ance through an agent is possible; and there should be no reason why the court could not imply into the ability of the authority to employ an agent, a limitation that the use, and choice, of any agent be a reasonable action.

The courts in the past have often assumed that the maxim *delegatus non potest delegare* lays down a rule of rigid application. The High Court, in recognising a distinction between the delegation of a power and the exercise of that power through servants or agents, has provided a mechanism for avoiding the undesirable consequences such a rigid application might lead to. Legal maxims often owe their existence more to theoretical niceties than to the realities of life. Fortunately, the High Court's interpretation and application of the *alter ego* principle has not suffered a similar fate.

ANDREW CHRISTIE*

CLELAND v. THE QUEEN[1]

Criminal Law — Evidence — Confession — Confession made by accused while unlawfully detained by police officers — Crimes Act 1958 (Vic.) s.460 — Judicial discretion to exclude voluntary confession — Voluntary and not unfair to admit — Application of Bunning v. Cross — Whether a judicial discretion to exclude the confession on grounds of public policy is attracted.

The facts

The applicant had been convicted in the Supreme Court of South Australia of shopbreaking, larceny, and armed robbery. The evidence against him was based upon an oral confession allegedly given to police in Melbourne. The applicant and another were arrested in Melbourne shortly after 1.00 p.m. on 9 April 1981, and both were taken to Russell Street Police Station. The applicant reached Russell Street at 2.00 p.m., and remained there until midnight. At about 8.35 p.m. the police began to question the applicant and the procedure continued for most of the evening. It was during this time that the alleged confession took place.

Shortly before midnight both men were charged, but the applicant was not brought before a justice or a magistrate until the next day. By reason of section 460 of the Crimes Act 1958, the applicant's detention after 5.30 p.m. was unlawful, and it was during this detention that the confession was made.

The issue

The applicant sought special leave to appeal to the High Court on three grounds. It was the first of these grounds which provides the focal point of this discussion.

The submission made on behalf of the applicant with respect to the first ground was that the learned trial judge, in exercising his discretion to exclude a confession voluntarily made, failed to take into account the discretionary principle in *R. v. Lee*,[2] and regarded the relevant principles as being those stated in *R. v. Ireland*[3] and *Bunning v. Cross*.[4] In support of the application for special leave to appeal, it was submitted that there had been a difference of opinion among judges of the Supreme Court of South Australia as to whether the principles of *Bunning v. Cross* had any

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1 (1982) 43 A.L.R. 619.
2 (1950) 82 C.L.R. 133.
3 (1970) 126 C.L.R. 321.
4 (1978) 141 C.L.R. 54.

application to confessional evidence, or were confined to real evidence, and that the question was of such importance that it should be resolved by the High Court.

It is appropriate at this stage to look at the background provided by Australian authority,[5] against which the High Court sought to resolve the question.

Confessional evidence

A voluntary confession made by an accused is legally admissible as evidence. The classic formulation of this rule is the enunciation of Dixon J. in *McDermott v. R.*[6]

> At common law a confessional statement made out of court by an accused person may not be admitted in evidence against him upon his trial for the crime to which it relates unless it is shown to have been voluntarily made. This means substantially that it has been made in the exercise of his free choice. If he speaks because he is overborne, his confessional statement cannot be received in evidence and it does not matter by what means he has been overborne. If this statement is the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure, it cannot be voluntary. But it is also a definite rule of the common law that a confessional statement cannot be voluntary if it is preceded by an inducement held out by a person in authority and the inducement has not been removed before the statement is made.[7]

The rational basis of this principle is that the accused may be induced by hope or fear to incriminate himself falsely, and that such statements are therefore possibly unreliable as evidence.[8] In *R. v. Baldry*,[9] Lord Campbell C.J. said,

> it would not be safe to receive a statement made under any influence or fear. There is no presumption of law that it is false or that the law considers such statement cannot be relied upon; but such confessions are rejected because it is supposed that it would be dangerous to leave such evidence to the jury.[10]

Deane J. in *Cleland v. R.*[11] agreed that,

> the rational basis of a confessional statement if it be shown to be voluntary should be seen as a combination of the potential unreliability of a confessional statement that does not satisfy the requirement of voluntariness and the common law privilege against self-incrimination.[12]

Exclusion of voluntary confessions

Alongside the development of the rule that only a confession voluntarily made would be admissible as evidence grew the precept that, under certain circumstances, the judge had a discretion to exclude a voluntary confessional statement as evidence.[13] In Australia, the rule was laid down in *R. v. Lee*,[14] where their Honours held, according to the headnote, that,

[5] In England the only basis for the exclusion of evidence illegally obtained is that it would operate unfairly against the accused if it was admitted.

[6] (1948) 76 C.L.R. 501.

[7] *Ibid.* 511. These principles were restated in the joint judgment of Gibbs C.J. and Wilson J. in *MacPherson v. R.* (1981) 55 A.L.J.R. 594, 596.

[8] *R. v. Warwickshall* (1783) 1 Leach 263.

[9] (1852) 2 Den. C.C. 430.

[10] *Ibid.* 442.

[11] (1982) 43 A.L.R. 619.

[12] *Ibid.* 632.

[13] The origins of the discretionary rule are traced by Lord Sumner in *Ibrahim v. R.* [1914] A.C. 559, and referred to in *R. v. Lee* (1950) 82 C.L.R. 133, 148. Weinberg M., 'The Judicial Discretion to Exclude Relevant Evidence' (1975) 21 *McGill Law Journal* 1, 7-25 traces the history of the exclusionary rule; and at 41 states that 'the existence of an exclusionary discretion stems from dubious legal sources. In particular, the judgments of Lords Moulton and Reading in the leading case of *R. v. Christie* [[1914] A.C. 545] are based on a serious misreading of earlier decisions and their judgments form the basis of many subsequent judicial statements on the discretion'.

[14] (1950) 82 C.L.R. 133.

> [i]f it is voluntary, circumstances may be proved which call for the exercise of discretion. . . . The discretion rule represents an exception to a rule of law, and it is for the accused to bring himself within the exception. The question for the presiding judge in considering the exercise of the discretion is whether in all the circumstances it would be unfair to use the statement against the accused, regard being had to the propriety of the means by which the statement was obtained.[15]

There does not appear to have been any single line of reasoning which lay behind the emergence of this doctrine; and their Honours in the above-mentioned case intimated that, '[t]he introduction of a discretionary rule may be considered by some to be, on the whole, unnecessary'.[16] But they stated, 'we do not think that this Court ought to interfere by denying the existence of such a discretion'.[17]

Thus, one can reasonably surmise that after the decision in *R. v. Lee* it was established in Australian law that there existed a judicial discretion to reject confessional statements, notwithstanding that they were voluntarily made, if it would be unfair to the accused to use that statement.

The emergence of the Bunning v. Cross doctrine

Apart from the particular discretion to exclude evidence of a voluntary confessional statement, a trial judge has a more general discretion to exclude evidence of relevant facts or information ascertained or procured by unlawful or improper conduct on the part of those whose task it is to enforce the law. Barwick C.J. in *R. v. Ireland*[18] stated that,

> evidence of facts or things so ascertained or procured is not necessarily to be admitted, ignoring the unlawful or unfair quality of the acts by which the facts sought to be evidenced were ascertained or procured. Whenever such unlawfulness or unfairness appears, the judge has a discretion to reject the evidence. He must consider its exercise. In the exercise of it, the competing public requirements must be considered and weighed against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand there is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion.[19]

This principle was restated in *Bunning v. Cross*,[20] and it was added by their Honours that that statement represented the law in Australia.[21] Deane J., in *Cleland v. R.*[22] added that,

> [t]he rationale of this principle is to be found in considerations of public policy, namely, the undesirability that such unlawful or improper conduct should be encouraged either by the appearance of judicial approval or toleration of it or by allowing curial advantage to be derived from it. Its application involves a weighing, in the particular circumstances of each case, of the requirement of public policy

[15] *Ibid.* 134.
[16] *Ibid.* 149-50.
[17] *Ibid.*
[18] (1970) 126 C.L.R. 321.
[19] *Ibid.* 334-5.
[20] (1978) 141 C.L.R. 54.
[21] *Ibid.* 64-5, 72. There is a marked difference between the approach taken in *R. v. Ireland* (1970) 126 C.L.R. 321 and *Bunning v. Cross* on the one hand, and by the Judicial Committee on the other hand. In *Karuma v. R.* [1955] A.C. 197, 204, Lord Goddard C.J., speaking for their Lordships acknowledged that, 'the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused'. Thus, in England the only basis for the exclusion of evidence illegally obtained is, if it would operate unfairly against the accused if it were admitted. However, it was clearly evident from Dixon C.J.'s statements in *Wendo v. R.* (1963) 109 C.L.R. 559, that he did not believe that *Karuma's* case 'had been put at rest', and this continues to be the apparent position in Australia today.
[22] (1982) 43 A.L.R. 619.

> that the wrong-doer be brought to conviction and the competing requirement of public policy . . . namely, that the citizen should be protected from unlawfulness or impropriety in the conduct of those entrusted with the enforcement of the law.[23]

The confusion arises

In *Bunning v. Cross*, Stephen and Aickin JJ. referred to the statement of principle enunciated in *R. v. Ireland*,[24] and were of the view that that principle would have a limited operation in relation to confessional evidence, being principally applicable to 'real' evidence. They said that the discretion in *R. v. Ireland*

> applies only when the evidence is the product of unfair or unlawful conduct on the part of the authorities. . . . Moreover it does not entrench upon the quite special rules which apply to the case of confessional evidence. Its principal area of operation will be in relation to what might loosely be called 'real evidence', such as articles found by search, recordings of conversations, the result of breathalyzer tests, fingerprint evidence and so on.[25]

Mitchell J. in *R. v. Barker*,[26] after referring to the above remarks of Stephen and Aickin JJ. in *Bunning v. Cross*, said,

> I do not understand that passage as excluding evidence of a confessional nature from evidence in respect of which the two competing requirements of public policy have to be weighed. If that were what the learned Judges meant then I do not think that they would have referred to the 'principal area of operation' but to the 'area of operation' of the discretionary process referred to in *Ireland's* case (1970) 12 C.L.R. 321. Nor would the reference to *Wendo's* case (1963) 109 C.L.R. 559 have been appropriate had the principle not applied in the case of confessional evidence. I understand the reference to 'the quite special rules which apply to the case of confessional evidence' to mean that those rules are not to be eroded by the application of the test in *Ireland's* case, but that in the case of confessional evidence, both sets of rules apply. So that where confessional evidence is improperly obtained it is not sufficient that the weight of public policy favours its admission. It remains necessary to decide whether the evidence should be excluded upon the ground of unfairness to the accused. Of course in many, if not all, cases where the evidence passes one test it will survive the other and that is why the test is *Ireland's* case will ordinarily be called for only in the case of 'real' evidence. But there seems to me to be no logical reason to limit the test to 'real' as opposed to 'confessional' evidence. Nor do I read *Bunning v. Cross* as so doing.[27]

However, in that particular case, Wells J. indicated that in his view none of the principles laid down in *Bunning v. Cross* had any application to the rules governing involuntariness of confessions, nor to the discretionary exclusion of voluntary confessions. He added that the discretion was governed by the principles laid down in *R. v. Lee*,[28] and the key principle was that of 'unfairness'. Wells J. reiterated these views in *R. v. Lavery (No. 2)*[29] gaining the entire agreement of Walters J. However, the judicial trend emerging in the Supreme Court of South Australia was to endorse the approach of Mitchell J.,[30] and in *R. v. Szach*[31] the Court of Criminal Appeal (comprising King C.J., Legoe and Mohr JJ.) endorsed Mitchell J.'s view in preference to that of Wells J.

In *Collins v. R.*[32] the Full Court of the Federal Court of Australia also expressed

[23] *Ibid.* 633.
[24] (1970) 126 C.L.R. 321.
[25] (1978) 141 C.L.R. 54, 75.
[26] (1978) 19 S.A.S.R. 448.
[27] *Ibid.* 451. Her Honour in *R. v. Killick* (1979) 21 S.A.S.R. 321, excluded certain confessional evidence by a simple application of *Bunning v. Cross* principles, without any consideration at all as to whether the 'unfairness' principle was made out.
[28] (1950) 82 C.L.R. 133.
[29] (1979) 20 S.A.S.R. 430.
[30] *R. v. Austin* (1979) 21 S.A.S.R. 315; *R. v. Killick* (1979) 21 S.A.S.R. 321.
[31] (1980) 23 S.A.S.R. 504.
[32] (1980) 31 A.L.R. 257.

differing views on this issue. Bowen C.J. stated that the 'unfairness' test was the only test which governed the exercise of the discretion. However, Muirhead and Brennan JJ. disagreed, each expressing the view that there was no reason why the *Bunning v. Cross* principles should be confined to real evidence. However, Brennan J. acknowledged that,

> [f]actors of the kind which, in *Ireland's* case and in *Bunning v Cross,* were said to be relevant in exercising a discretion with respect to the admission of real evidence, may be relevant in exercising a discretion with respect to the admission of voluntary confessions, but it is difficult to conceive of a case — though I do not say such a case could never arise — where a voluntary confession which might fairly be admitted against an accused person would be rejected in the public interest because of the unlawful conduct leading to the making of the confession. When the admission of confessional evidence is in question, the material facts are evaluated primarily to determine whether it is unfair to the accused to use his confession against him, and it would only be in a very exceptional case that the residual question would arise as to whether the public interest requires the rejection of the confession.[33]

It is therefore evident that, due to the divergence of opinion of the applicability of *Bunning v. Cross* principles to confessional evidence, it was difficult to elicit a clear principle of law; and it was this question which the High Court felt was of sufficient importance to justify the grant of special leave to appeal.

The decision: a pragmatic solution?

It is one thing for the High Court to seek to resolve the confusion which had arisen in the area of the admissibility of confessional statements voluntarily made, but, as the result of the present case illustrates so well, quite another thing for it to elicit clear and expedient principles of law for future application.

Gibbs C.J. (with whom Wilson J. agreed) and Deane and Dawson JJ. were in agreement that there can be no doubt that the principles laid down in *R. v. Lee*[34] remained quite unaffected by *R. v. Ireland*[35] and *Bunning v. Cross.*[36] Gibbs C.J. intimated that,

> [i]t would be absurd to suppose that the established rule designed to protect an accused person from being convicted on evidence which it would be unfair to use against him can be weakened by a new doctrine whose purpose is 'to insist that those who enforce the law themselves respect it'.[37]

Deane J. described the rules governing the admissibility of confessions and the discretionary power to exclude as, 'the quite special rules which apply to the case of confessional evidence',[38] and was in entire agreement with Gibbs C.J. that,

> there is nothing in the development or context of the more general principle involving the discretionary rejection of unlawfully or improperly obtained evidence of an alleged confessional statement which could warrant abrogation or modification of the well-established principle that evidence of an alleged confessional statement should not be admitted if its reception would be unfair to the accused.[39]

Deane J. stated that the *Bunning v. Cross* principles did not entrench upon the quite special rules which applied in the case of confessional evidence, and added,

> [n]or, in my view, is there anything in what was said in this court in *Bunning v. Cross* which would warrant conclusion that the discretion to exclude unlawful and improperly obtained evidence is inapplicable to the case of confessional evidence.[40]

[33] *Ibid.* 317.
[34] (1950) 82 C.L.R. 133.
[35] (1970) 126 C.L.R. 321.
[36] (1978) 141 C.L.R. 54.
[37] (1982) 43 A.L.R. 619, 624.
[38] *Ibid.* 634.
[39] *Ibid.* 633.
[40] *Ibid.* 636.

The Honours (with the exception of Murphy J. who did not decide on this issue) having surmised that the rule in *R. v. Lee*[41] was not affected by the principles laid down in *Bunning v. Cross*, then sought to examine whether the principles in *Bunning v. Cross* had any application to confessional evidence cases, in addition to real evidence cases.

It may be tentatively proposed at this point that the majority of judges of the High Court[42] held that *Bunning v. Cross* principles were applicable in confessional evidence cases, but that there were basic differences in their respective viewpoints as to the scope encompassed by the judgment.

Gibbs C.J., having stated that the rule in *Bunning v. Cross* was not confined to real evidence cases, added that, 'there is no general rule that the court will reject evidence illegally obtained', and '[o]n the contrary, the rejection of confessional evidence for this reason alone is most exceptional'.[43] His Honour then went on to say,

> I respectfully agree with the statement of Brennan J. in *Collins v. R.* (1980) 31 A.L.R. 257 at 317 that 'it is difficult to conceive of a case . . . where a voluntary confession which might fairly be admitted against an accused person would be rejected in the public interest because of the unlawful conduct during the making of the confession. . . . When the admission of confessional evidence is in question, the material facts are evaluated primarily to determine whether it is unfair to the accused to use his confession against him, and it would be only in a very exceptional case that the residual question would arise as to whether the public interest requires the rejection of the confession'. Further, if the use of the confession would not be unfair to the accused, it is difficult to see why the accused can be heard to complain if the judge does not reject the confession on the ground that it was unlawfully obtained, since the purpose of rejecting the evidence on that ground is to ensure the observance of the law, rather than the fairness of the trial.[44]

Gibbs C.J. held, therefore, that where the extraction of a voluntary confession had been attended with illegality, and it would not be unfair to use it, the court still had a discretion to reject the evidence on the principles considered in *Bunning v. Cross*.[45] Here the evidence was unlawfully obtained, but rejection of confessional evidence for this reason alone would be most exceptional.

Dawson J. was also of the view that it would be rare for a voluntary confession which might fairly be admitted against an accused person to be rejected in the public interest because of unlawful conduct leading to the making of the decision. His Honour stated,

> [t]he rule in *Bunning v. Cross* posits an objective test, concerned not so much with the position of an accused individual but rather with whether the illegal or improper conduct complained of in a particular case is of sufficient seriousness or frequency of occurence as to warrant sacrificing the community's desire to see the guilty convicted in order to express disapproval of, and to discourage, the use of unacceptable methods in achieving that end. The rule in *Bunning v. Cross* entails its own considerations. Theoretically at least, it is conceivable that notwithstanding that it may not be unfair to the accused to admit a confessional statement in evidence, the competing policy requirements referred to in *Bunning v. Cross* may require the rejection of the evidence in the discretion of the trial judge. No doubt such instances will be rare for, on the one hand, the law is markedly sensitive in the area of confessional statements and, on the other hand, the exercise of the discretion to reject relevant evidence on the ground that the public interest in the protection of the individual from unlawful or improper treatment outweighs the public need to bring to conviction those who commit criminal offences will not lightly be made.[46]

[41] (1950) 82 C.L.R. 133.
[42] Gibbs C.J., Wilson, Deane and Dawson JJ.
[43] (1982) 43 A.L.R. 619, 624.
[44] *Ibid.* 624-5.
[45] (1978) 141 C.L.R. 54.
[46] *Ibid.* 644-5.

Had Dawson J. terminated his judgment at that point, one would have reasonably concluded that the principles in *Bunning v. Cross*[47] were to apply to confessional evidence as a residual question after the unfairness question had been applied. However, it may be that Dawson J. surmized that the *Bunning v. Cross* discretion is no longer a consideration in the exercise of the *R. v. Lee*[48] discretion. Considerations of fairness in the exercise of the *R. v. Lee* discretion must now be limited to whether it would be unfair to the accused to admit the evidence because of the unreliability arising from the means by which, or the circumstances in which, it was procured. Illegality or impropriety would commonly need to exist before the balancing of public considerations would fail to favour the admission of the confessional evidence.

Dawson J., in support of this proposition, held,

> [w]hatever may have been the position before *Bunning v. Cross*, that decision makes it clear, in my view, that balancing of public interests which now forms the basis for the discretionary rejection of improperly or illegally obtained evidence, including evidence of confessional statements, is no longer a consideration in the exercise of the older discretion to exclude evidence of confessional statements. Such policy consideration as may have hitherto played a part in the exercise of that discretion have now been extracted to form a part of the new and wider discretion affirmed in *Bunning v. Cross*. Considerations of fairness in the exercise of the older discretion relating to the exclusion of evidence of confessional statements must now be limited to fairness in the sense of fairness to the accused, whether it would be unfair to the accused to admit the evidence because of the unreliability arising from the means by which, or the circumstances in which, it was procured. To view the situation otherwise would be to produce confusion because the newer discretion arising out of the decision in *Bunning v. Cross*, since it applies to all evidence, confessional or otherwise, necessarily encompasses the same policy considerations which may have hitherto played some part in the exercise of the discretion limited to evidence of confessional statements. Any function which the older discretion performed with regard to those policy consideration is not being performed by the application of the rule in *Bunning v. Cross*.[49]

Thus, it may be posited that some illegality will need to attend the confession before the *Bunning v. Cross* rule is applied.

Deane J., held that,

> the considerations of public policy which constitute the rationale of the discretion to exclude unlawfully or improperly obtained evidence may be plainly, indeed particularly, appropriate in the case of evidence of confessional statements procured by unlawful or improper conduct.[50]

Therefore, where a confession has been procured while the accused was unlawfully imprisoned by the police, (as in the instant case) special circumstances such as the illegality being slight, would commonly need to exist before the balancing of public considerations would operate to favour the exclusion of the confession. Deane J. was of the view that,

> where it appears that a voluntary confessional statement has been procured by unlawful or improper conduct on the part of law enforcement officers, there arise two independent, but related, questions as to whether the evidence of the making of the statement should be excluded in the exercise of the judicial discretion. . . . The unlawful or improper conduct of the law enforcement officers will ordinarily be relevant on the question of unfairness to the accused and unfairness to the accused will ordinarily be relevant on the question of the requirements of public policy. The task of the trial judge, in such a case, will involve determining whether, on the material before him, the evidence of a voluntary confessional statement should be

[47] (1978) 141 C.L.R. 54.
[48] (1950) 82 C.L.R. 133.
[49] (1982) 43 A.L.R. 619, 646.
[50] *Ibid.* 636.

> excluded for the reason that, on balance, relevant considerations of public policy require that it should be excluded.[51]

It is clearly evident that the High Court determined that the principles of *Bunning v. Cross* were applicable to confessional evidence cases. However, some illegality would need to be present for the operation of public policy considerations to come into play to exclude a confession which would not otherwise be unfair to admit against the accused. Murphy J., approached the matter somewhat differently. His Honour, taking a characteristically idiosyncratic approach, considered the issue without seeking to examine the applicability of *Bunning v. Cross* to confessional evidence cases. Murphy J. considered the circumstances where the exclusion of otherwise admissible evidence would be justified.

> One circumstance may be where the resolution of whether a voluntary confession was made may allow admission of otherwise inadmissible evidence, such as the bad character of the accused . . . or conduct of the defence is such as to involve imputations on the character of the prosecution witnesses, the accused can be cross-examined about convictions or bad character. . . . If the conduct of the defence involves an assertion that the prosecution witnesses fabricated a confession, the judge might exclude the evidence on the ground that the consequences of admitting it would be to introduce prejudice outweighing the inculpatory effect of the evidence. In such a case, one factor in the exercise of the discretion would be the judge's view of the probability of whether there was a voluntary confession.[52]

On this last point, Deane J. was in entire agreement with Murphy J., in that the discretion to exclude a voluntary confession may in some cases call for the consideration of other issues, such as the degree of probability that it was voluntary.[53] Murphy J. then stated that if a voluntary confession would not have come into existence except for unlawful or improper conduct, the evidence may as a matter of discretion, be excluded on public policy grounds. His Honour did not cite *Bunning v. Cross* as authority for this proposition. However, it may be safely assumed that his Honour was referring to the principles in that case, and was therefore in agreement with his brothers in holding that if a confession has been procured by unlawful or improper conduct, then the public policy considerations would come into force. Murphy J., however, departed from his brothers when he took a somewhat more stringent approach in ascertaining when the rule would operate to exclude a voluntary confession.

> The general rule may be departed from if the unlawful or improper conduct was technical or slight. A 'rule of reason' also should be followed. Evidence obtained by unlawful or improper conduct should be almost automatically excluded on trials of minor offences, but otherwise in trials for the most serious cases.[54]

Comment and Conclusion

It is submitted that, notwithstanding the different paths that their Honours took in deciding the question of the applicability of *Bunning v. Cross* principles to confessional evidence, it is possible to make the following conjectural observations:

(1) The principles in *Bunning v. Cross* do not entrench upon the quite special rules which apply to cases of confessional evidence.

[51] *Ibid.*
[52] (1982) 43 A.L.R. 619, 630.
[53] *Ibid.* 632.
[54] (1982) 43 A.L.R. 619, 630-1. McGarvie J., in *R. v. Clune* [1982] V.R. 1, held in that case that evidence which was relevant and admissible was excluded in the exercise of his discretion, because the consideration of unlawfulness and unfairness in the obtaining of the evidence outweighed the considerations which supported its admission.

(2) The principles of *Bunning v. Cross* are not confined to cases of real evidence, and are applicable to confessional evidence cases.

(3) There would commonly need to exist some illegality arising from the means by which, or the circumstances in which, the confession was procured before the public policy considerations come into play.

(4) Where a trial judge decides that it would not be unfair to the accused to admit evidence of a confession voluntarily made, it will only be in an exceptional case that it will be rejected in the public interest on the specific ground that it has been unlawfully obtained.

If the writer were to suggest that, with due respect, yet another decision would be necessary[55] before the principles of the instant case could be understood with any certainty, she may be accused of being overly cynical. However, the writer's reason for positing this, lies in the fact that their Honours delivered separate judgments, and a degree of uncertainty is inevitable. Though the decision was agreed upon, the paths to that decision (for instance the divergence of reasons between Gibbs C.J. and Murphy J.) exemplify the difficulty of extracting a ratio from the case.

It is not easy to fix on the level of abstraction at which the judges had wished to formulate their propositions. How widely or how narrowly is the formula to be understood? There is much to be said in favour of joint opinions: they may be more forceful and clear. It is opined that if the chief purpose of the law is to provide a working guide for the future, then joint judgments may serve that purpose better than separate judgments. Perhaps a single judgment delivered by the court would have defined more clearly what appears to have been the ratio of the case.

POLIXENI PAPAPETROU*

[55] Beach J., in *R. v. Makris* (unreported Vic., 13 April 1983, Court of Criminal Appeal), said in *obiter* that, notwithstanding that the applicant had been illegally detained by the police at the time he made the statement, that fact alone would not be a sufficient basis upon which to reject the statement in the circumstances of the case. His Honour, citing *Cleland v. R.* stated that where a trial judge decides that it would not be unfair to the accused to admit evidence of a confession voluntarily made, it would only be in an exceptional case that it would be rejected in the public interest on the specific ground that it was unlawfully obtained.

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