IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M154 of 2011

ON APPEAL FROM THE COURT OF APPEAL, SUPREME COURT OF VICTORIA

BETWEEN:

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KHALID BAKER

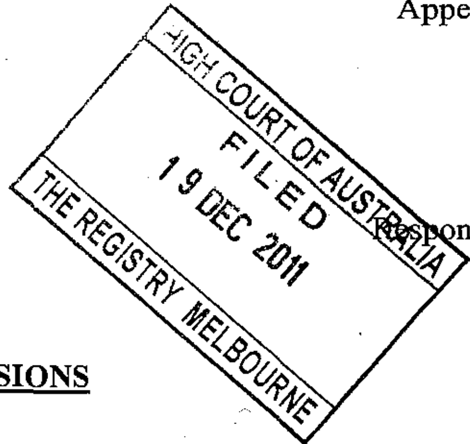
Appellant

Redacted for Publication

and

THE QUEEN

Respondent



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RESPONDENT'S SUBMISSIONS
~~(Amended)~~

PART I: SUITABILITY FOR PUBLICATION

1. The Respondent certifies that this submission is in a form suitable for publication on the internet.

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PART II: CONCISE STATEMENT OF THE ISSUES PRESENTED

2. This appeal raises the following questions -

   (a) whether the common law principle identified in ***Bannon v The Queen***[1] - namely evidence of a confession made by a third party (not called as a witness in the trial of an accused person) is not admissible even in circumstances where the evidence tends to exculpate the accused person – should be overruled and now recognised as a further exception to the hearsay rule;

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   (b) if so, what is the content and ambit of any such new exception;

   (c) and in this case, do the answers given by the Appellant's co-offender in response to police questioning in his record of interview constitute probative admissions?;

   (d) and if so, do such admissions tend or have the tendency to exculpate the Appellant?; and

   (e) finally, has the Appellant suffered a miscarriage of justice?

[1] (1995) 185 CLR 1

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PART III: NOTICES UNDER SECTION 78B OF THE *JUDICIARY ACT 1903 (CTH)*

3. The Respondent certifies that the question of whether any notice should be given under section 78B of the *Judiciary Act 1903 (Cth)* has been considered. Such notice is not thought to be necessary.

Part IV: CONTESTED FACTS

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4.1 The Respondent does not contest any of the material facts set out in the Appellant's *Narrative of Facts* or *Chronology*.

4.2 The trial judge summarised the evidence at trial at pp 2242 – 2401 of the Charge.[2]

4.3 The Court of Appeal summarised the circumstances of the offending at [3]-[6] and [16]-[39] in their Judgment.[3]

Part V: STATEMENT REGARDING APPLICABLE PROVISIONS

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5. The Respondent accepts the Appellant's *Statement of Applicable Constitutional Provisions, Statutes and Regulations.*

Part VI: ARGUMENT IN ANSWER TO THE APPELLANT

The death

6.1 On the 27th day of November 2005 the victim, Albert Snowball, fell through a glass window and plummeted 5.4 metres from the first floor of a converted warehouse to the pavement below. The fall occurred during a fight with others. The victim sustained severe injuries and died on the 29th day of November 2005.

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6.2 On the 27th day of November 2005 both the Appellant and the co-accused (referred to as "AB" at trial and "LM" on appeal) were interviewed by police and subsequently charged.

The charge

6.3 Trial Presentment C0504880.1C charged as follows –

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> The Director of Public Prosecutions presents that "LM" and KHALID BAKER at Brunswick on the 29th day of November 2005 murdered ALBERT DUDLEY SNOWBALL.

6.4 The Appellant and LM were ultimately presented for trial on murder. The prosecution case was that both accused intended to cause really serious injury to the victim rather than having an intention to kill. Or, in the words of the trial judge during his charge to the jury – the Crown contended that one or other or both of the accused dealt blows and/or had contact with the victim that caused him to go through the window.[4] The prosecution case was put on the basis of either the accused men acting in concert or aiding and abetting one another.

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[2] See *The Queen v AB & Baker* [2008] VSC 390

[3] See *Baker v The Queen* [2010] VSCA 226

[4] See *The Queen v AB & Baker* [2008] VSC 390, at 2163

The trial

6.5 On 26 March 2008 the trial commenced in the Supreme Court before Whelan J. Both accused pleaded Not Guilty to murder (and to all statutory alternatives).

6.6 Despite flagging it as an issue, counsel for the Appellant did not ultimately press an application for a separate trial.[5]

6.7 Between 26 March and 8 April 2008 the trial judge dealt with preliminary issues. Opening addresses were delivered by counsel to the jury on 8 and 9 April 2008. The jury heard evidence between 10 April and 6 May 2008.

6.8 On 7 May 2008 the trial judge made a ruling regarding the admissibility of alleged admissions made by LM in his record of interview[6] – it is that ruling which is the subject of challenge in this appeal.

6.9 Closing addresses were delivered by counsel to the jury on 8, 9, 12 and 13 May 2008. Between 14 May and 19 May 2008 the trial judge delivered his charge to the jury.[7] On 19 May 2008 the jury retired to consider its verdict (at 11.13 am).

6.10 On 23 May 2008 the jury returned a verdict of Not Guilty to murder (and all statutory alternatives) in respect of LM.[8] On 26 May 2008 the jury returned a verdict of Guilty to murder in respect of the Appellant.[9]

6.11 On 29 August 2008 the trial judge heard a plea in mitigation in respect of the Appellant.[10] On 2 October 2008 the Appellant was sentenced to 17 years imprisonment with a non-parole period of 12 years imprisonment fixed.[11]

The appeal

6.12 On 7 October 2008 the Appellant filed a notice of appeal against conviction. The sole ground of complaint relied upon by the Appellant was that the verdict of the jury was "unsafe and unsatisfactory".

6.13 On 9 September 2010 the Court of Appeal (Vic.) dismissed the appeal against conviction.[12]

The ruling in question

6.14 Prior to the charge, the trial judge raised the application of this Court's decision in ***Bannon v The Queen***. Counsel for the Appellant argued that he should be able to rely on LM's alleged admissions in his client's defence.[13] The trial judge refused the application ruling that he was bound by the decision in ***Bannon v The Queen***.[14] Despite the ruling, counsel

[5] See *The Queen v AB & Baker* [2008] VSC 390, at 3
[6] See *The Queen v AB & Baker* [2008] VSC 390, at 1812-1813
[7] See *The Queen v AB & Baker* [2008] VSC 390, at 2135-2188, 2194-2225, 2230-2240, 2242-2276, 2278-2329, 2333-2402, 2404-2428, 2449
[8] See *The Queen v AB & Baker* [2008] VSC 390, at 2462-2464
[9] See *The Queen v AB & Baker* [2008] VSC 390, at 2480-2482
[10] See *The Queen v AB & Baker* [2008] VSC 390, at 2482-2506
[11] See *The Queen v AB & Baker* [2008] VSC 390, at 2530-2537
[12] See *Baker v The Queen* [2010] VSCA 226
[13] See *The Queen v AB & Baker* [2008] VSC 390, at 1799-1810
[14] See *The Queen v AB & Baker* [2008] VSC 390, at 1812-1813

for the Appellant was permitted to make a comment in his closing address to the jury on his inability to use LM's alleged admissions as part of his client's defence.[15]

6.15 The trial judge gave a standard direction as to the separate consideration of the case against each accused, including a warning not to use LM's alleged admissions when considering the prosecution case against the Appellant.[16]

Admissibility of hearsay evidence of confession by a co-accused or third party

10 6.16 As the Appellant readily concedes, the common law does not recognise an exception to the hearsay rule which renders admissible either against or in favour of an accused hearsay evidence of a confession by a co-accused or a third party – so much was decided by this Court in ***Bannon v The Queen***. As a consequence, the Appellant again concedes that there is no error in the approach of the trial judge or the Court of Appeal in dealing with this point. However, the Appellant now submits that this Court should reconsider this rule. In response, the Respondent submits that this is not a suitable vehicle for a reconsideration of the common law rule.

Discussion of the rule in *Bannon v The Queen*

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6.17 In ***Bannon v The Queen***, Bannon and Calder were jointly tried for the murder of two persons. The prosecution case was that one of the accused was responsible for the murders as a principal, and that the other was complicit as an actor in concert or as an aider and abettor. Each accused asserted that the other was guilty of the murders acting alone. Within a short time of the killings, Calder made several statements in the absence of Bannon. At trial, Bannon's counsel relied on these statements as exculpating him because the statements suggested that Calder had acted alone. The trial judge directed the jury that Calder's statements were not evidence in Bannon's trial and could not be used against him. On appeal, this Court held that the statements were inadmissible in exculpation of Bannon
30 because they were insufficiently reliable and probative of innocence to satisfy an exception to the hearsay rule even if an exception to the rule was to be recognised.[17]

6.18 Brennan CJ analysed the different bases put forward for a relaxation of the hearsay rule – first, holding that hearsay evidence should not be admitted merely because the trial judge forms an opinion that the evidence is sufficiently reliable;[18] secondly, expressly warning against the dangers of readily admitting a statement against penal interest by reference to the possibility of false confessions untested by cross-examination bedevilling criminal trials;[19] and thirdly, stating that the conditions of "necessity" and "reliability" would not be sufficient criteria for the creation of an exception to the hearsay rule.[20]

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6.19 In the joint judgment of Dawson, Toohey and Gummow JJ, their Honours affirmed the general principle that in Australia there is no exception to the hearsay rule which renders admissible either against or in favour of an accused hearsay evidence of a confession by a co-accused or third party.[21] After a careful analysis of overseas authorities on point, their

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[15] See *The Queen v AB & Baker* [2008] VSC 390, at 2064-2065
[16] See *The Queen v AB & Baker* [2008] VSC 390, at 2155
[17] See B Marshall, *Admissibility of Implied Assertions: Towards a Reliability-based Exception to Hearsay Rule* (1997) 23 Mon L R 200; T H Smith & O P Holdenson, *Comparative Evidence – The Uniform Evidence Acts and the Common Law* (1998) 72 ALJ 363; C R Williams, *Implied Assertions in Criminal Cases* (2006) 31 Mon L R 47
[18] See *Bannon v The Queen* (1995) 185 CLR 1, at 7-8
[19] Ibid, at 8-10
[20] Ibid, at 10-12
[21] Ibid, at 22

Honours stated it was inappropriate to determine whether the court should follow those decisions (which have extended the exceptions to the rule against hearsay to include third party confessions) as Calder's statements did not satisfy the requirements of prejudice and reliability which underpin reception in those jurisdictions.[22]

6.20 McHugh J held that the Calder statements could not be used as evidence to support Bannon's case - his Honour held that even if such an exception existed, the statements did not meet the required conditions of reliability and probative value.[23] In relation to the proposed declaration against penal interest as an exception to the hearsay rule, McHugh J
10 stated that the conditions established by the relevant overseas authorities were not satisfied in this particular case.[24] And, finally, his Honour expressed the need for caution before recognising the "necessary" and "reliable" exception to the rule as accepted in the United Kingdom.[25]

6.21 Deane J was in general agreement with the joint judgment of Dawson, Toohey and Gummow JJ. However, his Honour added some observations which are relied on by the Appellant in support of his ground of appeal. Without expressing a concluded view on the matter, his Honour stated[26] –

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> "[I]t appears to me to be strongly arguable that the basic requirement of fairness dictates that, in circumstances where the Crown has seen fit to bring a person ("the first accused") to a joint trial with another accused and to place before the jury material which is tendered only against that other accused but which is supportive of the innocence of the first accused, the trial judge have a discretion to direct that that material, even though otherwise inadmissible in the trial of the first accused, be evidence in that trial at the instance of the first accused if, in all the circumstances of the case, the trial judge considers that fairness to the first accused and the interests of the administration of justice support the conclusion that such a direction be given."

6.22 Deane J expressed the view that reception of such evidence should be received by virtue of
30 an exercise of a discretion by the trial judge in order to avoid any apprehended miscarriage of justice. However, his Honour did state that in order for such evidence to be admissible it should provide unambiguous support for the accused's case.

Application of the rule in Australian jurisdictions

6.23 The decision in ***Bannon v The Queen*** has been consistently applied in appellate courts throughout Australia, but with one exception – for example, in Western Australia,[27] Northern Territory[28] and South Australia.[29]

40 6.24 In Queensland, however, the Court of Appeal has declared that earlier authorities permitting the reception of evidence of an out-of-court confession by a third party or co-accused is not necessarily inconsistent with this Court's decision in ***Bannon v The Queen***.[30] In ***R Martin, Klinge & Sambo***,[31] McPherson JA summarised the position as follows[32] –

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[22] Ibid, at 23-29
[23] Ibid, at 32-33
[24] Ibid, at 34-39
[25] Ibid, at 39-41
[26] Ibid, at 15
[27] See *Brown v State of Western Australia* [2011] WASCA 111; *Etherton v State of Western Australia* (2005) 30 WAR 65; *Button v R* (2002) 25 WAR 382; *Willis v R* (2001) 25 WAR 217
[28] See *Manufekai v R* (2006) 196 FLR 460
[29] See *R v Kamleh* [2003] SASC 269; *Re Questions of Law Reserved (No 3 of 1997)* (1998) 70 SASR 555
[30] See *R v Boyd; R v Poid* [2006] QCA 241; *R v Freer & Weekes* [2004] QCA 97; *R v Martin, Klinge & Sambo* (2002) 134 A Crim R 568; *R v K; ex parte A-G (Qld)* (2002) 132 A Crim R 108; *R v Zullo* [1993] 2 Qd R 572
[31] (2002) 134 A Crim R 568

"Hearsay statements claiming responsibility for a killing have been held admissible in Queensland in favour of some other person who is charged with the offence in question despite some cogent authority to the contrary in other jurisdictions. Recently, in R v K, ex p Attorney-General [2002] QCA 260, we held that courts in Queensland were bound by that line of authority, including R v Zullo [1993] 2 Qd R 572, 574, in this State. At the time of that decision, I was not aware of the judgment of the High Court in Bannon v The Queen (1996) 185 CLR 1. Having now read the report of that case, I am not persuaded that what their Honours said in their reasons is necessarily inconsistent with the Queensland line of authority referred to. It therefore follows that, until overruled by the High Court, that authority continues to be binding in Queensland."

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One possible response – a separate trial

6.25 Before embarking on any analysis of the rule, it is important to note that the common law is not entirely impotent in circumstances where one co-accused seeks in his trial to rely on evidence touching on a co-accused or third party.

6.26 Where the evidence relates to a co-accused in joint trial proceedings, the common law provides a remedy in the form of a separate trial. The touchstone of any application for a separate trial is one of fairness[33] – in this case, was the Appellant denied a fair trial in being presented jointly with LM? If presented separately, the Appellant would have been in a position to either call or have the Crown call LM as a witness (after LM's trial had first concluded). The Respondent notes that counsel for the Appellant made no such application.

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6.27 In circumstances where the evidence relates to a third party, likewise that party can either be called by the accused person or the Crown. The obligation of the Crown to call all relevant witnesses in a trial (which undoubtedly would extend to a third party making a potentially reliable confession to the crime) was examined by this Court in ***The Queen v Apostilides***.[34] In short, a prosecutor must exercise his or her power to choose which witnesses to call consistent with the requirements of fairness.[35]

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The rule against hearsay

6.28 The rule against hearsay can be simply expressed – out of court statements are not evidence of the truth of what is said unless the statement falls within an exception to the rule against hearsay.[36]

6.29 The rationale of the rule was discussed by this Court in ***R v Lee***[37] –

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"The common law of evidence has long focused upon the quality of the evidence that is given at trial and has required that the evidence that is given at trial is given orally, not least so that it might be subject to cross-examination. That is why the exclusionary rules of the common law have been concerned with the quality of the evidence tendered — by prohibiting hearsay, by permitting the giving of opinions about matters requiring expertise by experts only, by the "best evidence rule" and so on. And the concern of the common law is not limited to the quality of evidence, it is a concern about the manner of trial. One very important reason why the common law set its face against hearsay evidence was because otherwise the party against whom the evidence was led could not

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[32] Ibid, at [21]

[33] See, for example, see *R v Demirok* [1976] VR 244; *R v Gibb & McKenzie* [1983] 2 VR 155; *R v Jones & Waghorn* (1991) 55 A Crim R 159; *R v Alexander (*2002) 6 VR 53

[34] (1984) 154 CLR 563

[35] See, for example, *Whitehorn v The Queen* (1983) 152 CLR 657; *Dyers v The Queen* (2002) 210 CLR 285; *The Queen v Soma* (2003) 212 CLR 299; *Mahmood v Western Australia* (2008) 232 CLR 397

[36] See *Bannon v The Queen* (1995) 185 CLR 1, at 22; *Bull v The Queen* (2000) 201 CLR 443, at 478

[37] (1998) 195 CLR 594, at 602 [32]; see also *Teper v R* [1952] AC 480, at 486

cross-examine the maker of the statement. Confrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial."

6.30 However, appellate courts have recognised that the rule is not to be applied inflexibility and have created a number of exceptions, including admissions against a party's interests.[38]

Common law departure from the rule – Queensland

6.31 As this Court stated in ***Bannon v The Queen***, there is no exception to the hearsay rule which renders admissible either against or in favour of an accused hearsay evidence of a confession by a co-accused or by a third party.[39]

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6.32 However, in Queensland, a different course has been followed. The starting point for any analysis is the decision in ***R v Zullo***.[40] In that case, the prosecution contended that Zullo had stabbed Gilligan causing his death. The evidence consisted of two witnesses stating that the killer wore a red shirt; and the uncontradicted evidence was that Zullo had a reddish shirt on and was in the vicinity when Gilligan died. However, there was evidence from a police officer that another person present at the scene, Beard, later confessed to having killed Gilligan. That evidence was led at trial. In allowing the appeal, the Queensland Court of Appeal observed there was authority for the proposition that evidence of the Beard confession was not admissible on the trial. However, the Court opined that the confession made by Beard was "to be considered by the jury for what they thought it was worth". The rationale for reception appears to lie in the proposition that no other statement is so much against interest as a confession of murder.[41]

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6.33 In ***R v K, ex parte Attorney-General (Qld)***,[42] the Court of Appeal affirmed the approach adopted in *R v Zullo* notwithstanding the observation that there were decisions to the contrary in other jurisdictions including the House of Lords.[43]

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6.34 Finally, in ***R v Martin, Klinge & Sambo***,[44] the accused were convicted of killing the victim after a fight developed in the grounds of a school. At trial, Klinge sought to rely on an admission made by Sambo to a third party that he was responsible for the killing; however, the statement was ruled inadmissible in favour of Klinge by the trial judge as hearsay. On appeal, McPherson JA (Helman and Philippides JJ agreeing) referred to this Court's decision in *Bannon v The Queen* but nevertheless affirmed the *R v Zullo* line of authority; and thus held Sambo's statement ought to have been admitted in favour of Klinge.[45]

Common law departure from the rule - England

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6.35 In England, the common law position is slightly different – evidence of a confession by a third party is inadmissible as hearsay, but otherwise if the confessor is a co-accused.

6.36 In ***R v Blastland***,[46] the accused had been charged with the buggery and murder of a young boy. His defence was that M was the offender. The trial judge ruled that statements made

[38] See, for example, *Walton v The Queen* (1989) 166 CLR 283, at 293; *Adam v The Queen* (2001) 207 CLR 96, at 113
[39] (1995) 185 CLR 1, at 22
[40] (1993) 2 Qd R 572
[41] Ibid, at 574
[42] (2002) 132 A Crim R 108
[43] Ibid, at 113-4 [17]
[44] (2002) 134 A Crim R 568
[45] Ibid, at 575 [21]
[46] [1986] AC 41

by M to others indicating knowledge of the murder was hearsay and thus inadmissible. In addition, the trial judge refused an application to call police officers who had conducted an interview with M wherein admissions had been made (and subsequently retracted). On appeal against conviction, the House of Lords held that M's knowledge that the boy had been murdered was not relevant to any issue at the accused's trial.

6.37 However, in dismissing the appeal, Lord Bridge of Harwich commented on the line of authority which established that a confession by a person other than the accused to the offence with which the accused is charged is inadmissible in evidence where that person is
10 not called as a witness.[47] His Lordship stated[48] –

> "To admit in criminal trials statements confessing to the crime for which the defendant is being tried by third parties not called as witnesses would be to create a very significant and, many might think, a dangerous new exception."

6.38 The rationale for such exclusion was explained by Lord Bridge[49] –

> "Hearsay evidence is not excluded because it has no logically probative value. Given that the subject matter of the hearsay is relevant to some issue in the trial, it may clearly be potentially
> 20 probative. The rationale of excluding it as inadmissible, rooted as it is in the system of trial by jury, is a recognition of the great difficulty, even more acute for a juror than for a trained judicial mind, of assessing what, if any, weight can properly be given to a statement by a person whom the jury have not seen or heard and which has not been subject to any test of reliability by cross-examination."

6.39 However, the ambit of the principle under discussion in *R v Blastland* appears to have been subsequently narrowed by the House of Lords in ***R v Myers***.[50] In that case, two offenders were charged with murder. Prior to being cautioned, Myers made admissions to police she was the one who had stabbed the victim. At trial, the Crown did not seek to rely on the admissions. However, the trial judge ruled that the co-defendant Quartey was entitled to
30 rely upon the admissions made by Myers so as to help his defence. The Court of Appeal dismissed Myer's appeal against conviction.

6.40 On appeal, the House of Lords considered the following certified question – "In a joint trial of two defendants, A and B, is an out of court confession by A which exculpates B but which is ruled ... inadmissible as evidence for the Crown nevertheless admissible at the instigation of B in support of B's defence, or does such a confession in all circumstances offend the rule against hearsay?" Whilst the House of Lords declined to answer the question in dismissing the appeal, their Lordships did discuss the scope of the hearsay rule.

40 6.41 Lord Slynn (with whom Lords Steyn and Hutton agreed) referred to the earlier decision of *R v Blastland* and affirmed the general principle that an accused cannot call evidence of a third party's out of court admission of guilt in order to establish his own innocence.[51] However, his Lordship drew a distinction between a statement of a <u>third party</u> confession which is inadmissible as hearsay and a voluntary statement of a confession by a co-offender which is admissible.[52] The rationale for reception in the case of a co-offender's out of court admission of guilt appears to be one of general fairness.[53]

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[47] *Myers v DPP* [1965] AC 1001; *R v Turner* (1975) 61 Cr App R 67
[48] [1986] AC 41, at 52-3
[49] Ibid, at 53-4
[50] [1998] AC 124
[51] Ibid, at 132-3
[52] Ibid, at 133, 136
[53] Ibid, at 136, 137

6.42 Lord Hope (with whom Lord Mustill agreed) observed that the facts in this case were distinguishable from that in *R v Blastland*. The statements in question were made by a co-defendant, and as his Lordship rhetorically said – Why then should it be held to be inadmissible as evidence for the co-defendant?[54] In arriving at his conclusion, Lord Hope drew comfort from the observations of Lord McCluskey and Lord Sutherland in the decision of the Scotland High Court of Justiciary in ***McLay v H.M. Advocate*** on this point.[55]

Statutory departure from the rule – Hearsay under the Uniform Evidence Act

10 6.43 In introducing reforms to the common law hearsay rule by enactment of Uniform Evidence Acts, the Interim Report of the Australian Law Reform Commission described the rule and its exceptions as "overly complex, technical, artificial and replete with anomalies".[56] In ***The Queen v Benz,***[57] Mason CJ was simply content to observe that "[t]he precise scope of the hearsay rule in all its aspects is by no means clear"; and further, that "the hearsay rule itself with its many exceptions, also invites re-examination".

6.44 Part 3.2 of the **Evidence Act 2008 (Vic.)** deals with hearsay. Section 65 provides for general exceptions in criminal proceedings where the maker of a previous representation is not available to give evidence. The relevant provisions for reception of a third party
20 confession appear to be sections 65(2)(b), 65(2)(c), 65(2)(d) and 65(8) of the Act.

6.45 In relation to section 65(2)(b) [made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication], the touchstone for reception is unlikelihood of fabrication in circumstances of proximate contemporaneity.[58] The provision focuses attention upon the circumstances of the making of the representation rather than any enquiry into general reliability.[59] The tenor of the provision accords with the observations of Mason CJ in ***Walton v The Queen***[60] favouring admission of hearsay statements in circumstances of "extreme unlikelihood of concoction".

30 6.46 In relation to section 65(2)(c) [made in circumstances that make it highly probable that representation is reliable], the touchstone for reception is high probability of reliability. An exception to the hearsay rule upon the basis of general "reliability" appears to have been eschewed by this Court in ***Bannon v The Queen***. On the other hand, the tenor of the provision accords with the observations of Gaudron and McHugh JJ in ***The Queen v Benz,***[61] and again by McHugh J in ***Pollitt v The Queen***[62] favouring admission of hearsay statements in circumstances of "high degree of reliability".

6.47 In relation to section 65(2)(d) [against the interests of the person who made it at the time it was made, and made in circumstances that make it likely that the representation is reliable],
40 the touchstone for reception is statements against interest made in circumstances of probable reliability.

6.48 This provision is the most apt one to allow admission of a third party confession. The provision reads –

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[54] Ibid, at 142
[55] 1994 JC 159, at 69-270 and 176 (extracted at [1998] AC 124, at 143)
[56] See Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), at 166-174 [329]-[340]
[57] (1989) 168 CLR 110, at 116, 117-8
[58] See *Conway v R* (2000) 98 FCR 204; *Williams v R* (2000) 119 A Crim R 490; *Harris v R* (2005) 58 A Crim R 454
[59] See *R v Ambrosoli* (2002) 55 NSWLR 603; *R v Mankotia* [1998] NSWSC 95
[60] (1988) 166 CLR 283, at 293
[61] (1989) 168 CLR 110, at 143-4
[62] (1992) 174 CLR 558, at 621

(2) The hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation –

...

(d) was –

(i) against the interest of the person who made it at the time it was made; and
(ii) made in circumstances that make it likely that the representation is reliable.

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6.49 As to limb (i), section 65(7)(b) of the Act provides that a representation is taken to be against the interest of the person who made it if it tends to show that the person has committed an offence for which the person has not been convicted.

6.50 As to limb (ii), this was inserted into the Uniform Evidence Acts by amendments effective as of 1 January 2009 implementing Recommendation 8-3 of the Australian Law Reform Commission Report 102. The object of the amendment was to address problems concerning the evidence of an accomplice highlighted in the decision of ***R v Suteski (No. 4)***.[63]

20 6.51 Section 65(2)(d) is much broader than the common law as it applies to any "interest". The provision extends the common law by encompassing declarations against penal interest, which the Australian Law Reform Commission in its Interim Report considered to be just as reliable as statements against pecuniary and proprietary interests.[64]

6.52 Finally, in relation to section 65(8) [evidence of a previous representation adduced by a defendant or a document tendered as evidence by a defendant], the touchstone for reception is relevance. In this regard, the fetters that are placed upon the prosecution in respect of section 65(2) do not apply.

30 6.53 The relevant provision reads –

(8) The hearsay rule does not apply to –

(a) evidence of a previous representation adduced by a defendant if the evidence is given by a person who saw, heard or otherwise perceived the representation being made; or

(b) a document tendered as evidence by a defendant so far as it contains a previous representation, or another representation to which it is reasonable necessary to refer in order to understand the representation.

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6.54 The provision affords an accused greater leeway to introduce first-hand hearsay than the prosecution. The provision would arguably apply in this matter as LM was plainly "unavailable". In short, section 65(8) alters the common law by allowing an accused person to introduce third-party confessions (including that of a co-offender at a joint trial).

6.55 For example, in ***R v Hemmelstein***,[65] Smart AJ observed in relation to section 65(8)(a) –

"This important provision remedied a defect in the existing law as administered by the courts in this State. Hitherto, it had been difficult to adduce statements by a person other than the defendant to another that the speaker had committed the crime with which the defendant was charged, or had or had not done certain acts, which meant that the defendant had not committed the crime or that it was unlikely that he had done so. Sometimes these statements pointed to a third party having committed the crime."

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[63] (2002) 128 A Crim R 275 (Kirby J); (2002) 56 NSWLR 182 (NSW CCA)
[64] See Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), at 169 [331]
[65] [2001] NSWCCA 220

6.56 In ***R v O'Connor***,[66] the defendant sought to adduce evidence of the co-defendant denying the defendant's presence at the robbery. The trial judge ruled the evidence unreliable and inadmissible under section 65(2). On appeal, the New South Wales Court of Criminal Appeal held that the trial judge should have considered whether the evidence was admissible under section 65(8). However, the appeal against conviction was dismissed as the Court concluded there was no miscarriage of justice resulting from the rejection of the evidence.

6.57 Interestingly, Barr J (Greg James and Howie JJ agreeing) observed[67] –

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> In my opinion it may be unfairly prejudicial to the Crown for an accused person to adduce evidence of out-of-court statements of absent co-offenders exculpatory of the accused. Such persons may have a motive to lie. The probative value of such evidence is likely to be slight. The inability of counsel to test the evidence by cross-examining the maker of the statement may prejudice the Crown. Such prejudice may outweigh the probative value of the evidence.

Statutory departure from the rule – Admissions under the Uniform Evidence Act

6.58 Part 3.4 of the **Evidence Act 2008 (Vic.)** deals with admissions. Section 81 provides that the hearsay rule does not apply to evidence of an admission.

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6.59 Importantly, section 83 provides for the general exclusion of evidence of admissions as against third parties. The section reads –

> (1) Section 81 does not prevent the application of the hearsay rule ... to evidence of an admission in respect of the case of a third party.
>
> (2) The evidence may be used in respect of the case of a third party if that party consents.
>
> (3) Consent cannot be given in respect of part only of the evidence.
>
> (4) In this section, ***third party*** means a party to the proceeding concerned, other than the party who –
>
> (a) made the admission, or
> (b) adduced the evidence.

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6.60 Thus, the provision encompasses a third party who is a co-accused wishing to use another co-accused's admissions to support the third party's own defence. In drafting this provision, the Australian Law Reform Commission considered that a third party should be able to use an admission that is already in evidence, provided that all the evidence connected to the admission was also admitted even though it might be unfavorable to the third party's case.[68]

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Analysis of proposed exception to the common law rule

6.61 Currently, the common law in Australia does not permit A in a criminal trial to take advantage of a purported confession by B, whether B is a co-defendant or an unrelated third party. In this appeal, the Appellant contends that the common law should permit A to do so.

6.62 First, it is said by the Appellant that such an exception to the hearsay rule is sound in principle. In short, as B has made a statement against interest in the form of a confession, it is less likely to be unreliable evidence, and less prone to assessment difficulties associated with other forms of hearsay evidence. However, any extension of that underlying rationale to forensically favour a co-offender requires careful scrutiny.

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[66] [2003] NSWCCA 355
[67] Ibid, at [13]
[68] See Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), at 169 [331]

6.63 Suppose B has made a confession to a crime by accepting responsibility. The admissibility of the confession lies in the reliability of the evidence because the law proceeds on the assumption that B would not have confessed unless it was true. But when a second actor is introduced, a number of possibilities arise. First, B's confession may say nothing at all about the involvement of A in a jointly executed crime (and that is this case here). In other words, B's confession to guilt is equally consistent with A's involvement as a complicit actor. Second, B's confession may be designed to deflect attention from A's involvement – such a scenario occurred in ***R v O'Connor***[69] - and thus, what is otherwise a reliable piece of evidence in the case against B becomes unreliable in the case against A. In other words, if a confession is admissible because it is assumed that an offender will make a truthful statement about his involvement in a crime, the same assumption cannot be made as to what an offender may say about another party's involvement in a crime.[70] Third, B's confession may only say something about A's involvement if there is no alleged complicity - in other words, only A or B could have committed the crime (both not acting jointly), and B's confession to the crime ipso facto casts doubt upon A's guilt.

6.64 Thus, in a joint crime, the implied assertion sought to be derived by a co-offender from an offender's admission of guilt cannot be logically drawn. Professor Williams, in commenting on the decision in *Bannon v The Queen* in his 2006 journal article "*Implied Assertions in Criminal Cases*" makes the point more eloquently[71] –

> "The argument of the defence involved using the statement of the co-accused as implied hearsay. From the admission 'I killed the deceased' without reference to the accused, it was sought to infer that the co-accused was in substance saying 'I alone killed the deceased', which if the statement had been made, would have been direct hearsay. If a general rule against the admission of hearsay evidence is accepted, then the statement of the co-accused was correctly regarded as not admissible for the purpose of drawing such an inference.... There are any number of reasons why a person who has committed a killing may choose not to implicate another participant in the offence. When considered for the purpose for which it was sought to be used, the statement was highly ambiguous; a statement 'I committed a killing' by no means necessarily means 'I alone committed a killing'.

6.65 Secondly, it is said by the Appellant that fairness dictates A should be permitted to take advantage of B's confession when the prosecution itself puts forward B's confession as evidence. In short, this rationale accords with the policy underpinning reception under section 84 of the Act and the approach adopted by the House of Lords in *R v Myers*. But fairness at common law, if providing a sound doctrinal basis for reception, surely could not be limited only to the defence. For example, if it is said to be fair to A to take advantage of B's confession because of its reliability, why is it not also fair for the Crown to rely on B's confession in order to convict A in circumstances where B's confession also directly implicates A. As the relevant fairness is rooted in the reliability of a confession being put forward by the Crown as a probative piece of evidence, it is difficult to see why a common law exception to the hearsay rule should be created in order to cater only for the exculpatory nature of otherwise reliable evidence.

6.66 Further, what happens in a case where B makes a confession implicating C but not A? In a joint trial, a trial judge would be required to direct the jury that B's confession is relevant in determining B's guilt (inculpatory in nature), relevant in determining A's guilt (exculpatory in nature) but not relevant in determining C's guilt. In such circumstances, the overall probative force of the confession may be unfairly diluted in the eyes of the jury.

[69] [2003] NSWCCA 355

[70] For example, see the accomplice's warning - *Bromley v R* (1986) 161 CLR 315; *R v Faure* (1993) 67 A Crim R 172

[71] See C R Williams, *Implied Assertions in Criminal Cases* (2006) 31 Mon L R 47, at 63-64

6.67 Thirdly, it is said by the Appellant that the administration of justice would be mocked if such an exception is not created. But as contended above, it is only in a rare factual scenario where one might even approach such a conclusion. And, in such circumstances, the common law does provide a remedy – a separate trial.

6.68 Fourthly, the Appellant does not support any particular criterion of admissibility in support of the proposed exception, but contends whatever test is adopted, it would be satisfied in this case. However, in response, the nature of the confession by LM and how the prosecution puts its case is important. In relation to LM's record of interview, the Respondent first submits it does not amount to a confession. If we are wrong about that, the Respondent then submits the record of interview does not amount to a confession of sole responsibility. And, most importantly, the questioner quite properly does not seek to tease out the Appellant's responsibility but rather LM's involvement in the relevant events – in such circumstances it is unfair to the Crown for the Appellant to seek to take advantage of a statement which does not purport to traverse his involvement at all.

6.69 Fifthly, the Appellant seeks to confine any exception to a confession of a co-offender relied on by the Crown as a piece of evidence in the trial. But if the reliability of such a statement is said to arise because it is a statement made against penal interest, it is difficult then to understand the rationale for the *R v Blastland* limitation – for after all, a third party confession is a statement made against penal interest.[72]

6.70 Sixthly, the Appellant contends that such an exception would be consistent with the implementation of the Uniform Evidence Acts. However, as set out above, there are several provisions which appear to permit the reception of third party confessions, each differing in their test for reception. Furthermore, why is it necessary for the common law to adapt and mould itself to the statutory reforms[73] – for if that was a virtue in itself, this Court would need to modify a number of common law principles.[74]

6.71 Seventhly, the Appellant contends that such an exception is consistent with the common law in Queensland. However, the Respondent submits this argument is misconceived – the common law in Australia[75] has already been authoritatively declared by this Court in *Bannon v The Queen* and the Queensland line of authority appears to represent an extraordinary departure from the doctrine of precedent.

A broader principle?

6.72 A confession (or admission) has long been recognized as an exception to the hearsay rule. The law proceeds on the basis that a person does not assert something against his interest unless it is true.[76] Commonly, a confession is contained in a formal record of interview. However, if that is the true basis for admission, it does not satisfactorily explain the modern development in the conduct of criminal trials as to reception of a record of interview whether it contains an admission or not. If a record of interview does not contain an admission (and it often has only self-serving denials), the statements plainly offend the hearsay rule and yet it is still received without an appropriate warning given to the jury.

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[72] See C R Williams, *Implied Assertions in Criminal Cases* (2006) 31 Mon L R 47, at 64

[73] Ibid, at 47 - this is consistent with the general thesis propounded by Professor Williams – "It is suggested that the hearsay rule is properly regarded as formalistic in nature, and that the rejection in *Bannon v The Queen* of a flexible approach to admissibility is correct in principle. Leeway should however exist, allowing for admissibility in appropriate cases. This is best achieved not by judicial flexibility, but rather by statutory provisions …"

[74] For example, recent complaint evidence admitted under section 66 of the *Evidence Act 2008*

[75] See, for example, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520

[76] See *R v Sharp* (1988) 86 Cr App R 274, at 278; *Nicholls v The Queen* (2005) 219 CLR 196, at 266 [184];

6.73 This modern development was the subject of examination by this Court in ***The Queen v Soma***.[77] In that case, the prosecution had not tendered a police interview as part of its case but later cross-examined the accused by reference to parts of the interview in order to demonstrate the making of a prior inconsistent statement by the accused. The conviction was quashed by the Queensland Court of Appeal.

6.74 In dismissing a Crown appeal, Gleeson CJ, Gummow, Kirby and Hayne JJ stated[78] –

> "If the prosecution case was to be put fully and fairly, the prosecution had to adduce any admissible evidence of what the respondent had told police when interviewed about the accusation that had been made against him. To the extent to which those statements were admissible and incriminating, the prosecution, if it wished to rely on them at the respondent's trial, was bound to put them in evidence before the respondent was called upon to decide the course he would follow at his trial. To the extent that an otherwise incriminating statement contained exculpatory material, the prosecution, if it wished to rely on it at all, was bound to take the good with the bad and put it all before the jury. And consistent with what is said in *Richardson v R* and *Apostilides* the prosecutor's obligation to put the case *fairly* would, on its face, require the prosecutor to put the interview in evidence unless there were some positive reason for not doing so."

6.75 Whilst in *The Queen v Soma* the police interview contained a mixture of incriminating and exculpatory statements, the general principle of fairness appears to provide the rationale for reception of otherwise hearsay material. This notion of fairness was accepted by the Victorian Court of Appeal in ***R v Pidoto***[79] as the rationale for the Crown's obligation to tender an accused's record of interview containing self-serving statements even though the material did not advance the prosecution case. Vincent JA stated –

> "The Court of Appeal in Su states that such material is traditionally led by the Crown whether incriminating or not and then follow these vital words: 'Both as a matter of fairness and to show the first opportunity of response by the accused to the allegations made against him by his accuser.' Those words seem to me to echo the words of the English Court of Appeal in Storey's case which is (1968) 52 Criminal Appeal Reports 337, where the court states: 'In respect of a wholly exculpatory statement, a statement made voluntarily by an accused person to the police is evidence in the trial because of its vital relevance as showing the reaction of the accused when taxed with the incriminating facts. If, of course, the accused admits the offence then as a matter of shorthand one says the admission is proof of guilt and in the end it is but if the accused makes a statement which does not amount to an admission the statement is not strictly evidence of the truth of what was said but is evidence of the reaction of the accused which forms part of the general picture to be considered by the jury at the trial.' And that, it seems to me, is a statement of law."

6.76 However, in ***R v Callaghan***, the Queensland Court of Appeal adopted a slightly different approach. In that case, the Crown declined to tender an entirely exculpatory police interview at the accused's trial. In dismissing the appeal, Pincus and Thomas JJ observed –

> "[I]f a prosecutor chooses to put into evidence a version which is in substance exculpatory, he makes it evidence in the case, and subject to matters of weight, <u>it can be acted on as showing or tending to show the truth of its contents</u>. There is no general obligation on the prosecution to call such evidence. The calling of such evidence is a benefit tendered by the prosecution and accepted by the defence. If inadmissible evidence is let in without objection it may be used by any party "to the extent of whatever rational persuasive power it may have" ..." (emphasis added)

6.77 The decision in *R v Callaghan* is consistent with the approach adopted by the House of Lords in ***R v Sharp***.[80] In that case, the question certified (as amended) – namely, "[w]here a statement made to a person out of court by a defendant contains both admissions and self-

[77] (2003) 212 CLR 299
[78] Ibid, at 309-10 [31]
[79] [2002] VSCA 60; see also *R v Su & Ors* [1997] 1 VR 1
[80] (1988) 86 Cr App R 274

exculpatory parts do the exculpatory parts constitute evidence of the truth of the facts alleged therein?" – was answered in the affirmative.

6.78 In short, the above decisions tend to suggest a much broader principle for the reception of otherwise hearsay material in a record of interview than mere general reliability. The admission of such material appears wedded in a general notion of fairness as it provides an accused with an opportunity to have his responses to the accusations placed before a jury when considering the issue of guilt.

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The prosecution case against the Appellant at trial

6.79 In the early hours of the morning on 27 November 2005, Albert Snowball fell from the first floor of a converted warehouse. On the evening in question, a party was being held at the warehouse. Among those attending were the Appellant, LM, Ali Faulkner and the victim. At about 3.00 am, there was an outbreak of violence in the main party area, with the Appellant and Faulkner (and perhaps others) attacking party-goers at random and inflicting injuries. Soon afterwards, the Appellant, Faulkner and LM went out of the party through a door into the stairwell. Outside the door there was a landing, on one side of which were full-length windows. The death of the victim occurred after he crashed through the windows and fell 5.4 metres to the footpath below.[81]

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6.80 The prosecution case was that the Appellant and LM acted together in attacking the victim, and that as a consequence of the attack, he was forced backwards through the glass windows.

6.81 On appeal, it was accepted that there were five eyewitnesses who gave evidence as to the events. It was also noted that the evidence given by the witnesses revealed two different versions – the first version implicated the Appellant (see witnesses Doig, Arcaro and Stuart, in part); and the second version implicated LM (see witnesses Asfer and Masonga).

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6.82 As to the version implicating the Appellant, both Doig and Arcaro identified the Appellant as the aggressor and that it was either a punch or a push which sent the victim flying through the window. Acaro rejected the suggestion that LM was participating in the fight.

6.83 As to the alternative version implicating LM, Asfer gave evidence he was restraining the Appellant and that it was LM who was fighting with the victim. The witness did not see the victim go through the window. Similarly, Masonga stated that LM was fighting with the victim, and that the Appellant was fighting with another male person. The witness stated that LM was the last person to have contact with the victim before he fell to his death.

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6.84 In addition, the jury heard evidence as to the Appellant's prowess as a capable and experienced boxer.[82]

Analysis of the eyewitness evidence by Court of Appeal

6.85 Doig was on the landing observing the fighting. He gave evidence that two men - positively identifying one of the men as the Appellant - attacked the victim immediately prior to the victim falling through the window. Under cross-examination, Doig stated that the Appellant was punching the victim in a merciless and relentless fashion.[83]

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[81] See *Baker v The Queen* [2010] VSCA 226, at [3]-[5]

[82] See *The Queen v AB & Baker* [2008] VSC 390, at 2154

[83] See *Baker v The Queen* [2010] VSCA 226, at [19]-[21]

6.86 Arcaro was also standing on the landing next to Doig. However, Arcaro was adamant that it was only one man, the Appellant, who was fighting with the victim. The witness described the Appellant as incredibly aggressive - he stated it was either a punch or a push by the Appellant that sent the victim through the window. Under cross-examination, Arcaro stated he was "very sure" it was the Appellant who was the person who pushed or punched the victim through the glass; and rejected the suggestion that LM was involved.[84]

6.87 Stuart gave evidence that the Appellant was involved in a sustained attack on the victim which caused the victim to be "kicked or pushed" through the window; the witness added that another male was also involved in punching the victim (but to a lesser degree) at the time. Under cross-examination, Stuart stated that LM was not involved in the attack. However, the witness then stated that the person whom the Appellant was attacking was not the victim who went out the window.[85]

6.88 Asfer and Masonga were also on the landing. Asfer stated he restrained the Appellant whilst LM attacked the victim. He saw LM and the victim near the window. However, the witness did not see what happened but heard the window break. Asfer stated the Appellant had no physical contact with the victim.[86]

6.89 Masonga stated there were two different fights occurring at the same time – LM was fighting the victim and the Appellant fought another white male. He stated the Appellant did not fight the victim. The witness did not see the victim go through the window. However, under cross-examination, Masonga stated the victim lost his balance whilst fighting and fell out the window in trying to recover his footing.[87]

6.90 The Court of Appeal found it was open to the jury to prefer the accounts of Doig and Arcaro over the accounts of Asfer and Masonga. The witnesses Doig and Arcaro both gave compelling evidence as to what they observed and were close to the attack. On the other hand, Masonga's credibility had been seriously impaired as he changed his evidence between committal and trial; and further admitted that his original police statement was false. Asfer's account was undermined by his failure to describe the Appellant as being bare-chested at the time (an uncontroversial fact).[88]

6.91 Importantly, counsel for the Appellant in the court below conceded it was open to a jury to conclude beyond reasonable doubt that it was the Appellant who struck the final blow upon the victim.[89]

Other evidence admissible against LM but inadmissible against the Appellant

6.92 The trial judge administered a conventional direction to the jury in relation to separate consideration of the case against each accused – this was particularly important as LM had made some alleged admissions which were relied on by the prosecution in proving guilt. The probative value of those admissions was vigorously challenged by counsel for LM.[90] The Appellant now seeks to rely on these alleged admissions made by LM in developing an argument that the jury's verdict was "unsafe and unsatisfactory".

[84] See *Baker v The Queen* [2010] VSCA 226, at [22]-[25]
[85] See *Baker v The Queen* [2010] VSCA 226, at [26]-[32]
[86] See *Baker v The Queen* [2010] VSCA 226, at [34]-[36]
[87] See *Baker v The Queen* [2010] VSCA 226, at [37]-[39]
[88] See *Baker v The Queen* [2010] VSCA 226, at [40]-[43]
[89] See *Baker v The Queen* [2010] VSCA 226, at [44]
[90] See *The Queen v AB & Baker* [2008] VSC 390, at 2155-2158

Alleged admissions by LM

6.93 In the case against LM, the Crown relied on two pieces of evidence said to constitute an admission. First, in his record of interview with police, LM stated he had pushed the victim – this was said by the prosecution to be an admission by LM to the fatal push. And secondly, evidence was given by witnesses Asfer and Morgan that LM had variously said "look what you made me do" and "see what you've put us through" whilst travelling in a car after the party – again this was relied on by the prosecution as an admission of responsibility for the crime.

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6.94 As to the alleged admissions contained in the record of interview, counsel for LM argued that the push referred to in the interview did not amount to an admission that LM pushed the victim through the window.[91] A summary of the relevant passages in the record of interview are extracted as follows[92] –

> And then, we lead out to the stair – where the staircase is and that's when the other guy ran out. Just started yellin' at my friend. An' w-, they went to fight. I break it up. I was pushin' my mate down the stairs. The other guy hit me from the side. I grabbed him and pushed him. I turned around and kept walking. By the time I got downstairs, the guy was on – on the pavement … I – I think he fell
>
> 20 through the window.
>
> …
>
> Did you see him go out the window?
> No.
>
> …
>
> Did you hear anything?
> No. W-, when I went downstairs, when I seen the guy, I'm like, "Oh my God." I – I took off. I was – I was – I was shocked.
> How – how did you know it was you that pushed him out the window in that case?
> 'Cos I – I'm – I knew the – I knew the face, the guy.
>
> 30 Okay. So, you're saying you were punched once?
> Yeah.
> Then you've pushed him?
> Yeah.
> And you didn't see him go out the window, you didn't hear anything and you've turned away and walked out?
> Yep.
>
> …
>
> Okay. It's then alleged that you have gone to the male who was thrown out of the window, punched him once in the face and then said something to him - - - ?
>
> 40 What? No.
> You've then punched him again in the face and then you've pushed him out of the window.
> No. That is not – that's not how it happened at all.
>
> …
>
> You tell me you've done something terrible but then you say all you did was push a guy away who punched you.
> Well, I'm assuming that I did something terrible because at - at - as - I was the only person to have any contact with him at last, from - from - from what I've seen, so I'm only assuming that this guy is badly injured from me pushing him.
>
> …
>
> 50 What did you see him do after you pushed him?
> I pushed him, he – he was stumbling backwards ---
> Stumbling backwards?
> He ke-, he was stumbling backwards. I turned around and I didn't get the chance – I just wanted to get out of there.
>
> …
>
> And how – how far away from the window was he?

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[91] See *The Queen v AB & Baker* [2008] VSC 390, at 2165

[92] See **Exhibit P10** - Q/A 98, 200, 204-208, 258-259, 275, 326-327, 333-335, 353, 355-356 and 371 of ROI dated 27 November 2005; see also Q/A 19, 163, 179, 198-199, 203, 212, 260, 321 and 360

When - - -
When you pushed him?...
From here to where you are now, say. I don't know, about a metre – 2 metres. I don't know how far.
...
And after you pushed him, did you see him go through the window?
No, I - I - I see him when I was downstairs.
...
Did you hear him crash through the window?
10 No.... I just pushed and turned and walked off.
...What I'm putting to you is that you must – you must have seen him fall through the window.
I – I did not see him fall through the window. I – I pushed him away, just enough for him to get away from me. Next time I see him, he was downstairs on the – on the – on the pavement, next time I seen him. So, I assumed – I assumed that the – the reason he fell downstairs was 'cos I – I would've pushed him or – that's what – that's the assumption that I've got – that I pushed him out the window. So I was – left.
...
Well, what would you say if I put to you that you deliberately pushed that person through the window?
20 That's wrong. I would not do that.

6.95 In short, it was open to the jury to reject the Crown contention that the responses by LM amounted to a confession that he pushed the victim through the window. That the jury returned a verdict of Not Guilty indicates that they were not satisfied beyond reasonable doubt as to his guilt, despite the witnesses Asfer and Masonga also giving accounts which implicated LM.

6.96 In relation to the implied admissions made by LM in the car shortly after the event, Asfer stated in examination-in-chief the following[93] -

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As best you can remember, what was said in the car? Who said what, as best you can remember?---Someone might have said: "Look what you made me do".
Who was that?---I think it might have been Bizzy. [reference to LM]

6.97 The witness Morgan was also called and examined on the same topic. In examination-in-chief, the witness stated[94] -

Having read it, can you remember what he said?---I remember - I remember Bizzy telling Ali "see what've you done" and "see what you put us through" as well, yes. [reference to LM]

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In cross-examination, the witness was challenged as follows[95] –

What you heard him say was: "See what you've done. Look what you made me do"?---I don't know. When I say he was saying "see what you've done", like I've gone and put it in my own words....
Did you say this: "Bizzy started fighting with Ali. He said, 'See what you've done. Look what you made me do'"?---That's what I said in the statement.
...
What were the words as best you remember Bizzy said?---I wouldn't remember the particular words but what Bizzy was saying at the time was "see what you've done" and "see what you've put all of us
50 through", but I've put it in my own words ... [reference to LM].

6.98 Again, the above exchanges did not take the matter any further than what was contained in LM's record of interview. In short, it was open to the jury to reject the Crown contention that LM was admitting to pushing the victim through the window.

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[93] See *The Queen v AB & Baker* [2008] VSC 390, at 1231
[94] See *The Queen v AB & Baker* [2008] VSC 390, at 1142
[95] See *The Queen v AB & Baker* [2008] VSC 390, at 1462-1463, 1468

Jury verdict

6.99 That the jury returned a verdict much earlier in time in respect of LM demonstrated the relative weakness of the Crown case against LM; in so doing, the jury must have rejected the combined evidence of Asfer, Masonga and the LM statements in preference for the evidence of Doig and Arcaro. The verdict returned against the Appellant is only explicable on the basis that they accepted the evidence of Doig, Arcaro and Stuart beyond reasonable doubt; and therefore expressly rejected the evidence of Asfer and Masonga.

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A miscarriage of justice?

6.100 The Respondent submits that this is not a suitable vehicle for a reconsideration of the issue raised in ***Bannon v The Queen*** – for like reasons as in that case, the probative value of the alleged admissions made by the Appellant's co-accused [LM] is very slight. In short, LM does not admit to a killing; and if he does, he does not admit to killing alone.

6.101 Furthermore, the alleged admissions said to be made by LM did not bolster the evidence of Asfer and Masonga who both testified as to the sole involvement of LM in the fatal push. In fact, the admissions, if viewed as an acceptance of criminal responsibility rather than moral responsibility for the victim's death [after all LM was only 17 years old at the time of interview], created a third and competing version for the jury to consider. LM stated he had only pushed the victim away, and denied being involved in any fighting with the victim – this stood in stark contrast with how the prosecution put its case against both accused and was contrary to the witness testimony of the fatal event.

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6.102 Given that the jury has plainly rejected the evidence of Asfer and Masonga who unequivocally implicate LM (and not the Appellant) in the offence, it is difficult to see how a reasonable jury could elevate LM's statements (to a single push several metres away from the windows after having been struck and assuming responsibility for the victim's death) to any higher level than the combined testimony of the above two witnesses. That being so, the reception of LM's admissions upon the Appellant's trial would have had no real bearing on the verdict returned - an admission to a push does not provide any support for the alternative version of physical fighting between LM and the victim.

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6.103 And, even if admissible on the Appellant's trial, whatever admissions could be gleaned from LM's account had to be viewed against the emphatic denial by LM in his record of interview that he pushed the victim through the glass window.

6.104 The preceding analysis of course assumes that this was a case of "one or the other" and that is how the jury must have approached their task – but the fundamental nature of the Crown case was that both men were acting together, and that is how the trial judge directed the jury.[96] Accordingly, even if one can construe LM as having made admissions, such evidence, of itself, did not definitively resolve the jury's task in relation to the prosecution case of complicity put against the Appellant.

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[96] See *The Queen v AB & Baker* [2008] VSC 390, at 2163-2164 – "... the Crown says Mr [LM] and Mr Baker were acting as a team. The Crown says this began inside with Ali Faulkner. The Crown says from then on they were acting in concert with each other or aiding and abetting each other. The Crown says they were a team. The Crown says their intention to cause really serious injury was manifested by the high degree of violence exhibited both inside and on the landing and by the nature of the attacks both inside and on the landing. The Crown says that on the landing Mr [LM] and Mr Baker were acting in concert pursuant to an unspoken agreement to assault Mr Snowball and cause really serious injury to him. Alternatively, the Crown says that one or other of them performed the act and committed the crime as the principal offender and that the other was involved as an aider and abettor."

6.105 The issue for the jury in respect of the Appellant was a relatively simple one – did he push the victim through the window (if yes, he was guilty); or if he did not and LM did, did the Appellant act in a complicit manner with LM at the relevant time. And, in respect of the latter, there was ample evidence supporting complicity contrary to the general contention now being put that a finding by the jury that LM pushed, or was more likely to have pushed, the victim through the window would have resulted in the exculpation of the Appellant (or acquittal). In other words, whilst the prosecution witnesses gave competing versions as to who pushed the victim through the window, that did not mean that it was not open to the jury to find the other criminally complicit in the relevant conduct.

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6.106 At the time the victim was pushed through the window, there was evidence demonstrating the presence of the Appellant; there was evidence of earlier fighting by the Appellant with others inside the warehouse; and there was evidence of the Appellant fighting others in the stairwell. Accordingly, even if LM's admissions were brought into the mix and accepted, there was a strong case of complicit liability in respect of the Appellant.

6.107 On the other hand, the evidence touching on LM's complicity was in a relative sense much weaker. The preponderance of evidence did not have LM involved in the fighting inside the warehouse; indeed, there was evidence pointing to LM acting as a peacemaker in relation to the initial fighting.[97] Further, counsel was able to point to a motive not to get involved given that LM attended the party in order to promote his music career.[98]

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6.108 Once the alleged admissions have been assessed in their true light, then the rationale that appears to pervade, for example, the Queensland authorities simply does not arise in this case. For example, in ***R v Zullo***,[99] the appellant had been convicted of murder after the jury had been permitted to receive evidence of a confession to the killing by a third party. The confession carried strong probative weight as the confessor was present at the scene, involved in the melee preceding the stabbing and was known to carry a knife with him. In short, it was an unequivocal confession to the very crime the appellant faced.

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6.109 Likewise in ***R v Martin, Klinge & Sambo***,[100] the Queensland Court of Appeal ruled that an inculpatory response by Sambo ("I did it) to a question ("You let Chris [Martin] kill somebody?") was admissible on Klinge's trial as a statement in his favour. The confession in this case was highly probative, as Sambo had told the witness in question that they had just killed someone.

6.110 In light of the above, the Respondent submits that the trial judge's adherence to the rule in ***Bannon v The Queen*** has not resulted in the Appellant suffering a miscarriage of justice.

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Dated this 19th day of December 2011.

....	....
Gavin J.C. Silbert S.C.	**Brett L. Sonnet**
Chief Crown Prosecutor, State of Victoria	Crown Prosecutor, State of Victoria
Senior Counsel for the Respondent	Junior Counsel for the Respondent

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[97] See *The Queen v AB & Baker* [2008] VSC 390, at 1989, 2008, 2013-2014, 2038, 2044-2045
[98] See *The Queen v AB & Baker* [2008] VSC 390, at 2015
[99] (1993) 2 Qd R 572
[100] (2002) 134 A Crim R 568