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SUPREME COURT OF QUEENSLAND — COURT OF CRIMINAL APPEAL

R v MITCHELL

Douglas, Hoare and Kelly JJ

26 July 1978

CRIMINAL LAW – UNLAWFUL USE MOTOR VEHICLE – IDENTIFICATION – DEFENDANT TOLD THAT HE HAD BEEN IDENTIFIED BY A POLICE OFFICER – SUCH STATEMENT NOT TRUE – CONFESSION SUBSEQUENTLY OBTAINED – DISCRETION TO EXCLUDE AS UNFAIRLY OBTAINED BY MISLEADING STATEMENT – WHETHER CONFESSION SHOULD HAVE BEEN REJECTED – CONVICTION QUASHED.

HELD: Conviction quashed.

1. The appellant made his admissions consequential on what was an untrue statement made to him by Lunney. In those circumstances the confession should not stand on the basis that it was unfairly obtained by Detective Lunney from the appellant.

2. The trial judge was asked to exercise his discretion in favour of rejecting the confession as evidence. It was a clear case in which he should have done so. If the confession had been rejected as evidence, as it should have been, there would have been no evidence in front of the jury sufficient for their consideration. In those circumstances the appeal should be allowed and the conviction quashed and no new trial ordered.

DOUGLAS J: This is an appeal against conviction by Billy Mitchell who, on 8 May 1978, in the District Court at Brisbane, was convicted on a charge of the unlawful use of a motor vehicle to which he had pleaded not guilty. The principal evidence against Mitchell consisted of evidence of identification by Sergeant Collins and evidence of an alleged confession to Detective Senior Constable Lunney.

The first ground of appeal here is that the learned trial judge should have exercised his discretion to exclude evidence of a confession made to Detective Lunney by the appellant following a misleading statement by Lunney that Sergeant Collins had identified the appellant as the driver of the motor vehicle which was the subject of the charge. Sergeant Collins gave evidence that on 1 December 1977 he was travelling towards Murgon in a vehicle when another vehicle approached him on the incorrect side of the roadway. He slowed his vehicle and observed that this other vehicle contained three Aborigines seated in the front seat. He was unaware of the identity of the Aborigines, but he made a mental note of the registration number of the vehicle. He was told something later at Cherbourg and he made inquiries in Brisbane and as a result of his inquiries he ascertained that the vehicle was reported to be stolen. He saw the appellant at the Kingaroy Police Station on 3 Dec. when he had a conversation with him. The appellant was with the senior sergeant of police at Kingaroy. In the meantime, on 2 Dec. 1977, Detective Lunney saw the appellant and questioned him, but the questioning was unfruitful until Lunney said to the plaintiff, 'I have spoken to Sergeant M. Collins of Cherbourg police and he told me he saw you driving the car on the Murgon to Cherbourg road at about 11.45 a.m. yesterday with some other Aborigines.' The appellant was then alleged to have replied, 'Well I am gone. Who dobbed me?' The detective's evidence goes on, 'I said to him, "I intend to ask you some further questions"' — he gave the usual warning, and then there is the further statement by the appellant, 'Yes. Who dobbed me?' and the detective said, 'As I told you before you were seen in the car by Sergeant Collins of Cherbourg yesterday on the road between Murgon and Cherbourg.' There then emerged statements which would amount, if accepted, to a confession of unlawful user of a motor vehicle.

It was plain on the evidence that at the time Detective Lunney told the appellant that Sergeant Collins had told him that the appellant was driving the car on the Murgon to Cherbourg road he did not have that information at all from Collins because at that time Collins did not know the identity of the appellant. It can only be assumed that the senior sergeant at Kingaroy had informed Lunney that the appellant was the suspect, but certainly the situation did not exist as

stated by Detective Lunney. On the way Lunney has given his evidence it is clear that the appellant made his admissions consequential on what was an untrue statement made to him by Lunney. In those circumstances it seems to me that the confession should not stand on the basis that it was unfairly obtained by Detective Lunney from the appellant.

The learned trial judge was asked to exercise his discretion in favour of rejecting the confession as evidence. In my opinion it was a clear case in which he should have done so. If the confession had been rejected as evidence, as it should have been, there would have been no evidence in front of the jury sufficient for their consideration. In those circumstances in my opinion the appeal should be allowed and the conviction quashed and no new trial ordered. There is no need to consider the other grounds of appeal.

HOARE J: I agree. I have nothing to add. **KELLY J:** I agree.

DOUGLAS J: The appeal is allowed. The conviction is quashed.
