3. Admissions made in circumstances likely to make them unreliable, and
4. The judicial discretion to exclude improperly of illegally obtained evidence.

Any of these applications will require questions of fact to be determined on a voir dire.

Ban On Oral Admissions

In the bad old days police would regularly give evidence that the defendant had made an oral confession but refused to acknowledge it in writing. Such defendants were referred to as being 'verballed'. Section 86 put a stop to this practice by providing that oral admissions are not admissible unless electronically recorded or acknowledged in writing. This has been interpreted as preventing the admission of oral admissions.[1] Note that this only applies to admissions made in response to questions from an investigating official.

Violence and Threats

Section 84 provides that evidence of an admission is not admissible unless the court is satisfied that it's making was 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.*

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[1] The Queen v Gregory Martin Hinton [1999] ACTSC 20 (16 March 1999)

'Oppressive' conduct is not limited to physical conduct and can be mental or psychological pressure.[2] It is also not limited to conduct or threats from the police – it could be from any person.[3] The police carry the burden of negativing a causal link between the conduct and the making of the admission.

Reliability

Section 85 only applies in criminal proceedings and only to admissions made to an investigating official or a person capable of influencing the decision to prosecute the defendant. Such an admission is not admissible:

> '. . . *unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected.*'[4]

So the prosecution carries the burden of demonstrating reliability in cases where the truth of an admission may be in doubt due to the circumstances in which it was made. The question is not whether the circumstances did in fact affect the truth of the admission but whether they were likely to do so. The concern is with the methods used to obtain the admission rather than whether it is in fact true.

Whether the admission is true or not is not relevant unless the defendant chooses to raise the issue. In fact, the defendant cannot be asked in the voir dire if the admission is true or not.[5] The defendant would only choose to raise the issue if he could show that the admission is false as this suggests that it was induced by the circumstances.

Finally, the court is required to consider the personal circumstances of the defendant in analysing the circumstances in which the admission was made. This includes, but is not limited to, age, education, personality and physical or mental disability.[6]

Improperly or Illegally Obtained Evidence

The final basis to exclude admissions is pursuant to judicial discretion under s138 which provides that such evidence:

> '*is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence obtained in the way in which it was obtained.*'

This discretion specifically applies to admissions and requires the court to examine:

> *(a) whether the police did something to substantially impair the defendant's ability to respond rationally to the questioning, or*
> *(b) lied to induce the admission.*

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[2] Higgins v The Queen [2007] NSWCCA 56 at [26] per Hoeben J (Sully & Bell JJ agreeing)
[3] R v GH (2000) 105 FCR 419 at [40]
[4] s85(2) Evidence Act (NSW) 1995
[5] s189(3) Evidence Act (NSW) 1995
[6] s85(3)(a) Evidence Act (NSW) 1995

Section 138(3) then gives a non-exhaustive list of matters the court may take into account. These include:

- probative value,
- importance in the proceeding,
- nature of the offence,
- gravity of the impropriety,
- whether it was deliberate or reckless,
- whether it breached the International Covenant on Civil & Political Rights,
- whether any action will be taken in relation to the impropriety, and
- the difficulty of obtaining the evidence without the impropriety.

Counsel should make submissions on each of these matters that apply.

The Voir Dire

An application to exclude the document under any of these provisions will require a voir dire. The burden of proof is on the balance of probabilities.[7] Where voluntariness is in dispute the onus is on the Crown. Where discretion is in dispute, the onus is on the accused.[8] The focus is on the circumstances of making the admission and so the accused cannot be asked if the statements in the admission were true.[9]

Submissions

Counsel should get clear written instructions from the client regarding the circumstances of the admission including any threats, promises or tricks used to procure it. Once the application is made, a voir dire will be held to determine the facts and counsel will make submissions regarding each of the four bases that apply.

If you have any interesting issues, I'm available every day.

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[7] s142 Evidence Act (NSW) 1995
[8] Bodsworth [1968] 2 NSWLR 132
[9] s189 Evidence Act (NSW) 1995