Does Failure to Understand the Police Caution Render an Accused Person's Admission Involuntary?

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Background:

There have been a handful of Western Australian cases (decided over the past couple of years) in which it has been argued that an admission was not voluntary, and thus should be inadmissible, because the accused person did not understand the police caution given to them. That is, the argument goes that the person did not understand that they had a right to remain silent, so they were not speaking voluntarily.

The judgments:

The Court of Appeal has made it very clear that failing to understand the caution does not itself give rise to involuntariness. For example (and most recently), in *Luo v The Queen* [2020] WASCA 184, the Court said that:

'… in Australian law, an accused person does not need to have understood that he or she has a choice as to whether or not to speak before a statement is taken to be voluntary. A failure by police to give a caution at all or a failure by an accused to understand the caution will be relevant to the exercise of the residual [fairness] discretion. However, such failures do not of themselves render a confessional statement inadmissible by reason of being involuntary.

In the present case it is not suggested that the police officers offered any threat or inducement in order to procure the admissions, or that the appellant's will was overborne by any external factor. The fact that he did not understand the caution and appreciate that he did not have to answer questions, if established, would be relevant to the exercise of the residual discretion but would not make the admissions involuntary for the purposes of the common law exclusionary rule.' (at [74]–[75])

In *Luo*, the appellant spoke Cantonese and submitted that he spoke no English. He also submitted that he was an unsophisticated fisherman. For these reasons (amongst others), at trial, he claimed he did not understand the caution given to him by police. A similar situation arose in *George v State of Western Australia* [2020] WASCA 139, in which the appellant was a speaker of a dialect of Tamil who the Court of Appeal observed could 'communicate effectively in English' (at [43]). In *George,* the Court of Appeal (at [100]–[101]) made the same point that was later made in *Luo*.

These arguments in *Luo* and *George* might have been prompted by a similar argument which was made the year prior in *EYO v State of Western Australia* [2019] WASCA 129. In that case, the appellant spoke Djaru as his first language, and also spoke some English. The appellant argued that his admissions were involuntary because he did not understand the caution given to him.

Ultimately, in *EYO*, the Court did not clearly state that a failure to understand would not result in an admission being made involuntary, presumably because the Court agreed with the trial judge that the appellant did in fact understand the caution:

'Having viewed the VROI, and seen and heard the appellant's answers to the questions put to him by the police, including those that were interpreted into Djaru, we think that his Honour did not err in finding that the appellant understood that part of the caution which informed him that he was not obliged to answer the questions put to him by the interrogating police officers. This is because, not only did the appellant answer in the affirmative that he understood that he did not have to answer the officers' questions, but on several occasions asserted that he did not wish to do so.' (at [66])

However, in *EYO*, the Court did find that the record of interview should have been excluded through exercise of the fairness discretion due to law enforcement's failure to comply with the *Anunga guidelines* (which are to be complied with when interviewing a suspect who is an Aboriginal or Torres Strait Islander person). As the Court set out:

'Breaches of the Anunga guidelines may be relevant to an assessment of the voluntariness of confessional evidence given by an Aboriginal person and the exercise of the unfairness discretion.' (at [54])

The breaches in *EYO* ultimately justified exercise of the discretion to exclude the record of interview for the following reasons:

'… on various occasions, when asked whether he wished to answer questions by the police, the appellant answered to the effect that he did not wish to answer. The appellant could not have been any clearer when he said, 'I'm saying nothing'; 'Yeah, I don't want to speak'; 'Yeah. I don't want to say anything'; 'On them other thing, like, this lawyer told me to, you know. The lawyer tell me to say no'.

Whenever the appellant responded to the effect that he did not wish to answer any questions, the interrogating police officers ignored those responses. Instead, they continued to interrogate the appellant about the alleged offences, as if the appellant had answered in the affirmative. In our opinion, the police officers, by their conduct, whittled down the effect of the caution by continuing with the interview when the appellant had repeatedly stated his wish to remain silent. In this way, the interrogating officers failed to respect the appellant's choice to stay silent. Their conduct infringed guideline 8 of the Anunga guidelines which provides that an interview should not proceed if the person being interviewed states he or she does not wish to proceed further.

[The trial judge should have] concluded that the VROI was inadmissible on the basis of the unfairness discretion. In our opinion, it was plainly unfair to admit into evidence the VROI, having regard to the factors above.' (at [76]–[78])

Conclusion:

The judgments are very clear that failure to understand the caution will not make an admission involuntary. However, it will be relevant to the exercise of the fairness discretion.