38/99; [1999] VSC 414

SUPREME COURT OF VICTORIA

WINDUS v WADE

Warren J

25, 29 October 1999

EVIDENCE – CONFESSION MADE BY ACCUSED TO POLICE – CLAIM AT HEARING OF CHARGES BY ACCUSED THAT HE WAS OFFERED AN INDUCEMENT OF BAIL IN EXCHANGE FOR CERTAIN ADMISSIONS – FINDING BY MAGISTRATE THAT INDUCEMENT OFFERED – FURTHER FINDING THAT CONFESSION ADMISSIBLE ON THE BASIS THAT THE ADMISSIONS WERE TRUE – WHETHER MAGISTRATE IN ERROR IN ADOPTING SUCH APPROACH: *EVIDENCE ACT* 1958, S149.

Section 149 of the *Evidence Act* 1958 ("Act") provides (so far as relevant):

> "No confession which is tendered in evidence shall be rejected on the ground that a promise or threat has been held out to the person confessing, unless the judge or other presiding officer is of opinion that the inducement was really calculated to cause an untrue admission of guilt to be made;"

On the hearing of a *voir dire* to determine the admissibility of a record of interview, the accused Windus claimed that he was offered an inducement of bail in exchange for certain admissions. The magistrate found that an inducement had been offered and then considered whether under s149 of the Act the inducement was calculated to cause an untrue admission of guilt to be made. The magistrate applied the test that the critical question was the truth of the admissions and found that the inducement was not calculated to cause an untrue admission of guilt and accordingly, the record of interview was admitted into evidence. Upon appeal—

HELD: Appeal allowed. Conviction and sentence quashed. Matter remitted for re-hearing by a different magistrate.

1. The correct exercise of the discretion under s149 of the Act arises from the circumstances under which the statement was made. It does not involve an assessment of whether the admission is true or false.

***R v Lee* [1950] HCA 25; (1950) 82 CLR 133; [1950] ALR 517, applied.**

2. In the present case, the magistrate was required to determine whether or not the admissions were made voluntarily. Upon being satisfied that the admissions were not made voluntarily, the magistrate was then required to determine whether the admissions were made on the basis of an inducement really calculated to elicit an untrue admission. That is, whether the inducement of bail in the circumstances of the accused was calculated to induce untrue admissions. The magistrate was not entitled to have regard to any view formed as to whether the admissions actually made were true but was restricted to the consideration of the tendency or otherwise of the accused — assuming him to be innocent — to admit guilt.

***R v Hammond* (1965) NZLR 257, adopted.**

3. In determining whether the inducement was calculated to cause an untrue admission by considering whether or not the admissions were true, the magistrate adopted an incorrect approach and fell into error in the exercise of the discretion under s149 of the Act.

WARREN J:

1. The appellant, Donald Arthur Windus appealed under s92 of the *Magistrates' Court Act* 1989 against an alleged error of law made by a magistrate below in admitting a record of interview into evidence.

2. The admission of the record of interview led to the conviction of the appellant upon a series of burglary charges and related offences and the imposition of a custodial sentence. The question of law to be determined is whether the admissions were property admitted into evidence pursuant to s149 of the *Evidence Act* 1958.

3. The appellant was detained by the police at about 5.00am on 20 July 1998 in the Essendon/ Moonee Ponds area very close to the scene of a recent burglary. He was tracked and located by

police dogs which had followed the appellant from another burglary scene. These matters led to burglary charges being laid by a Constable Petkovic and are hereafter referred to as the "Petkovic charges". The appellant was taken into custody at the Moonee Ponds Police Station. At the police station members of the Criminal Investigation Bureau ("CIB") indicated they wished to interview the appellant about other matters. These other matters were the responsibility of a Detective Wade, the respondent to the appeal. It seems that shortly after arriving at the station the appellant was taken to be present during the execution of a search warrant at his mother's house at Pascoe Vale and then returned to the station. When Constable Petkovic finished dealing with all charges the appellant was handed over to the CIB and placed in an interview room.

4. The appellant at the time was 29 years old. He is a Torres Strait Islander Aboriginal Australian. At the time of his arrest he had a criminal history.

5. When the appellant was taken into custody the police ascertained that the appellant had two warrants outstanding for his arrest for failing to appear on other burglary charges and a charge of possessing a regulated firearm. The police ascertained, also, that the appellant had significant prior convictions. By the time the appellant was handed over to the CIB at Moonee Ponds he had been charged with the Petkovic charges related to earlier burglaries. The police had ascertained, further, that he had acted in breach of an existing intervention order that included a condition prohibiting him from going within 200 metres of his mother's house. It seems he went to that house whilst the intervention order was in place for the purpose of depositing stolen property. By the time the appellant commenced his interview with the CIB he had also been charged with breach of the intervention order.

6. The appellant remained in the interview room for at least three hours. Early on he engaged in discussions with Detective Wade. The past and immediate criminal history of the appellant formed the setting for the discussions. During the discussions with Detective Wade and others the appellant alleges they told him he had the choice of confessing to certain burglary charges or remaining in custody. To use the appellant's words: "Nod to some burglaries and pretty much I would be assured to be home by 6.00 that night". The appellant alleged he was offered an inducement of bail in exchange for certain admissions. The appellant was provided with access to a solicitor early on during the three hour interview period. The appellant was advised by the solicitor during that period that he would not be granted bail by a magistrate. The inducement by the police continued after the appellant spoke to his solicitor. It further transpired that the appellant as a Torres Strait Islander Aboriginal Australian had particular concerns about being placed in custody.

7. A record of interview was made during the three hour interview period in the course of which the appellant made a series of straightforward and precise admissions in relation to a number of burglaries in the Essendon and Moonee Ponds areas. The admissions contained a description of burglaries allegedly conducted by the appellant over a period of time in the area and included a description of a *modus operandi* in considerable detail. Of potential significance was the fact that in the course of the interview when certain matters were put to him by the informant, Detective Wade, the appellant corrected descriptions of matters described by the informant. Ultimately the appellant was charged with 30 charges of burglary and related offences. He was granted bail to appear one month later on 20 August 1998.

8. On 28 June 1999 the charges were heard at the Magistrates' Court at Broadmeadows. The appellant pleaded not guilty to all charges and was represented by counsel. It appears that the prosecution and the defence agreed that the evidence was not contested rather the entire case turned on the admissibility of the record of interview. A *voir dire* was conducted in which evidence was given by the informant, the corroborating officer and the accused. The appellant stated that he ultimately made the admissions so as to achieve bail. The informant and the corroborator denied the allegations. After extensive argument the magistrate delivered short oral reasons.

9. In his reasons the magistrate found that at common law an inducement had been offered by a person in a position of authority to the appellant to make the confessions subsequently given in the record of interview. Such admissions were inadmissible at common law: *Cornelius v R* [1936] HCA 25; (1936) 55 CLR 235; [1936] ALR 278; *McDermott v R* [1948] HCA 23; (1948) 76 CLR 501; [1948] 2 ALR 466. After making such finding the magistrate proceeded to consider the position under s149 of the *Evidence Act* and found that the inducement was not calculated or

likely to cause an untrue admission of guilt to be made. Accordingly, the record of interview was admitted into evidence. No further evidence was called and on the basis of the record of interview as tendered the magistrate found the appellant guilty of the various charges. At the time of the hearing of the charges the appellant was in custody serving a sentence of 20 months for other offences with a minimum of 14 months. In respect of the subject charges the magistrate sentenced the appellant to a term of 12 months' imprisonment and directed that eight months of the period be served concurrently with the existing sentence. The net outcome was that as a result of the conviction and sentence the appellant was sentenced to a further four months' imprisonment.

10. The oral reasons of the magistrate were brief. They essentially stated conclusions based upon indications and conclusions previously given by the magistrate during the course of argument. The oral reasons followed extensive submissions and arguments by the prosecution and the defence, including analysis of the evidence given on *voir dire*. The magistrate applied the approach that the critical question was the truth of the admissions. The approach was founded on the basis that s149 of the *Evidence Act* required the relevant inducement to be calculated to induce "untrue" admissions. The magistrate proceeded to determine whether the inducement was calculated to cause an untrue admission by considering whether or not the admissions were true.

11. The question of law is whether the magistrate misapplied s149 of the *Evidence Act*. The section provides:

> "**149. *Confession after promise or threat or purporting to be on oath***
> No confession which is tendered in evidence shall be rejected on the ground that a promise or threat has been held out to the person confessing, unless the judge or other presiding officer is of opinion that the inducement was really calculated to cause an untrue admission of guilt to be made; nor shall any confession which is tendered in evidence be rejected on the ground that it was made or purports to have been made on oath."

12. Section 149 of the *Evidence Act* is the legislative successor of s141 of the *Evidence Act* 1928. The provision originally came into force in 1857. It does not have a counterpart in England although there is a similar section in force in New Zealand. In *Cornelius v R* [1936] HCA 25; (1936) 55 CLR 235; [1936] ALR 278 the High Court held that at common law when a confession is tendered in evidence its voluntary character must appear before it is admissible.

13. In *Cornelius v R* (at CLR 245) the High Court in considering s141 cited the observations of the Full Court of the Supreme Court of Victoria in *R v Douthwaite* (1858 *Australian Digest*, Vol 5, col 699). The High Court observed in *Cornelius* (at CLR 245-246):

> "In the year after the enactment of this provision, *Stawell* CJ, speaking for the Full Court, said, after stating the terms of the section:- 'The Judge is, therefore, to decide in each case whether the inducement was really calculated to cause an untrue admission to be made. If, in his opinion, it was so calculated, the evidence should be rejected; if not so calculated, it should be received. It was urged on behalf of the prisoners in the present case, that the Legislature never could have intended the Judge to enter into a metaphysical discussion as to what amount of influence might or might not have been exercised on the mind of each prisoner, and that the section in question was intended to provide for extreme cases only, in which the threat or promise was of too trifling or insignificant a character to induce an untrue admission of guilt to be made. We are of the opinion, however, that the terms of the clause do not admit of doubt or justify us in limiting its application as contended for. The duty, onerous and responsible as it may be, is now cast on the Judge in every case of determining from the evidence as to the '[probable?]' effect of the alleged inducement upon each particular prisoner."

14. In *Cornelius* the High Court having considered the observations of the Full Court in *Douthwaite* observed (at CLR 246):

> "This, no doubt, correctly states the effect of the provision. When it appears that, but for a particular promise or threat made by a person in authority, the prisoner's confession would be voluntary, it becomes necessary for the Judge at the trial to decide whether the promise or threat in question was really calculated, that is, really likely, to cause an untrue admission of guilt to be made."

15. From the judgment of the High Court in *Cornelius* the principle may be extracted that when a judge considers whether or not to admit into evidence admissions pursuant to s149 of the Act the following steps must be taken:

> (1) The judge must ask whether the inducement was really calculated to cause an untrue admission to be made.
>
> (2) If the judge is satisfied that the inducement was so calculated it should be rejected.
>
> (3) If the trial judge is satisfied that the inducement was not so calculated it should be received into evidence.

16. In *Cornelius* the High Court (and earlier the Full Court in *Douthwaite*) did not consider the issue as to whether under the statute it was necessary for the court to be satisfied as to whether the admissions were true. However, both the High Court and the Full Court did not consider it appropriate for the trial judge to embark upon a psychological exercise of entering the mind of the accused. From the analysis of the High Court in *Cornelius* it is apparent that at that stage the court was of the view that the threshold test to be applied by a court involved focus upon the inducement and the purpose of the inducement.

17. In *R v Lee* [1950] HCA 25; (1950) 82 CLR 133; [1950] ALR 517 the High Court revisited s141 of the *Evidence Act* 1928 and held that the section applied only to cases in which the common law would have rejected the confession as non-voluntary on the sole ground that it was induced by such a threat or promise, but not to cases in which the common law would have rejected the confession as non-voluntary on any other ground.

18. In *R v Lee* the High Court was concerned with circumstances where admissions by the accused were admitted into evidence by the trial judge and on appeal the Full Court held that the admissions had been wrongly admitted. On appeal before the High Court the decision of the Full Court was overturned and in the course of the judgment there was an analysis by the High Court of what was described as "an exposition" made by the majority of the Full Court of the then s141 of the Act. In particular, the High Court considered the view of the majority of the Full Court that it was unfair to allow evidence to be used where improper conduct of the police may have resulted in an accused failing to do justice to his or her real position. The High Court was critical of this approach and held (at CLR 152):

> "No satisfactory meaning, in our opinion, can be attached to the words 'his real position' and there is a highly dangerous ambiguity about them. His real position, one would suppose, is to be assumed to be the position which he takes up at the trial, which may be a position far removed from the truth, and which may be unknown to the judge at the stage of the trial at which evidence of the statement is tendered. The learned judges did not, of course, mean that it was enough to exclude the evidence that there should be ground for thinking that the accused had had insufficient opportunity to invent plausible falsehoods. This is made plain by the example taken of a case where the accused has been 'badgered into apparent contradictions or trapped or surprised into making some ambiguous comment which is suggestive of guilt'. But another example taken in the case of 'an untrue statement which he believes to be wholly or partly exculpatory but which in fact goes to establish some part of the Crown's case or is inconsistent with the defence set up at the trial, e.g., an alibi'. The selection of this as an illustration suffices to show how dangerous the test laid down could be. <u>In so far as it suggests that the judge, in ruling on whether a statement should be admitted, should consider whether it is true or false, it cannot, in our opinion, be supported.</u> It cannot be that the exclusion of a 'statement' from evidence is to depend on whether or not it is prejudicial to the defence set up at the trial. But the words used in formulating the test are capable of bearing that meaning. Any such formula should in our opinion be rejected. The 'unfairness' of using a 'statement' must arise from the circumstances under which it was made." (Emphasis added.)

19. On the basis of the reasons of the High Court in *Lee* the correct exercise of the discretion under s149 of the *Evidence Act* arises from the circumstances under which the statement was made. It does not involve an assessment of whether the admission is true or false.

20. Aside from the observations of the High Court in *R v Lee* the issue does not appear to have been considered further in this State. However, the issue has been considered briefly in New Zealand in *R v Hammond* (1965) NZLR 257 where Wilson J of the Supreme Court in considering the admission into evidence of a confession stated the test to be applied under s20 of the *Evidence Act* 1908 (a comparable provision to the Victorian provision) as follows:

> "I think that the test to be applied in deciding this question is whether or not an innocent person in the position of the accused and in the circumstances in which he was placed would be likely to confess

> to a crime which he had not committed. I think that Mr Holland was right when he submitted that, for this purpose, the Judge is not entitled to have regard to any view which he may have formed as to whether the admission actually made was true but must restrict himself to the consideration of the tendency or otherwise of the accused, assuming him to be innocent, to admit guilt."

21. In light of the principle stated by the High Court in *Lee*, the test articulated in *Hammond* is a convenient statement of the appropriate approach in circumstances such as the present. In the Magistrates' Court in the present proceeding an incorrect approach was adopted by the magistrate as to the determination of whether or not to exercise the discretion under s149 of the *Evidence Act*. The appropriate course was for the magistrate to determine whether or not the admissions were made voluntarily and whether or not they were made on the basis of an inducement really calculated to elicit an untrue admission. The magistrate, upon being satisfied that the admissions were not made voluntarily, failed to turn his mind as to whether or not the inducement of bail in the circumstances of the appellant was calculated to induce untrue admissions. Whilst on the face of the evidence given in the *voir dire* it appears highly likely that the inducement was so calculated the magistrate did not determine that matter.

22. It follows that the magistrate fell into error in the exercise of the discretion under s149 of the *Evidence Act* and that the appeal should be upheld and the conviction and sentence quashed.

23. It was urged by Mr Walmsley for the appellant in light of the fact that no further evidence had been called or relied upon by the informant in the court below that the course I ought adopt is to determine the matter and not remit the proceeding to the Magistrates' Court for re-hearing. Ms Carlin who appeared for the informant opposed such a course on the basis that she did not have any instructions as to whether the informant was in a position to call other evidence. The present circumstances from the perspective of this court are unsatisfactory for the purposes of determining the matter finally. I consider that the appropriate course is to remit the matter to the Magistrates' Court to be heard and determined by a different magistrate in accordance with law. Orders will be made accordingly.

APPEARANCES: For the appellant Windus: Mr BG Walmsley and Mr KJ Doyle, counsel. Victorian Aboriginal Legal Service Co-operative Ltd. For the respondent Wade: Ms RE Carlin, counsel. Solicitor for Public Prosecutions.
