35/82

SUPREME COURT OF VICTORIA

R v THE CORONER: ex parte ALEXANDER

Gray J

8 August 1980 — [1982] VicRp 73; [1982] VR 731

EVIDENCE – WITNESS CALLED TO GIVE EVIDENCE AT CORONIAL INQUIRY – WITNESS ALLEGED TO HAVE BEEN IMPLICATED IN MURDER, FORGERY AND DRUG OFFENCES – WITNESS OBJECTED TO ANSWER QUESTIONS – CORONER RULED THAT WITNESS SHOULD ANSWER QUESTIONS – WHETHER CORONER IN ERROR: *EVIDENCE ACT* 1958, S29.

Applicant was a witness at an Inquest into the deaths of two persons alleged to be members of International drug ring. The applicant had previously been charged in NSW with conspiracy to pervert the course of Justice, but not committed for trial. Previous witness at Inquest implicated applicant as being a person who gave information to an alleged drug dealer. Allegations made concerning applicant's involvement with drug offenders. When the witness was called to give evidence his Counsel indicated that he did not wish to answer any questions on the grounds of possible self-incrimination. The Coroner referred to *Re O'Callaghan* [1899] VicLawRp 184; (1899) 24 VLR 957 and s29 of *Evidence Act*, which he assumed was applicable. He ruled that the witness should answer the questions and then he should decide whether s29 applied. Upon an Application for an Order for Prohibition—

HELD: Matter remitted to the Coroner so that the witness can be excused from giving evidence.
1. The privilege against self-incrimination applies to proceedings in the Coroner's Court.

2. The Court could not be satisfied that an answer to any relevant question had no incrimination potential for the applicant. The allegations against the witness included his involvement in murder, forgery and drug offences. One could not conceive of any question which could be seen to be free of any self-incriminating potential.

GRAY J: ... The first question to decide is whether the privilege against self-incrimination applies to proceedings in a Coroner's Court. There can be no doubt that the privilege does apply. The common law privilege is now expressed in s29 of the *Evidence Act* to which the Coroner referred. The fact that the privilege extends to a Coronial inquiry is made clear in *O'Callaghan's case* (*supra*) to which the Coroner also referred. It is true that the privilege does not automatically operate upon the witness taking the objection. The court is bound to form a judgment as to whether the claim is *bona fide* and has substance.

Mr Meagher does not raise any question of the *bona fides* of the applicant in seeking to exercise the privilege. Nor does it seem to me that there can be any doubt that the applicant's fears of self-incrimination was substantial. There can be no doubt that the objection can be taken by the witness' legal representative, as was the case here. In this instance, the applicant had been asked one question when the objection was taken. That question, in the light of the cross-examination of Mr Aston, can be seen to be directed towards establishing sudden and unexplained wealth on the part of the applicant. In the context of this case, an answer to the question can be seen as potentially self-incriminating.

In *R v Rutledge* [1923] St RQd 284; 17 QJPR 134 the Queensland Full Court held that a witness at an inquest may, before being sworn, object to answer questions, where it appears that the answer to any relevant question might tend to incriminate him. Lukin J expressed himself as follows at p287:-

> "Any question that was relevant to the cause of the death was relevant to the subject matter of the inquiry. It is clear, however, that the objection was *bona fide*, and the question is whether the Magistrate under the circumstances had the power to commit the witness. The Magistrate appears to have proceeded on the assumption that he had a right to insist upon the witness being called and answering questions which might be put to her. The witness by admitting her name might be furnishing some evidence of identity which might tend to incriminate her. A witness need only answer relevant questions, and it is difficult to suggest any question in this case (as, indeed, in most cases) which would be relevant to the inquiry, and which might not tend to incriminate the witness."

In *R v Coldwell* (1863) 2 VLR 208 (2 W. & W. (L.)) the Full Court was dealing with a case where the deposition of a person under suspicion had been tendered at an inquest. She had been given no warning. At p210, Stawell CJ, said:-

> "I think the safe rule is that if a suspicion attached to a witness, at any time before the proceedings have terminated, such a witness should be cautioned."

Barry J said this, at the same page:-

> "There is a sound distinction between evidence given before a coroner, and before justices of the peace. Any thing having the appearance of extracting evidence of guilt, under the form of legal pressure, is very objectionable."

In view of those authoritative statements, I am quite satisfied that the applicant's objection was properly taken and was expressed to be an objection to answering any question relevant to the deaths of the Wilsons. It is, in my opinion, clear that the applicant was objecting to being required to answer any questions relevant to the inquiry on the ground that the answers may incriminate him. It was an objection in these terms which the Coroner was called upon to rule. The Coroner made it clear that the applicant was required to answer questions put to him. The Coroner appeared to consider that it was only when the question was answered that its self-incriminating character could be judged. This approach to the problem was clearly misconceived and, if adopted, would rob the privilege of any effect.

Mr Meagher's secondary submission was that the matter should be sent back to the Coroner with a direction that he consider each question individually and rule upon the objection in each instance. Mr Meagher submitted that there may well be relevant questions which the applicant could answer without fear of self-incrimination. For my part, I cannot conceive of any question which could be seen to be free of any self-incriminating potential. The allegations made against the applicant included allegations that he was implicated in murder, forgery and drug offences, at least. It would be impossible for the court to feel satisfied that an answer to a question, relevant to the deaths of the Wilsons, had no incriminating potential for the applicant.

To my knowledge, there has been a long standing practice in the Coroner's Court, not to call a witness who is likely to be implicated in a serious crime. This practice seems to be in general accord with the views expressed by Stawell CJ in *R v Coldwell* (*supra*). It is, in my opinion, a wise practice and one which might profitably have been followed in this case particularly in view of the grave nature of the allegations levelled at the applicant.

The matter shall be remitted to the Coroner so that he can excuse the applicant from giving evidence.
