08/92

SUPREME COURT OF VICTORIA

R v HEATHERINGTON

Teague J

21 January 1992

CRIMINAL LAW – CONFESSIONS AND ADMISSIONS – PRELIMINARY DISCUSSION HELD WITH PERSON IN CUSTODY IN POLICE STATION – RECORDING FACILITIES AVAILABLE – DISCUSSION NOT TAPE RECORDED – PERSON LATER QUESTIONED – CONVERSATION AUDIOTAPED – RECORDED – ADMISSIONS MADE – WHETHER SUCH ADMISSIONS ADMISSIBLE: *CRIMES ACT* 1958, S464H.

1. When all of the provisions of the *Crimes (Custody and Investigation) Act* 1988 are read together, whatever is not tape-recorded is not admissible unless exceptional circumstances exist, but whatever is tape-recorded is admissible unless it is shown to be inadmissible on the grounds of unfairness or involuntariness.

2. Where a preliminary discussion was held with a person in custody in a Police Interview Room where taperecording facilities were available, and questions were asked by a police officer whereby the person in custody provided much more than a bare outline of the circumstances of the alleged offence, and such discussion was not tape-recorded, evidence of the tape-recorded interview subsequently conducted was not inadmissible and not in breach of s464H of the *Crimes Act* 1958.

3. Further, having regard to the events leading up to the making of the tape-recorded interview, the person in custody was not unfairly intimidated nor taken advantage of by the police and accordingly, it was not unjust or unfair to admit the record of interview into evidence.

TEAGUE J: **[1]** Before a jury was empanelled, Mr D'Arcy for the accused applied for a ruling as to the admissibility of evidence of tape-recorded answers by the accused to questions put to him by the police, which was sought to be led by the prosecution. Evidence was taken before me on the *voir dire* from 3 police officers, Senior Constable Denyse Watson, Senior Detective Michael Steendam and Senior Detective Mark Ziemann and from the accused. On 30 August 1990, at about 9.36pm, the accused telephoned the Metropolitan Ambulance Service and said that he had hit a mate on the head with an iron bar, that he thought the mate was dead, and that he wanted an ambulance to attend at 4 Gina Court, Hallam. At about 9.45pm, Watson went to that address, where she was met by the accused who said that he had hit "him" over the head with an iron bar. As the accused later explained, the victim was the accused's landlord, Mr Simpson, who died later, although more than four months later. Watson said, and I accept her evidence in preference to that of the accused to the contrary, that she cautioned the accused that what he said might be used in evidence. Watson escorted the accused to a divisional van, travelled with him to the Dandenong Police Station, and remained with him in an interview room there.

At about 10.35pm, Steendam and Ziemann went to the interview room, spoke outside the room with Watson, then entered and spoke with the accused. **[2]** Steendam, Ziemann and the accused were present during the whole of the discussion that followed, and Watson was present for some but not all of it. The discussion touched on subjects which included how the accused was, how Mr Simpson was, whether the accused wanted a cup of coffee, whether he wanted to telephone a friend, and whether he wanted to telephone a lawyer. There were somewhat different recollections as to the nature and the extent of the discussion, most particularly insofar as it touched on the events earlier that night which led to the accused being at the police station. The discussion certainly included the subject of the accused contacting a friend, and he was able to speak by telephone to a friend, Brian Renard. I am also satisfied that the discussion included the subject of the accused contacting a lawyer. The recollections of the four were significantly different as to the extent of the coverage in that preliminary discussion of the events earlier in the evening.

It is not necessary to set out the differing recollections, as I consider that the handwritten

notes of Steendam made immediately after that discussion are the most reliable indicator of the extent of the discussion of the earlier events. It is not necessary to set out the details of the notes, but it is enough for me to say that they contained information as to the accused's name, age and address, as to Simpson, and as to the events occurring that night from an initial exchange of words between the accused and Simpson **[3]** through what was said and done until the accused waited outside the house for the police and ambulance to arrive. There were almost 200 words in the notes, so I am satisfied that, after establishing formal details, Steendam asked enough questions to lead to the accused providing much more than a bare outline of what had happened earlier that night. After that preliminary discussion concluded, Watson remained with the accused, while Steendam and Ziemann made further enquiries, including of their supervising superior officer, of the hospital where Simpson had been taken, and of the Homicide Squad. About 40 minutes later, at around 11.20pm, Steendam and Ziemann re-entered the interview room and, in the presence of Watson, embarked on a question and answer session with the accused, which continued until 1.18am. The questions and answers were recorded on audiotape.

Mr D'Arcy's primary submission was that the answers given by the accused to the questions posed by the police during that tape-recorded session ought not to be admitted because all of the questioning of the accused by the police, or at least all of questioning to determine his involvement in the commission of an offence had not been tape-recorded in accordance with the requirements of s464H of the *Crimes Act*, because none of the preliminary discussion had been tape-recorded, even though the facilities to do so were available. **[4]** I now set out the relevant part of s464H and of other sections in the *Crimes (Custody and Investigation) Act* 1988.

> The purposes of this Act are—
>
> (a) to reform the law governing consensual questioning and investigation of persons suspected of having committed offences; and
>
> (b) to provide for the tape recording of confessions or admissions as a prerequisite for admissibility in proceedings for indictable offences.
>
> 464. (1) ... a person is in custody if he ... is ... being questioned; or ... to be questioned ... to determine his ... involvement (if any) in the commission of an offence.
>
> 464H.(1) Subject to sub-section (2), evidence of a confession or admission made to an investigating official by a person ... suspected ... of having committed an offence is inadmissible as evidence ... unless ... if the confession or admission was made during questioning at a place where facilities were available to conduct an interview the questioning and anything said by the person questioned was taperecorded ...
>
> (2) A court may admit evidence of a confession or admission otherwise inadmissible by reason of sub-section (1) if the person seeking to adduce the evidence satisfies the court on the balance of probabilities that the circumstances—
> (a) are exceptional; and
> (b) justify the reception of the evidence.
>
> 464J. Nothing in section 464 to 464I affects ...
> (b) the onus on the prosecution to establish the voluntariness of an admission or confession made by a person suspected of having committed an offence; or
> (c) the discretion of a court to exclude unfairly obtained evidence; or
> (d) the discretion of a court to exclude illegally or improperly obtained evidence."

[5] Counsel referred me to a number of recent unreported decisions. Judge Bland in *R v Anderson* (21 January 1991), Judge R Lewis in *R v Haintz* (11 June 1991) and Judge Kelly in *R v Ahern* (16 July 1991) ruled against the admissibility of evidence of confessions or admissions which had been taperecorded, based on what they considered to be the appropriate construction of the provisions of the *Crimes Act*. Put shortly, they all took the view that the relevant statutory provisions should be strictly construed, and Judge Kelly expressed that view that there were sound policy reasons against permitting the breaking up of questioning by the police.

A position requiring no breaking up or "indivisibility" contemplates that, except under sub-section 464H(2), only the questions and answers provided at the one police questioning session, at which is tape-recorded everything that is said, can be admitted into evidence. Judge Higgins

in *R v Martin* (19 June 1991) and Coldrey J in *R v Heaney* (11 November 1991) were asked, but declined, to make similar rulings, both indicating an unwillingness to accept the correctness of the "indivisible" construction of the relevant statutory provisions which was the basis of the earlier rulings.

The members of the Court of Criminal Appeal in *R v Pollard* (unreported, 20 September 1991) were unimpressed by an argument as to indivisibility based on s464(1), although it must be noted that the context was somewhat different, and **[6]** that the Court appears not to have had put to it the policy considerations raised by Judge Kelly.

Coldrey J, who adverted to the decision in *Pollard* concluded that the automatic exclusion of any answers unless all questions were tape-recorded would render the investigative process too inflexible. It seems from what he said elsewhere in his ruling that he treated s464J(b), (c) and (d) as providing a more flexible safeguard. The Court of Criminal Appeal in *R v Shaw* (unreported, 11 November 1991) did not address directly the issue of indivisibility. However, it seems to me that certain comments of Young CJ and Murphy J in *Shaw* concerning s464J lend some weight to the conclusion that the provisions of the statute are not to be treated as cast in inflexible terms requiring punctilious compliance, and that there is still a significant role for the exercise of judicial discretion.

In determining how the provisions of sections 464 and 464H are to be construed in the present case, the focus is on the words "evidence of a confession ... is inadmissible ... unless ... the questioning and anything said by the person questioned was tape-recorded". The words of the statute are ambiguous. They could be construed as establishing, as a prerequisite for admitting any part of what was tape-recorded, that every part of what was said by the person questioned, (or at least every part of what was said in response to questioning to determine his involvement in the commission of **[7]** an offence), and the failure to do so means that anything which is tape-recorded is not admissible.

But they could also be construed on the basis that what is to be excluded is only those parts of what was said that were not tape-recorded, as to which s464H(2) may be invoked. I am satisfied that, when all of the provisions of the 1988 amendments are read together, the preferable construction is that what was intended was that whatever was not tape-recorded was not admissible unless exceptional circumstances warranted its admission, but that whatever was tape-recorded was admissible, unless there was a basis for not admitting it on the grounds of unfairness, involuntariness etc.

I recognise that the construction that I have rejected has some attractions. One of them is that it achieves greater certainty. Another is that it provides a powerful incentive for police not to cut any corners. But that certainty would be achieved at the cost of flexibility, and of ignoring the "checks and balances" considerations which underpin the legislation, which were evident in the report which led to the introduction of the legislation, and which are evident in the decisions of the courts over the years in this area, where it has been necessary to weigh competing public interests. See *R v Lee* [1950] HCA 25; (1950) 82 CLR 133; [1950] ALR 517, and the other cases referred to in *Shaw*.

Practicalities cannot be ignored altogether. If the very high penalty of inadmissibility of anything said, if everything said is not tape-recorded, is to be avoided, that **[8]** would mean that an extraordinarily high level of inconvenience and expense would have to be incurred because the tape-recorders would have to be kept operating at all times to ensure that everything said by every person questioned is recorded. I am satisfied that the rights of the individuals are sufficiently protected if the less strict construction is applied.

Police questioners still face a multiple risk of inadmissibility, not only if they fail to give the detailed warnings of rights, not only if they fail to record the questions and answers they would seek to have admitted into evidence, but also if the questions and answers which are recorded are done so in circumstances which warrant the exercise of the discretions preserved by s464J. In the light of the construction which I put on the relevant statutory provisions, I am not prepared to rule that the tape-recorded questions and answers are inadmissible on the first of the bases submitted.

Mr D'Arcy put to me the alternative submission that the evidence ought not be admitted in the exercise of my discretion to disallow confessional evidence unfairly obtained, with the further alternative that I should exercise my discretion to disallow evidence illegally obtained, the necessary warnings as to rights having not been given at all or having been given inadequately.

The legal principles with respect to those discretions have been reviewed in many decisions including *Lee* and *Shaw* referred to above. **[9]** I accept that Steendam and the other police did not comply with the requirements of s464C at the start of the preliminary discussion with the accused, in the terms contemplated by that section. But Watson had earlier given the accused a caution, and the accused had been given the telephone so as to give him the opportunity to ring a friend, which he took, and to ring a lawyer, which he chose not to take. I have no doubt that, in other circumstances, the course which Steendam appears to have followed of having a dry run to cover the events to be the subject of detailed questioning later could be found to be unfair. A dry run conducted at some length, or in some depth as to some crucial areas, could lead to the later questioning being unbalanced against the person being questioned. Because of the answers given in the dry run, certain questions might not be asked later, whether because the answers might be perceived as not being likely to advance the prosecution case or otherwise, and other questions might be framed very differently. The circumstance that a dry run could be unfair, does not mean that the preliminary questioning of the accused by Steendam was unfair.

I have had the opportunity of seeing the accused and the three police officers give evidence, of reading Steendam's notes, and of listening to the audiotapes. I did not form an unfavourable impression of any one of the four who gave evidence, although it did seem that with **[10]** the passage of time, Steendam and the accused had coloured their position somewhat to their own advantage. I certainly formed the impression that the accused, when answering the police questions was trying to give correct answers. He was, and still is, young and not streetwise, but he appeared to me to be of at least average intelligence.

It might have been less inhibiting to his counsel in preparing for trial if the accused had been less candid, but that does not mean that for the police to allow the accused to be as candid as he was was for them to be acting unfairly. I do not think that the police deliberately set up a "dry run" situation, with the aim of framing their questions so as to obtain a preponderance of answers unfavourable to the accused. Mr D'Arcy urged me to take an unfavourable view of the police having failed to put to the accused during the taperecorded questions, that he had earlier made admissions, not tape-recorded, to Watson in Gina Court, and to Steendam in the preliminary discussions.

I saw nothing untoward in their not having done so, in the light of the accused's willingness to tell a story replete with admissions, in the same, or almost exactly the same, terms as the earlier admissions. It seemed to me that the interview was conducted in a manner essentially conducive to allowing the accused to tell his story on his terms. It did not seem to me that the accused was unfairly intimidated or taken advantage of by the police. **[11]** I do not think that it would be unjust that the answers the accused gave in the tape-recorded interview should go before the jury.
