

15/96

## SUPREME COURT OF VICTORIA

**VU v RANDOE**

Hedigan J

4, 26 March 1996 — (1996) 84 A Crim R 473

**PROCEDURE – CRIMINAL LAW – RECORD OF INTERVIEW – ADMISSIONS MADE DURING QUESTIONING BUT NOT TAPED – TAPING FACILITIES AVAILABLE – ADMISSIONS SUBSEQUENTLY CONFIRMED DURING TAPE-RECORDED INTERVIEW – WHETHER WHOLE OF TAPED INTERVIEW INADMISSIBLE – WHETHER OPEN TO MAGISTRATE TO EXCLUDE ONLY UNRECORDED ADMISSIONS – “ANYTHING SAID” – MEANING OF: *CRIMES ACT* 1958, S464H(1).**

Section 464H of the *Crimes Act* 1958 (‘Act’) provides (so far as relevant):

“(1) Subject to sub-section (2), evidence of a confession or admission...is inadmissible as evidence against the person in proceedings for an indictable offence unless—

(d) 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 tape-recorded...”

After V. was arrested, he was taken to a police station for the purposes of an interview. Prior to the commencement of the tape-recorded interview, V. was questioned by a police officer and made admissions which he later confirmed during the taped interview. When the matter came on for hearing, V.’s counsel submitted that because of the provisions of s464H of the Act, the whole of the tape-recorded interview was inadmissible as evidence against V. The Magistrate rejected this submission but excluded (for the purposes of this Report) the part of the interview where the earlier unrecorded admissions were confirmed by V. on tape. Upon appeal—

**HELD: Appeal dismissed.**

**1. The phrase “anything said” in s464H(1)(d) of the Act ought to be construed to mean anything said in response to questioning amounting to a confession or admission.**

**2. The legislative intention of s464H is to exclude confessions and admissions which have not been tape-recorded or, if not recorded, not confirmed by the person questioned in a subsequent tape-recording.**

*Pollard v R* [1992] HCA 69; (1992) 176 CLR 177; (1992) 110 ALR 385; (1992) 67 ALJR 193; (1992) 64 A Crim R 393; and

*Heatherington v R* [1994] HCA 19; (1994) 179 CLR 370; 120 ALR 591; 68 ALJR 418; 71 A Crim R 18, referred to.

**3. In the present case, the Magistrate was not bound to exclude the whole confession and admissions made by V. It was open to the Magistrate to exclude those parts of the tape-recorded admissions which were confirmations of the admissions in the earlier interview.**

**HEDIGAN J:** [After setting out the facts leading up to the interview, the submissions made to the Magistrate and the provisions of s464H of the Act, His Honour continued]...[7] The magistrate found that there was one period of questioning. According to para20(c) of Mr Willis’s affidavit, the magistrate, with respect to s464H, ruled there had been one period of questioning and therefore he excluded questions 181 to 230 of the taped record of interview. No further reason was articulated. Mr Sullivan’s submission was that since there was only one period of questioning, if anything less than all of the questions that were asked and all the answers that were made were tape-recorded, then the whole of the confession or admission, since it was made during questioning in a place where facilities [8] were available, was inadmissible because of s464H(1)(d). It followed from that submission that any admission made prior to the commencement of taping which might have been taped, but had not been taped, was inadmissible by reason of s464H(1)(d).

Mr Horgan, who appeared for the respondent, submitted that the issue here was covered by s464H(1)(c), namely that the confession or admission was made before the commencement of questioning and was confirmed by the appellant, that confirmation being tape-recorded in

questions 181 to 188. In effect, he submitted that if it were correct that there was only one period of questioning, the admissions were made in the course of a lead-up conversation which was not tape-recorded. He submitted that on no view of the section ought it be concluded that confessions or admissions which were confirmed should be excluded. He submitted that on no view of the section was the whole of what was said by an accused person, even statements not amounting to a confession or an admission, to be rendered inadmissible if not tape-recorded and that, at the worst, only the unrecorded confession or admission was to be excluded. This left intact, he argued, the admissions made in the course of questioning prior to question 180 and the answers to and it was upon those confessions or admission that the magistrate relied in order to convict.

Finally he submitted that it was open to this Court to find that the magistrate was incorrect in deciding that there was but a single session of questioning. He pointed out that the magistrate had in effect doubted the police evidence about the time the accused man spent in the interview room prior to the recording session commencing, implying that it was longer than that being contended for by the informant and by inference more [9] likely to be the period suggested by Thompson, as much as one hour. This finding was more apt to support two separate episodes of questioning rather than a single questioning. He sought to explain the exclusion of the questions after question 188 on the basis that if the confirmatory admissions were excluded, the chance of the defendant being affected by the confirmation being sought and the reiteration of the admissions was such as to render, on general discretion grounds, the exclusion of subsequent questioning on the grounds of general unfairness. He submitted that there was always a discretion in a court to admit illegally obtained evidence. He referred to *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561 and *R v Ireland* [1970] HCA 21; (1970) 126 CLR 321; [1970] ALR 727; (1970) 44 ALJR 263, presumably in the support of a submission, if it became necessary, with respect to inadvertent illegality.

In support of his submission, Mr Sullivan referred to various passages in *Heatherington* [1994] HCA 19; (1994) 179 CLR 370; 120 ALR 591; 68 ALJR 418; 71 A Crim R 18 and also *Pollard* [1992] HCA 69; (1992) 176 CLR 177; (1992) 110 ALR 385; (1992) 67 ALJR 193; (1992) 64 A Crim R 393. The difficulties inherent in s464H are well demonstrated by the division of opinion between the majority and the minority in *Heatherington*. Mr Sullivan contended that the legislative intention inherent in s464H(1)(d) was that anything said by a person being interrogated at a police station at which recording facilities are available was to be excluded unless everything that passed between questioner and suspect was recorded. This would be a surprising intention to attribute to the legislature as it would exclude non-confessional or non-admission statements of the most innocuous kind, including denials of guilt and strong statements of fact that might point to innocence. In my view the legislative intention of s464H is to exclude confessions or admissions which have not been tape-recorded or, if not recorded, not confirmed by [10] the person questioned in a subsequent tape-recording. In the judgment of Mason CJ, Deane and McHugh JJ in *Heatherington* it was stated (CLR 373):

"As *Pollard* and the judgments in the Court below in the present case make clear, the construction of s464H is not free from difficulty. Despite what was said in the Minister's speech during the second reading of the Bill, the legislation does not provide that a confession is inadmissible unless the entire interrogation is tape-recorded and the tape-recording is available to be tendered in evidence. Instead, the section expressly allows for the admissibility of a confession which was not tape-recorded when there are no facilities for recording and the confession is subsequently confirmed (par.(e)) or when the confession occurs before the questioning begins and it is subsequently confirmed (par. (c)). It also allows a court to admit evidence of an otherwise inadmissible confession if the court is satisfied on the balance of probabilities that exceptional circumstances justify the reception of the evidence (s464H(2)). On the other hand, even where the requirements of s464H are satisfied, a court retains the ordinary discretion to exclude unfairly or improperly obtained evidence. Clearly enough, the primary object of s464H, like that of other provisions of sub-div 30A of the Act, is not to protect the guilty from acknowledging guilt but to ensure that alleged confessions or admissions are genuine and voluntary and not unfairly obtained."

*Pollard* had decided that in a case where there were different and distinct periods of interrogation, the expressions "if the confession ... was made during questioning" and "the questioning and anything said by the person questioned" in s464H(d) refer not to the overall interrogation at a particular place, but to the particular period or episode of questioning in which the confession sought to be obtained was made. The judgments of Deane and McHugh, JJ, the other members of the majority in *Pollard*, rested upon a narrower base, namely that when one

has different periods or stages of questioning at different places, the confession made at one place is not rendered inadmissible because an earlier period or stage of [11] questioning at the other place was not recorded. The majority in *Heatherington* viewed that latter statement as being an instance of the general proposition that, in a case where there have been different periods or episodes of interrogation, the requirement that "the questioning" which yields a confession is to be recorded relates to a particular period or episode during which the confession was made. Indeed, Mason CJ, Deane and McHugh JJ in *Heatherington* regarded the reference in para(d) questioning "during" which an admission was made, where there was more than one episode of questioning, as designating the relevant period or episode of questioning. Any other construction would produce the result that "not only the period of questioning during which the confession or admission was made but every material question which had earlier been asked or which is subsequently asked of the suspect in a particular place" as being excluded. It was stated (376):

"... the operation of par.(c) to make admissible a confession or admission made before the commencement of questioning if it is subsequently confirmed by the suspect and the confirmation is tape-recorded would be precluded if any material question or questions, however unprejudicial, had been asked before the original confession or admission was made. Again evidence of a confession or admission made in the completed interview with respect to which the requirements of s464H(d) had been fully satisfied would be retrospectively rendered inadmissible if any material question or questions were subsequently asked of the suspect at the relevant place. Yet again, the asking of any material question or questions, however unprejudicial, at a particular place would make it necessary that the suspect be taken to some other place so that evidence of any subsequent confession or admission could be admissible. It cannot be supposed the legislature intended to bring about such results. Much to be preferred is a construction according to which the admissibility of a confession turns on a question of substance: whether the earlier questioning was part of the same questioning which produced the confession. If it was [12] not, the fact that the earlier questioning was not recorded will not of itself preclude the reception of evidence of the questioning in the course of which the confession was made. The existence and circumstances of the earlier unrecorded questioning could, of course, be relevant to, and possibly decisive of, the question whether the evidence of the confession should be rejected on unfairness or public policy grounds."

To add to the corpus of questionable consequences, it would follow from the appellant's argument in this case that if the appellant had made a confession or admission to police officers within the police station whilst walking towards the interview room, where the recorded questioning was to take place, not only were those admissions inadmissible, but so would be the later tape-recorded questioning. Or if questioning were commenced and admissions made, and it were then discovered that as a consequence of a malfunction of tape or recorder, the questions and answers had not been recorded, a re-commenced questioning which included a confirmation of the previous question and answers would be inadmissible.

Mr Horgan argued that, even if his primary submission that 464H(1)(c) applied was not correct, and that subpara(d) was the only subsection applicable, it is only the confession or admission that had not been originally recorded that was to be excluded, not confessions or admissions made and tape-recorded. Put another way, if there were lead-up conversations not recorded, but later confirmed, at the worst only the admissions would be excluded which occurred in the lead-up conversation not admissions that were made for the first time during the tape-recorded interview. On this basis the admissions on which the magistrate relied to convict the appellant would still be admissible. [13] Mr Sullivan sought to support the submission that the whole of the tape-recorded interview must be excluded by pointing to the language of subpara(d):

"If the confession or admission was made during questioning ... the questioning and **anything said** (my emphasis) by the person questioned ..."

In my view, the phrase "anything said" ought be construed to mean anything said in response to questioning amounting to a confession or admission. Section 464H is specifically concerned with the admissibility of confessions or admissions. Mr Horgan's submission that subpara(c) applied appears to be founded on the proposition that the asking of the earlier questions was not necessarily inconsistent with them being asked prior to the commencement of a formal period of questioning so that once confirmed by the appellant, and the confirmation tape-recorded, they were saved by subs(c). The argument to the contrary appears to be that the finding by the magistrate that there was a single episode of questioning meant that the relevant confessions, although subsequently confirmed, were nevertheless made in the course of, and not prior to, that

single episode of questioning. It was submitted by Mr Sullivan that the differences in language of para(c) and para(d) were such that it ought to be concluded that the confessions or admissions made before the commencing questions had to be "volunteered" confessions or admissions, not ones made in response to questions. If this were so, then subs(c) would not apply, as the questions 181 to 187 in the tape-recorded record of interview would indicate [14] that there were questions asked of the appellant rather than him volunteering statements in the lead-up questioning.

I do not find it necessary to embark upon the resolution of all of these issues and statutory conundrums. The answer to the present appeal is to be found in my conclusion that the appellant's submission that the totality of the confessions or admissions constituted by the tape-recorded interview must be excluded is incorrect. I reject the contention that the whole of the tape-recorded interview is inadmissible. Without deciding whether or not all of it was admissible, on the proper construction of s464H, those parts of the recorded admissions which were confirmations of the admissions in the earlier interview should have been excluded and they were. That being so, the balance of the interview, sufficient to found the conviction, was properly admitted. That it was sufficient to permit the conclusion reached was not disputed.

**ORDER:** The only argument for the appellant having failed, the appeal is dismissed. The answer to Question 1 of the questions of law is therefore: No. The appeal being dismissed, the appellant must pay the costs.

**APPEARANCES:** For the appellant: Mr T Sullivan, counsel. Solicitors for the appellant: Legal Aid Commission of Victoria. For the respondent: Mr G Horgan, counsel. Solicitors for the respondent: Solicitor for Public Prosecutions.

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