09/07; [2006] VSCA 257

SUPREME COURT OF VICTORIA — COURT OF APPEAL

R v DRASKO

Vincent, Eames and Redlich JJ A

20 October, 1 December 2006

CRIMINAL LAW – EVIDENCE – ATTEMPTING TO OBTAIN PROPERTY BY DECEPTION – CLAIM MADE ON INSURANCE COMPANY - LOSS SAID BY CLAIMANT TO BE RESULT OF A 'BURGLARY' – LOSS ADJUSTER AND PRIVATE INQUIRY AGENT ENGAGED BY INSURANCE COMPANY TO INVESTIGATE CLAIM – CLAIMANT INTERVIEWED BY AGENT WITH THE AID OF A TAPE RECORDER – CLAIMANT TOLD THAT CLAIM REQUIRED FURTHER INVESTIGATION – CLAIMANT AGAIN INTERVIEWED ON TAPE – NO CHARGES LAID – MATTER BEING DEALT WITH BY A DETECTIVE – CLAIMANT LATER VISITED POLICE STATION AND MADE A WRITTEN STATEMENT WITHDRAWING THE CLAIM – WHETHER CLAIMANT'S TAPE-RECORDED INTERVIEW SHOULD HAVE BEEN EXCLUDED AS INVOLUNTARILY OBTAINED OR EXCLUDED IN THE EXERCISE OF THE COURT'S DISCRETION – WHETHER CLAIMANT WAS "A PERSON IN CUSTODY" – WHETHER CASE TO ANSWER – SENTENCING – NO PRIOR CONVICTIONS – CLAIMANT DEPRESSED – WHETHER IMMEDIATE IMPRISONMENT MANIFESTLY EXCESSIVE: *CRIMES ACT* 1958, S464.

D. resided in a rented house. When another tenant moved out taking her own possessions, D. reported to police that a 'burglary' had taken place and later made a claim upon her insurance company in the sum of $55,293.85. As part of the investigation of the claim, the insurance company engaged a loss adjuster and a private enquiry agent, who both interviewed D. The interview conducted by the private inquiry agent was tape recorded on two occasions. Some time later D. attended at the police station and made a written statement withdrawing the complaint. D. was later charged with one count of attempting to obtain property by deception. At the trial it was submitted that the first tape-recorded interview of D. and later the written statement at the police station should not have been admitted into evidence as being involuntarily obtained. The court rejected a 'no case' submission and after the charge was found proved and submissions as to sentence made, D. was sentenced to 15 months' imprisonment with 12 months suspended for 2 years. Upon application for leave to appeal against conviction and sentence—

HELD: Applications dismissed.

1. The statements were made in furtherance of D.s desire to secure benefits under a civil contract of insurance pursuant to arrangements into which she had voluntarily entered. The duty of disclosure under a civil contract of insurance in no way restricts the capacity of an individual to speak or remain silent under the criminal law or interfere with the manner in which the choice may be exercised. D. can be taken to have been well aware that the insurance company was entitled to ascertain whether or not she was entitled to benefits before any payment was made and her conduct on this occasion constituted, on the prosecution case, an integral part of her alleged criminal enterprise. No question of the making of a statement against penal interest in respect of an earlier committed crime arose. The evidence was not probative as an admission against interest and admissible on this basis as an exception to the hearsay rule, but because it was directly relevant to the central question in the trial, namely, whether D. had attempted to defraud the company. In any event, there was nothing whatever to suggest that D.s will may have been overborne or her capacity to exercise a free choice compromised in any way. In so far as there was an inducement for the making of the statements, it arose from the applicant's earlier and continuing desire to secure benefits under her contract of insurance. Finally, there was no indication that either D. or the private inquiry agent ever perceived him as "a person in authority", save perhaps to the limited extent that he could have reported adversely in relation to a civil claim.

2. D. was on any view of the evidence, not "a person in custody". The police officer did nothing more than secure a voluntarily made statement from D. withdrawing her complaint and setting out her stated reason for doing so. The police officer engaged in no abuse of power, trickery or subterfuge.

3. Having regard to the fact that the reported 'burglary' did not take place and that none of the chattels the subject of D.s claim belonged to her or were at the premises when the 'burglary' allegedly occurred, there was ample evidence before the jury to support the conviction of D.

4. In relation to sentence, whilst D. had no prior convictions, was suffering symptoms of significant depressive illness and the adverse consequences suffered including loss of her job, it was open to the judge to state that "insurance contracts are contracts of ultimate good faith and require

the scrupulous honesty of people who deal with insurance companies. Attempted frauds of this nature must be the subject matter of curial disapproval, and the message must be clear to all people who are minded to commit offences of this nature that they will not be tolerated." There was no error in the sentence imposed.

VINCENT JA:

1. The applicant was found guilty, on 15 November 2005, by the jury empanelled on her trial in the County Court at Melbourne on one count of attempting to obtain property by deception.

2. After hearing a plea in mitigation of penalty, the sentencing judge, on 12 December 2005, imposed a term of imprisonment of 15 months. His Honour further ordered that the service of 12 months of that sentence be suspended for a period of two years.

The Applications for Leave to Appeal

3. The applicant seeks leave to appeal against both conviction and the sentence imposed upon her upon the grounds that:

> *Conviction*
> 1. The learned trial judge erred in admitting into evidence the evidence of the witness Peter Hiscock as to tape recorded and other conversations with the applicant, in that such evidence should have been excluded as involuntarily obtained or should have been excluded in the exercise of discretion.
>
> 2. That the learned trial judge erred in admitting into evidence the evidence of the witness Eamon Leahy as to conversations with the applicant and a typewritten statement obtained from the applicant, such evidence being said to evidence a consciousness of guilt, in that such evidence should have been excluded as involuntarily obtained or should have been excluded in the exercise of discretion.
>
> 3. That the learned trial judge erred in ruling that there was a case to answer at the conclusion of the prosecution case.
>
> *Sentence*
> 1. That the learned sentencing judge gave insufficient weight to the evidence of the applicant suffering from and being treated for depression at the time of the offence, there being unchallenged medical evidence that this affected the applicant's judgment at the time of the offence.
>
> 2. That the learned sentencing judge gave too much weight to the matter of general deterrence.
>
> 3. That the learned sentencing judge erred in his consideration of the applicant's plea of not guilty and continuing failure to acknowledge her guilt after her conviction, in that he gave excessive weight to the absence or remorse.
>
> 4. That the learned sentencing judge erred in imposing a sentence of 15 months imprisonment, 12 months of which was suspended for an operational period of two years.
>
> 5. That the learned sentencing judge imposed a sentence that was manifestly excessive in all the circumstances, particularly having regard to:
> (a) the applicant's depression at the time of the offence,
>
> (b) the applicant's lack of prior or subsequent convictions,
>
> (c) the applicant's personal circumstances at the time of the offence, and
>
> (d) the consequences already suffered by the applicant as a result of her conviction – including the loss of her job and impecuniosity.

The Background

4. For some time prior to 12 July 2003, the applicant had resided in a rented house in Warrs Avenue, Preston. The premises consisted substantially of a lounge, dining and sitting room, laundry and kitchen on the ground floor, and three bedrooms on the first floor. She occupied one of the bedrooms, while the remaining two were occupied by co-tenants; one, by *Maria Romeo*, who moved out on 12 July 2003, and the other, by *Kristalee Gibb*, who moved out a few days earlier and had been replaced by a male tenant, *Hagan Friese*. There was a substantial quantity of furniture and other chattels on the ground floor in the common areas until 12 July 2003, all of which, apart from a washing machine and some items of cutlery and crockery, was the property of Ms Romeo.

5. When Ms Romeo vacated the premises she took all of her belongings with the consequence that, at the end of that day, the downstairs area of the house was, for practical purposes, devoid of furniture and household items, apart from those mentioned above.

6. On 14 July 2003, the applicant reported to the police at Preston, that a "burglary" had taken place at the house, sometime earlier that day. She provided an interim list of the property allegedly stolen and subsequently made a claim upon her insurance company, Westpac General Insurance Limited, for the claimed loss, in support of which she provided a detailed list of 73 items that she asserted had been taken, with a total value of $55,293.85.

7. On 26 August 2003, the applicant went to the Preston Police station and made a statement to the effect that she was withdrawing her complaint, although, she still maintained that valuable property owned by her had been stolen.

8. The prosecution contended at the trial that the applicant was well aware that there had been no burglary and embarked upon a scheme to defraud the insurance company, presumably to re-furnish the house following the removal by Ms Romeo of her belongings. She decided to desist from this endeavour, it was submitted, when it became clear to her that her claims were being investigated and could not withstand scrutiny.

The Evidence

9. *Michael Henry Pickering*, a chartered loss adjuster who is engaged by insurance companies to assess claims, was instructed by Westpac Insurance Co., on 14 July 2003, to deal with that being made by the applicant.

10. On the following day, he met with her at the house and he explained to her his role in such circumstances; that is, to gain information about what has happened, make recommendations to the insurer about whether or not the claim falls within the terms of the policy, and, once the insurer has accepted the claim, to assist the insured to replace the stolen items.

11. He looked around the property, but did not go upstairs. He saw very little furniture and noted the absence of any electrical appliances in the kitchen. Mr Pickering secured some details from the applicant about the items that she claimed had been stolen.

12. He asked the applicant where she was at the time of the burglary and she told him that she had been shopping. When he asked her whether she had any thoughts concerning who might have been responsible, she said that building operations had been taking place in the area and that she believed that the rear garage roller doors had been forced open and entry gained through the French doors leading into the back of the house.

13. The witness stated he subsequently forwarded a claim form to the applicant for completion. This document, which is headed "Home and Contents Insurance Claim", requires the insured to identify themselves, provide basic information about the nature of the claim, explain what happened, and, in the case of a burglary, give details of items stolen. He believed that he received the completed form and a two-page annexure indicating when and where the items were acquired, on about 28 July 2003.

14. He reviewed the form and the annexure at his Carlton office in the presence of the applicant, making sure she had completed all the relevant sections. He looked at the list of items that she was claiming had been taken, noting that it contained more than the one she had given him on 15 July 2003. He asked her whether she could provide more detail concerning them, as he needed additional information identifying when and from where the various items had been purchased. He explained to her what would be involved in the further processing of the claim, pointing out that the insurer had a discretion whether to replace stolen items on a "new-for-old" or an "indemnity" basis and that the loss adjustor required this information as, generally speaking, the age of items that could be subject to wear and tear was relevant to their assessed cash value. He said that he would have informed her of the need to provide documents proving ownership and indicating the process by which items that had been taken were replaced. He recalled the applicant saying that she would have some difficulties with the proof of ownership documents and that she would do her best to provide them to him, but that she did not have very many records, such as invoices

and receipts bearing her name or indicating the places at which the items were purchased. At some stage, and possibly while she was at his office on this occasion, she provided some material to him.

15. He subsequently sent the originals of what he did obtain to Peter Hiscock, an insurance investigator, and retained copies. The documents consisted of a mixture of photocopies of the first page of instruction manuals, installation documents or instructions, what appeared to be typed tickets with information as to price and the name of the particular item, and tickets with bar codes and prices. Later, he received an e-mail[1] message from the applicant with further details concerning some of the items in the schedule annexed to the claim form, and commenced the process of obtaining quotations for the replacement of the listed items.

16. Over the weeks leading to 28 July 2003, Mr Pickering had a number of discussions with the applicant concerning proof of ownership, but he did not recall Maria Romeo's name being referred to at any stage in this context and asserted that in all of their discussions and correspondence, the applicant indicated or implied that the property in the schedules to the claim form was her own.

17. *Peter George Hiscock*, a private inquiry agent, was instructed by Westpac Insurance, on or about 5 August 2003, to speak to Mr Pickering and investigate the applicant's claim. He contacted her and arranged to meet her at her address on 6 August 2003, arriving there at about 4.30 p.m. After introducing himself to the applicant Mr Hiscock had a look around and took photographs.[2]

18. He observed no marks on either front or rear doors to indicate that either may have been forced and noted that the rear roller door which appeared to be undamaged could not be physically lifted from the outside. The applicant informed him that the roller door was operated by remote control, with an override switch inside the premises. He went upstairs and observed that there appeared to have been no forcing of the applicant's bedroom door and that inside were a number of valuable items, including expensive clothing, shoes and jewellery. He took photographs in that room[3] which depict, *inter alia*, a television set and a stereo unit. The latter appeared to be of the same make and model as that listed as having been taken.[4] Following the making of these observations, he interviewed the applicant with the aid of a tape recorder.[5] He told the applicant that the circumstances of the claim were unusual and required further investigation.[6]

19. They had, he said, an extensive general conversation before the interview, in order to put events into chronological order.

20. Mr Hiscock had previously investigated an earlier claim by the applicant, on the same insurance company involving premises in Kew. He understood that she had moved out of the Kew premises to the Preston premises where he spoke to her. He stated in cross-examination that he had "looked in" two other bedrooms at the premises and asked the applicant who the occupants were, as they passed them. It was possible but highly unlikely, he said, that she mentioned Maria Romeo at that stage. He believed that the fact that Maria Romeo had moved out was first mentioned in the course of the interview, and that, it was at that stage, that the applicant said to him that not all of the items on the list belonged to her and that some were the property of Ms Romeo. He stated that he was not sure whether she told him that Ms Romeo may have taken some of the property when she left. He agreed that he may have told the applicant that he had a daughter about her age, who was overseas, and that he did not want her to get into trouble. He said that this might have been said when he was talking to her about security measures, such as alarms. He also asked her questions in the interview about the ownership of various items and told her that he was "looking to her" to provide proof that they belonged to her.

21. Following this interview, Mr Hiscock made some further enquiries in the area which clearly aroused substantially any suspicions that he may already have held concerning the *bona fides* of the applicant's claim. He returned and spoke to her again, on this occasion in a distinctly interrogative fashion.

22. His Honour found, with respect to this portion of Mr Hiscock's evidence that–

> "It is clear that Hiscock saw the witness, Hagan Friese, after he had left Warr Street after the first

> portion of the recorded interview had been conducted. When he returned to the premises he resumed his questioning of the accused. He then put to the accused that Hagan Friese had stated to the effect that the furniture had been moved out of the ground floor by a former sub tenant, one Maria Romeo, and that movement of the furniture had not been the result of a burglary. The attitude of Hiscock towards the accused changed perceptively during that portion of the recorded interview. The interrogation soon took on the form of cross-examination and Hiscock assumed an attitude of belligerence, claiming that the accused had exaggerated her claim and the questions soon became marked by scornful overtones of disbelief. The recorded interview was in evidence at the hearing of the *voir dire* and I had occasion to listen to all portions of that recorded interview during the hearing of the *voir dire*. In my view, the questions asked in this portion of the recorded interview were of such a nature that the possibility of exposure to questions of such damaging nature at the trial might well lead the accused to stand mute at her trial and thus exempt herself from further cross-examination of this nature. While I consider that the questions and answers in the second recorded interview were admissible, for reasons which I shall later provide in more detail, I am satisfied on balance that the discretion to exclude evidence the admission of which would operate unfairly to the accused should be exercised for their rejection to the general issue."[7]

23. *Maria Paula Romeo* said that she lived for a time at the Preston house and that, after she moved out, the downstairs area of the premises "looked pretty much completely empty", except for a washing machine and a few kitchen items that belonged to the applicant.

24. She stated that she engaged the service of removalists and that, on the day she vacated the premises, two men arrived at about 1.00 p.m and were there for about an hour. She was aware that the applicant was in her room upstairs because she could hear her moving about, however she did not see her on that day. She had spoken to the applicant a few days to a week earlier, telling her she was leaving, although she was not sure whether she indicated when this would happen.

25. Ms Romeo was referred to the list of items on the insurance claim form and the two-page annexure provided by the applicant. With respect to a number of the items, she had never seen any of them in the house. In relation to item 36 (a quantity of food), the applicant did have food in the kitchen, but not to the claimed value of $400. She stated that the television set downstairs, being item 59, belonged to her (Romeo) and that with respect to item 73 (the stereo unit), the applicant had one, but it was in her room.

26. She did not give the applicant a forwarding address, although the applicant would have had her mobile telephone number. She stated that she did not speak to the applicant thereafter.

27. *Kristalee Gibb* resided at the house for about four or five months from February 2003 and moved out on 9 July 2003. She stated that she lived there with the applicant and Ms Romeo and that she (Ms Gibb) owned only the furniture that was in her bedroom. She said that Ms Romeo owned most of the downstairs items, but that some of the kitchen equipment and the washing machine belonged to the applicant. She stated that there was no barbecue stove at the house, as claimed by the applicant in the list.

28. When she moved out, she told the applicant and Ms Romeo that she was leaving and took only items that belonged to her. When she left, Ms Romeo's property was still there.

29. Ms Gibb was referred to the list of items claimed by the applicant to have been taken. She stated that some were never at the house, that she could not remember the presence of others and that some were never downstairs.

30. In a statement, signed 7 October 2003 which, by agreement, was read into evidence by the prosecutor, *Hagan Friese* stated (*inter alia*) that:

> "He lived at the Preston apartment, sharing with the applicant, after seeing an advertisement in a newspaper. ... He first looked at the two-story townhouse on 6 July 2003. It was fully furnished but quite basic; there were couches, a couple of rugs on the floor, a refrigerator and a small table at the front. He told them he would take the room, and moved in on 10 July 2003. On Saturday 12 July 2003, he was at home in his room upstairs. He did not come downstairs until after 2.00 p.m. During the time he was upstairs, he heard furniture being moved and he knew that Maria was moving her property out. When he went downstairs he saw that everything had been moved out of

> the living area. Downstairs was an empty space. He was not aware that all the furniture was Maria's, but when he saw it was all gone he assumed that it must have been. He did not see the applicant on the Saturday or the Sunday. On Monday 14 July 2003, he got up and went to work, leaving the house at 8.15 a.m. and returning at about 5.30 p.m. He left via the rear door, as he parked his car in the carport at the rear. He locked the door behind him. The ground floor of the house was empty of property. When he got home at 5.30 p.m., uniform police were at the house and he was told there had been a burglary during the day. He was not told what had been stolen."

31. *Samantha Jane Thomas***,** a Senior Constable of police, in company with Constable Dale Clune, attended at the Preston residence at about 4.10 p.m., on 14 July 2003. They were greeted by the applicant and she told them there had been a number of items, including pots, pans, cutlery, a refrigerator, linen, towels and electrical appliances stolen. Senior Constable Thomas made a list of the missing articles, setting out valuations of them, some brand names, serial and model numbers. Thomas noted that the house was very clean, and the applicant told them that items had been removed from the refrigerator and placed in a garbage bag and, that she had cleaned up prior to their arrival. The applicant showed them the upstairs bathroom from where she said towels had been taken and pointed out her bedroom which had a lock on the door and had not, it appeared, been entered. There were two other bedrooms, one was occupied whilst the other was empty. The door to the occupied bedroom was open and the applicant said that she did not know whether anything had been taken from there. There were no signs of forced entry to the front or rear of the premises.

32. *Dale Brett Clune***,** a Constable of police at the time, attended the Preston house on 14 July 2003 in company with Senior Constable Thomas.[8] When they arrived, he asked the applicant to show him where "they" may have entered and what items were missing. The applicant directed him to French doors at the rear of the premises and stated that they were open when she arrived home. She also informed him that she had had trouble with the back doors in the past and that she had reported this to the estate agent. He found no signs of any damage to indicate where entry may have been effected and there was no damage to any of the external doors or windows. The garage roller door which was closed, was in good order and there was no damage to its panelling.

33. He stated that the applicant reported that items were stolen from the lounge room and kitchen area and she showed him where some were taken from the bathroom. She also stated that some furniture had been taken from the rear courtyard.

34. He stated that the applicant informed him that there was one housemate who was living with her at the time, and he observed that there were still items of furniture in that room. The applicant said that a man from Germany[9] had moved in, a week or two prior to the burglary but made no mention of other housemates.

35. On 8 August 2003,[10] he received a call from a woman who identified herself as the applicant and he had a conversation with her. She told him that she wanted to revise the list of stolen items, as she had not realized at the time that her housemate had moved out and taken the furniture. He told her that the file had been forwarded to Detective Senior Constable Monique Kelley and that the applicant would need to contact her.

36. *Eamon Thomas Leahy*, a Constable of police at the time,[11] stated that, on 26 August 2003, he was performing watch-house duties at Preston police station when, at about 5.00 p.m., the applicant approached him and stated that she had reported a burglary on 14 July 2003, that she wished to withdraw her complaint and did not want the matter to be taken any further. When he queried her as to why she wished to take this course she responded that she could not handle the stress involved. He asked her about the source of this stress. She told him that she kept thinking about the property and that she would not see it again. She also mentioned that she had some flatmates who had moved out and she believed they may have taken her property. She said that she did not know where they were, where to look for them and that she did not wish to bother the police to look for them either. He asked her how withdrawing the complaint would help and she replied that she was "sick of the police calling her and asking questions," and that she could not deal with it anymore. He asked her whether she had insurance and whether she was making a claim in respect of the property, to which she responded that she had done so but did not intend to pursue it.

37. The witness, who knew nothing of the matter, checked the police database and ascertained that the police member dealing with it was Detective Senior Constable Kelley. He then contacted her by telephone and informed her of the applicant's attendance. Kelley, who it appears had not at that stage interviewed the applicant but intended to do so, told him to take a statement from her.

38. He stated that he took a written statement from her indicating that she should understand that she had endorsed it to say it was true and correct and that she was liable to penalties if what she asserted was false. She then left the police station.

The Grounds
Ground 1

39. The arguments presented in support of this ground were both convoluted and misconceived. It was submitted that the statements made to the witness, Peter Hiscock, who was engaged by the insurance company to investigate what was understandably viewed as an unusual claim, in the course of his first interview of the applicant on 6 August 2003, were –

(a) confessional in character;

(b) not made in the exercise of a free choice to speak or remain silent; and

(c) made to a person in authority.

In consequence, it was said, the statements should have been ruled inadmissible by the trial judge; alternatively, the proper exercise of judicial discretion required their exclusion.

40. There is no need to expatiate upon the principles to be applied in the consideration of this question. They are the subject of numerous judicial pronouncements over many years. It is sufficient, I think, to refer to the formulation of them by Dixon J in *McDermott v R*.

> "At common law a confessional statement made out of court by an accused person may not be admitted in evidence against him upon his trial for the crime to which it relates unless it is shown to have been voluntarily made. This means substantially that it has been made in the exercise of his free choice. If he speaks because he is overborne, his confessional statement cannot be received in evidence and it does not matter by what means he has been overborne. If his statement is the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure, it cannot be voluntary. But it is also a definite rule of the common law that a confessional statement cannot be voluntary if it is preceded by an inducement held out by a person in authority and the inducement has not been removed before the statement is made: per Cave J. in *R v Thompson* ... . The expression 'person in authority' includes officers of police and the like, the prosecutor, and others concerned in preferring the charge. An inducement may take the form of some fear of prejudice or hope of advantage exercised or held out by the person in authority (*Ibrahim v The King* ...; *R v Voisin* ...."[12]

41. The trial judge accepted that the interview that had been accepted into evidence commenced with an acceptance by Mr Hiscock that a burglary had occurred and that the questions which followed were directed to a "genuine insurance investigation". The applicant he found, provided "at arms length answers" to them and that there was nothing to suggest that her will may have been overborne. Although it seems that his Honour possessed doubts concerning the characterization of the statements as "confessional", in the sense that that term is employed in this area of the law, he addressed the question of the admissibility of the evidence on that assumption. This view, I consider, was unduly generous to the applicant in the circumstances and incorrect as a matter of law. It would seem to be incontrovertible that the statements were made in furtherance of the applicant's desire to secure benefits under a civil contract of insurance pursuant to arrangements into which she had voluntarily entered. The duty of disclosure under a civil contract of insurance in no way restricts the capacity of an individual to speak or remain silent under the criminal law or interfere with the manner in which the choice may be exercised. In the present matter, the applicant can be taken to have been well aware that the insurance company was entitled to ascertain whether or not she was entitled to those benefits before any payment was made and her conduct on this occasion constituted, on the prosecution case, an integral part of her alleged criminal enterprise. No question of the making of a statement against penal interest in respect of an earlier committed crime arose. The evidence was not probative as an admission against interest and admissible on this basis as an exception to the hearsay rule,[13] but because it was

directly relevant to the central question in the trial, namely, whether the applicant had attempted to defraud the company. In any event, there was nothing whatever to suggest that the will of the applicant may have been overborne or her capacity to exercise a free choice compromised in any way. In so far as there was an inducement for the making of the statements, it was not proffered by Mr Hiscock but arose from the applicant's earlier and continuing desire to secure benefits under her contract of insurance. Finally, there was no indication that either the applicant or Mr Hiscock ever perceived Mr Hiscock as "a person in authority", save perhaps to the limited extent that he could have reported adversely in relation to a civil claim. The situation may well be perceived to have changed significantly at the time of the second interview but the evidence of what transpired at that stage was excluded by his Honour and need not be addressed.

Ground 2

42. It was not submitted that the evidence of Leahy was inadmissible on the basis that the statement made by the applicant withdrawing her burglary complaint was involuntary or unreliable, but because he was, in the circumstances, "an investigating official" and the applicant was "a person in custody" within the meaning of s464[14] of the *Crimes Act* 1958 and therefore should have been cautioned against self-incrimination.

43. The same submission was advanced before the trial judge who stated in his ruling –

> "[Counsel] argued that Leahy was notionally in possession of such information because he had spoken to the informant who was in turn in receipt of a report from the licensed inquiry agent Hiscock. Accordingly, it was submitted that although Leahy knew very little about the matter and clearly was not personally in possession of sufficient information to justify his arrest of the accused, that possession by Detective Kelley of such information was notionally to be attributed to Leahy for that purpose. The ingenuity of these submissions must be recognised.[15] ...
>
> I am prepared to acknowledge that Constable Leahy was an investigating official for the purpose of s464, although I am certain that he himself would be surprised to be categorized as such. Although my view is to the contrary I am prepared to proceed on the assumption that the accused was in custody when in the company of Constable Leahy for the purpose of s.464(1), even though she had gone voluntarily and unexpectedly to the police station specifically to withdraw her complaint of burglary. In the circumstances I consider she would be the last person to consider herself in custody as that situation is generally understood. I am also prepared to hold that her withdrawal of complaint involved an admission against interest for present purposes, but I am satisfied positively on the balance of probabilities that her statement was voluntarily made, both in the traditional sense and in the situational sense of voluntariness, as captured by the authorities and further I am not satisfied that any discretion to exclude the evidence is activated. There is clearly no improper conduct on the part of Leahy which has led to the withdrawal of the complaint. At worst it would be an isolated and merely accidental non-compliance. I am not satisfied that there would be unfairness to the accused in admitting the evidence and I am also not satisfied that the overall discretion to ensure a fair trial is activated in this case."[16]

44. Again, his Honour's approach was unduly generous to a misconceived submission.

45. It is clearly beyond dispute that no one involved in this process appears to have even contemplated the possibility that the applicant may have been "a person in custody". She was on any view of the evidence, not so situated in fact, having attended at the police station for her own purposes, at her own volition and in the absence of any suggestion or thought whatever in the mind of anyone involved that she was not entitled to leave, or that she might conceivably have been in custody in some technical sense. Leahy who, as I have earlier mentioned, had not been previously involved in the matter, clearly did not so regard her. He contacted Detective Senior Constable Kelley only in consequence of the applicant's attendance and upon ascertaining Kelley's interest in the matter through a check of the police database. He did nothing more than secure a voluntarily made statement from the applicant withdrawing her complaint and setting out her stated reason for doing so. Leahy engaged in no abuse of power, trickery or subterfuge. It must be regarded as highly doubtful that Kelley herself had sufficient information to justify the arrest of the applicant at that time, although there was evidence that she intended to interview her and, in any event, it is quite unrealistic to attribute to Leahy the notional possession of information which may have been held by Kelley. Further, as the Crown pointed out in their written submissions in this Court, insofar as the withdrawal of her complaint by the applicant might be received as evidencing a consciousness of guilt in the circumstances, that could be established on the basis of

her voluntary attendance and initial statement to Leahy that she did not wish to have the matter pursued. The subsequent written statement did no more than provide a possibly exculpatory explanation given at that time that otherwise would not have been before the jury. If, as was not the case, a caution should have been given under s464 or in accordance with recognized common law principles, its absence in this case cannot be seen to have foreseeably disadvantaged the applicant in any respect. Indeed, the exclusion of the evidence on this basis could only have operated to her detriment.

Ground 3

46. Again, this ground lacks substance. There was ample evidence before the jury to support the conviction. As the trial judge stated when ruling on a submission by the applicant's counsel that there was no case to answer –

> "The submission of [defence counsel], as I understand it, is that while the claim form and its appendages are apt to demonstrate the identity of the chattels allegedly lost and values attributed to them by the accused, the real question is what interpretation of the claim is open to the jury. [Counsel] submits that there is no categorical statement in the claim form in which the accused uses words such as, 'I herby claim a cheque in the sum of $55,293.85 being the total value of all the items listed in the schedule.' [Counsel] again highlights that the word 'no' is ticked as the answer to the question, 'Are you the sole owner of the property that is the subject of this claim? [Counsel] accordingly submits that no jury properly instructed could conclude that the state of mind of the accused was such that she intended to claim a cheque in the sum of $55,293.85 from the insurance company. He contends that in the ordinary course of its business, and indeed in the present case, the insurance company, through its representative, would and did put her to the proof of her ownership of the chattels in respect of the attributed value of which the claim was made. On behalf of the Crown the learned prosecutor submits that the submission on behalf of the accused overlooks the fundamental distinction between any proof of ownership which might be required by the insurance company in its consideration of the claim after the claim has been made on the one hand, and the attempted deception involved in the very process of making a false claim on the other. In this regard attention must be directed to the inferences which are capable of being drawn from the evidence of Maria Romeo and Kristalee Gibb, that the 'burglary' which was reported by the accused to the police did not take place at all, that none of the chattels listed in the claim were present at all at the premises at Warrs Avenue after Romeo and Gibb had moved out and taken with them the chattels which belonged to them and that the accused knew full well at the time when the 'burglary' was reported by her that both Romeo and Gibb had moved out and taken the chattels which belonged to them at the time of their respective departures from the premises and that none of the chattels listed by her in the 73 items were in the premises at all. In my judgment all of these inferences are open to the jury and are capable in combination of leading the jury to be satisfied beyond reasonable doubt that at the time when the claim was made by the accused she intended to achieve a payment by the company of a cheque for the total value attributed by her to the chattels. In those circumstances it is impossible for me to be satisfied that no jury, properly instructed, could lawfully convict the accused of the offence alleged against her and in all the circumstances I make the positive finding that there is a case to answer."[17]

47. His Honour, a judge with many years experience in the conduct of criminal trials, was conscious of the principles of law applicable to the consideration of this question and applied them appropriately. There is nothing in his ruling that suggests he may have fallen into error, nor could the verdict sensibly be perceived as unsafe or unsatisfactory in all of the circumstances.

48. The argument advanced in this Court, that because as it transpired the applicant could only have secured a cheque for the sum of $36,400 under the insurance policy she could not have been properly convicted on a count alleging that she was endeavouring to secure a cheque for a larger sum, is also patently without substance and does not merit analysis. As the summary of evidence set out earlier indicates, there was ample evidence before the jury to support the conviction of the applicant in this case.

49. It follows that I would dismiss this application.

The Application for Leave to Appeal Against Sentence

50. Although the application for leave to appeal against sentence is based upon five grounds, it is to be observed the central contention advanced is that by reason of the weight attributed to the various considerations set out, the sentence imposed was manifestly excessive.

51. With respect to the assertion that his Honour attributed insufficient weight to evidence that the applicant was suffering from significant depressive illness at the time of the commission of the offence, it is apparent from his sentencing remarks that he directed a deal of attention to the evidence of the applicant's personal circumstances and background. He made specific reference to the reports of the psychiatrist, Dr Jennifer Andrews who first saw the applicant on 27 May 2003, that is, prior to the commission of her offence and found her to be suffering symptoms of significant depressive illness. When this diagnosis was first drawn to his Honour's attention in the course of the proceeding, counsel for the applicant in the court below sought an adjournment of the plea in order to obtain further expert evidence. This application was granted and a report of Elizabeth Warner, a psychologist, was tendered upon the resumption of the hearing. It is apparent from the direct references to them, and as the following abstract illustrates, that his Honour had considered both these reports in his determination of an appropriate sentence in this case. Similarly he adverted to the fact that the applicant had no prior or subsequent convictions, the adverse consequences already suffered by her as a result of her offending, which included the loss of her job, and her impecunious state at the time of sentencing. He concluded –

> "... [Counsel] acknowledged that your offence should be punished by a sentence of imprisonment, but he sought a suspension of that sentence of imprisonment. This was opposed by the learned prosecutor, who submitted that at least a portion of the sentence which is to be imposed should be immediately served. Regretfully I must accept the submission of the learned prosecutor. Insurance contracts are contracts of ultimate good faith and require the scrupulous honesty of people who deal with insurance companies. Attempted frauds of this nature must be the subject matter of curial disapproval, and the message must be clear to all people who are minded to commit offences of this nature that they will not be tolerated. In the ultimate I have chosen a sentencing option which has regard to all of the difficulties and all the rehabilitative matters to which reference has been so capably been made by [counsel], and I have chosen a sentencing option which may be regarded as benign, but it will also serve to impose upon you what I consider to be just punishment in all the circumstances."[18]

52. I have been unable to detect any error of omission or commission in his Honour's sentencing remarks and none was suggested in the course of argument. Nor does the sentence at which he arrived bespeak error.

53. Accordingly, I would dismiss this application.

EAMES JA:

54. For the reasons stated by Vincent JA, I agree that the applications for leave to appeal against conviction and sentence should both be dismissed.

REDLICH JA:

55. I have nothing to add to the reasons of Vincent JA which I have read in draft form. For those reasons, I agree that the applications for leave to appeal against conviction and sentence should be dismissed.

---

[1] Exhibit G.
[2] Exhibit A.
[3] Exhibit J.
[4] The stereo was numbered Item 73 on the list.
[5] Exhibit K.
[6] He stated in cross-examination that he had previously been a police officer for 14 years, rising to the rank of sergeant.
[7] Ruling, T5-6.
[8] His rank at the date of the trial was Senior Constable.
[9] Mr Hagen Friese.
[10] This was, of course, after she had been interviewed by Hiscock.
[11] His rank at the date of the trial was Leading Senior Constable.
[12] *McDermott v R* [1948] HCA 23; (1948) 76 CLR 501 at 511; [1948] 2 ALR 466. See also with respect to the issue of voluntariness generally and exercise of discretion to exclude *R v Lee* [1950] HCA 25; (1950) 82 CLR 133; [1950] ALR 517; *Cleland v R* [1982] HCA 67; (1982) 151 CLR 1; 43 ALR 619; (1983) 57 ALJR 15; *R v Swaffield & Pavic* [1998] HCA 1; (1998) 192 CLR 159; (1998) 151 ALR 98; (1998) 72 ALJR 339; (1998) 96 A Crim R 96; [1998] 1 Leg Rep C5.
[13] *Bannon v R* [1995] HCA 27; (1995) 185 CLR 1; (1995) 132 ALR 87; (1995) 83 A Crim R 370; (1995) 70 ALJR 25; (1995) 19 Leg Rep C1.

[14] s464 (1) For the purposes of this Subdivision a person is in custody if he or she is—
(a) under lawful arrest by warrant; or
(b) under lawful arrest under section 458 or 459 or a provision of any other Act; or
(c) in the company of an investigating official and is –
(i) being questioned; or
(ii) to be questioned; or
(iii) otherwise being investigated—
to determine his or her involvement (if any) in the commission of an offence if there is sufficient information in the possession of the investigating official to justify the arrest of that person in respect of that offence.
s464A (1) Every person taken into custody for an offence (whether committed in Victoria or elsewhere) must be—
(a) released unconditionally; or
(b) released on bail; or
(c) brought before a bail justice or the Magistrates' Court—
within a reasonable time of being taken into custody.
(2) If a person suspected of having committed an offence is in custody for that offence, an investigating official may, within the reasonable time referred to in sub-section (1)—
(a) inform the person of the circumstances of that offence; and
(b) question the person or carry out investigations in which the person participates in order to determine the involvement (if any) of the person in that offence.
(3) Before any questioning (other than a request for the person's name and address) or investigation under sub-section (2) commences, an investigating official must inform the person in custody that he or she does not have to say or do anything but that anything the person does say or do may be given in evidence.
[15] T18-19.
[16] T20.
[17] T289-290.
[18] Sentence T462.

APPEARANCES: For the Crown: Mr MA Gamble, counsel. Ms A Cannon, Solicitor for Public Prosecutions. For the applicant Drasko: Mr KT Armstrong, counsel. Victoria Legal Aid.
