

20/84

SUPREME COURT OF VICTORIA — FULL COURT

DIRECTOR of PUBLIC PROSECUTIONS REFERENCE (No. 1 of 1984)

Young CJ, Murphy and Hampel JJ

27-30 April, 10 May 1984 — [1984] VicRp 64; [1984] VR 727

CRIMINAL LAW – REFERENCE BY DIRECTOR OF PUBLIC PROSECUTIONS – PERSON ACQUITTED OF THEFTS AND ASSAULT WITH INTENT TO ROB – VOLUNTARY RECORDS OF INTERVIEW EXCLUDED BY TRIAL JUDGE – RECORDS OF INTERVIEW UNLAWFULLY OBTAINED – WHETHER TRIAL JUDGE CORRECT IN EXERCISE OF DISCRETION: *CRIMES ACT 1958*, SS450A, 567, 573.

The respondent was presented for trial on 3 counts under the *Crimes Act 1958*. At the trial, records of interview which had been voluntarily obtained from the respondent were sought to be tendered in evidence; however, the trial judge ruled that they were not admissible because they were made at a time when the respondent was detained in unlawful custody. At the conclusion of the Crown case, the respondent was acquitted by direction of the trial judge. Upon reference by the Director of Public Prosecutions of certain points of law to the Full Court for consideration—

HELD: As the points raised for consideration were not points of law within s450A of the *Crimes Act 1958*, the Court declined to express an opinion upon the reference.

Observations by the Court:

(1) Confessional statements made voluntarily may be excluded from evidence if it be shown that they were obtained in circumstances which would render their use—

- (a) unfair and unjust to the accused;**
- (b) against the public interest.**

Collins v R [1980] FCA 72; [1980] 31 ALR 257 per Brennan J; and

Cleland v R [1982] HCA 67; (1982) 151 CLR 1; [1983] 43 ALR 619; (1983) 57 ALJR 15 per Gibbs CJ, Wilson and Dawson JJ, followed.

(2) There is no general rule that courts should reject evidence merely because it has been unlawfully obtained. Further, rejection on this ground alone is most exceptional. The Court should consider the nature and extent of the unlawful conduct and the circumstances in which it took place, and then weigh the following competing considerations of public policy—

- (i) the community's desire to see the guilty convicted;**
- (ii) discouragement of the use of unacceptable methods in achieving conviction of the guilty.**

YOUNG CJ, MURPHY and HAMPEL JJ: *[After referring to the circumstances leading up to the ruling by the trial judge, the points of law said to have arisen in the case, the purpose of s450A of the Crimes Act 1958, and the Full Court's declining to express an opinion upon the reference by the Director of Public Prosecutions, their Honours continued]: ... [8] the material before us reveals a disturbing situation. Not only did the learned trial judge act in the way we have already described, he also treated as overstated certain observations made in a recent trial by a judge of this Court which was directly relevant to the task before him. See the ruling given by Hampel J in *R v Larson & Lee* [1984] VicRp 45; [1984] VR 559. Further, we were informed by Mr Weinberg that a number of other judges have taken a view similar to that taken by the trial judge in this case and that a large number of criminal trials has been postponed pending this Court's determination of the present reference. In these circumstances we think that we should make certain observations for the assistance of trial judges, recognising, however, [9] the dangers of a Court's going beyond the precise matter which arises for decision in the case before it.*

It has long been the law that confessional statements which have not been voluntarily made are not admissible in evidence. But even if such statements are shown to be voluntary they may nevertheless be excluded from evidence by the exercise of the discretion of the trial judge. A trial judge should exercise his discretion to exclude such statements if it is established by the accused that they were obtained in circumstances which would render the use of such statements unfair and unjust to him. What is unfair must depend upon the circumstances of each case and no attempt should be made to define and thereby to limit the extent or application of the conception: see *R v Lee* [1950] HCA 25; (1950) 82 CLR 133 at p151; [1950] ALR 517, quoted by Gibbs CJ in

Cleland v R [1982] HCA 67; (1982) 151 CLR 1; [1983] 43 ALR 619 at p621; [1982] 57 ALJR 15 at p17. Independently, considerations of public policy are relevant to the residual discretion, see *Bunning v Cross* [1978] HCA 22; [1978] 141 CLR 54 at pp74-5; 19 ALR 641; 52 ALJR 561 per Stephen and Aickin JJ, but may overlap with considerations of unfairness. See Dawson J in *Cleland v R*; Brennan J in *Collins v R* [1980] FCA 72; (1980) 31 ALR 257 .

Two matters emerge from the High Court's decision in *Cleland's case*. The first is that there is no general rule that a trial judge should reject evidence merely because it has been unlawfully obtained. The second is that the rejection of confessional evidence on this ground alone is most exceptional. Gibbs CJ said at p624 ALR; p18 ALJR;

"It should, however, be made clear that there is no general rule that the Court will reject evidence illegally obtained. [10] On the contrary, the rejection of confessional evidence for this reason alone is most exceptional. I respectfully agree with the statement of Brennan J in *Collins v R* [1980] FCA 72; [1980] 31 ALR 257, at p317 that it is difficult to conceive of a case where a voluntary confession which might fairly be admitted against an accused person would be rejected in the public interest because of unlawful conduct leading to the making of the confession.'

His Honour continued at p317:

'When the admission of confessional evidence is in question, the material facts are evaluated primarily to determine whether it is unfair to the accused to use his confession against him, and it would be only in a very exceptional case that the residual question would arise as to whether the public interest requires the rejection of the confession.'

"Further, if the use of the confession would not be unfair to the accused, it is difficult to see why the accused can be heard to complain if the judge does not reject the confession on the ground that it was unlawfully obtained, since the purpose of rejecting the evidence on the ground is to ensure the observance of the law rather than the fairness of the trial."

Wilson J agreed fully (at p631 ALR; at p22 ALJR) with Gibbs CJ. Dawson J agreed with the extract from the judgment of Brennan J in *Collins v R* (above) and his judgment contains a full examination of the discretionary power to exclude relevant evidence. We shall quote two passages from it at pp644, 645:

"The principle affirmed by *Bunning v Cross* does not, as was pointed out by Stephen and Aickin JJ (p75), entrench upon the quite special rules which apply in the case of confessional evidence. That does not mean that the discretionary processes involved have entirely separate areas of operation and that there is no overlap between them. Clearly, if a confessional statement has been obtained by the use of improper or illegal means but nevertheless can be shown to be voluntary, a discretion is exercisable by the trial judge to exclude it from [11] evidence on the basis that to admit it would be unfair to the accused. The exercise of that discretion will not turn upon the policy considerations which must otherwise exercise the judge's mind in the case of evidence which is improperly or illegally obtained. It will entail a consideration of the result of such methods and whether it would be unfair to the accused to admit it in evidence in the sense that to do so would result in an unfair trial. If it would, then that is an end of the matter and the confessional statement will be excluded from evidence. If it would not, then there still remains to be considered whether the policy considerations referred to in *Bunning v Cross* nevertheless require the rejection of the evidence. The exercise of the latter discretion will not, in the case of confessional evidence, turn upon whether the admission of the evidence will be unfair to the accused, for, if that were the case, the evidence would be rejected under the rules applying to confessional evidence."

A little later His Honour said:

"The rule in *Bunning v Cross* posits an objective test, concerned not so much with the position of an accused individual but rather with whether the illegal or improper conduct complained of in a particular case is of sufficient seriousness or frequency of occurrence as to warrant sacrificing the community's desire to see the guilty convicted in order to express disapproval of, and to discourage the use of unacceptable methods in achieving that end."

In *R v Larson & Lee* to which we have already referred, Hampel J pointed out that when it is submitted that a confessional statement should be excluded solely because it has been unlawfully obtained, it is necessary to consider the nature and extent of the unlawful conduct and the circumstances in which it took place. Then it is necessary to balance the two competing

considerations of public policy and to exercise the discretion by applying [12] what Dawson J described as the objective test. There are two further observations we should make about *Cleland's case*. First, Brennan J was not a member of the Court that heard that case, but, as already pointed out, His Honour's statement of the position in *Collins v R* [1980] FCA 72; [1980] 3 1 ALR 257 at p317 was adopted by Gibbs CJ and Wilson J. It was also quoted with approval by Dawson J (at p30). It thus represents the view of a majority of the High Court and as such should be followed by the Courts of this State. Secondly, Murphy J and Deane J formed the minority in *Cleland's case* and to the extent that Their Honours' views differ from those of the majority, they should not be followed. For the reasons we have given we shall express no opinion upon the reference.

Solicitor for the Director of Public Prosecutions: JM Buckley.
Solicitor for the Respondent: Legal Aid Commission.
