14/85

HIGH COURT OF AUSTRALIA

HILTON v WELLS and ORS

Gibbs CJ, Mason, Wilson, Deane and Dawson JJ

7, 8, 14 March 1985

[1985] HCA 16; [1985] 59 ALJR 396; 157 CLR 57; 58 ALR 245; 15 A Crim R 394; Noted 59 ALJ 303

CRIMINAL LAW – EVIDENCE – INTERCEPTION OF TELECOMMUNICATION – INFORMATION OBTAINED BY UNLAWFUL INTERCEPTION – WHETHER SUCH INFORMATION MAY BE GIVEN IN CERTAIN PROCEEDINGS – STATUTORY CONSTRUCTION OF S7 OF *TELECOMMUNICATIONS (INTERCEPTION) ACT* 1979 (CWLTH).

Section 7 of the *Telecommunications (Interception) Act* 1979 ('Act') neither impliedly nor directly prohibits the admission into evidence, in proceedings for an offence referred to in para 7(6)(c) of the Act, of information obtained by an illegal interception of a communication passing over a telecommunications system.
So HELD by Gibbs CJ, Wilson and Dawson JJ, Mason and Deane JJ dissenting.

GIBBS CJ, WILSON and DAWSON JJ: *[After setting out preliminary matters, relevant provisions of the* Telecommunications (Interception) Act *1979, and deciding that s20 of the Act is not beyond the power of the Commonwealth Parliament, Their Honours continued]:* ... **[15]** We turn now to the second question, which is whether s7 of the Act prohibits the admission into evidence, in proceedings for an offence of the description in par7(6)(c) of the Act, of information obtained by an illegal interception of a communication passing over a telecommunications system. Since we hold s20 to be valid, this question can arise in the present case only if it is held that the warrants were wrongly issued, and that in consequence the interceptions were illegal. Those matters have not been resolved, but since the present question has been fully argued we express our views on it. A number of conflicting constructions of the section were advanced by counsel in the course of the hearing but the Court may find it unnecessary in reaching its conclusion to resolve all the issues that have been canvassed.

Mr Ellicott argues for an affirmative answer to the question which has been propounded. In brief, his submission is that s7 is a code for determining whether intercepted telecommunications and telegrams can be admitted into evidence. The effect of the section is to permit their admission only in the circumstances set out in **[16]** s7(6). Since that permission is extended only to information which has been lawfully obtained in accordance with the Act there is a clear implication arising from s7 that information obtained by an illegal interception is not admissible.

It is essential to Mr Ellicott's argument that sub-ss(4) and (6) on their proper construction refer only to information lawfully obtained. If those provisions, and in particular sub-s(6), apply to intercepted information notwithstanding that it had been obtained illegally, then a person may give that information in evidence in a proceeding of the kind referred to in par (c) and a negative answer to the question would follow. This is the construction for which Mr Robberds, counsel for the third respondent, contends. On the other hand, the learned Solicitor-General for the Commonwealth, intervening, supports Mr Ellicott on the argument that sub-ss(4) and (6) deal only with information lawfully obtained but disputes the implication of inadmissibility of information unlawfully obtained upon which Mr Ellicott relies.

It seems to us that the submissions of Mr Ellicott and the Solicitor-General should so far be accepted. The scheme of the section appears to be plain. Having prohibited under a substantial penalty the interception of a communication passing over a telecommunications system, the remainder of the section constitutes a code designed to deal with authorized and therefore lawful interceptions, identifying the circumstances in which an interception may take place and

regulating the use which may be made of any information obtained thereby. The legislature does not assume that its command in sub-s(1) will be disobeyed. Indeed, it would be surprising to find the legislature proceeding to regulate the uses to which information obtained in a manner which has been so clearly outlawed may lawfully be put.

On the other hand, it is said that it would be surprising if the prohibition contained in sub-s(4) did not apply to information obtained unlawfully. But there are several answers to that submission. First, the broad description of the subject matter of sub-s(4) is necessary to cover the exceptions contained in pars (a) and (b) of sub-s(2); merely to refer to information obtained by virtue of a warrant would fail to deal with information obtained pursuant to par (a). Secondly, the exceptions to the prohibitions imposed by sub-s(4) give an authority to communicate. Thirdly, there is no necessity to provide for an offence of divulging, contrary to sub-s(4), information **[17]** obtained in contravention of sub-s(1) because evidence to that effect would demonstrate the commission of an offence carrying a similar penalty under that last-mentioned section.

However, this conclusion will not assist Mr Ellicott if the proper construction of s7 is that it is not dealing with the admissibility of evidence in court proceedings. It is that question which must now be addressed. Leaving aside the provisions in ss11 and 21 relating to the issue of warrants authorizing the inspection of telegrams (which are not material for present purposes), s7 is concerned in essence with two prohibitions. The first is the prohibition of the interception of a communication passing over a telecommunications system, subject to prescribed exceptions. The second is the prohibition of the communication by one person to another person of any information obtained by intercepting a communication passing over a telecommunications system with a prescription of the circumstances under which such information may be divulged without committing an offence. Hence sub-s(1) creates the offence of unlawful interception.

Sub-section (2) outlines the circumstances in which an interception will not be affected by the prohibition in sub-s(1). Sub-section (4) moves on to the consequences of permissible interception. It prohibits the divulging or communicating by one person to another of any information obtained by an interception except in the circumstances described therein. Sub-section (5) introduces further exceptions to the ban on the communication of any information, related in this case to officers of the Australian Security Intelligence Organization and to police officers. It is introduced by the words "Nothwithstanding sub-section (4)", indicating thereby that the effect of the sub-section is to make further inroads on the ban imposed by the former sub-section. Sub-section (6) opens with the words "Without limiting the application of sub-section (4)". These words place the sub-section in a different light to that cast on sub-s(5) by the opening words of that sub-section. They suggest that the sub-section is entering a field which differs from that which is the subject of sub-s(4). They are confirmatory of a construction of sub-s(4) which would exclude from its prohibition the communication of intercepted information by a person to a Court. In *Miller v Miller* [1978] HCA 44; [1978] 141 CLR 269 it was said, at p277; (1978) 22 ALR 119; [1978] FLC 90-506; 4 Fam LR 474; 53 ALJR 59, of similar words in s5(3) of the *Telephonic Communications (Interception) Act* 1960 (Cwth):

> **[18]** I doubt whether a court is 'another person' within the meaning of the words, 'A person shall not divulge or communicate to another person ...' in that sub-section."

This view was adopted and applied by Crawford J in *R v Padman* (1979) 36 FLR 347; (1979) 25 ALR 36; [1979] Tas R 37. Sub-section (6) is then moving into a field which has not been touched by sub-s(4). It indicates, in addition to those circumstances in which by virtue of sub-s(4) intercepted information may be communicated, the circumstances in which such information may be given in evidence in a court proceeding. Without it, the only circumstances in which the Act would seem to contemplate intercepted information being divulged are those set out in sub-ss (4) and (5). Nevertheless, it is odd that the section does not contain any prohibition on divulging intercepted information to a court otherwise than in the circumstances prescribed in sub-s(6). We incline to the view that this omission is merely a legislative oversight the result of which however is that relevant evidence obtained from an intercepted communication may be given in a proceeding other than those mentioned in sub-s(6) without the person giving it committing an offence under the Act.

But all of this is merely to show that in s7 the Act is dealing with the subject of the

interception of telecommunications in the following respects:

> (a) prohibiting under penalty the interception of a communication passing over a telecommunication system save in the circumstances described;
>
> (b) prohibiting, subject to exceptions, the communication by one person to another person of any information obtained in those circumstances;
>
> (c) declaring that a person may give lawfully intercepted information in evidence in certain proceedings.

It will be observed that the admissibility of evidence in legal proceedings is not a subject which is dealt with by the section. It is unnecessary to recall the many and detailed rules that govern that subject. Suffice it to say that questions of relevance, of the capacity of witnesses **[19]** and of the discretion of the judge to reject relevant and admissible evidence which has been obtained unlawfully or in circumstances where it would be unfair to admit it remain to be considered by the trial judge.

The question asks whether s7 prohibits the admission into evidence, in proceedings for an offence of the description in par (c) of s7(6) of evidence obtained by an illegal interception. In our opinion, the answer must be in the negative. Neither sub-s(6) nor for that matter sub-s(4) has anything to say either directly or by implication to the question. They are not concerned with information obtained in contravention of the Act. To find an implication such as that contended for by Mr Ellicott would be to read too much into the Act. The discretion of a court when confronted with evidence which has been unlawfully obtained has been clearly explained in recent decisions of this Court: *R v Ireland* [1970] HCA 21; [1970] 126 CLR 321, at p334; [1970] ALR 727; (1970) 44 ALJR 263; *Bunning v Cross* [1978] HCA 22; [1978] 141 CLR 54, at pp72-77; 19 ALR 641; 52 ALJR 561; *Cleland v R* [1982] HCA 67; (1982) 151 CLR 1; [1982) 57 ALJR 15; 43 ALR 619.

No doubt it is true, as Barwick CJ recognized in *Ireland,* at p334, that acts in breach of a statute may more readily warrant the rejection of the evidence as a matter of discretion. But this is to do no more than confirm the existence of the discretion, a discretion which is to be exercised in the light of the competing public interests to which the Chief Justice referred. As we have said, this is not a case such as His Honour contemplated in the same passage at p334, namely, a case where the statute may on its proper construction itself impliedly forbid the tender in evidence of information obtained in breach of its terms. The question should be answered No. We would therefore answer both questions in the negative and would remit the matter to the Federal Court.
