6/00; [2000] VSC 73

SUPREME COURT OF VICTORIA

RICE v TRICOURIS

Beach J

6, 14 March 2000 — (2000) 110 A Crim R 86

CRIMINAL LAW – EVIDENCE – USE BY INFORMANT OF YOUNG PERSON TO OBTAIN EVIDENCE – PURCHASE OF CIGARETTES BY YOUNG PERSON FROM MILK BAR – CHARGE LAID FOR BREACH OF *TOBACCO ACT* 1987 – SUBMISSION THAT INFORMANT GUILTY OF ENTRAPMENT – RULING BY MAGISTRATE THAT EVIDENCE OF INFORMANT AND WITNESS SHOULD BE EXCLUDED ON GROUNDS OF PUBLIC POLICY – WHETHER MAGISTRATE IN ERROR: *TOBACCO ACT* 1987, S12(1).

R., an Environmental Health Officer, arranged for S., a schoolgirl aged 15 years, to purchase some cigarettes from T's milk bar. S. then purchased five cigarettes from T. Subsequently, T. was interviewed and charged with an offence of selling a tobacco product to a person under the age of 18 years contrary to s12(1) of the *Tobacco Act* 1987. At the hearing, it was submitted by T. that the informant had been guilty of entrapment and accordingly, the evidence of the informant and S. should be excluded on the grounds of public policy. In agreeing with this submission and ruling that the evidence in question should be excluded on the basis of public policy, the magistrate referred *inter alia*, to the decision of the High Court in *Ridgeway v R* (1995) 184 CLR 19 which deals with the discretion to exclude prosecution evidence on public policy grounds in circumstances where it has been obtained by unlawful conduct on the part of the police or other prosecuting authority. The magistrate also stated that the use of a child to procure an offence is inconsistent with the minimum standards expected by society. Upon appeal—

HELD: Appeal allowed. Order of magistrate quashed. Matter referred back for hearing and determination by another magistrate.

1. There is no doubt that a magistrate has a discretion to exclude prosecution evidence on public policy grounds in circumstances where it has been obtained by unlawful conduct on the part of the police or other prosecuting authority. However, the court must not fall into the error of categorising all cases in which there has been unlawful conduct in the same fashion.

2. In the present case, there was no unfairness concerning the manner in which the evidence in question was obtained. T. was not induced to sell the cigarettes to S. S. did not commit any offence by purchasing the cigarettes. There was no insidious manipulation of S. by the informant. S. agreed to take part in the purchase.

3. The magistrate was in error in failing to consider matters such as the need to protect children from the hazards of smoking, the need for general and specific deterrence of selling cigarettes to children and the difficulty of obtaining evidence to prove the commission of the offence. Further, it cannot be accepted that society would frown upon the use of a 15-year old child to make a test purchase of cigarettes as in the present case. Most reasonable members of the community would take the view that this was a most satisfactory way of attempting to stamp out the illegal sale of tobacco products to minors.

BEACH J:

1. This is an appeal from the order of the Magistrates' Court at Sunshine made on 24 September 1999 whereby the Magistrate dismissed a charge brought against the respondent by the appellant that on 25 February 1999 at Altona North the respondent sold a tobacco product to a person named Amanda Smith who was then under the age of 18 years, contrary to s12(1) of the *Tobacco Act* 1987.

2. When the matter came before the Magistrates' Court on 24 September counsel for the respondent made an application to the Court that the evidence of the appellant and Amanda Smith be excluded having regard to the manner in which it had been obtained.

3. The Magistrate stated that he would hold a *voir dire* to determine the admissibility of the evidence.

4. The appellant then gave evidence that she was an Environmental Health Officer with the

Hobsons Bay City Council and was an authorised officer for the purposes of the *Tobacco Act*.

5. The appellant swore that on 25 February 1999 she visited the home of Amanda Smith who was a schoolgirl then aged 15, and discussed with Amanda and Amanda's mother a proposal that Amanda make a test purchase of cigarettes from the milk bar conducted by the respondent in Ross Road, Altona North.

6. Both Amanda and her mother were agreeable to the proposal. Mrs Smith signed a formal consent to that effect.

7. The appellant handed Amanda $2 which Amanda was to use to purchase the cigarettes.

8. At about 4.45pm that afternoon the appellant drove Amanda to the vicinity of the milk bar. Amanda alighted from the appellant's car, went into the milk bar and returned to the car a short time later with five cigarettes and some change from the $2. The appellant then drove Amanda back to her home.

9. On 10 March the appellant interviewed the respondent in relation to the sale of the cigarettes to Amanda. He made no admission concerning the sale.

10. Amanda Smith gave evidence along similar lines to that given by the appellant. So far as the actual purchase of the cigarettes was concerned she swore that she simply walked into the respondent's milk bar, asked for cigarettes, and purchased four or five Peter Jackson cigarettes for 35 cents each. At no time was she asked to produce any identification.

11. The submission put to the Magistrate by counsel for the respondent was that in arranging for Amanda Smith to purchase the cigarettes from the respondent the appellant had been guilty of entrapment and that in that situation the Magistrate should exclude the evidence of both Amanda Smith and the appellant on the grounds of public policy. The authority relied upon by counsel in support of that contention was the decision of the High Court in *Ridgeway v The Queen* (1995) 184 CLR 19.

12. Having heard debate concerning the matter the Magistrate acceded to the submission and ruled that the evidence in question should be excluded on the basis of public policy. The Magistrate gave the following reasons for his decision in that regard:

> "1. He had a discretion available to him to exclude evidence on public policy grounds.
>
> 2. Council had engaged a 15 year old child to procure the commission of an offence, namely the sale of tobacco products to minors.
>
> 3. The child was induced to act by another person in authority.
>
> 4. The child could be liable for the aiding and abetting of an offence.
>
> 5. He had to engage in a balancing process per *Ridgeway* and weigh up the public interest in protecting children (from potentially being liable for an offence as a consequence of their use by law enforcement agencies to procure an offence) and the public interest in bringing to justice those who have committed offences pursuant to the *Tobacco Act*.
>
> 6. To put a child in the position of possibly committing an offence is a misconceived endeavour to enforce the law concerning the selling of tobacco products to minors.
>
> 7. The public interest in protecting children from engaging in unlawful conduct was paramount and that his view in this was strengthened by the vulnerability of Amanda Smith in the witness box.
>
> 8. The Defence had engaged in a gratuitous attempt to discredit Amanda Smith (by attacking her character, her association with other young people and her overall reliability as a witness).
>
> 9. On the evidence of the Informant it was open to draw an inference that cigarettes had been purchased in the shop by Amanda Smith. However to admit the evidence of the Informant would generally defeat the purpose of making a finding on the basis of public policy.

> 10. Any conduct by law enforcement agencies needs to be consistent with minimum standards expected by society and the use of a child to procure an offence is inconsistent with such standards.
>
> 11. This was a class of case in which the evidence of both the Informant and the child witness should be excluded."

13. On 22 October 1999 the appellant made application to a Master of the Court pursuant to Rule 58.09 of the *Supreme Court Rules* for an order stating each question of law the appellant contended was raised by her proposed appeal.

14. The Master acceded to the application and stated that the following question of law was to be determined by the appeal:

> "Whether the learned Magistrate erred in exercising his discretion (*Cross* discretion) to exclude the evidence of the informant and child witness as to the purchase of tobacco by the child? (See *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561 and *Ridgeway v R* [1995] HCA 66; (1995) CLR 19 at 38; (1995) 129 ALR 41; (1995) 69 ALJR 484; (1995) 78 A Crim R 307; (1995) 8 Leg Rep C1)."

15. It is to be remembered that appellate jurisdiction in respect of discretionary decisions involves a strong presumption in favour of the correctness of the decision appealed from. An appellate court needs to be satisfied that the discretionary decision was clearly wrong before it is justified in intervening in the matter. See *Australian Coal and Shale Employees Federation v The Commonwealth* [1953] HCA 25; (1956) 94 CLR 621 at 627.

16. However, as the High Court pointed out in *House v R* [1936] HCA 40; (1936) 55 CLR 499 at 504; 9 ABC 117; (1936) 10 ALJR 202:

> "A degree of satisfaction sufficient to overcome the strength of the presumption may exist where there has been an error which consists in acting upon a wrong principle, or giving weight to extraneous or irrelevant matters, or failing to give weight or sufficient weight to relevant considerations, or making a mistake as to the facts. Again, the nature of the error may not be discoverable, but even so it is sufficient that the result is so unreasonable or plainly unjust that the appellate court may infer that there has been a failure properly to exercise the discretion which the law reposes in the court of first instance."

17. There can be no doubt but that a Magistrate has a discretion to exclude prosecution evidence on public policy grounds in circumstances where it has been obtained by unlawful conduct on the part of the police or other prosecuting authority. See *Ridgeway* at CLR p30.

18. But one must not fall into the error of categorising all cases in which there has been unlawful conduct in the same fashion.

19. So much is clear from the decision of the majority in *Ridgeway*. At CLR p39 their Honours said:

> "References in this judgment to an offence being 'procured' by illegal conduct on the part of law enforcement officers are intended to refer to two distinct, but possibly overlapping, categories of case. The first category consists of cases in which the police conduct has induced an accused person to commit the offence which he or she has committed. In that category of case, the public interest in the conviction and punishment of those guilty of crime is likely to prevail over other considerations except in what we would hope to be the rare and exceptional case where the illegality or impropriety of the police conduct is grave and either so calculated or so entrenched that it is clear that considerations of public policy relating to the administration of criminal justice require exclusion of the evidence. The other category of case is where illegal police conduct is itself the principal offence to which the charged offence is ancillary or creates or itself constitutes an essential ingredient of the charged offence. An example of that category is a case where a person is charged with receipt or possession of stolen property in circumstances where not only the supply, but the actual theft, of the stolen property had been organised by the police for the purpose of obtaining the conviction of the person to whom it is supplied (see eg. *R v D'Arrigo* [1994] 1 Qd R 603). In that category of case, the police illegality and the threat to the rule of law which it involves assume a particularly malignant aspect."

And again as the majority in *Ridgeway* said at CLR p37:

> "The effective investigation by the police of some types of criminal activity may necessarily involve subterfuge, deceit and the intentional creation of opportunities for the commission by a suspect of a criminal offence. When those tactics do not involve illegal conduct, their use will ordinarily be legitimate notwithstanding that they are conducive to the commission of a criminal offence by a person believed to be engaged in criminal activity."

20. In the present case there can be no question of unfairness concerning the manner in which the evidence in question was obtained. This is not the type of case instanced in *Ridgeway* at CLR p36 namely "a case of creating circumstances of temptation under which a vulnerable but otherwise law-abiding citizen commits an offence of a kind which he or she otherwise might not have committed."

21. It is clear from the evidence of the appellant and Amanda Smith that the respondent was not induced to sell the cigarettes. In all probability he would have been prepared to sell them to anyone who asked.

22. If I might return to the Magistrate's reasons for his ruling.

23. The Magistrate was quite correct in stating that he had a discretion available to him to exclude evidence on public policy grounds.

24. And true it is that the Council engaged a 15 year old child to procure the commission of the offence. But that can hardly be said to be improper conduct. To successfully prosecute the respondent it was necessary that the Council obtain evidence that the respondent was selling tobacco products to children under the age of 18.

25. Amanda Smith was not committing any offence by purchasing the cigarettes. The situation in this case can be contrasted with that in *Ridgeway* where the actual importation of heroin into Australia was performed by police.

26. Further there was no insidious use or manipulation of Amanda by the appellant. The child and her mother were comprehensively informed of the procedure and ramifications of the test purchase. Amanda was hardly induced to take part in the purchase. She was asked to and agreed to as did her mother.

27. It is fanciful to suggest that any charge of aiding and abetting would ever be brought against her.

28. And in any event as Allen J (with whom Gleeson CJ and Barr AJ agreed) said in *R v Dumas* (CCA (NSW) 20.11.95):

> "The importance of the role of the undercover police officer must be recognised in the exercise of the discretion. It must be recognised that there are areas of crime such as trafficking in illegal drugs in which the effectiveness of the police would be reduced to an extent clearly contrary to the public interest were undercover agents, posing as willing buyers, effectively precluded on the technical commission of ancillary offences ..."

29. In engaging in the balancing process he did (Reason No. 5) I consider that the Magistrate was in error in failing to take into account the following matters:

> 1. The need to protect children from the hazards of smoking.
>
> 2. The avoidance of long-lasting health problems caused to children smokers.
>
> 3. The need for general and specific deterrence of selling cigarettes to children.
>
> 4. The difficulty of obtaining evidence to prove the commission of the offence.
>
> 5. The absence of viable or practical alternatives to the successful prosecution of those selling cigarettes to children.

30. The only other reason given by the Magistrate which I wish to comment about is Reason No. 10 that is that any conduct by law enforcement agencies needs to be consistent with minimum

standards expected by society and the use of a child to procure an offence is inconsistent with such standards.

31. I cannot accept that society would frown upon the use of a 15 year old child to make a test purchase of cigarettes from a milk bar in the circumstances in which Amanda Smith did in the present case. Indeed I suspect that most reasonable members of the community would take the view that that was a most satisfactory way of attempting to stamp out the illegal sale of tobacco products to minors.

32. In my opinion the result in this case was so unreasonable and unjust that I consider the Magistrate can be said to have failed to properly exercise his discretion in the matter.

33. The specific answer to the question of law identified by the Master is "Yes the Magistrate did."

34. The appeal will be allowed.

35. The order of the Magistrates' Court at Sunshine made on 24 September 1999 is quashed.

36. I order that the information and summons be referred back to the Magistrates' Court at Sunshine for hearing by another Magistrate of that Court.

37. I order that the respondent pay the appellant's costs of the appeal including any reserved costs.

38. The order for costs in the Magistrates' Court is set aside.

APPEARANCES: For the appellant Rice: Mr D Gurvich, counsel. Maddock Lonie & Chisholm, solicitors. For the respondent Tricouris: Mr I Bowditch, counsel. Caleandro, Guastalegneme & Co, solicitors.
