32/01; [2001] VSC 254

SUPREME COURT OF VICTORIA

WEGENER v WEGENER & ANOR

Beach J

5, 12 June 2001 — (2001) 123 A Crim R 170

PRACTICE AND PROCEDURE – REFUSAL BY WITNESS TO ANSWER QUESTION ON GROUNDS OF SELF-INCRIMINATION – SOME ANSWERS GIVEN BY WITNESS OF AN INCRIMINATING NATURE – WAIVER OF PRIVILEGE AGAINST SELF-INCRIMINATION – WHETHER PRIVILEGE WAIVED.

During the hearing of an application for an Intervention Order, evidence was given by the applicant that the defendant was a heroin user. The defendant stated to his counsel that the applicant was also a heroin user and she was cross-examined about this allegation. When the defendant gave evidence, he was asked by his counsel when he had last used heroin to which he replied: "A long time ago … in the past." When asked whether it was more than a year ago, the defendant refused to answer the question on the ground that it might incriminate him. The matter was stood down and upon resuming, the defendant consented to the making of the Intervention order. Upon an originating motion seeking an order in the nature of *certiorari*—

HELD: Originating motion dismissed.
The privilege against self-incrimination is a basic and substantive common law right available to all witnesses in both civil and criminal proceedings. It extends to all questions where the answer would have the tendency to expose the witness directly or indirectly to a criminal conviction. However, the privilege against self-incrimination may be waived. In the present case, the question as to whether the defendant had used heroin more than a year ago was sufficiently related to his previous answers that it had been a long time ago in the past as to be covered by the waiver.

BEACH J:

1. For some eight years the first defendant, Jane Lazzari-Wegener, lived in a de facto relationship with the plaintiff, Markus Wegener. The relationship ended in September 2000.

2. On 28 February 2001 the first defendant sought an intervention order against the plaintiff pursuant to the provisions of the *Crimes (Family Violence) Act* 1987.

3. The complaint came before the Preston Magistrates' Court on 1 March 2001. The plaintiff was represented by counsel, the first defendant by the duty solicitor who was present at the court that day.

4. In the course of her evidence the first defendant gave evidence of the fact that the plaintiff was a heroin user. During a short adjournment the plaintiff informed his solicitor that the first defendant was also a heroin user. The first defendant was recalled to the witness box and was cross-examined about the allegation. During that cross-examination the presiding Magistrate commented that he was waiting for the plaintiff to be asked when he had last used heroin.

5. In due course the plaintiff returned to the witness box and was asked by his solicitor when he had last used heroin. After some toing and froing the plaintiff declined to answer the question on the ground that his answer might incriminate him.

6. I think that it is important to set out in full the detail of what occurred in relation to the matter as appearing in the transcript of proceedings that day:

> "Magistrate: Are you represented … You're Mr Wegener are you? Mr Wegener: Yes I am. Magistrate: Are you represented today? Mr Wegener: Yes … Peter … will be representing me Your Honour. Magistrate: Yes Mr Baker? Mr Baker: Yes Your Worship, I appear on behalf of Mr Wegener. Magistrate: Yes … what's happening? Mr Baker: The Intervention Order is not consented to Your Worship. Magistrate: Yes … yes call the evidence."

Then evidence was called, and later:

"Magistrate: Mr Wegener, you go back in the box again. I remind you you are still under oath. Yes, Mr Baker.
Mr Baker: Mr Wegener, what was the ... when would you say was the last occasion that you used heroin? Mr Wegener: A long time ago ... in the past and I ...
Magistrate: When was it? Mr Baker: Was it more than a year ago?
Mr Wegener: I am not happy to answer that question as ...
Magistrate: I direct you to answer the question. Mr Wegener: It was over ...
Mr Baker: Well, Your Worship ...
Magistrate: I direct you to answer the question ... Are you going to answer?
Mr Wegener: I'm not ... I'm ... I'm not happy to answer because ... um it may incriminate me.
Magistrate: Mr Baker, you might care to give your client advice ... having regard to the provisions of the Magistrates' Court Act ... I will stand the matter down while you consider that ... Do you understand what I am talking about?
Mr Baker: Well Your Worship ... Yes I'll ...
Magistrate: You asked him a question. He refuses to answer his own counsel a question. I've directed him to answer. He is now in contempt. You can deal with that ... I'll give you a chance to ...
Mr Baker: Well, Your Worship ... I understood that he answered, 'it was more than a year ago,' Your Worship.
Magistrate: I am directing him to tell me when it was as you asked him."

7. There was then a short adjournment during the course of which the plaintiff told his solicitor that he was "spinning out" and that he could not go on and would be willing to consent to the first defendant's application.

8. When the court resumed the plaintiff's solicitor informed the Magistrate that his client would consent to the application, whereupon the Magistrate made an intervention order against the plaintiff for a period of 12 months.

9. On 27 April 2001 the plaintiff filed an originating motion in the court whereby he seeks an order in the nature of *certiorari* quashing the order of the Magistrates' Court on the ground that in making the order the Magistrate failed to accord the plaintiff natural justice. The particulars relied upon read:

"(a) The Plaintiff was a witness in proceedings taken against him by the First Defendant under the *Crimes (Family Violence) Act*, during which he declined to answer a question put to him on the grounds that it might tend to expose him to the possibility of conviction of a crime.

(b) His Worship refused to acknowledge the Plaintiff's entitlement to refuse to answer the question and instead directed the Plaintiff to answer. When the Plaintiff again declined to answer, His Worship stated that the Plaintiff was in contempt of court for not answering the question.

(c) The effect of His Worship's actions was to make it impossible for the Plaintiff to conduct his case in the manner of his choosing and to raise in the Plaintiff the reasonable belief in the circumstances that he had no choice but to consent to the order sought.

(d) The Plaintiff was thereby denied an opportunity to properly defend the proceedings that had been brought against him."

10. In the alternative the plaintiff seeks certain declaratory relief. So far as that aspect is concerned the originating motion reads:

"2. Further or in the alternative a declaration that:

(a) His Worship was obliged to recognise and protect the Plaintiff's entitlement, as a witness in an application made pursuant to the *Crimes (Family Violence) Act* 1987, to refuse to answer a question put to him on the grounds that it might tend to expose him to the possibility of imposition of a civil penalty or conviction of a crime;

(b) In
(i) refusing to permit the Plaintiff to exercise his right to refuse to answer the question put to him on the ground that it might tend to expose him to the possibility of conviction of a crime; and

(ii) stating that the Plaintiff was in contempt of court for not answering the question;
His Worship denied the Plaintiff natural justice."

11. There can be no question but that the Magistrate was bound by the rules of natural justice. Nor can it be doubted that the privilege against self-incrimination is a basic and substantive common law right available to all witnesses in both civil and criminal proceedings. It extends to all questions where the answer would have the tendency to expose the witness directly or indirectly to a criminal conviction. See *Reid v Howard* [1995] HCA 40; (1995) 184 CLR 1; 131 ALR 609; (1995) 69 ALJR 863; 83 A Crim R 288, particularly at CLR page 11 and page 14.

12. But of course the privilege against self-incrimination may be waived. This aspect was considered by the Court of Appeal in New South Wales in *Accident Insurance Mutual Holdings Ltd v McFadden and Another* (1993) 31 NSWLR 412. At p425 Kirby P (as he then was) said:

> "8. The privilege against self-incrimination may be waived in certain circumstances. In this respect it accords with other privileges. This much is clear law: see, eg, J.H.Wigmore, *Evidence in Trials at Common Law* (1961) Boston, Little, Brown & Co, vol 8 at 453ff and *BTR Engineering* (at 727). The presence of a privileged document in the hands of a third party does not necessarily destroy the privilege. The question remains whether the party entitled to the privilege has actually waived it: see *Kennedy v Lyell* (1883) 23 Ch D 387; *Trade Practices Commission v Sterling* [1979] FCA 33; (1979) 36 FLR 244; *Hartogen Energy Ltd (In Liq) v Australian Gaslight Co* 36 FCR 557; (1992) 109 ALR 177; cf *Giannarelli v Wraith* [No 2] [1991] HCA 2; (1991) 171 CLR 592 at 604; (1991) 98 ALR 1; 65 ALJR 196. The extent of possible waiver is, however, disputed. The respondents asserted, with the support of Wigmore, that it was available in two cases only, being the two mentioned by that author, viz, by contract or other binding pledge before trial and by voluntarily testifying in the case. I do not consider that this states the common law of Australia. It is conceptually unsatisfactory. It appears to be inconsistent with the passage of Lord Barker LC in *East India Co v Atkins* (1719) 1 Str 168 at 176; 93 ER 452 at 457 where it was pointed out that what was involved is 'only a privilege, not an actual right'. It also appears incompatible with reasoning of the High Court of Australia in analogous cases: see, eg, *Attorney-General for the Northern Territory v Maurice* [1986] HCA 80; (1986) 161 CLR 475 at 480; 69 ALR 31; 61 ALJR 92. Nevertheless, as with any waiver, it is necessary to define with some precision what is waived. It will be rare that a person is taken to have waived all rights and privileges in respect of any prosecution for any offence arising out of circumstances only generally defined. The point of difficulty will be presented by the definition of the subject matter of the waiver. This will require assessment of the reasonable interpretation to be placed upon the conduct of the witness said to amount to the waiver."

Later on 424 His Honour said:

> "The giving of a written statement (whether to police or to an insurance investigator) on the general subject matter of certain criminal activities does not forever waive the privilege against self-incrimination in respect of other crimes which may arise from the oral elaboration of the written document. Of course, what is involved raises a question of degree. Each question put must be judged by reference to the matters already admitted and the waiver already expressed. But because of the prosecution for a wide range of offences which this witness potentially faced and the great latitude normally allowed to a witness to be protected from self-incrimination, I consider that the course adopted by P R Bell DCJ was proper. It was certainly open to his Honour. I see no error in it. That part of the challenge in the appeal therefore fails."

At p431 Clarke JA said:

> "In *Phipson on Evidence*, 14th ed, (1990) at 540, the following statement appears: '... Witnesses have also, in a few cases, been held disentitled to the privilege of refusing to answer in respect of penalties or forfeiture, but not of crime, by their own contract or conduct.' The clear thrust of this statement is that conduct of the witness will not disentitle him or her from answering the question which may tend to expose that witness to conviction for a crime. *Wigmore*, on the other hand, (Wigmore, *Evidence in Trials at Common Law*, (1961), vol 8, par 2275 at 453) says that it has never been doubted that the privilege against self-incrimination, like all privileges, is waivable. The text goes on to say (at 454): 'There are two possible ways of waiving: (a) By contract or other binding pledge before trial, or (b) by voluntarily testifying in the case.' The second alternative is discussed in par 2276 (at 456-457) where it is said: 'The witness who is not the accused in a criminal trial – the *ordinary witness* – may waive his privilege; this is conceded. He waives it by exercising his option of answering; this is conceded. Thus the only inquiry can be whether, by *answering as to fact X, he waived it for fact Y*. The answer is yes, provided the facts are sufficiently related. The clear case is that in which fact Y is but a detail implying no further self-incrimination – none in addition to that already volunteered by the disclosure of fact X. A more difficult case is that in which facts X and Y are interdependent parts of a whole fact forming a single relevant topic. If it is patent at the time of the disclosure of fact X that any distortion caused by that disclosure can be discovered and corrected only by the acquisition of information as

> to fact Y, then it is reasonable to hold that the witness' voluntary disclosure of part is a waiver as to the related parts. This is so at least if the witness is aware of his rights, the part voluntarily disclosed is itself self-incriminating, and the distortion created by partial disclosure would incurably prejudice the interests of someone other than the government in its pursuit of the witness.'"

13. What is contended by counsel for the first defendant in the present case is that by his conduct during the course of the hearing the plaintiff waived his right to decline to answer questions put to him relating to his use of heroin. In that regard he points to the following aspects of the matter:

> 1. Although the first defendant was the first witness to raise the use of heroin by the plaintiff as an issue in the trial, the plaintiff then made the whole question of heroin use by himself and the first defendant a primary feature of the trial by having his solicitor cross-examine the first defendant concerning the matter and putting it to her that she herself was a heroin user.
>
> 2. When the plaintiff commenced to give evidence he did not challenge the fact that he had used heroin but said that it had occurred "a long time ago, in the past". When asked by his own solicitor whether it was more than a year ago he then claimed privilege against self-incrimination.

14. In my opinion the question as to whether he had used it more than a year ago was sufficiently related to his previous answers that it had been a long time ago in the past, as to be covered by the waiver.

15. Much criticism was made by the learned Magistrate for stating as he did when the plaintiff declined to answer the question that the plaintiff was then in contempt. It was said that of itself constituted a denial of natural justice.

16. I am unable to accept that proposition.

17. In the first place it is clear that the statement was made in the heat of the moment. If the Magistrate had then proceeded to impose some penalty upon the plaintiff that would be one thing. But he did not. He then told the solicitor for the plaintiff that he would give him a chance to deal with it and then left the bench.

18. If the plaintiff's solicitor had wished to debate the matter he had every opportunity to do so. If he wished to ask for an adjournment to give further consideration to the matter he could have made an appropriate application for one. He did not do that, but appears to have been quite content to accept the plaintiff's instructions to consent to the first defendant's application and proceeded to do so.

19. In my opinion that was a decision which was open to the plaintiff if he was so minded and there is no basis for this court to interfere in the matter.

20. I order that the originating motion be dismissed.

21. I order that the plaintiff pay the first defendant's costs of the proceeding including any reserved costs.

APPEARANCES: For the plaintiff Mr Wegener: Mr N Papas and Miss R Ellyard, counsel. Victoria Legal Aid. For the defendants Ms Lazarri-Wegener and Anor: Mr R Macfarlane, counsel. Slater & Gordon, solicitors.
