40/88

SUPREME COURT OF VICTORIA

BAYLY v VAUGHAN

Kaye J

7, 22 June 1988 — [1989] VicRp 33; [1989] VR 364

CRIMINAL LAW – EVIDENCE – PERSON QUESTIONED ABOUT OFFENCES – CAUTION ADMINISTERED – PURPOSE OF CAUTION – WHETHER TO PREVENT SELF-INCRIMINATION – CONFESSIONAL STATEMENTS MADE – MAY BE EXCLUDED IF ADMISSION UNFAIR – BURDEN OF PROOF.

V. who was the engineer in charge of maintenance, mechanical services and diesel oil stored at the County Court, was charged with numerous counts of theft of diesel fuel owned by the Law Department. During the hearing, 3 witnesses (who had previously been dealt with in respect of their theft of the fuel) gave evidence as to their involvement in the removal of the fuel. The informant, B., gave evidence that V. was cautioned in the usual manner prior to a lead-up conversation and again prior to the record of interview. However, V.'s legal practitioner objected to any evidence being led on the ground that the caution did not make it clear that the police were investigating charges against V. In upholding the objection, the Magistrate stated that as V. might not have been aware that he did not have to make self-incriminating statements, evidence of the lead-up conversation and record of interview would be excluded. No further evidence was led, the Magistrate upheld a submission of "no case" and dismissed the charges. Upon order nisi to review—

HELD: Order absolute. Remitted for further determination.
(1) The requirement that a caution be given to a person about to be questioned concerning the commission of an offence is not to give effect to the policy of the law against self-incrimination.
***Webb v Cain* [1965] VicRp 12; (1965) VR 91, applied.**

(2) Accordingly, the Magistrate was in error in excluding the evidence on the ground that V. may not have been aware of his right not to make self-incriminating admissions of fact.

(3) Where a defendant seeks to have any voluntarily-made confessional admissions excluded on the basis that their reception into evidence would be unfair or unjust, the defendant bears the onus of persuading the Court on the balance of probabilities.
***R v Lee* [1950] HCA 25; (1950) 82 CLR 133; [1950] ALR 517; and**
***Cleland v R* [1982] HCA 67; (1982) 151 CLR 1; (1983) 57 ALJR 15, applied.**

(4) In the present case, taking into account V.'s age, occupation and responsibilities in connection with the property stolen, together with the fact that no evidence was given by V. as to whether or not he believed he may not have been the subject of the police investigation, it would not have been open to the Magistrate to exclude the confessional admissions on the ground of unfairness.

KAYE J: [1] The Applicant in the present proceedings was the Informant charging the Respondent ("Defendant") by an information with three counts of theft under s74 of the *Crimes Act* 1958. The property alleged to have been stolen by the Defendant was quantities of diesel fuel owned by the Law Department. On 11th December 1986 the information, which was heard together with 18 informations charging the same offence against the Defendant, was dismissed by Order made by a magistrate sitting in the Magistrates' Court at **[2]** Melbourne. Upon the return of an Order Nisi to review, the Applicant sought to have the magistrate's order set aside. The dismissal occurred in circumstances verified in an affidavit in support of the Order Nisi sworn by Senior Constable M.P Collins, who appeared to prosecute on the hearing of the information. The Defendant did not file an answering affidavit.

The magistrate dismissed the information at the close of the Applicant's case, which took the following course. Five witnesses in addition to the Informant were called by the prosecutor. The Registrar of the County Court swore that the Defendant was the engineer in charge of maintenance, mechanical services and diesel oil stored in the County Court, that the diesel oil was the property of the Law Department and that permission was not given to any person to remove the oil from the premises of the Court. One witness observed two persons known to the Defendant in the subbasement of the County Court Building pumping diesel oil into 44 gallon

drums. Two witnesses, each of whom before the hearing of the information had pleaded guilty to charges of theft of diesel oil from the County Court and had been dealt with summarily, were together involved in the removal of diesel oil in 44 gallon drums from the County Court building by means of a truck. A further witness, who also on pleading guilty to similar charges of theft had been dealt with summarily, filled the petrol tank of his vehicle weekly from the diesel oil storage of the Court.

The Informant swore that he was present during a conversation between Sergeant Williams and the Defendant at **[3]** approximately 1.00 pm. on 19th March 1986 in Russell Street C.I.B. Office, when Sergeant Williams said to the Defendant:-

> "We are investigating the theft of diesel oil from the County Court. You are not obliged to say anything but anything you say will be given in evidence. Do you fully understand this?"

The solicitor who appeared for the Defendant objected to further evidence of the conversation being led on the ground that the caution given to the Defendant did not make it clear that police were investigating criminal charges against him, that the terms of the caution were consistent with police investigating charges against "the other three Defendants", and that the caution did not include additional words "against you".

The prosecutor submitted that the caution was in accordance with the *Judges' Rules* and the *Police Standing Orders*. The magistrate, upholding the objection, stated that the defendant might not have been aware that he did not have to answer questions which might result in him making self-incriminating statements. The Magistrate added that he considered the Defendant was not made aware that he was being questioned in respect of a criminal offence alleged to have been committed by himself. The magistrate stated that he exercised his discretion to exclude further evidence of the conversation. The Informant then swore that at 1.25 pm. on the same day Sergeant Williams commenced to conduct a record of interview with the Defendant. After the Defendant answered questions directed to his full name, age, date of birth and occupation, Sergeant Williams said to him:-

> **[4]** "I am going to ask you some questions in relation to an amount of diesel fuel which has apparently been taken from the County Court building over the past 18 months or so. Before I do so, however, I will first warn you that you are not obliged to say anything in answer to my questions and anything you do say will be taken down and given in evidence. Do you understand that?"

The solicitor for the Defendant objected to further evidence being given of the record of interview on the ground that the Defendant had not been given proper warning of the interview being conducted with a view to instituting criminal proceedings against him or even possible civil proceedings. The prosecutor opposed the solicitor's objection on the same ground as he had the previous objection. The magistrate, exercising his discretion, excluded further evidence of the record of the interview. The prosecutor, having no further evidence, closed the Informant's case. Upon a submission of no case for the Defendant to answer made by his solicitor, the magistrate dismissed the information.

The Informant sought to have the order of the Court below reviewed on the sole ground of the several upon which the Order Nisi was granted, namely: that the magistrate exercised his discretion erroneously in ruling that the evidence of the lead-up conversation and of the record of interview with the Defendant was inadmissible. It was accepted by Counsel for both parties that evidence of the conversation and of the record of interview could not have been properly excluded on the ground of any self-incriminating admissions were not made voluntarily by the Defendant. The basis therefore upon which the magistrate, in the exercise of his discretion, could have rejected the **[5]** evidence was that any confessional admissions made voluntarily by the Defendant were made in circumstances that rendered it unfair or unjust to use the evidence against him; *R v Lee* [1950] HCA 25; (1950) 82 CLR 133 at 153; [1950] ALR 517; *Cleland v R* [1982] HCA 67; (1982) 151 CLR 1 at 5 per Gibbs CJ (with whom Wilson J agreed) and at 18 per Deane J; (1983) 57 ALJR 15; and *Director of Public Prosecutions Reference (No. 1 of 1984*) [1984] VicRp 64; (1984) VR 727 at 731. The onus of persuading the magistrate, on the balance of probabilities, that the admission of the evidence would be unfair to him was borne by the Defendant; *R v Lee supra* at 152-155; and *Cleland v R supra* at 19 per Deane J.

The conclusion of unfairness was said by Mr Lagone of Counsel, who appeared for the Defendant, to have resulted from inadequate caution given to the Defendant by the interrogating police officer. It was not disputed by Counsel that the form of the caution complied with the *Judges' Rules* and the *Police Standing Orders*, notwithstanding that neither the Rules nor the Orders were tendered by the prosecutor. Whether it is necessary for a party seeking to rely on them, formally to tender and have admitted the Rules and Order may be a matter yet to be resolved by the Court of Criminal Appeal. Doubt whether a prosecutor is obliged to follow this course arises out of expressions appearing in the judgements of the Court in *R v Fogarty* [1959] VicRp 79; (1959) VR 594; [1959] ALR 1130; Sir Norman O'Bryan at VR p600 expressed the view that, if reliance were intended to be placed on the Chief Commissioner's instructions to members of the police force, strictly speaking the document should be proved; Sholl J at p604 would appear to have left **[6]** open the question; and Hudson, J at VR 604-605, while agreeing with the reasons of the presiding judge for refusing leave to appeal, did not expressly address himself to the question. Be that as it may, resolution of the adequacy of caution in the case before the magistrate did not depend upon conformity with the Rules or the Orders. In *R v Jeffries* (1947) 47 SR (NSW) 284 at 293; 64 WN (NSW) 71 Jordan CJ described the *Judges' Rules* as "rules of fair play", adding that "they must be administered and applied as such". The High Court in *R v Lee (supra)* at p154 said of the *Chief Commissioner's Standing Orders*, which corresponded with the *Judges' Rules*:-

> "They are not rules of law, and the mere fact that one or more of them have been broken does not of itself mean that the accused has been so treated that it would be unfair to admit his statement. Nor does proof of a breach throw any burden on the Crown of showing some affirmative reason why the statement in question should be admitted. As has already been pointed out, the protection afforded by the rule that a statement must be voluntary goes so far that it is only reasonable to require that some substantial reason should be shown to justify a discretionary rejection of a voluntary admission. The rules may be regarded in a general way as prescribing a standard of propriety, and it is in this sense that what may be called the spirit of the rules should be regarded."

Furthermore, there may be circumstances in which non-compliance with the Rules or the Orders will not render inadmissible self-incriminating admissions made by a person being interrogated and subsequently charged with a criminal offence; see *R v Lee supra* at pp158-159 and *Webb v Cain* [1965] VicRp 12; (1965) VR 91 at 92 and 95-96. However, both the solicitor's objection to the admission of the evidence and the magistrate's exercise of discretion excluding the evidence proceeded upon **[7]** misconception of the purpose of addressing a caution to a person about to be questioned concerning the commission of a crime. In *R v Banner* [1970] VicRp 31; (1970) VR 240 at 252 the primary purpose of a caution was stated by the Full Court to be:-

> "....to guard against the danger that a suspect or a prisoner, when subject to questioning by a person in authority, may wrongly suppose that he is being required to answer or that it will be the worse for him if he does not, and against the danger that he may, therefore, answer when his desire is to remain silent. The absence of a caution, however, does not make it unfair to use a confessional statement when it has been obtained, as here, not by reason of any such misapprehension, but because conscience makes the speaker volunteer the truth."

Street J in *R v Jeffries, supra* at 313-314 spoke of the purpose of a caution in the following passage:-

> "The obligation resting upon police officers is to put all questions fairly and to refrain from anything in the nature of a threat, or any attempt to extort an admission. But it is in the interests of the community that all crimes should be fully investigated with the object of bringing malefactors to justice, and such investigations must not be unduly hampered. Their object is to clear the innocent as well as establish the guilt of the offender. They must be aimed at the ascertainment of the truth, and must not be carried out with the idea of manufacturing evidence or extorting some admission and thereby securing a conviction. Upon the particular circumstances of each case depends the answer to the question as to the admissibility of such evidence."

That the underlying reason for the requirement of a caution to a person questioned concerning a crime in which he might be implicated was a policy of the law against self-incrimination was rejected by Hudson J in *Webb v Cain, supra* at 94-95. His Honour described as unsupportable a submission that to question such a person and obtain admissions from him which are made in ignorance of his right to refuse to answer was unfair and that admissions made in those circumstances may be rejected under the discretion rules. His Honour added at 95:-

> **[8]** "Whilst it is certainly true that a person cannot be compelled to incriminate himself it is not true that he cannot be allowed to make incriminating admissions or that, to this end, he must be warned against answering questions in case it should be that he is unaware that he is entitled to refuse to answer. To lay down a rule in such wide terms would go far to render practically ineffective the efforts which members of the police force are required to make in the course of their duty to discover the authors of crimes which they believe to have been omitted. The power to pursue such inquiries and put such questions without caution up to the stage at which it is determined to arrest or charge the person interrogated is, as I have already pointed out, expressly recognized by r1 of the *Chief Commissioner's Standing Orders*. And quite apart from any *Judges' Rules* or *Standing Orders* this was recognized to be the position in the case of *Lewis v Harris* (1913) 110 LT 337, where the question of the requirement of a caution before questioning was fully discussed."

After referring to the facts in *Lewis v Harris* and the Court of Appeal's decision that the justices' decision excluding self-incriminating evidence because no caution had been given was wrong in law, Hudson J continued:-

> "The reason why a caution is required when a certain stage of the questioning has been reached was discussed in argument. One reason that seemed to be suggested in *R v Voisin* (1918) 1 KB 531, at p538: (1918-19) All ER Rep 491, is that when the investigation has proceeded to the point where the questioner has decided to arrest or lay a charge he should, by a warning, put the person questioned upon his guard as to the importance of what he is being asked and its possible bearing upon some charge which may be laid. It was urged that the power of the police to question should not be used to 'manufacture' (in the sense of 'obtain') or extract evidence unless a caution is given that answers may be used in evidence. If this is limited to the case in which the questioner has already in his possession evidence which has led to his having determined to charge the person questioned, then this may be correct. But until this point has been reached the absence of a caution cannot be regarded as sufficient to justify rejecting evidence of admissions voluntarily made by a person who is not under arrest and who has not been subjected to any duress or influence which would call for the rejection of the evidence at common law."

[9] I respectfully agree with and adopt the views of Hudson J which I have cited. I do so bearing in mind that a police officer in the discharge of his duty is required to investigate the commission of crime by, *inter alia*, making enquiries directed to charging the person or persons who may be responsible for its commission. In the course of interrogating a person – including one whom he may suspect of having committed the crime – the officer is bound to seek by fair and lawful means a truthful statement of facts relating to the crime, insofar as lies within the knowledge of the person interrogated.

By cautioning that he or she is not obliged to answer questions, the person interrogated is made aware of his or her right to remain silent. A warning in terms that anything which he or she might say will be given in evidence against him or her, might be capable of having several adverse or prejudicial results. First, it might induce an innocent person to decline to answer questions which otherwise might clear him or her of complicity in the crime; compare rule 5 of the *Judges' Rules* appearing in *R v Jeffries supra* at 292. Secondly, it might be capable of being understood by the person interrogated as a threat thereby forming a proper basis for rejecting any confessional admission made by him; see *Evidence Act* 1958, s149. Thirdly, a caution so expressed might cause a guilty person to decline to answer the interrogator's questions, thereby frustrating the police officer's lawful investigations. It is necessary to be mindful that it is perfectly proper and indeed a purpose of police interrogation to obtain from a person suspected of having **[10]** committed a crime a confessional admission. It follows that the form of caution should not be expressed in terms likely to induce a person to withhold information necessary for police investigations, including self-incriminating as well as self-exculpating statements.

There is a strong presumption in favour of the correctness of the exercise of discretion by a Court whose decision is subject to review or appeal. Nevertheless, where an Appellate Court is satisfied that the discretion was exercised by a magistrate on a wrong principle of law, or upon a mistake of fact, or without evidence of fact upon which the discretion is based, the presumption will be rebutted and the Court will interfere setting aside the decision; *Australian Coal and Shale Employees Federation v The Commonwealth* [1953] HCA 25; (1953) 94 CLR 614 at 627; [1956] ALR 868.

In the present case the magistrate exercised his discretion by excluding further evidence

of the lead-up conversation and record of interview on two bases. The first basis was that the Defendant may not have been aware of his right to withhold from making self-incriminating statements. The Defendant did not give evidence of what, at the material time, was or was not within his knowledge. There was therefore no evidence before the magistrate that the Defendant was without knowledge of his right. However, on the assumption that he was ignorant of his right, the magistrate, for the reasons which I have stated, proceeded on a wrong principle of law in the exercise of his discretion.

The second basis was that the magistrate considered that the Defendant was not made aware that he was **[11]** being questioned in respect to a criminal offence alleged to have been committed by him. However, implicit in the second basis was also the notion that the Defendant was required to be informed by the police officer of his right not to make self-incriminating admissions of fact. It follows that in my opinion the magistrate's discretion, exercised on the grounds stated by him, miscarried.

Mr Pagone submitted that the magistrate could have exercised his discretion excluding the evidence also on the basis that the terms of the caution were consistent with police investigating a theft committed by three other persons. It was said that, three other persons being involved, it was not made clear to the Defendant that questions would be asked of him concerning his own involvement in the theft. This, Counsel urged, might have been clarified by adding to the caution the words "against you", thereby warning the Defendant that he also was being investigated. Nothing, however, was said by the police officer about the complicity of others. There was no evidence before the magistrate that the Defendant thought he would be questioned only about the complicity of the three other persons in the theft of fuel, rather than his own involvement. Furthermore, there was no evidence upon which an inference could have been properly drawn that the Defendant entertained such thought or belief. Moreover, such an inference could not have been properly drawn when evidence of the Defendant's age, occupation and responsibilities in connection with the stolen oil, and the absence of him being subject to any particular psychological characteristic are taken into consideration. In any event, **[12]** regardless of any misunderstanding of the purpose of the questions under which he might have been labouring, by the caution in the terms given to him before the lead-up conversation and the commencement of the record of interview, the Defendant was made aware of his right in the circumstances then existing.

The Defendant did not discharge the onus of showing that it would have been unfair or unjust to use in evidence against him any confessional admissions which were likely to be made by him in the course of either the lead-up conversation or in the record of the interview. Dr Hardingham of Counsel who appeared to move the order absolute joined with Mr Lagone in the latter's request that I should examine the contents of the record of interview. The document, Counsel informed me, was not made available to the magistrate. Although during the course of argument at their request I read the document, I have not for the purposes of this judgment taken into account any of its contents.

For the reasons which I have stated, it is clear that the magistrate's exercise of discretion was based upon a wrong principle of law and therefore miscarried. In the result the order dismissing the information was made in error and the Order Nisi must be made absolute. These proceedings were heard together with orders to review in relation to dismissal of the other similar informations preferred against the Defendant. It follows that the Orders Nisi in those cases must also be made absolute. Accordingly, the Orders Nisi will be made absolute, the orders dismissing the informations will be set **[13]** aside, the informations will be remitted to the Magistrates' Court for rehearing and determination according to law, and the Defendant will be ordered to pay the Applicant's costs including costs reserved by the Master.
