02/78

SUPREME COURT OF QUEENSLAND — FULL COURT

SMITHERS v ANDREWS; ex parte ANDREWS

Wanstall CJ, Matthews and Kelly JJ

19 October, 7 November 1977 — [1978] Qd R 64

EVIDENCE – ALLEGED CONFESSION BY ACCUSED – APPLICATION BY ACCUSED FOR A *VOIR DIRE* – WHETHER APPROPRIATE BEFORE A MAGISTRATES' COURT – FINDING BY MAGISTRATE THAT NOT A PROPER CASE TO HOLD A *VOIR DIRE* – WHETHER MAGISTRATE IN ERROR.

An application for a *voir dire* before the Magistrates' Court at Cairns to determine the admissibility of a confession, claimed by the defence not to have been made voluntarily, was refused. In the course of delivering his decision, the Magistrate held that it was not a proper case for a *voir dire*. That to adopt such a course would place the defendant in a privileged and protected position. Since he would not be subjected to cross-examination at large nor would the evidence given be admissible for any other purpose. Upon appeal—

HELD: Appeal allowed.
There is no reason in principle why *voir dire* proceedings should be restricted to trials before a judge and jury. The proper course for the Magistrate in the present case to have adopted was to have heard evidence on a *voir dire* for the purpose of determining whether or not the alleged confessional evidence should be admitted on the trial and that in refusing the application to do so he erred in law.

THE COURT: *[After setting out the facts and the grounds of the Order to Review, the Court continued]* ... In cases such as the present where the admissibility of the evidence depends on the circumstances in which the alleged confession was made the Magistrate can only properly determine this if he hears evidence of those circumstances. Very often it will be desired to call the defendant as a witness on the issue of admissibility. Where the procedure of a *voir dire* is adopted the question of whether the evidence should be admitted on the trial can be determined on all the available evidence, including that of the defendant, who in *voir dire* proceedings may claim privilege if he is asked about the actual events, and his guilt or otherwise, as distinct from the issue or issues raised on the *voir dire* (*R v Gray & Ors* (1965) Qd R 373; *R v Toner* (1966) QWN 44.)

If such a procedure is not adopted the defendant is obviously placed at a disadvantage. Unless material emerges in the course of the prosecution case, for example, in the cross-examination of its witnesses, which causes the Magistrate to form the view that the evidence of a confessional nature should not be admitted by reason of s10 of the *Criminal Law Amendment Act* of 1894 or of the common law rule as to voluntariness or should be rejected in the exercise of his discretion, that evidence would form part of the prosecution case and may well preclude the making of a submission at the close of that case that there is no case to answer.

If the defence wished to call the defendant to give evidence of the circumstances in which the alleged confession was obtained this could then only be done by calling him as a witness on the trial when he would be liable to cross-examination at large including cross-examination on matters relating to the commission of the alleged offence. The defendant should not be placed in this position and the question of the admissibility of the alleged confession should be determined before he is called upon to decide whether or not he will give evidence on the trial. Any suggestion that this would place the defendant 'in a very privileged and protected position' in our view has no substance.

There is no reason in principle why *voir dire* proceedings should be restricted to trials before a judge and jury and the considerations to which we have referred make it desirable that where in a trial held before a Magistrate it becomes necessary to determine whether an alleged confession should be admitted as evidence on the trial of a *voir dire* should be held and a ruling then given.

In *Smith v R* [1957] HCA 3; (1957) 97 CLR 100, an appeal from the Supreme Court of the Territory of Papua New Guinea, the question of the admissibility for a confession has arisen in a criminal trial heard according to the law of that territory by a judge without a jury. Williams J said at p118:

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

Webb J at p132 said:

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

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

The passages to which we have referred in those judgments lend support to the view that a *voir dire* for the purpose of determining the admissibility of evidence is an appropriate procedure before a tribunal which has to determine both the law and the facts. There are three decisions of the Supreme Court of New South Wales in which the appropriateness of such a procedure in proceedings before a Magistrate is recognised, namely, *Ex parte Hamilton; Re Fagan* (1966) 2 NSWR 732; *Ex Parte Whitelock; Re Mackenzie* (1971) 2 NSWLR 534 and *Dixon v McCarthy* (1975) 1 NSWLR 617. In the two latter cases there is some discussion of the use as evidence on the trial of the evidence given on the *voir dire* (see *Ex parte Whitelock: Re Mackenzie* (*supra*); *Dixon v McCarthy* (*supra*) at p637. This is a matter which it is not necessary to determine on this appeal and we express no opinion on it. We are of the opinion that the proper course for the Magistrate to have adopted was to have heard evidence on a *voir dire* for the purpose of determining whether or not the alleged confessional evidence should be admitted on the trial and that in refusing the application to do so he erred in law. ...
