10/00; [2000] VSC 96

SUPREME COURT OF VICTORIA

R v ROBA & ORS

Coldrey J

7 February 2000 — (2000) 110 A Crim R 245

EVIDENCE – ADMISSIBILITY OF TAPE-RECORDED CONVERSATIONS BETWEEN ACCUSED AND UNDERCOVER POLICE OFFICER – DOMINANT AND CONFIDENT ROLE PLAYED BY OFFICER DURING FIRST CONVERSATION – ADMISSIONS MADE – INFORMATION GAINED USED IN CONVERSATION WITH SECOND ACCUSED – ADMISSIONS MADE – ACCUSED COULD HAVE BEEN FORMALLY INTERVIEWED – ACCUSED DEPRIVED OF PROCEDURAL RIGHTS – WHETHER TAPE MATERIAL SHOULD BE EXCLUDED FROM EVIDENCE: *CRIMES ACT* 1958, S464.

After R. had been interviewed and charged with an offence of intentionally causing serious injury, he was lodged in the cells at the police station. Also in the cells was an undercover police officer, K. whose role was to ascertain the identity of the co-offenders and where the balaclavas and weapons used in the commission of the offence were hidden. The conversation between R. and K. (in which R. made a number of admissions) was tape-recorded and lasted in excess of two hours. During the conversation, K. presented as a confident experienced criminal who was clearly in control of the situation. The mode of conversation went far beyond the facilitation of R. providing information and the role which K. was supposed to fulfil. Subsequently, K. was used to conduct a conversation with N. who was a significant suspect in respect of the commission of the offence. In this conversation, N. was said to have made various admissions about his involvement in the offence. On the trial, R. and N. objected to the admission into evidence of the whole of the tape-recorded conversations.

HELD: Objections upheld. All of the tape-recorded material excluded from evidence.
1. In relation to R., what occurred between R. and the undercover police officer K. in the police cells constituted a reckless disregard of R's rights sufficient, on any balancing exercise, to exclude the taped conversation on the grounds of public policy. The manner in which the conversation was conducted by K. — who essentially fashioned its course — was such that it would be quite unfair in the circumstances to admit any portion of it into evidence.

2. In relation to the conversation between N. and K., the deliberate decision of the investigating police to allow K. to speak with N. rather than conduct a formal interview with him constituted an effective circumvention of N's procedural rights. Further, that conversation was the product of the initial tainted conversation between R. and K. On any balancing of these circumstances it would be contrary to public policy to admit this conversation into evidence.

COLDREY J:
1. In the early hours of 18 February 1999 the three accused, together with a fourth person, Hasan Kevelj visited the house of the deceased Mr Robert Filipovic in Barrands Lane, Drysdale. Also resident at those premises was Mr Filipovic's girlfriend (the sister of the accused Paul Roba), Natalie Roba.

2. In broad terms, the Crown case is that the visit to the Drysdale house was motivated by Paul Roba's displeasure at what he perceived to be the conduct of Mr Filipovic who he blamed for introducing his sister to heroin and for the subsequent thefts perpetrated by the couple upon his elderly parents and the Roba family in order to support their heroin habit.

3. The four men, having taken steps to disguise themselves with such items as a balaclava and beanies and having armed themselves with two pipes, ultimately broke down the front door of the premises. It is alleged that Mr Filipovic retreated and, if he produced a knife, as is asserted by the accused, he was quickly subdued and beaten with the pipes.

4. The principal attack, according to the Crown, was perpetrated by the accused Roba. The three accused and Kevelj eventually left the property and disposed of the pipes and portion of the disguises before returning to Geelong. It transpired however, that Ms Natalie Roba recognised her brother Paul as one of the assailants. Consequently, he was arrested and later that same day

interviewed by investigating police. At that time Mr Filipovic, although critically injured, was still alive.

5. In the course of that interview, the accused Roba admitted being present at the Drysdale premises and kicking the door down. He stated that he had gone there in essence to scare Mr Filipovic. He claimed that after Mr Filipovic had produced a knife, he had struck him twice with an iron bar. After he had fallen unconscious to the floor, the group had left the premises.

6. Paul Roba was then charged, *inter alia*, with intentionally causing serious injury.

7. Mr Roba was not pressed to name his companions during the course of that interview but it is common ground that he provided the investigating police with the names of his two co-accused (although not the fourth man Kevelj) shortly after the completion of the record of interview. He professed however, to be unable to specify the location of where any pipe or other items had been jettisoned.

8. Having been formally interviewed and accorded his legal rights as specified in s464ff of the *Crimes Act* 1958 (the Act), the accused Roba was lodged in the cells at Geelong Police Station.

9. As I indicated, prior to this time, the police had been provided with the names of two alleged compatriots of Mr Roba who, given the information of the numbers of persons at the scene, must be regarded as prime suspects for this offence.

10. It is not suggested that these suspects could not have been located and interviewed, including being questioned about the possible whereabouts of any items used in the commission of the offence. However, investigating police had already chosen another course. It had apparently been decided to place an undercover policeman (a man using the name of Greg King) in the cells to await the arrival of Paul Roba, after the interview formalities had been completed.

11. At the committal proceedings Mr King deposed to perceiving his role as finding out the others who were involved in the incident and where the balaclavas and weapons might be hidden.

12. As a result of this operational decision a lengthy tape-recorded conversation occurred, and the name of the fourth person, Kevelj, was ultimately obtained. That success in itself cannot justify the admission of the tape-recorded material into evidence, albeit it proved to be one way of progressing the investigation.

13. Indeed, in the course of argument, Mr Leckie agreed to the proposition that a distinction may exist between the use of such a technique to obtain material which advances an investigation and the use of the conversation recorded in garnering that information against an accused person who has previously been interviewed and exercised his or her legal rights.

14. In the present case objection was taken by Mr Brustman, on behalf of Mr Roba, to the whole of the tape-recorded conversation. He submitted, in effect, that the conversation, which contains a number of admissions, should be excluded in the exercise of either the fairness or the public policy discretions.

15. In *R v Heaney and Welsh* [1998] 4 VR 636; (1998) 100 A Crim R 450, I endeavoured to summarise the current law in this area as stated by the High Court in *R v Swaffield; Pavic v R* [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. Apart from setting out statements from each of the judgments I remarked at CLR p644:

> "Putting aside the issue of voluntariness, the current approach of the majority of the High Court to the exclusory discretions seems to be as follows. The fairness discretion encompasses considerations of the effect of the conduct of law enforcement officers upon the reliability of the impugned material. The term 'law enforcement officers' may be regarded as including persons acting as their agent. The fairness discretion will also come into play where some impropriety by law enforcement officers or their agent has eroded the procedural rights of the accused, occasioning some forensic disadvantage. Those procedural rights include the right to choose whether or not to speak to the police. Importantly, the method of eliciting an admission or confession will clearly be relevant in determining whether it would be unfair to an accused to admit it into evidence.

> The discretion to exclude evidence on the grounds of public policy may be enlivened where no unfairness to an accused is occasioned, but nonetheless, the method by which the confessional evidence has been elicited is unacceptable in light of prevailing community standards. This broad discretion would involve a balancing exercise."

16. It is true to say that these concepts have always had a nebulous aspect to them, as well as an element of overlap. Moreover, the courts have shown considerable flexibility in determining the relevant conduct that will give rise to the exercise of a particular discretion in individual cases. Indeed, in an article produced in argument, entitled *Police Deception, the Right to Silence and the Discretionary Exclusion of Confessions*, Vol 22 Criminal Law Journal p352, a Melbourne University academic, Mr Andrew Palmer, criticises the majority of the High Court in *Pavic's case*, for their application of the facts to the legal principles enunciated.

17. In the course of argument Mr Brustman cited *R v Franklin*, an unreported decision of Vincent J delivered on 23 July 1998. In that case the introduction of an undercover policeman into the cells with the accused occurred in the urgent and dramatic circumstances that the whereabouts of the deceased was unknown and the possibility existed that he was still alive and required assistance.

18. It was argued, (*inter alia*), that the police activities denied to the accused a statutory protection of s464ff of the Act.

19. In declining to exercise his discretion to exclude the impugned material for reasons of unfairness or public policy, Vincent J stated:

> "For my part I consider that the course which was adopted was entirely appropriate in the circumstances. Indeed it would perhaps have been remarkable if some serious endeavours were not being made to find the missing lad. In that important feature the case differs dramatically from that which sometimes comes before the court, where, for forensic or other purposes, investigating police choose to adopt techniques which deny effectively to individuals their rights under the law. In other words, there is nothing to suggest in this material any deliberate or reckless disregard of those rights".

His Honour also noted:

> "There is, in the conversation itself, nothing in the nature of trickery save that which is involved in the concealment of the identity of the person engaged in it with the accused which may be perceived as inherently unfair or likely in the context in which the conversation occurred, to create the possibility that the accused may, in order to impress a person with whom he was speaking, make claims or exaggerated statements which may not properly reflect the situation. In making this comment I have in mind the cautionary note sounded by Kirby J in his judgment in *R v Swaffield*. He there drew attention to the nature of prison communications and the possibility that, for a wide variety of reasons, individuals in that context may wish to make themselves appear "larger" than in reality they are."

20. It was argued by Mr Brustman that, in stark contrast to *Franklin's case*, the circumstances in the instant case did not warrant the use of an undercover policeman effectively circumventing Mr Roba's procedural rights.

21. On behalf of the Crown Mr Leckie submitted that the seriousness of the offence, coupled with the fact that the names of the co-offenders were not known and the weapons had not been recovered, justified the subterfuge. He argued that a measure of flexibility ought to be permitted in the investigative process. (I interpolate that the second assertion is not accurate).

22. Just to state the propositions advanced by Mr Leckie is to demonstrate that such factual situations as outlined will be far from rare. Is it to follow that in the name of investigative flexibility or efficiency, the legislative safeguards provided by s464 of the Act ff are to be circumvented? I think not. However, it should be stressed, as *Franklin's case* demonstrates, each case will necessarily turn on its unique facts.

23. In the present case I am driven to the conclusion that, at the very least, what occurred constituted a reckless disregard to the accused's rights, sufficient, on any balancing exercise, to exclude the taped conversation on the grounds of public policy.

24. The matter does not, however, end there. Mr Brustman presented a catalogue of complaints about the conduct of the conversation by the undercover policeman. It was submitted that such conduct created a situation in which it would be quite unfair to use the accused's statements against him.

25. I do not intend to go through that conversation line by line, but rather to deal compendiously with some aspects of it.

26. Prison conversations, of which this may be regarded as an example, carry with them the temptation of big noting; of using language regarded as demonstrating familiarity with ones surroundings, or as an expression of bravado and toughness; or of seeking to bond with a cell mate in an atmosphere of shared adversity. As indicated, the nature of prison communication is noted by Vincent J in *Franklin's case*.

27. Here the conversation is replete with the familiar mindless expletives and studied callousness, albeit that a large measure of the language emanates from the undercover police officer. In my view no amount of judicial filleting would enable the removal of the prejudicial effect of it upon any jury.

28. In the course of the conversation Mr King proffers the view that the victim sounds like "a bit of a cunt", and on several occasions observes "it sounds like he deserved what happened". He gratuitously observes: "at least he's suffering, eh!"

29. On yet another occasion Mr King suggests that the accused should have got Mr Filipovic's knife and "given him one."

30. The accused initially having given an account of what occurred, Mr King advises that he word up his colleagues. A series of exchanges occur which, whilst frequently ambiguous, are capable of suggesting the view of the policeman, that the accused's account of why he went to Mr Filipovic's premises and what occurred there, is necessarily a concocted story.

31. This aspect was submitted by Mr Brustman to be independently objectionable on the basis of the principles enunciated in *R v Pritchard* [1991] VicRp 8; [1991] 1 VR 84; (1990) 49 A Crim R 67. Moreover, Mr King presenting as a confident experienced criminal, is constantly urging the accused to get to his mates with his version of events or to make sure their stories are straight. On another occasion, the accused is advised to get his mates to shut up about what occurred.

32. The tendency to subvert the accused's account proceeds in other more subtle ways. For example, when told by the accused that he had started crying during the video taped interview, Mr King responds, "That's good though, that'll look good for you."

33. Much of the conversation involves Mr King advising the accused to get rid of the items, sometimes referred to as "the stash" or "that bag of shit" involved in the assault. He also received gratuitous advice on what his ultimate account should be. The accused is further advised that next time such an enterprise is embarked upon, it should be planned.

34. Virtually all of the topics to which I have referred are the subject of considerable repetition by Mr King who was clearly in control of the situation.

35. In my opinion, the mode of conversation goes far beyond any facilitation of the provision as information by the accused and in particular, goes beyond the brief which Mr King saw himself as having been given.

36. Although initially unpersuaded about the importance of "the stash", (since Mr Roba claimed to have admitted his own role in events), the accused is ultimately induced by Mr King to provide telephone numbers and addresses of co-accused to facilitate the removal or destruction of "the stash". This was to be done by initially contacting his co-accused Elvis Novosel.

37. Interlarded in this conversation, which lasted in excess of two hours, is a version of the accused Roba of what occurred at Drysdale. No doubt the Crown would gain considerable forensic

advantage if able to contrast some of this material, to which Mr Leckie drew my attention, with the accused's account given in the video taped interview.

38. However, the forensic devastation deriving from the manner in which this conversation was conducted by the undercover policeman, who essentially fashioned its course, is such that it would be quite unfair, taking the factors to which I adverted in combination, to admit any portion of that conversation into evidence. Consequently, in the exercise of the fairness discretion, I would also exclude it.

39. I now turn to the application by Mr Gucciardo on behalf of the accused Novosel, that a subsequent conversation between his client and Mr King should also be the subject of discretionary exclusion.

40. This conversation, which may be said to contain various admissions, commenced shortly after 3am on 19 February 1999 when Mr King attended at the accused Novosel's address at 72 Separation Street, North Geelong. According to the depositional evidence of Detective Senior Constable Cindy Millen, the initiative for this venture came from Mr King who proposed to see what he could speak to Novosel about.

41. Investigating police were prepared "to give him his head" and he was subject to no specific instructions. Mr King himself deposed to having three objectives; firstly, to obtain any information about "the stash". Secondly, any information about what Mr Novosel might say to the police if detected, and thirdly, what the accused Novosel actually did on that night.

42. As previously indicated, at the time of this conversation, the names of Novosel and Wilson had been given to the police by Roba as participants in the Drysdale incident. By that stage, Novosel was admittedly a significant suspect and could have been formally interviewed by the police.

43. It was submitted by Mr Gucciardo that the deliberate introduction of the undercover police officer to effectively question Novosel, at a time when he could formally have been interviewed in accordance with the s464ff safeguards, should be regarded as contrary to public policy, and in the circumstance of this case, result in the exclusion of the conversation from evidence.

44. In developing this argument, Mr Gucciardo referred to the conclusions of Mr Palmer in the article to which I have earlier referred. Mr Palmer remarks of such a situation at p339:

> "This is where the admissions have been deliberately elicited by the undercover police officer but have been elicited before the suspect has been officially questioned by police and therefore before he or she has had the opportunity to exercise their right of silence. It is submitted that such admissions should be held inadmissible because such an approach to questioning would derogate from the suspect's right of silence. He or she would be deprived of that right because the police had chosen to question him or her by means of the undercover officer, rather than in a formal context."

45. Apart from the issue of public policy, Mr Gucciardo submitted the erosion of the accused procedural rights constituted by the conversation itself, together with the forensic disadvantage occasioned by the nature of the conversation, enlivened the fairness discretion.

46. In submitting that the taped material should be admitted into evidence, Mr Leckie put that any introduction of an undercover agent as an operational decision, should not be seen as a deliberate attempt to usurp the accused's rights. Although he was a "gold plated A grade suspect" (to use words agreed to by Senior Detective Millen at the committal proceedings), what had been done should be seen as a reasonable investigative ploy in the circumstances.

47. Mr Leckie, however, conceded that the issue of whether the present conversation was tainted by what had occurred between the accused Roba and Mr King was a relevant one. This must be so, because it was as a result of that conversation that Mr King obtained not only the keys to unlock the doors to legitimacy and acceptance by the accused Novosel, but also was furnished with the material upon which to found his subsequent conversation with him.

48. Apart from his broadly couched submission, Mr Gucciardo pointed to a number of aspects

of the conduct of the conversation, (the methodology), which he argued, led to unfairness. Specific examples were the falsehood that Paul Roba had not revealed anyone who was present at Drysdale, and the insistence by the undercover policeman of the need to get rid of "the stash". There was also the return of Mr King on seven occasions to the topic of what had to be said if Novosel was caught.

49. The effect of all this was, submitted Mr Gucciardo, to de-legitimise any defence in advance.

50. Without condescending to details I regard such criticisms as having substance.

51. Mr Gucciardo also pointed to the ambiguity of portions of the conversation. He asserted that there was demonstrable unreliability in some of the accused Novosel's answers. The latter proposition was the subject of some debate, but it is unnecessary for me to decide that matter.

52. As with the conversation involving Mr Roba, admissions were made, even volunteered, which would have significant probative value for the Crown. However, any such admissions must be seen in the context of any deprivation of procedural rights; the general manner in which the conversation was conducted by the undercover policeman; and the circumstances of the initial conversation between King and Roba, which was the genesis of the subsequent exchange between King and Novosel.

53. In my view the deliberate decision of the investigating police to permit Mr King to speak with the accused, rather than conduct a formal interview with Novosel, constituted an effective circumvention of his procedural rights. Moreover, that conversation was the product of the initial tainted conversation between King and Roba. On any balancing of these circumstances I am satisfied that it would be contrary to public policy to admit this conversation into evidence.

54. Similar factors, together with an examination of the nature of the exchanges constituting the conversation, some of which I have mentioned, constrain me to the view that this conversation should also be excluded in the exercise of the fairness discretion.

55. I should conclude this ruling with a caveat. This has been a ruling fashioned in some haste because of the time constraints of the trial process. It does not purport to lay down any immutable principle that the utilisation of an undercover police officer to speak to a suspect prior to any formal interview, or indeed subsequent to such interview, will necessarily result in the exclusion of any admissions obtained. The myriad of facts situation facing police investigators makes such an approach unrealistic. Indeed, cases such as *Franklin* and *Swaffield* are illustrative of the differing results, depending on the exigencies facing police investigators.

56. The courts, however, will be vigilant to ensure that the legislative safeguards accorded to suspects are not circumvented as a matter of mere investigative convenience or expediency.

57. In the result all of the tape material will be excluded from evidence.

APPEARANCES: For the Crown: Mr J Leckie, counsel. Office of Public Prosecutions. For the accused: Mr D Brustman, counsel. Victoria Legal Aid. Mr F Gucciardo, counsel. GR Bryant & Associates, solicitors. Mr H Mason, counsel. Paul A Vale Pty, solicitors.
