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'Mr Big' Comes to Australia

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'Mr Big' is the name of an undercover police operation created by the Royal Canadian Mounted Police (RCMP) in Canada. It is named after the character, Mr Big, who was a shadowy villain in the 1960s cartoon series *Rocky and Bullwinkle*.

The RCMP has used Mr Big very successfully to extract confessions in a number of murder cases. The scenario is simple: undercover police play the role of gangsters and target their suspect, who is invited to join the gang. The target is given a taste of the gang's wealth and power. Membership has its privileges, but comes at a price. The gang demands trust, loyalty and honesty between members. Anyone who wishes to become a member first has to be checked out by Mr Big. The target's possible murder charge is a concern since such charges bring unwelcome police attention; however, the gang and Mr Big have the power to 'fix' things with the police. All that they need is for the target to tell them the truth. The bait is set, the target confesses and another murder is solved.

Mr Big has been imported into Australia. In *Tofilau v The Queen* the High Court of Australia was called upon to rule on the admissibility of confessions obtained using Mr Big in four different cases all arising in the state of Victoria.¹ In each of the four cases the police investigation was stymied; in fact, in one, *Clarke v The Queen*, the murder had remained unsolved for twenty years.

Mr Big works. The fundamental question is whether Mr Big is good police work or an invitation for the target suspect to confess to a murder they did not commit?

Tofilau v The Queen

Tofilau provides a classic example of the Mr Big operation. In June 1999 the body of Belinda Romeo was found in the bedroom of her flat. She had been strangled. Mr Tofilau was a suspect. He had been seeing the victim. He was questioned by the police and provided an unconvincing account as to his whereabouts on the day the victim was last seen alive. Tofilau became the prime suspect, but there was insufficient evidence to charge him. The investigating police needed a confession and requested the assistance of a covert operations unit.

In December 2001 an undercover operation was mounted. An operative named 'P' established a friendship with Tofilau. P introduced Tofilau to the gang and he was offered a possible position in it. Tofilau was told that he would have to be checked out and cleared by the boss. He was also told that the gang could 'fix' things with the police as they controlled certain corrupt police officers.

Thereafter Tofilau was introduced to a series of purported gang activities. One scenario involved a burglary in which

diamonds were purportedly stolen from a safe. Tofilau was to keep lookout and was provided with a mobile telephone and told to ring if any police presence was detected. Coincidentally, a patrol car containing police members, who had no knowledge of the Mr Big operation, did pass by. They stopped and spoke to him. He told them that he was waiting for a friend to pick him up, as he had just finished work. The police were satisfied and left. Tofilau was praised for his quick thinking. His share from the robbery was \$10,000, which was put in a safety deposit box for him, if and only if he was accepted into the gang.

In March 2002 the police turned up the heat by having a notice served on Tofilau to obtain a bodily sample for the purposes of DNA analysis. Tofilau had declined to give a blood sample for such purposes at the time of the initial investigation in 1999. The notice was intended to trigger further statements by him about the murder in three ways. First, it demonstrated the investigation was active. Second, it indicated that Tofilau was a suspect and the police might have evidence against him. Third, it demonstrated that Tofilau had been less than frank in previous discussions with P, because he had told P that he had previously given a DNA sample to the police. When Tofilau received the notice he contacted P. P then confronted Tofilau and encouraged him to tell the truth about the death of the deceased; after all the motto of the gang was 'trust, loyalty and honesty'. Thereafter Tofilau admitted to P that he killed the deceased by strangling her with something she had round her neck.

At this point, as was the plan, Tofilau was taken to see Mr Big, who told him that he needed to know all the relevant details if he was going to be able to fix things with the police. Mr Big in effect interrogated Tofilau as to such details. Tofilau provided a detailed confession. He admitted that he strangled the deceased with a scarf and that she struggled while he strangled her. Further, that he strangled her deliberately and went so far as to remove the telephone connection from the wall before he strangled her, replacing it after he had done so. The confession was secretly videotaped. Tofilau had taken the bait and was arrested the next day.

At trial Tofilau took the stand and testified that he did not kill Belinda Romeo and that his confession to Mr Big was a lie prompted by his desire to impress the boss and be accepted into the gang. The jury did not believe him and he was convicted of murder.

Admissibility of a Mr Big confession

At issue before the High Court was the admissibility of the confessions obtained using the Mr Big scenario. The defence challenged the confessions using three arguments:

- (1) That Mr Big violated the 'definite rule', which 'definitely' excludes a confession made in response to a threat or inducement by a person in authority.
- (2) That the confessions violated the 'basal voluntariness rule', which requires that any confession must be made voluntarily.
- (3) Finally, the defence asked the trial judges to exercise their overriding discretion to exclude the confessions for reasons of fairness, reliability, probative value or public policy.

1. The definite rule

It is accepted 'definite' law that a confession made following a promise or threat by a person in authority is not to

be admitted. There is no question that Mr Tofilau was plied with inducements. He had no money and membership of the gang represented money. Specifically the \$10,000 put in a safety deposit box as his share from the robbery was his, but only if he became a gang member. The key issue before the High Court was whether the inducement needs to be made by 'persons in lawful authority' or whether the rule could be triggered by any person capable of influencing the prosecution. Here the inducements were made by a purported criminal organisation that controlled corrupt police officers.

Ultimately six of the seven High Court justices in *Tofilau* found that a criminal organisation, even if perceived as being capable of influencing a prosecution, could not be regarded in law as 'persons in authority'. The fundamental principle underlying the 'definite rule' is to protect accused persons from improper inducements or threats made by state authorities. The accused must subjectively believe that the state is involved in making the inducements or threats. Criminal organisations do not count. However, three of the justices left the door open to the possibility that inducements or threats made directly by corrupt police officers might trigger the rule.²

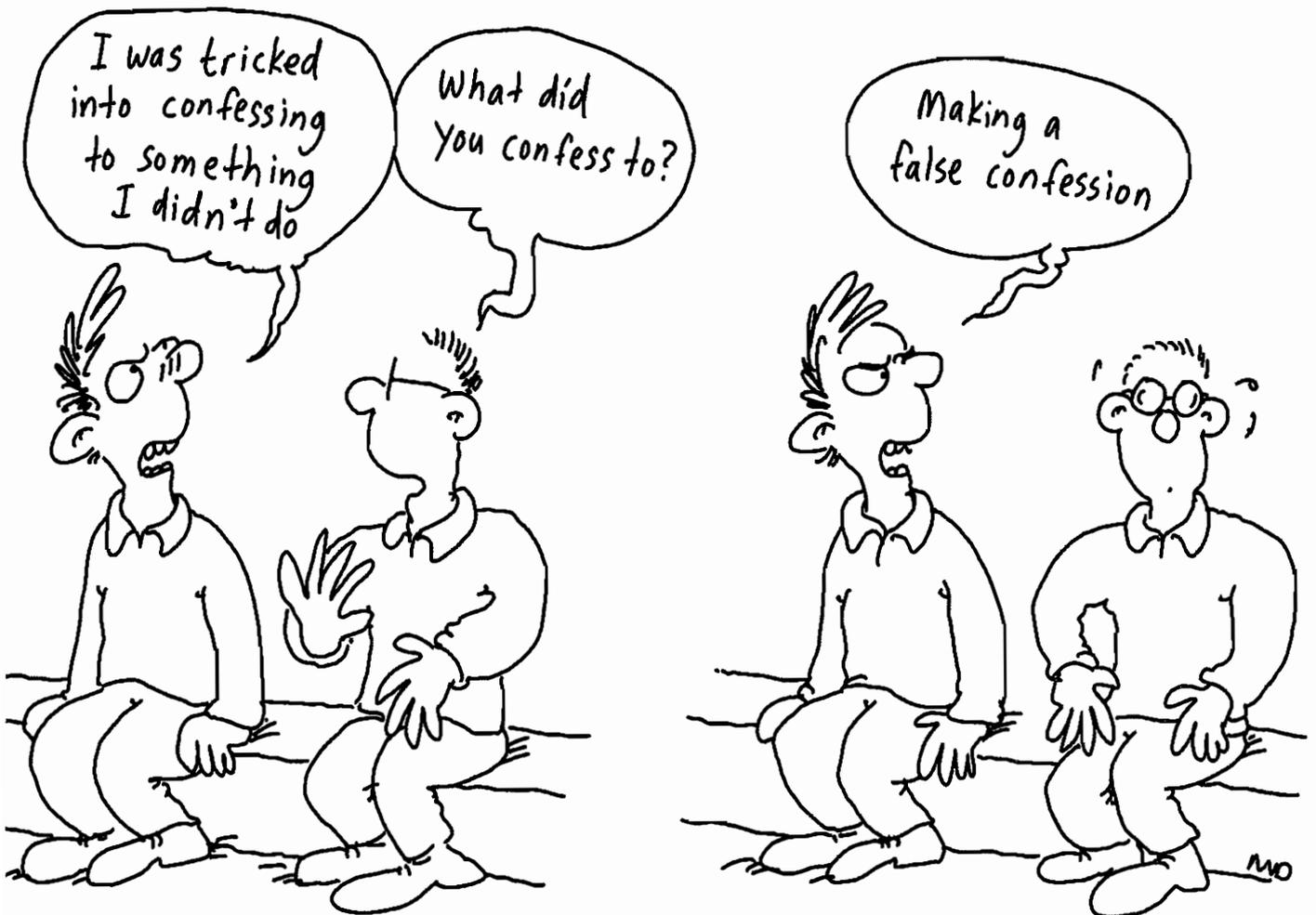
Kirby J dissented. He accepted a broad notion of 'person in authority'. In his view all that is required is that the maker of a statement must have a subjective belief, reasonably held, that the person to whom they are talking has a sufficient connection with the prosecution to affect the prosecution. What bothered Kirby J is that the police were being allowed to do indirectly that which they could not do

directly. Police officers – in uniform – if interrogating Mr Tofilau could not offer him \$10,000 in cash to confess, yet as undercover operatives they could offer all sorts of inducements.

Callinan, Heydon and Crennan JJ found little merit in this argument. In their view inducements by the police were of a different kind and had a different impact. Inducements or threats by the police would be far more likely to impact on the maker's belief that they could influence the prosecution. Furthermore, their judgment also reflects practical concern. If you remove the 'person in authority' requirement then it would compel the prosecution to establish the voluntariness of every statement against interest made by an accused to any person. In their view, that requirement would impose 'an overwhelming burden' on the prosecution.³

For example, assume that in *Tofilau* there really was a criminal Mr Big. The police through an authorised listening device capture the detailed confession on tape. The accused admits to confessing but says that he did so because of inducements or threats made by the gang members and Mr Big specifically, who said that he could fix things. In order to admit the confession the prosecution would have to call and rely upon the testimony of the crime members and Mr Big, who would hardly be co-operative witnesses.

The majority decision of the High Court in *Tofilau* is consistent with the unanimous decision of the Supreme Court of Canada in *R v Grandinetti*.⁴ In *Grandinetti* the Supreme Court of Canada considered a Mr Big scenario and addressed the very same arguments raised in *Tofilau*.



2. The basal voluntariness rule

The basal voluntariness rule has no 'person in authority' requirement. 'Basal voluntariness' refers to the fundamental principle that before any confession is to be admitted into evidence it must be voluntary in the sense that it is made free of compulsion from whatever source. The key inquiry is whether a person's free choice to speak or to remain silent was overborne by compulsion 'the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure'.⁵

In *Tofilau* the High Court affirmed the basal voluntariness rule, but gave it narrow scope. A finding that a person's free choice to speak has been overborne will not be lightly found. The fact that there is some advantage to confessing will rarely if ever suffice to deprive persons of their free choice to speak. The fact that the person is acting under a mistake will not suffice. The fact that a person's decision to speak is not a wise one will not suffice. The fact that there was deception will not suffice. The bottom line is that there needs to be a high measure of compulsion.

There is no question that Mr Tofilau was under pressure. He wanted to join the gang; he wanted the money that came with that membership; and he wanted the murder prosecution to go away. But that is not the point. The key point is that there was no coercion, intimidation or duress such to conclude that he had no free choice as to whether to speak or not. At the videotaped confessional meeting with Mr Big the accused was told that he did not have to say anything; that he could 'get up and walk out now'. He was then told, 'But we can help you, we can make this go away but you'll have to tell me everything that happened so that I make sure that we cover all the bases.'⁶ The accused then went on to confess.

Mr Big was carefully crafted. The gang emphasised 'trust, loyalty and honesty'. Mr Big stressed that he wanted the 'truth'. In the end Tofilau and the others were tricked into confessing, but not coerced into doing so. In law, he and the others voluntarily chose to confess.

3. The discretion

A judge has an overriding discretion to exclude otherwise admissible evidence. In this situation the discretion would apply to exclude an otherwise voluntary confession. In only one of the four cases before the High Court was the issue of discretion seriously argued.

The fundamental question to ask is 'whether, having regard to the conduct of the police and all the circumstances of the case, it would be unfair to use his/her own statement against the accused'.⁷ A number of factors are considered in the exercise of the discretion including: any impropriety or unlawfulness on the part of the authorities; the reliability of the evidence; the seriousness of the offence; potential prejudice to the accused; and the relevance of the evidence sought to be excluded.

None of the judgments in the High Court gave much credence to this argument – for good reason. First, the operation involved no impropriety or illegality. The alleged criminal activities which the accused either witnessed or participated in were all feigned. No crimes were committed. In short, the police were involved in legal trickery. Second, a voluntary confession to murder is extremely relevant evidence involving our most serious of crimes. Third, there is a measure of reliability as the detailed confessions are caught on videotape.

The fate of Mr Big operations

In *Tofilau* Gleeson CJ was of the view that Mr Big operations would have a 'limited life expectancy', assuming that the criminal community would read the law reports or media reports on the tactic.⁸ Such is not the Canadian experience, where Mr Big operations continue in a variety of forms and increased sophistication.⁹

R v Bridges is a perfect example.¹⁰ The accused was the target of an elaborate Mr Big operation. His girlfriend had disappeared and he was the prime suspect. The RCMP sting began by having a female undercover officer go door-to-door doing a radio marketing survey. She convinced Bridges to do the survey, where participants could win a grand prize. Two weeks later she returned to tell Bridges that he was selected as a finalist to win a trip to see a National Hockey League game. She even gave him a prize package that contained a miniature hockey stick, puck and T-shirt. A few days later Bridges was thrilled when informed that he had won the grand prize. Bridges was then flown to the game city where he was introduced to winners from other cities – all undercover police officers. Contact was made. One of the officers quickly befriended Bridges and introduction to the gang soon followed. Bridges eventually confessed. Most importantly he told Mr Big where he had buried the victim. He had buried her in a fresh grave in a local grave yard. The finding of the body definitely confirmed the reliability of his confession!

Although the confessions in the *Tofilau* decision were all found to be admissible, the High Court did express concern surrounding covert police operations generally, especially when the police are to act as gangsters. Callinan, Heydon and Crennan JJ concluded their joint judgment with the following words of caution: 'Nothing said above should be taken as a warrant for any indiscriminating reception of evidence gathered by police officers operating covertly.'¹¹ Keep in mind that Mr Big operations are specifically intended to solve murder cases and are requested when the traditional investigation reaches a dead end.

The biggest concern is that of false confessions.¹² What happens if the police target the wrong suspect? No doubt the seduction of money and power to those vulnerable could induce false confessions. In the Mr Big scenario there is a real up-side to confessing, whether true or not, with little perceived down-side.¹³

There are two important safeguards. First, as was done in the four cases in *Tofilau*, it is imperative that the police audio or videotape their interactions with the accused. Second, the existence of any corroborating evidence should be critical. The reality is that a videotaped confession is powerful evidence and may well mask an otherwise weak case. Judicial scrutiny is required. In *Tofilau* the confession was in part confirmed by the scarf used to strangle Ms Romeo. In one of the companion cases heard at the same time, *Marks v The Queen*, the accused admitted to using a hammer to kill his victim. The use of a hammer in the killing had never been made public; presumably only the killer would know that a hammer was used.

Mr Big is an elaborate undercover sting. It costs a great deal in terms of police time and resources. However, the fact that murderers are tricked into confessing their guilt is unfortunate for them, but hardly unfair or unacceptable practice.

References

- ¹ *Tofilau v The Queen; Marks v The Queen; Hill v The Queen; Clarke v The Queen* [2007] HCA 39. Although the case originates in Victoria, arguably the same law and principles would apply in the other Australian states. The applicable sections of the *Evidence Act* 1995 (Cth) are: s 84 – Exclusion of admissions influenced by violence and certain other conduct; s 85 – Criminal proceedings: reliability of admissions by defendants; s 90 – Discretion to exclude admissions; s 137 – Exclusion of prejudicial evidence in criminal proceedings; s 138 – Exclusion of improperly or illegally obtained evidence.
- ² *Tofilau v The Queen* [2007] HCA 39, [312].
- ³ *Ibid* [320].
- ⁴ *R v Grandinetti* [2005] 1 SCR 27.
- ⁵ *Tofilau v The Queen* [2007] HCA 39, [60].
- ⁶ *Ibid* [76].
- ⁷ *Ibid* [66], quoting from *R v Lee* (1950) 82 CLR 133, 154.
- ⁸ *Ibid* [5].
- ⁹ See *R v Unger* (1993) 83 CCC (3d) 228 (ManCA), which involved a Mr Big operation in 1990. Ten years later Mr Big was used once

again in the same jurisdiction: see *R v Bridges* [2005] MJ 232 (QB).

- ¹⁰ *R v Bridges* [2005] MJ 232 (QB); appeal dismissed [2006] MJ 428 (CA).
- ¹¹ *Tofilau v The Queen* [2007] HCA 39, [416].
- ¹² For a critical documentary movie on 'Mr Big' see <http://www.mrbigthemovie.com>.
- ¹³ See the comments of the trial judge in *R v Mentuck* [2000] MJ 447 (QB), [100]-[101].

Where do you stand?

Do you agree with the majority decision of the High Court in the Tofilau case? Or do you favour the position of the dissenting judge, Kirby J?