10/85

SUPREME COURT OF VICTORIA

EGAN and ANOR v BOTT and ANOR

Beach J

10 December 1984; 15 February 1985 — [1985] VicRp 75; [1985] VR 787

CRIMINAL LAW – EVIDENCE – CONFESSION – ADMISSIBILITY – RECORD OF INTERVIEW BETWEEN POLICE AND ACCUSED – WHETHER CONFESSION VOLUNTARY – WHETHER MAGISTRATE SHOULD HOLD A *VOIR DIRE* TO DETERMINE ADMISSIBILITY OF ALLEGED CONFESSION.

Once the question of the voluntariness of an alleged confessional statement is raised in criminal proceedings, a Magistrate should hold a *voir dire* to determine whether the confession was made voluntarily and is admissible in evidence.

***Furnell v Betts* [1978] 20 SASR 300; and**
***Smithers v Andrews; ex parte Andrews* [1978] Qd R 64; MC 02/1978, applied.**

BEACH J: *[After setting out the grounds of the orders nisi, His Honour continued]*: … **[4]** At the commencement of the hearing before the Magistrates' Court on 8th March 1984, the defendants pleaded not guilty to each of the charges. Before any evidence was led by the prosecution, counsel for each defendant informed the Magistrate that the defendants wished to challenge the admissibility of confessional evidence the prosecution proposed to lead on the ground that the confessional statements had not been made voluntarily, had been obtained illegally and unfairly, and were therefore inadmissible. Counsel for each defendant requested the Magistrate to hold a *voir dire* to enable that matter to be determined before the hearing of the information proceeded.

[5] The Magistrate refused counsel's application stating, *inter alia*,

> "This is not a judge and jury situation. The normal procedure in this court is to entertain the prosecution case until your submission is justified. Proceed with your case until, if you wish to proceed with it later, I will consider your submission then".

The prosecution then proceeded to call the informant Bott to give evidence of his observations of the defendants on the evening it was alleged the offences were committed, of the arrest of the defendants that same evening, and of their interrogation both at the scene and later at the Malvern Police Station. During the course of Bott's evidence-in-chief counsel for the defendants again requested the Magistrate to hold a *voir dire* to determine whether the confessional statements alleged to have been made by the defendant had been made voluntarily and should be admitted in evidence. On that occasion the Magistrate said,

> "There will be no *voir dire* at this moment. The court is charged with the responsibility of hearing the entire proceedings, not part of it. This is not a trial with a judge and jury. I will proceed till the time of submissions at the end of the evidence".

The case for the prosecution then proceeded. In all, four police officers gave evidence against the defendants. During the course of their evidence two records of interview which had been conducted by police officers with the defendants whilst the defendants were at the Malvern Police Station on the evening in question were received in evidence.

[6] The four police officers called by the prosecution were cross-examined at some length by counsel for each defendant. Serious allegations were put to them concerning their treatment of the defendants between the time of their arrest and the time at which the records of interview were conducted. It is sufficient for present purposes to say that if there is any substance in those allegations it would be very difficult to contend that the question of the voluntary nature of the confessional statements was not a significant issue in the case.

At the conclusion of the case for the prosecution counsel for the defendants renewed

their applications for a *voir dire*. From the affidavit material before me it is difficult to determine whether or not that application was also rejected. Having heard submissions from both counsel in relation to the matter, the Magistrate said:

> "I take into consideration all the submissions of Counsel. I agree especially with *McPherson's case*. However, it is quite clear to me in this jurisdiction, these Courts are faced with a different situation than the situation of a judge and jury. It appears quite clear to me that the defendants are entitled to *voire dires* as such. Problems arise as to how properly those rights can be dealt with. If the Court happens to rule against the defendants, this puts them at a disadvantage. The Courts must determine if the defendants are telling the truth and it might disadvantage the defendants, in my view, unfairly. It is quite clear in this case today that this is the case, that the defendants may be put in this disadvantageous position. The Court will decide if the admissions are voluntary or not and then whether to reject them as unfair. At this stage it doesn't prejudice the defendants at all and that's what I propose to do."

Counsel for the defendant Egan then submitted that the issue as to the voluntariness of the confessional statements should be determined prior to the commencement of **[7]** the case for the defence.

The Magistrate then made a statement to the effect that the New South Wales and South Australian authorities to which he had been referred during the course of argument were not binding upon him. I assume the Magistrate was there making reference to the decision of Yeldham J in *Dixon & Ors v McCarthy & Ors* [1975] 1 NSWLR 617, the decision of Miles J in *McKellar v Smith* [1982] 2 NSWLR 950 and the decision of Wells J in *Furnell v Betts* [1978] 20 SASR 300, those cases having been relied upon by counsel for the defendants as authority for the proposition that where the voluntariness of confessional statements is in dispute the appropriate course for a Magistrate to adopt is to direct a *voir dire* hearing and determine the issue prior to the commencement of the case for the defence. After the Magistrate stated that the New South Wales and South Australian authorities were not binding upon him, counsel for the defendant Egan asked that the matter be stood down to enable the defendants to obtain a ruling in relation to the matter from this Court. The Magistrate then said,

> "I don't propose to do that. I've quite clearly indicated the course I propose and that is the course I'm adopting".

Having regard to the course of events thereafter, it is clear that what the Magistrate had determined to do was to hear the whole case and at the conclusion of the hearing then determine whether or not the confessional material should be admitted into evidence. After a short adjournment counsel for the defendants proceeded to call five witnesses to give evidence in relation **[8]** to the events which had occurred on the evening the defendants were arrested and of the injuries the defendants had received whilst in police custody. At the conclusion of that evidence counsel for each defendant indicated that his client would make an unsworn statement. The Magistrate then stated that an unsworn statement was not an appropriate way to give evidence in his court. Counsel for the defendant Egan submitted that if his client was required to give evidence on oath, that would open up all issues and it would be impossible to isolate the matters of voluntariness, unfairness and illegality. The Magistrate then stated that in his court he did not accept unsworn statements.

If I may say so, that was a most unfortunate observation. Regardless of the views one might have in relation to unsworn statements, the fact is that an accused person has the right to make an unsworn statement, and it becomes part of the evidence in the case and is to be considered along with evidence which is given on oath. At all events, the hearing of the informations was then adjourned to 13th March 1984. At the commencement of the hearing that day the Magistrate said,

> "They quite clearly have the option to give unsworn evidence from the floor of the Court or to give evidence on oath. If evidence on oath is given, it is subject to full cross-examination".

Both defendants then made unsworn statements. It is sufficient for present purposes to note that in their statements the defendants made no admission in relation to the offences with which they had been charged, but made serious allegations against the police in relation to the treatment **[9]** they had received whilst in police custody.

At the conclusion of the hearing the Magistrate ruled that the confessional statements made by each defendant had been made voluntarily and had not been obtained illegally or unfairly. Having regard to the grounds upon which the orders nisi have been obtained it is unnecessary to set out the Magistrate's findings in that regard in these reasons for judgment. Each defendant was then convicted of the offences with which he had been charged.

The matter raised for determination by grounds (1) to (7) of the orders nisi really comes down to this. If a defendant appearing before a court of summary jurisdiction raises the question of the voluntariness of alleged confessional statements and thus their admissibility, should a *voir dire* be held and a ruling given before any further step is taken in the proceedings?

It is clear from the decision of the High Court in *MacPherson v R* [1981] HCA 46; (1981) 147 CLR 512; [1981] 55 ALJR 594; [1981] 37 ALR 81 that in a criminal trial before a judge and jury that course should be adopted. In the joint judgment of Gibbs CJ and Wilson J Their Honours said at p598 (at p88 ALR):

> "The judge presiding at a criminal trial is under an obligation to ensure that the trial is conducted fairly and in accordance with law. He must accordingly exclude evidence tendered against the accused which is not shown to be admissible. Particularly if the accused is unrepresented, once it appears that there is a real question as to the voluntariness of a confession tendered by the Crown, the judge must satisfy himself that the confession was voluntary, and if, as will usually be the case, this can only be done by holding a *voir dire*, he must proceed to hold a *voir dire* even if none is asked for: cf. *R v Deathe* [1962] VicRp 90; [1962] VR 650, at p652; and *R v Little* [1976] 14 SASR 556, at pp570-571. We are not to be taken as suggesting that the trial judge must hold a *voir dire* on every occasion when a confession is tendered, or that he is bound to accede to an application made for a **[10]** *voir dire* when there is nothing to suggest that a real question of voluntariness, unfairness or impropriety arises, for it does not advance the cause of justice to allow a *voir dire* which is used merely as a fishing expedition, or a means of testing in advance the evidence of the Crown witnesses. And the trial judge has a discretion to keep the examination and cross-examination of witnesses on a *voir dire* within reasonable bounds. Nevertheless, the duty of the judge is to ensure that the confession is not admitted until the fact that it was voluntary has been established."

That Magistrates frequently hold *voir dires* to determine whether or not confessional statements have been made voluntarily and are thus admissible is clear from the two New South Wales decisions and the South Australian decision to which I have referred. Indeed, those decisions make it clear that in appropriate cases it is proper for a Magistrate to do so. See also the decisions of Muirhead J in *Fry v Jennings* (1983) 25 NTR 19 and of the Full Court of Tasmania in *Ryan v Marshall* [1965] Tas SR 1.

But is a Magistrate bound to hold a *voir dire* when there is a real question as to the voluntariness of a confession, or has he a discretion in the matter? This question was considered by the Full Court of Queensland in *Smithers v Andrews; ex parte Andrews* [1978] Qd R 64. In that case the defendant had appeared before the Magistrates' Court at Cairns on a charge that without lawful authority, justification or excuse he aided a prisoner to remain at large. In the course of the prosecution case the solicitor who appeared for the defendant made an application for a *voir dire* for the purpose of determining the admissibility of certain alleged confessional evidence which the prosecution intended to call. That application was refused by the Magistrate. On appeal to the Full Court, the Court held that there is no reason in principle why **[11]** *voir dire* proceedings should be restricted to trials before a judge and jury, and it is desirable that when in a trial held before a Magistrate it becomes necessary to determine whether an alleged confession should be admitted as evidence on the trial a *voir dire* should be held and a ruling then given.

In the course of its judgment the Court said at p65:

> "If the admissibility of evidence of this nature had to be determined in a trial before a judge and jury the appropriate course would be for the judge to hear evidence in the absence of the jury and to rule upon that evidence whether the alleged confession should be admitted or not. The question which arises is whether this procedure of a *voir dire* or 'a trial within a trial' is appropriate in a court such as a magistrates' court where the tribunal is required to determine both the law and the facts.
>
> In cases such as the present where the admissibility of the evidence depends on the circumstances in which the alleged confession was made the magistrate can only properly determine this if he hears evidence of those circumstances. Very often it will be desired to call the defendant as a witness on

the issue of admissibility. Where the procedure of a *voir dire* is adopted the question of whether the evidence should be admitted on the trial can be determined on all the available evidence, including that of the defendant, who in *voir dire* proceedings may claim privilege if he is asked about the actual events, and his guilt or otherwise, as distinct from the issue or issues raised on the *voir dire* (*R v Gray & Ors* [1965] Qd R 373; *R v Toner* [1966] QWN 44; 61 QJPR 75)

If such a procedure is not adopted the defendant is obviously placed at a disadvantage. Unless material emerges in the course of the prosecution case, for example, in the cross-examination of its witnesses, which causes the magistrate to form the view that the evidence of a confessional nature should not be admitted by reason of s10 of *The Criminal Law Amendment Act* of 1894 or of the common law rule as to voluntariness or should be rejected in the exercise of his discretion, that evidence would form part of the prosecution case and may well preclude the making of a submission at the close of that case that there is no case to answer. If the defence wished to call the defendant to give evidence of the circumstances in which the alleged confession was **[12]** obtained this could then only be done by calling him as a witness on the trial when he would be liable to cross-examination at large including cross-examination on matters relating to the commission of the alleged offence. The defendant should not be placed in this position and the question of the admissibility of the alleged confession should be determined before he is called upon to decide whether or not he will give evidence on the trial. Any suggestion that this would place the defendant 'in a very privileged and protected position' in our view has no substance.

There is no reason in principle why *voir dire* proceedings should be restricted to trials before a judge and jury and the considerations to which we have referred make it desirable that where in a trial held before a magistrate it becomes necessary to determine whether an alleged confession should be admitted as evidence on the trial a *voir dire* should be held and a ruling then given. In *Smith v R* [1957] HCA 3; [1956-57] 97 CLR 100, an appeal from the Supreme Court of the Territory of Papua New Guinea, the question of the admissibility of a confession had arisen in a criminal trial heard according to the law of that Territory by a judge without a jury. Williams J said at p118:

> 'His Honour was placed in a somewhat difficult position in having to sustain the dual functions of judge and jury in a criminal cause but he was quite right, in my opinion, if I may say so with respect, in deciding in the first instance on a *voir dire* as a judge the question whether the confessions were admissible in evidence and subsequently deciding as a jury the weight that should be given to them in the light of the whole of the evidence, because it was only after the question of admissibility had been held against the accused on the *voir dire* that the accused could be called upon to decide whether to give evidence or not and if he did thereby to subject himself to the risk of cross-examination.'

Webb J at p132 said:

> 'If I may say so with respect I think His Honour revealed of full knowledge of the law and a full appreciation of the evidence, as appears from his observations on what he called the *voir dire* and his summing-up. But I must say that I fail to see why His Honour should have separated his functions to the extent of permitting each of the police witnesses to be twice **[13]** cross-examined on the same subject matter. To say the least that appears to me to have been unnecessary. However, as that course was favourable to the appellant and the Crown did not object to it here or below I pay no further attention to it.'

In *Wendo v R* [1963] HCA 19; [1962-63] 109 CLR 559; [1964] ALR 292; 37 ALJR 77, an appeal from the same court, Taylor and Owen JJ in their joint judgment at p572 impliedly accepted the propriety of a judge sitting without a jury holding a *voir dire* to determine whether confessional statements were made voluntarily."

The conclusion I have arrived at in the matter is that no distinction should be made between the procedure to be adopted in a trial before a judge and jury and a hearing before a magistrate. Once there is a real question as to the voluntariness of a confession sought to be tendered by the prosecution, it is necessary that the Magistrate satisfy himself that the confession was made voluntarily. To do this he must hold a *voir dire*, for, if he does not, the defendant will be prejudiced in the manner pointed out by the Full Court in *Smithers' case*, that is, he will be called upon to decide whether or not he will give evidence on the hearing before the question of the admissibility of the alleged confession has been determined, and, if he does find himself placed in that situation and elects to give evidence, he will be liable to cross-examination at large.

In my opinion it would be quite wrong to place a defendant in such a situation. Lest it be suggested that if a magistrate adopted such a course and rejected a confession on the ground that it was not voluntary or had been unfairly or illegally obtained, he might thereafter feel inhibited or

uneasy in proceeding to deal with the matter, may I quote the following passage from the judgment of Wells J in *Furnell v Betts*. At page 302 **[14]** His Honour said:

> "Magistrates are, by the nature of their qualifications, training, and experience, both competent and entitled to listen to information or evidence that, for reasons subsequently found to be valid, ought to be and is discarded, and thereafter to dismiss it from their minds and to decide a case or make an adjudication as if that information or evidence had never come to their notice."

I agree with those observations. It follows from the conclusions I have reached that a number of the grounds in each order nisi has been made out and that each order nisi should be made absolute.

Solicitors for the applicant Egan: Slade and Webb.
Solicitors for the applicant Thomas: Slade and Webb.
Solicitor for the respondent: RJ Lambert, Acting Crown Solicitor.
