Oppressive Conduct and Section 84 of the *Evidence Act 1995 (NSW)* - A Case Study Concerning *R v Sumpton* [2014] NSWSC 1432

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SCOPE OF THE PAPER

This paper examines section 84 of the *Evidence Act 1995 (NSW)* and its potential use by defence practitioners in seeking to have evidence of admissions excluded in criminal proceedings. Specifically, the law in this area is examined through the prism of the decision of *R v Sumpton* [2014] NSWSC 1432, a judgment of Hamill J on the voir dire. The author appeared as trial counsel on behalf of Mr Sumpton.

A VERY BRIEF OUTLINE OF THE FACTS IN *R v SUMPTON* [2014] NSWSC 1432

Andrew Sumpton was charged with one count murder and two counts of malicious damage by fire, both alleged to have occurred in May 2012 at South Grafton.

The deceased (Michelle Roberts) was a middle-aged woman who had been stabbed multiple times and was found in the bedroom of her home (where she lived alone) by members of the fire brigade in the early hours of 18 May 2012. They had attended to deal with the residential dwelling being ablaze. Apart from clear evidence of arson, it was also readily apparent that there had been a deliberate attempt to incinerate the body of the deceased as a product of the fire. The deceased's underwear had been found around her lower thighs, and post-mortem examination revealed blunt force trauma to the face and multiple (24) stab wounds to the body, including to the genital region.

Mr Sumpton was the last person to see the deceased alive. He acknowledged having made her acquaintance the previous day, having spent several hours with her drinking significant amounts of alcohol and socialising with her at the subject residence until well into the late hours of 17 May 2012.

Mr Sumpton was a "person of interest" almost from the outset of the investigation, and was spoken to a number of times in the following days. On the afternoon of 24 May 2012, at 5.07pm Mr Sumpton was arrested and taken to Grafton police station. He was interviewed by way of ERISP interview at some considerable length; he denied the allegation that he was responsible for either the death of Michelle Roberts or the fire, and claimed to be elsewhere (at home alone) at the relevant times.

The ERISP interview commenced at 7.12pm. A break was taken at around 9pm. A detention warrant was obtained extending the investigation period by six hours (from 10.10pm to 4.10am). The interview re-commenced at 10.51pm. At about 12.42pm Mr Sumpton chose to exercise his right to silence and the interview was terminated. The interview had exceeded 2,400 questions and answers.

Mr Sumpton was refused police bail in the early hours of 25 May 2012 and was placed in the police cells pending bail court. On the morning of 25 May 2012 police made a decision not to place Mr Sumpton before the Registrar at Grafton, but instead intended to transport him to Coffs Harbour to be put before the Magistrate.

Police experienced significant logistical and resource challenges in organising Mr Sumpton's transport to Coffs Harbour. He was still in the police cells at Grafton on the afternoon of 25 May 2012, having been arrested at 5.07pm the previous afternoon.

Whilst waiting for the transport arrangements to take effect, investigating police visited Mr Sumpton in the cells, persuading him to participate in a further interview recorded by way of hand-held audio recording device. It was during this final interview (shortly after 1pm on 25 May 2012) that Mr Sumpton made full admissions interspersed with rather chilling and wrenching sobs. His Honour would later describe the audio recording of this interview as "compelling evidence against the accused."

ISSUES ON THE VOIR DIRE

At trial, Mr Sumpton challenged the admissibility of the cells interview. Principal reliance was placed on section 84 of the *Evidence Act 1995 (NSW).* Another argument focused on section 138. Whilst initially the parties raised section 90 for consideration, that issue largely fell by the wayside as the voir dire progressed.

The following themes were pursued during the course of the evidence on the voir dire:

The Police Fail to Take Mr Sumpton Before A Registrar

The Registrar at Grafton was available from 9am onwards on 25 May 2012. At some stage after 9am police decided not to take Mr Sumpton before the Registrar. In evidence, police cited concerns that included:

- a suppression order was sought concerning the victim's injuries (family of the victim had yet to be contacted or fully informed).
- no police prosecutor was present in Grafton.
- a police prosecutor was present in Coffs Harbour.
- a magistrate was sitting at Coffs Harbour.

Mr Sumpton Remains In Custody

Mr Sumpton did not confer with a legal representative until 4.03pm at Coffs Harbour and was taken before the Court at some time after that. He stated in evidence on the voir dire (which was accepted by Hamill J) that he had asked to see a lawyer whilst being taken back to the cells after the ERISP interview (being many hours before the cell interview).

Bail Act 1978 (NSW) section 20 [see now Bail Act 2013 (NSW) section 46]

The legislation required the police to take the accused before a court to be dealt with according to law "as soon as practicable". The parties agreed that the Registrar of Grafton Local Court would have been available from 9am on 25 May 2012. Notwithstanding that the Registrar was available, a decision was made by

police (sometime after 9am) that Mr Sumpton would not be put before the Registrar at Grafton, but would instead be transported to Coffs Harbour and put before the Magistrate.

Hamill J found that by failing to take Mr Sumpton before the Registrar at Grafton police were in breach of the relevant provisions of the Bail Act 1978 (NSW) [see now Bail Act 2013 (NSW) s.46].

Mr Sumpton had therefore been unlawfully detained by police at Grafton from the time it first became reasonably practicable for police to put him before the Registrar on the question of bail.

Section 99(4) of LEPRA

Hamill J also found that by failing to take Mr Sumpton before the Registrar at Grafton police were in breach of their obligation under section 99(4) of LEPRA to take Mr Sumpton before an "authorised officer" to be dealt with "as soon as reasonably practicable". Hence at the time of the cell interview Mr Sumpton was also found to be unlawfully detained on this basis - see at [49].

Hamill J found at [147] that police had exhibited "a certain indifference to the accused's right to be taken before an authorised officer to be dealt with according to law."

The Failure Of Police To Prioritise Resources

Sergeant Ruehe (custody manager) and Detective Sergeant Burke (OIC / informant) conceded under cross-examination on the voir dire that the option of recalling additional police to duty to facilitate Mr Sumpton's transfer to Coffs Harbour was not taken or even requested as the request to overtime would inevitably be refused.

Hamill J was critical of police in this regard and found that a lack of police resources, together with a preference to take Mr Sumpton before a magistrate at Coffs Harbour did not establish that it was "not reasonably practicable" to take him before an authorised officer - see at [51] - [53].

Hamill J noted at [148] that "there appeared to be a form of systemic failure exemplified in the resignation of Sergeant Ruehe that any request for police to be recalled for the mere transport of a prisoner was destined to fail."

Improper Questioning At Arrest And During the Preceding ERISP Interview

Another relevant factor was improper questioning of Mr Sumpton at both the time of arrest and the ERISP interview. The defence argued that broadly, the questioning fell into a number of categories:

(1) Questions assuming the guilt of the accused

(2) Questions asking the accused to comment on the evidence of other witnesses (and in particular comment on their reliability)
(3) Questions reversing the onus of proof.
(4) Questions belittling the accused or ridiculing his account
(5) Questions tending to undermine the accused's right to silence

The defence also argued (unsuccessfully) that police had made a number of untrue representations concerning DNA evidence when interviewing Mr Sumpton.

Discussion of these issues and a few examples can be found in the judgment at [54] - [80] inclusive.

The Request For A Lawyer After The Conclusion of the ERISP interview

Hamill J found at [91] that the accused requested a lawyer after the conclusion of the ERISP interview whilst being taken back to the cells. He also found that police took no steps to comply with this request, police having exhibited "an attitude of indifference to the accused's rights" during the ERISP interview.

The Accused Placed Under Pressure Prior To The Cell Interview

The substance of the unrecorded conversation between police and Mr Sumpton prior to the cell interview can be found at [81]-[82]. Police spoke to Sumpton in terms including:

> *"I want to give you an opportunity to tell us what **actually happened**...."*
>
> *"....you are facing a charge that effectively carries life."*
>
> *"..to say you don't remember doesn't add up.."*
>
> *"Think of the family Andrew. We have to tell them things and they want to know how their mother died. They want answers about how she died."*

HIs Honour found at [135] that Mr Sumpton, having repeatedly denied the offences, was subject to psychological and emotional pressure to change his version of events.

Custody Manager Not Engaged Immediately Prior to Or After The Cells Interview

The police entered and exited the cell without engaging the custody manager who was also the shift supervisor and had stated in his evidence that he was "all over the place." Much was made of the fact under cross-examination that the custody manager would have been required to make a log of the accused's movements if he had been moved from the cell to the ERISP room. This would have engaged the custody manager who may have asked the accused if he wished to exercise any of his rights. It was suggested to police (and rejected by

them) that the conduct of the interview in the cell was intended to avoid engaging the custody manager, and thus designed to reduce the likelihood of Mr Sumpton availing himself of any of his rights.

HIS HONOUR'S FINDINGS ON THE VOIR DIRE

His Honour Hamill J excluded the evidence pursuant to section 84. His Honour went on to state that he would have been inclined to allow the evidence pursuant to section 138 had he been required to rule on that basis.

OTHER EXAMPLES CONCERNING OPPRESSIVE CONDUCT FROM THE CASE LAW

Obviously the accumulation of circumstances in *R v Sumpton* represents one example of a set of circumstances that were held to engage the to "oppressive" conduct provisions of section 84. Other examples can be found in the case law as follows:

In *R v Ye Zhang* [2000] NSWSC 1099 at [40] her Honour Simpson J found the following facts as amounting to oppressive conduct:

> *"[40]....he was offered witness protection in exchange for co-operation in the context of being confronted with two alternatives only: to co-operate with police or be charged with murder. He was offered those alternatives at the same time as being told that he could expect a reduced (or no) sentence in return for his co-operation. There was a threat of some kind, of physical violence (when Detective Goodwin told him he would like to hit his face); and, finally and importantly, he was told that once Detective Goodwin had left the room he would have no further opportunity to co-operate with police. This last was calculated to apply pressure to the accused."*
>
> *"[41] I am satisfied that the conduct of the police as whole was designed to and did in fact oppress the accused."*

Higgins v R [2007] NSWCCA 56 concerned a Commonwealth Bank branch manager charged with fraud upon his employer. He was interviewed by internal bank investigators. He was aware at the time of that interview that police were conducting an investigation. He was cautioned by bank investigators at the commencement of each such internal bank interview that he was "not obliged to answer any questions unless you wish to do so" but any answers could be used "in the course of the bank's deliberations." The appellant's evidence was that had he known the evidence could be used in criminal proceedings he would have ceased the interview pending legal advice. He stated that he felt he had no choice but to participate as he had been directed by a superior to attend. The trail Judge found that there was no oppression. The NSWCCA found no error in this finding.

R v Ul-Haque [2007] NSWSC 1251; 177 A Crim R 348 concerned a trial in the Supreme Court before Adams J for alleged terrorism offences under Commonwealth law. His Honour found that two ASIO officers who questioned the accused by confronting him at a train station, then taking him to a park for a

"private conversation". Adams J found at [27] that the ASIO officers deliberately created the impression that the accused was under an obligation to accompany them and answer their questions. He also found at [29] that the selection of a park at a time that was near dark was designed to frighten and disturb the accused, at [31] that the mode of questioning was intimidating; at [34]that the actual powers of the ASIO officers and the legal rights of the accused were deliberately not conveyed to the accused; at [35] that the accused was unlawfully detained by the ASIO officers. There were further examples of appalling conduct by investigators. His Honour found at [95] that the conduct of the ASIO officers was "well within the meaning" oppressive conduct".

Habib v Nationwide News [2010] NSWCA, 76 NSWLR 299 is a defamation case decided by the NSW Court of Appeal. Mr Habib was present in Afghanistan on 11 September 2001. He was arrested in Pakistan in early October 2001. He was detained for a number of years including at Guantanamo Bay. He was variously interviewed by ASIO and Australian Federal Police in Pakistan, Egypt and Guantanamo Bay. He brought defamation proceedings as a result of certain asserted imputations published in the media. The defendant sought to lead evidence of interviews referred to above to substantiate a defences in the nature of substantial truth and public interest. Mr Habib resisted their admission into evidence, invoking section 84 of the *Evidence Act 1995 (NSW)* (amongst other arguments). The parties in the Court of Appeal agreed that if what Mr Habib alleged as to his treatment by interviewing authorities was true, it would amount to oppressive conduct. Summaries as to how Mr Habib alleged he was treated can be found at [77] and [126] and (if true) reflect very sadly upon how suspects were treated in the climate of fear following 11 September 2001.

WHAT IS "OPPRESSIVE CONDUCT" FOR THE PURPOSES OF SECTION 84?

Prior to the decision in *R v Sumpton* [2014] NSWSC 1432 the superior courts had been reluctant to crystallise any definition of "oppressive" conduct for the purposes of section 84. In this regard, his Honour Hamill J surveyed the available authorities.

In *R v Heffernan* NSWCCA 16/6/98 unrep. it was held that the term should not be given an "expansive definition".

In *R v Ye Zhang* [2000] NSWSC 1099. In this decision her Honour Simpson J stated:

> *"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. 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."*

In *Higgins v R* [2007] NSWCCA 56 Hoeben J (Sully and Bell JJ agreeing) cited the decision of Simpson J as quoted above with approval at [26]. His Honour went on to say 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."*

In the NSW Court of Appeal in *Habib v Nationwide News* [2010] NSWCA 34, 76 NSWLR 299 the Court disagreed at [241] with the views of Refshauge J in *R v JF* [2004] ACTSC 104 in the following terms:

> *"[241] In R v JF (at [37]), Refshauge J commented that because the effect of s 84 was "…automatic exclusion of the confession, with no discretion, and a relatively low threshold of causation, it does seem that the conduct involved should be of a relatively significant level of impropriety". With respect, that imposes a gloss on the section which, in our view, is not warranted by its language. The only question s 84(1) poses is whether the "admission and [its] making" were "not influenced by" conduct of the nature identified. At best, as was said in Heffernan (at 22), the wide scope of the section in its application in both civil and criminal proceedings is a reason for not giving "an expansive meaning to 'oppression' in s 84".*

In *R v Ul-Haque* [2007] NSWSC 1251; 177 A Crim R 348 Adams J at [94] stated that "the precise boundaries of 'oppressive...conduct' are uncertain".

"OPPRESSIVE CONDUCT" NOW DEFINED?

His Honour surveyed the case law as noted in the authorities above. His Honour considered the term "oppression" in the UK legislation, Police and Criminal Evidence Act (or "PACE" Act) to be of assistance (though acknowledging the different statutory regime).

His Honour noted that in *R v Fulling* [1987] 2 All ER 65 the Court adopted the Oxford 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 unjust or unreasonable burdens..." - see at [128].

On the voir dire the Crown accepted that the application of that definition was an appropriate basis for considering whether the admissions made in the cell interview were influenced by "oppressive conduct".

Of legal significance, is that his Honour forms a definition of "oppressive conduct" for the purposes of section 84. His Honour stated at [134}:

> *"Having considered the matter anxiously, I have concluded that the accused was subject 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."

The author's humble view is that practitioners should proceed on the basis that the above represents a common law definition of "oppressive conduct" for the purposes of section 84 unless and until the superior courts decide otherwise. If this view is correct, then it is also the author's view that the decision is significant as a definition has now been crystallised. Whilst other case law remains of great significance, practitioners will no longer have to cast around for a working definition in the case law only to discover that there is not one.

SECTION 84 AND SECTION 138 CAN BE ENGAGED SIMULTANEOUSLY

On behalf of the accused it was submitted that conduct that was "oppressive" for the purposes of section 84 could also be unlawful or improper for the purposes of s.138. In essence the submission was that the two sections could be considered simultaneously, and that evidence may fall to be considered under either or both sections. This submission was accepted by his Honour - see [105] to [119].

The Crown at the trial of Mr Sumpton argued that the evidence must fall to be considered under one section or the other; but not both. This submission was rejected.

His Honour noted a number of Australian authorities where it appeared that the bench had proceeded on the basis that could be regarded as relevant for the purposes of s.138 could also be regarded as relevant for the purposes of section 84. However none of the authorities referred to explicitly found this to be so. These decisions included *R v Ul-Haque* [2007] NSWSC 1251; 177 A Crim R 348, *R v LL* NSWCCA 1 April 1996 unrep. and *R v Troung* (1996) 86 A Crim R 188.

His Honour also drew some assistance from the English decision of *R v Fulling* [1987] 2 All ER 65 (cited in *Sumpton* at [115]) where the court stated:

"We find it hard to envisage any circumstances in which such oppression would not entail some impropriety on the part of the interrogator."

His Honour noted the different statutory regime under consideration in *Fulling.* It is the author's view that this explicit finding of principle by Hamill J, though implicit in some earlier Australian authorities, represents an important development in the law favourable to defence practitioners.

THE FORENSIC ADVANTAGES OF SECTION 84

Depending on the evidence, the forensic advantages of relying on section 84 may be three-fold:

Firstly, once an issue under the section is raised by the defence, it falls to the prosecution to show that the admission was not influenced by oppressive

conduct (or one of the other matters raised in the section). The defence only has to raise the issue based on evidence on the voir dire; it does not have to positively establish facts. Once raised it is for the Crown to negative. This is amply borne out by the decision of *Habib v Nationwide News* [2010] NSWCA 76 NSWLR 299 where the NSWCA held (Hodgson JA, Tobias JA, and McColl JA) held as follows:

> *"[227] Returning to the respondent's submission the critical issue is whether, before s 84(1) could apply, the appellant had to adduce evidence positively establishing a causal nexus between the proscribed conduct and the alleged admission.*
>
> *"[228] In our view, the language of s 84(2) does not support that proposition. The expression "has raised" does not import any notion that the s 84(2) party has to prove the issue being "raised", namely whether "the admission or its making" were influenced by the s 84(1) conduct."*

The Court further held at [234]:

> *"[234] We would conclude from the language of s 84, the statutory context and legislative history and the common law position when s 84 was enacted that in order to raise a s 84 issue, that there must be some evidence that indicates through legitimate reasoning that there is a reasonable possibility an admission or its making were influenced by proscribed conduct (cf Colosimo v Director of Public Prosecutions (NSW) [2006] NSWCA 293 (at [19](1) per Hodgson JA, Handley and Ipp JJA agreeing). However it is not necessary that that evidence prove as a fact that an admission or its making were so influenced."*

Secondly the section does not have any scope for discretionary admission of the evidence (in sharp contrast to section 138). If the issue is raised, and the Crown fails to negative the issue, then the evidence is out.

Thirdly, unlike section 85, the reliability of the admission does not come in to issue - this can *extremely helpful* when the admissions appear to be truthful and reliable.

THE FORENSIC DISADVANTAGES OF RELYING ON SECTION 138

Depending on the evidence, the disadvantage of reliance on section 138 may be two-fold:

Firstly, if the defence wishes to allege an impropriety or illegality for the purposes of section 138, then the defence bears the onus of establishing the fact of that impropriety or illegality on the balance of probabilities - see *Evidence Act 1995 (NSW)* section 142.

Secondly, even if the defence is successful in establishing an illegality or impropriety, the section allows the court to exercise a discretion to allow the

evidence. A further difficulty arises in this regard in that the case law in essence states that the more serious the offence alleged, the greater weight is to be given to the public interest in the conviction and punishment of offenders - see especially s.138(3)(c) and *R v Dalley* [2002] NSWCCA 284, 132 A Crim R 169.

When one compares the relevant advantages and disadvantages to the defence in the reliance on section 84 and s.138 the judgment of Hamill J represents something of a classic case study - his Honour ultimately excluded the evidence pursuant to section 84 as he was not satisfied that the obtaining of admissions by Mr Sumpton (contained within the cell confession) had not been influenced by oppressive conduct. HIs Honour noted, that having reached this conclusion, there was no discretion to allow the evidence - see at [140]-[141]. His Honour did, however go on to state that he would have been inclined to exercise a discretion under s.138 to allow the evidence - see [143]-[151].

A WORD OF CAUTION - EACH CASE TURNS ON THE AVAILABLE EVIDENCE

It is important for defence practitioners to be mindful that whether or not the available evidence is capable of raising the issue of "oppressive conduct" by police or others will ultimately turn on the available evidence . Not every case of impropriety or illegality by police or others will automatically lend itself to being characterised as "oppressive". Whilst the developments in the law pertaining to "oppressive conduct" for the purposes of section 84 as found in the decision of *R v Sumpton* [2014] NSWSC 1432 are very helpful and represent important advances in the common law for the purposes of defence practitioners, the case *is not* a "one size fits all" remedy to the problems besetting defence practitioners seeking to have evidence excluded.

I hope the above has been of some assistance. I am happy to chat further about the matters raised in this paper with fellow practitioners. I am best caught on my mobile - **0408 277 374**. Please respect the "no fly zone" on my phone between 9am and 10am on a weekday - I am about to go into court too :-). Other than that you are fine to call anytime including out of hours. Alternatively you may wish to email me - I will almost always respond within 24 hours. My email remains:

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I have endeavoured to state the law of New South Wales as at 1 May 2015.

Mark Dennis
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APPENDIX I - SECTION 84 OF THE EVIDENCE ACT 1995 (NSW) AS AT 1 MAY 2015

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.

APPENDIX II - SECTION 138 OF THE EVIDENCE ACT 1995 (NSW) AS AT 1 MAY 2015

138 Exclusion of improperly or illegally obtained evidence

(1) Evidence that was obtained:
(a) improperly or in contravention of an Australian law, or
(b) in consequence of an impropriety or of a contravention of an Australian law,
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.

(2) Without limiting subsection (1), evidence of an admission 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:
(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
(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.

(3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account:
(a) the probative value of the evidence, and
(b) the importance of the evidence in the proceeding, and
(c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding, and
(d) the gravity of the impropriety or contravention, and
(e) whether the impropriety or contravention was deliberate or reckless, and
(f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the *International Covenant on Civil and Political Rights*, 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 an Australian law.

Note. The *International Covenant on Civil and Political Rights* is set out in Schedule 2 to the *Human Rights and Equal Opportunity Commission Act 1986* of the Commonwealth.

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