68/82

SUPREME COURT OF TASMANIA

MARSHALL v WILSON

Everett J

7 December 1981 — (1982) 6 Crim LJ 160

MOTOR TRAFFIC – DRIVING WITH PRESCRIBED CONCENTRATION OF ALCOHOL – DRIVING UNDER THE INFLUENCE OF INTOXICATING LIQUOR – WHEN INTERCEPTED DRIVER LOCKED HIMSELF IN HIS MOTOR CAR – POLICE OFFICER FORCED ENTRY INTO VEHICLE AND REQUIRED DRIVER TO SUBMIT TO A BREATH TEST – AT SUBSEQUENT HEARING MAGISTRATE DISMISSED CHARGE ON BASIS THAT ADMITTING THE EVIDENCE WOULD GIVE CURIAL APPROVAL TO THE ACTIONS OF THE POLICE OFFICER – WHETHER MAGISTRATE IN ERROR.

HELD: Dismissal set aside.
Accepting that the act of the police officer, not being an act in pursuance of a power of arrest or of any statutory authority, was unlawful in the sense that it was a trespass to chattels, the magistrate gave undue emphasis to the need to avoid curial approval of unlawful acts of those whose duty it is to enforce the law. Further, no weight had been given to the public interest in ensuring that offending motorists should not escape punishment by simply locking themselves in their vehicles.

The respondent had been acquitted by a magistrate of offences against the *Road Safety (Alcohol and Drugs) Act* 1970. He had been charged with breaches of ss4(a) and 6(1) of that Act. When stopped by police as a result of observed aberrant driving, respondent had locked all the doors and windows of his motor vehicle and refused to open them to let the police in or to emerge to speak to the police. The arresting officer then broke into the vehicle and as a result formed the opinion that the respondent was intoxicated. He then required the respondent to submit to tests which disclosed a blood alcohol content of 0.260 grammes of alcohol in 100 mls of blood.

At the hearing the learned magistrate excluded all evidence obtained as a result of the forced entry into the vehicle. He purported to exercise the discretion referred to in *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561 to exclude evidence obtained by unlawful means upon the grounds that to admit the evidence would be tacitly to give "curial approval" to the actions of the police officer. The prosecutor appealed by way of order to review. The appeal was based upon the contention that the learned magistrate had failed properly to exercise the discretion he had to exclude evidence of events following the constable's unlawful act.

Everett J accepted that the act of the police officer, not being an act in pursuance of a power of arrest or of any statutory authority, was unlawful in the sense that it was a trespass to chattels. However, he held that the learned magistrate had given undue emphasis to the need to avoid curial approval of unlawful acts of those whose duty it is to enforce the law. Further, in his Honour's view, no weight had been given to the public interest in ensuring that offending motorists should not escape punishment by simply locking themselves in their vehicles. Having determined that the learned magistrate had incorrectly exercised his discretion, his Honour examined the factors referred to in the joint judgment of Stephen and Aickin JJ in *Bunning v Cross* and found as follows:

> 1. The unlawfulness was not a result of a deliberate disregard of the law. The cogency of the evidence to be obtained was not affected by the illegality and would have vanished had it not been reasonably promptly obtained.
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> 2. There was no readily available means of obtaining the evidence without the unlawful act.
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> 3. The offences charged were serious and involved potential physical harm to other persons. It may be noted that had the respondent not been arrested that potential harm would have continued until he ceased to drive.

4. There was nothing to suggest that the legislature had turned its attention to the question of conferring a power of entry into a motor vehicle in the circumstances of the case. His Honour was satisfied that rather than being a deliberate attempt to restrict police power the failure of the legislature to confer power to enter vehicles of suspect persons to obtain evidence for drink driving offences was "a result of inadvertence".

5. Although his Honour did not advert to it, the case was, for what it is worth, one where the evidence of intoxication would have disappeared with time.

His Honour then said:

"My conclusion which I reach with full respect to the magistrate, is that his discretion was exercised erroneously and that the decision should not be allowed to stand. The orders under appeal are quashed. The complaint (No. 1819/1981) is remitted to the magistrate who originally heard it with a direction that the evidence which he excluded should be admitted and the complaint be determined in accordance with law." Decision: Appeal by way of notice to review allowed.

[Ed Commentary. There seems no end in sight to further cases involving the exclusion of evidence unlawfully obtained. Undoubtedly the question is and remains an important one. The courts in the United Kingdom have taken the approach that there will be no exclusion of evidence whether as of right or as a matter of discretion, regardless of the illegality involved in the obtaining of the evidence (e.g. *R v Sang* [1979] UKHL 3; [1980] AC 402; [1979] 2 All ER 1222; [1979] 3 WLR 263; (1979) 69 Cr App R 282 (House of Lords). The control of official illegality in pursuit of evidence will, in future, in England be left to criminal or civil law, police disciplinary and complaint codes and the general respect for the law that police officials are expected, as a result of proper training, to have. The United States has opted for an automatic exclusion of evidence obtained as a result of an infringement of the law. The same is regarded as a breach of the "due process" guarantee in the *Constitution* (e.g. *Miranda v Arizona* 384 US 436; 10 ALR 3d 974; 16 L Ed 694; 16 L Ed 2; 86 SCt 1826; 10 Ohio Misc 9; 16 L Ed 2d 694; 86 SCt 1602; 427 PA 486)).

The Australian approach involves a judicial discretion, a balancing process "between "... the public need to bring to conviction those who commit criminal offences" and "... the public interest in the protection of the individual from unlawful and unfair treatment". (per Barwick CJ, *R v Ireland* [1970] HCA 21; (1970) 126 CLR 321, at 335; [1970] ALR 727; (1970) 44 ALJR 263). That such a balancing process exists was affirmed in *Bunning v Cross* (*supra*) and the joint judgment of Stephen and Aickin JJ gives some further guidance as to how that balancing process is to be conducted. The instant case demonstrates, however, that if the occasion for discretion arises, it is necessary for a court to give consideration to each of the factors which tend in favour of reception of the evidence as well as the existence and nature of the unfairness or illegality which tends against it. The illegality will assume more weight if it is a deliberate or reckless disregard of the law. It will also assume more weight if it is an illegality arising out of the disregard of a specific legislative provision to the contrary. Although the finding of Everett J indicates that the object of deterring future illegality is not sufficient *per se* to cause the exclusion of cogent evidence of a serious offence, this should not be interpreted as support for the proposition that such a consideration is not relevant or is always insufficient. It has to be noted that what appeared to weigh heavily with Everett J was the consideration that the officer really had no alternative, was acting in good faith in the belief he had power, was seeking to prevent driving that could cause harm to others and was frustrated by an accidental lack of power. Indeed in *R v Ireland* (*supra*) the relevant illegality arose from a misconception by the police of the scope of their powers, not from bad faith or reckless disregard of legal constraints. The evidence excluded was cogent, relevant to a charge of murder and if it had not been then and there obtained would have become irrevocably unobtainable. The evidence was nevertheless excluded together with further expert testimony based on such evidence. For similar cases see *R v Carmichael* (1974) 2 Queensland Lawyer 262; *Ex p Weldon, Re Gilmour* (1971) 2 NSWLR 29; *R v Demicoli* (1971) Qd R 358; *Pascoe v Little* (1978) 24 ACTR 21. For cases where even a deliberate breach has not led to exclusion, see *R v Padman* (1979) 36 FLR 347; (1979) 25 ALR 36; [1979] Tas R 37; *R v Cowley* (1979) 21 SASR 166. What is the future tendency for the Australian courts? Is it to be a leaning towards the American system so that the normal result of illegality in the obtaining of evidence will be exclusion or towards the British system whereby the usual and now inevitable result will be admission?

There is no doubt that in general terms courts in Australia will find it distasteful to allow an offender to escape punishment unless police power has been apparently knowingly abused. However, it may be that the encouragement of official recklessness, in the hope that disingenuous denials of intent to act illegally will be accepted by courts may be seen to be a factor demanding greater weight. It is undoubtedly the case that official illegality is generally undertaken with the motive of promotion of the public good. As a result, it is unreasonable to expect other officials to punish or even strongly to disapprove of such conduct. It is only the courts, by denying the fruits of such illegality, which can effectively control, limit and, with some optimism, perhaps seek to prevent, illegal practices. If the risk of such official disapproval of illegal practices to gain the conviction of criminals is slight, it will not be an effective deterrent. In that event, it is important that the

usual expectation of the official acting illegally be that such illegality will lead to the exclusion of evidence thereby obtained. If the perceived expectation is otherwise, more illegalities can be expected, whether from deliberate intent or from the feeling that legal power need not he explored so that ignorance of the law might excuse the official though it does not excuse the ordinary citizen.]
