27/86

SUPREME COURT OF VICTORIA — FULL COURT

R v BECKER

Crockett, O'Bryan and Vincent JJ

21 November 1985

CRIMINAL LAW – CONFESSION IN RECORD OF INTERVIEW – OFFENDER IN POLICE CUSTODY BEYOND PRESCRIBED PERIOD – WHETHER FURTHER REMAND UNLAWFUL – WHETHER SUCH UNLAWFULNESS SUFFICIENT TO EXCLUDE CONFESSIONAL STATEMENT – OFFENDER MISLED INTO MAKING STATEMENT – EFFECT OF ADMISSIBILITY WHERE OFFENDER DELIBERATELY/UNINTENTIONALLY MISLED: *CRIMES ACT* 1958, SS460, 568.

Whilst B. was being interviewed by Police concerning his involvement in a number of offences, a police officer, Martin noticed that a camera found in the house occupied by B. at his apprehension was similar to one stolen in a burglary during which sexual attacks were made on a woman residing in the house. As the prescribed period in custody had expired by five minutes, Martin applied to an authorised officer for a further remand, and said B. was to be interviewed "regarding property found in his possession". No mention was made about the offences involving the sexual attacks. Upon B's consenting, the remand was extended and when later interviewed, B. made certain admissions about his involvement in the sexual attacks. At the subsequent trial the confessional statement was admitted into evidence and B. was convicted. On appeal against conviction—

HELD: (Crockett and Vincent JJ, O'Bryan J dissenting) Application for leave to appeal against conviction granted. Convictions and sentences set aside; new trial ordered.
(1) As the application to the authorised officer was not made within the prescribed period of six hours, there was no jurisdiction to grant the further remand; accordingly, B's subsequent detention was technically unlawful. However, the trial judge was plainly correct in treating the unlawfulness of a trifling and technical nature and in refusing to exercise his discretion to exclude the confessional statement.

(2)(a) If B. was deliberately misled into consenting to the further remand on the ground that the interview would relate to "property" matters only, the confessional statement so made would be rejected on the ground of "high public policy". The purpose of its rejection would be to ensure the observance of the law rather than the fairness of the trial.
***Collins v R* [1980] FCA 72; (1980) 31 ALR 257 at 317; and**
***R v Ireland* [1970] HCA 21; (1971) 126 CLR 321 at 335; [1970] ALR 727; (1970) 44 ALJR 263, applied.**

(b) If B. was unintentionally misled into consenting to the further remand it was manifestly unfair to use the relevant parts of the confessional statement against him because the statement would not have been made if he had not been misled.
***DPP Reference (No. 1 of 1984)* [1984] VicRp 64; (1984) VR 727 at 731, considered.**

CROCKETT J: (with whom Vincent J agreed) *[after setting out the facts, continued]:* … **[5]** However, s460(3) provides that the application must be made "within the prescribed period or within any further period that a person has been remanded". In consequence, as the application was not made within such a period, there was no jurisdiction to grant the remand sought and the applicant's subsequent detention for the purpose of further questioning was technically unlawful.

It is in reliance on Ground 1 that it is said that, although that unlawfulness was not a circumstance that could be regarded as exceptional nor could it be said to involve a question of high public policy, it did in the circumstances result in unfairness to the applicant of such a nature and degree that the record of interview produced during the unlawful detention should have been excluded by the Judge. The Judge found that the illegality, if any occurred, was of "a trifling and technical nature and not one upon which I should exercise my discretion to reject any confessional evidence for the reason of illegality alone". This conclusion was plainly correct and, after some discussion, counsel was, I thought, disposed not to press the ground. At all events, I would find that it has not been sustained.

I turn then to Ground 2. It may be noted at the outset that the applicant, consistently with his apparent attitude of ready confession of complicity in the series of thefts in the Huntingdale-Murrumbeena area, did **[6]** not deny responsibility either to the police or at his trial for the theft of goods from the Hawthorn house. He made an unsworn statement at the trial in the course of which he conceded his culpability. His counsel, accordingly, told the jury that his client had no defence to the second count and that their proper course was to return a verdict of guilty on that count. Nor did counsel on the hearing of the application suggest that there should be a new trial on that count. Even if Ground 2 should be made out the proviso to s568(1) of the *Crimes Act*, 1958 would plainly operate to prevent the grant of a new trial by this Court. Complicity in the four sexual offences was, however, denied. The evidence to support the Crown case in relation to those offences fell into three categories, viz:

(a) The uncontroverted fact that the applicant was one of two intruders in the house of the prosecutrix at the time she was assaulted. (She was, due to near darkness and the assailant's use of a scarf for disguise, unable to identify her attacker).

(b) The fact that the prosecutrix, who at no relevant time had been party to any voluntary act of sexual intercourse, was found shortly after the attack on her to be suffering from certain sexually transmissible venereal diseases from which the applicant was also at such time suffering.

(c) A number of answers given by the applicant in the record of interview. These were answers **[7]** which, to some extent, were denials of guilt but were made in such a way and in such circumstances as to constitute evidence from which an acknowledgement of guilt may be inferred. That is to say that, whilst intending to deny guilt the applicant might by the manner and words of his denial have been admitting just that by the consciousness of that guilt disclosed by him. (*Woon v R* [1964] HCA 23; (1964) 109 CLR 529; [1964] ALR 868; 38 ALJR 32).

Thus the record of interview, because of the equivocal but none the less possibly damaging answers of the applicant recorded in it, formed a significant part of the Crown case. At the trial counsel sought to have the evidence excluded on the basis that -

(i) the record of interview was not voluntarily made; or

(ii) in the circumstances it would be unfair and oppressive to the applicant to admit the evidence: *R v Lee* [1950] HCA 25; (1950) 82 CLR 133; [1950] ALR 517 ; or

(iii) considerations of "high public policy" required the Judge's discretion to be exercised in favour of the evidence's rejection: *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54 at 74-5; 19 ALR 641; 52 ALJR 561 and *Cleland v R* [1982] HCA 67; (1982) 151 CLR 1; 43 ALR 619; (1983) 57 ALJR 15.

The foundation for these submissions was said to be constituted by these propositions -

(a) The questioning which resulted in the record of interview took place during, and only because **[8]** an authorised officer purported to grant, a further remand of the applicant into Martin's custody for an additional six hours.

(b) That remand could not have been granted without the applicant's consent (sub-sec (7)).

(c) Martin prepared for placing before the authorised officer a written application upon which was endorsed the words, "He is to be further interviewed regarding property found in his possession at Oakleigh on 13th November 1984". One of the police officers (Leonardi) engaged in the Huntingdale (Oakleigh) raid, and also Martin, swore in evidence on the *voir dire* that they each told the applicant that the application was to permit continuation of an interview regarding further burglaries and that the applicant indicated that he was agreeable to such a course.

(d) At the hearing of the application the applicant told the authorised officer in response to the officer's question that he consented to the remand being sought.

(e) The application by the other police officers at about 2 pm. that same day for a six-hour extension was made on the ground of further enquiries in relation to "property". The application was consented to by the applicant and granted and the further period of almost six hours was, in fact, devoted to "property" **[9]** enquiries in which the applicant fully co-operated.

(f) In his evidence given on the *voir dire* Martin denied that he intended to interview the applicant concerning the rapes when he made the application pursuant to s460(3). This despite the fact

> that Martin then must have been convinced that a camera found in the applicant's possession on 13th November was stolen on 3rd November from a house at the time and in which the rapes were committed. Further, that earlier that day Martin had heard the applicant admit that he had got the camera from a companion in whose company he (the applicant) was at the time of the camera's theft by the companion: Martin swore also that he first decided to interview the applicant about the rape when the applicant in answer to the fifth question put to him gave a different version to account for his possession of the camera.
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> (g) Examination of the record of interview discloses plainly that, after some initial prevarication and evasion, the applicant was prepared when the corroborating detective had left the room to make a clean breast of his part in the Hawthorn burglary but, when the questions broached the topic, was unprepared to confess to any sexual impropriety on his part – albeit that the answers he gave may unintentionally have had **[10]** just that effect. Examples of such questions and answers may be found in the judgment of O'Bryan J.
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> (h) The applicant, without knowing the purpose for which they were required, consented during his interrogation to undergo medical tests. However, when the medical practitioner to whom he was taken explained that those tests might disclose information that could be used to implicate him in sexual assault, he withdrew his consent and flatly refused to allow them to proceed.

Now, having regard to the foregoing matters it was said that it was plain beyond argument that the applicant had been misled into the giving of his consent – without which he could not have been questioned at all – by his having been led to believe that the further questions would be limited to enquiries about "property" and that such consent would not have been forthcoming had he realised that he was to, or might, be questioned about the commission of sexual offences. With this submission I should have thought it was difficult not to agree. The only question would seem to be whether Martin deliberately or unintentionally so misled the applicant.

Applicant's counsel, not unnaturally, put at the forefront of his submissions made on the *voir dire* (counsel's addresses are to be found in the transcript) the contention that Martin gained his opportunity to question the applicant by a deliberate and practised deception. The [**11]** submission was elaborate and extensive and could not, I believe, have left the Court in any doubt as to its import. If the submission were accepted I should have thought that any judge would have felt impelled to reject the confessional material. He would do so on the ground of "high public policy". The purpose of its rejection would be to ensure the observance of the law rather than the fairness of the trial (*Collins v R* [1980] FCA 72; (1980) 31 ALR 257 at 317). If ever it could be said that a conviction would have been obtained at too high a price (*R v Ireland* [1970] HCA 21; (1971) 126 CLR at 335; [1970] ALR 727; (1970) 44 ALJR 263) then this would be such a case if the exercise of discretion were, on such a hypothesis, exercised adversely to the applicant. On the other hand, if the deception were unintentional then doubtless different considerations would apply. Certainly the applicant's claim to have the record of interview excluded would be less strong.

I come then to the Judge's ruling and the reasons given for it. The first and greater part of his reasons is devoted to the grounds upon which the Judge found, as he did, that the so-called confession was voluntary. Non-voluntariness as a ground for exclusion of the evidence was relied upon below. The Judge's finding was not challenged in this Court and was clearly right. His Honour then went on to say:

> "The accused man was taken before an authorised person pursuant to section 460 of the *Crimes Act* at a little after 8.00 pm. on the evening in question. Previously he had been taken before a Stipendiary Magistrate at about 2.00 pm. so that a similar application, namely that he be released into the custody of the police, could **[12]** be made. The basis upon which he was released into the custody of the police was that he was to be questioned in relation to certain burglaries, although in its terms the order made was much wider than that. That is a matter which has caused me some concern but it seems to me that the police, once a person was released into their custody, cannot be limited to enquiries in respect of a particular offence or offences upon which the release is based and they must be entitled to follow up their enquiries wherever they may lead them.
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> I have considered the questions of unfairness and illegality as dealt with by the High Court in *Cleland v R* [1982] HCA 67; (1982) 151 CLR 1; 43 ALR p619; (1983) 57 ALJR 15. If an illegality occurred, it appears to me to have been of a trifling and technical nature and not one upon which I should exercise my discretion to reject any confessional evidence for the reason of illegality alone.

> With regard to unfairness, although various aspects have been suggested, it has not been demonstrated to me that any unfairness occurs on the evening in question which requires me to exercise my discretion to exclude the evidence."

The second paragraph in this passage from his Honour's reasons is concerned with the question of illegality raised by Ground 1 with which I have already dealt. As to the balance of the passage, what is immediately apparent is that the Judge has seemingly not addressed the major issue which was in contest before him, namely, whether Martin acted dishonestly so as to procure an opportunity to interrogate the applicant about his possible involvement in the sexual offences. The Judge's reasons appear to me not only to be deficient in this respect but to miss the point. The question, in the circumstances that existed was, not whether a remand into a police officer's custody will cause that officer's interrogation to be confined only to investigation of the offences of which he suspects the arrested person to be guilty, but whether confessional **[13]** material produced during that remand is to be rendered inadmissible if the order for that remand is gained by deception – deliberate or unintentional. For this reason I am bound to say, with respect, that I find the reasons unsatisfactory. However, with some hesitation, I have concluded that, having regard to what the Judge did say in the first paragraph of the cited passage together with the great prominence that was given the allegation of fraud by Martin by counsel in the course of his submissions, the only reasonable interpretation to be placed upon the Judge's reasons is that he was not prepared to find the allegation of deliberate deception proved.

This leaves for determination the question as to whether Martin unintentionally misled the applicant into consenting to being remanded for interrogation when he would otherwise have not so consented and, if so, to what conclusion should one come concerning the admissibility of the material brought into existence during the remand. These questions must remain to be answered notwithstanding that, during that remand and before volunteering his incriminating answers, the applicant was fully aware of his right to remain silent and did, in fact, on certain occasions refuse to answer questions asked of him. Now, it is clear that the trial Judge has not analysed the matter he was required to determine in such a manner. This, of itself, probably means that the Judge did not exercise any relevant discretion as required of him and that discretion which he purported to exercise is, accordingly, founded upon wrong considerations so as to **[14]** cause it to miscarry.

However, it may be said that, if the Judge is to be taken as negativing fraud on Martin's part the only feasible alternative is that the applicant was unintentionally misled. I think this is the only other view of the matter that was open to the Judge. It was not reasonably possible, I believe, to have found that the applicant was not misled at all. Now, if this hypothesis should be treated as acceptable, to what considerations should the Judge have had regard in the exercise of a discretion he was on this assumption called upon to exercise?

This Court in *DPP Reference (No.1 of 1984)* [1984] VicRp 64; (1984) VR 727 at 731 said that if "statements are shown to be voluntary they may nevertheless be excluded from evidence by the exercise of the discretion of the trial judge. A trial Judge should exercise his discretion to exclude such statements if it is established by the accused that they were obtained in circumstances which would render the use of such statements unfair and unjust to him. What is unfair must depend upon the circumstances of each case and no attempt should be made to define and thereby to limit the extent or application of the conception". The unfairness and injustice of which the applicant complains (and which, if the complaint is well-founded, has, so it is said, resulted in an unfair trial) is that a statement capable of being construed as containing admissions of guilty was received into evidence when, but for his having been misled on a material matter, the statement itself **[15]** would never have come into existence; and would not have done so because the applicant in the legitimate exercise of his right would not have permitted it to do so. This, of course, has nothing to do with unlawfulness, illegality or the public interest. But it does appear to me that the applicant has substantial and cogent grounds for contending that in such circumstances the use of the statement against him – at least that part of it which dealt with matters other than "property" – was manifestly unfair.

It is unnecessary for me, and probably preferable for me not, to express any concluded view as to how I would have exercised the discretion. It is sufficient to say that the applicant was denied an exercise of a discretion to which he was entitled. As a result he was never given

the opportunity to which he was entitled to have the relevant sections of the statement possibly removed from the jury's consideration. Having regard to the manner in which the Judge approached the resolution of the issues raised on the *voir dire* as revealed by the contents of the first of the three above-quoted paragraphs from his reasons, it appears clear to me that the reference to "unfairness" in the third paragraph does not relate to the possible existence of unfairness in the context to which I have referred. This is further borne out by the fact that what he had to say in the first and third paragraphs is separated by a second paragraph which deals with a quite discrete topic. The "unfairness" referred to in the third paragraph relates, I **[16]** believe, to a consideration of such matters as the applicant's fatigue, length of time under interrogation, etc. at the time of the making of the record of interview which fell short of rendering the statement "involuntary" but which applicant's counsel also put forward as a ground for rejection of the statement in the interests of a trial that was fair from the point of view of the applicant. The Judge's ruling on this aspect of the matter doubtless could not be – and, indeed, was not – impugned.

The Crown contended that, even had the statement been rejected, the jury would inevitably have reached the same verdict in respect of counts 3, 4, 5 and 6. Accordingly, it was said that the application should be dismissed on the ground that it has been shown that no substantial miscarriage of justice had actually occurred. In my opinion, the record of interview was one of the critical pieces of evidence upon which the prosecution relied and it cannot be said that a reasonable jury must have arrived at the same conclusion in the absence of the statement. It is thus not open to the Court to dismiss the application in reliance upon the proviso to s568(1) of he *Crimes Act* 1958.

Accordingly, I consider that the application must be granted. The result would be that the convictions and sentences on counts 3, 4, 5 and 6 should be quashed and a new trial on those counts ordered.
