

03/06; [2006] VSC 29

SUPREME COURT OF VICTORIA

DPP v AZZOPARDI

Bell J

5, 8 February 2006 — (2006) 159 A Crim R 543

CRIMINAL LAW – EVIDENCE – EMPLOYEE APPROACHED BY COMPANY MANAGERS – EMPLOYEE ASKED QUESTIONS ABOUT ALLEGED THEFT OF PROPERTY – EMPLOYEE/SUSPECT NOT CAUTIONED – SUSPECT'S BAG SEARCHED AND STOLEN PROPERTY FOUND – POLICE CALLED – SUSPECT LATER CHARGED WITH THEFT – AT THE HEARING EVIDENCE GIVEN BY MANAGERS AND POLICE EXCLUDED BY THE MAGISTRATE IN THE EXERCISE OF THE GENERAL UNFAIRNESS DISCRETION – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR: *CRIMES ACT* SS458(1), 464(1), (2), 464A(2), (3), 464C(1), 464H(1).

On the way out of work, an employee A. was asked to go to an interview room where he was questioned by three managers of the company. A. was suspected of theft of a screwdriver set. A. had no lawyer nor union representative with him. A. denied the allegations. The managers then searched his bag and found the screwdriver set. A. said he knew nothing about it. Police were later called and A. was charged with theft. On the hearing of the charge the magistrate expressed concern about the way the managers had questioned A. and searched his bag. The magistrate excluded their evidence in the exercise of his general discretion because it would have been unfair to allow the prosecution to use it against A. The magistrate then dismissed the charge. Upon appeal—

HELD: Appeal dismissed.

1. Investigating officials under s464A(3) of the *Crimes Act* 1958 include police officers and persons exercising police-like statutory powers and are obliged to caution suspects before commencing to interview them. In the present case the managers were not investigating officials. They were acting as civilians.

2. The general unfairness discretion is available to a court to exclude evidence where it considers that it would be unfair to the accused if it were admitted in the sense that this would or might render his or her trial unfair. Evidence of a confession or admission, although voluntarily given or made, might be excluded if in the light of all the circumstances the confession has been made in conditions which render it unjust to allow the accused's own words to be given in evidence against him. The discretion is a discretion to exclude and is to be exercised in the interests of fairness and justice to the accused. The proper exercise of the general unfairness discretion requires a consideration of matters of fact and degree in the light of all of the circumstances of a given case. The objects of bringing wrongdoers to justice and ensuring the fair trial of accused persons are weighed in the balance. It is not only the conduct of police or investigating officials under the *Crimes Act* that might give rise to the possible exclusion of evidence under the general unfairness discretion. The conduct of civilian investigators, such as store detectives, loss controllers and security personnel, might also do so.

3. In the present case, the magistrate did not proceed on the basis that the managers were investigating officials and therefore required to caution A. before asking him questions but was concerned about a number of problems such as the failure to caution, the circumstances in which A.'s bag was searched and the general conduct of the interview. In those circumstances it was open to the magistrate to exercise his general unfairness discretion, exclude the evidence and dismiss the charge.

BELL J:

INTRODUCTION

1. In 2004 Mr Alfred Azzopardi was working at Mannway Transport and Distribution Centre in Hampton Park doing cleaning and other general duties. On the way out of work one day he was asked to come into an interview room where he was questioned by three managers. They suspected him of theft of a screwdriver set. He had no lawyer and no union representative with him. He denied the allegations. The managers searched his bag and found the screwdriver set. He said he knew nothing about it.

2. The managers told Mr Azzopardi the matter would be dropped if he resigned. He refused and the police were called. He was charged with theft.

3. At all times Mr Azzopardi protested his innocence. He said the company had set him up because they were trying to get rid of him – he was on light duties due to a workplace injury and was not very productive.

4. The charge came before the Magistrates' Court at Dandenong in 2005. After hearing the evidence of the managers and a summary of the evidence of the police informant, the Magistrate expressed concern about the way the managers had questioned Mr Azzopardi and searched his bag. His Honour found they had not cautioned Mr Azzopardi about his rights before interviewing him. He described the bag search as "illegal". He exercised his discretion to exclude the evidence of the managers (and the police informant) from the case. There was no other evidence, which meant the prosecution had to fail. The Magistrate made an order dismissing the charge.

5. The Director of Public Prosecutions now appeals to this Court upon the ground that the Magistrate committed an error of law in excluding the evidence.^[1]

6. Counsel for the DPP contends the Magistrate proceeded upon the incorrect footing that the managers were acting as investigating officials under the *Crimes Act* 1958. Such officials are obliged to caution suspects before commencing to interview them.^[2] In fact, so counsel contends, the managers were not investigating officials. They were acting as civilians. Therefore they were not obliged to caution Mr Azzopardi before questioning him.

7. Counsel for Mr Azzopardi accepts the managers were not investigating officials. Under the *Crimes Act*, an investigating official is a police officer or someone exercising police-like statutory powers.^[3] The managers did not fall into this definition. However, submits counsel, the Magistrate did not exclude their evidence (and that of the informant) on this basis. His Honour excluded the evidence in the exercise of his general discretion because it would have been unfair to allow the prosecution to use it against Mr Azzopardi.

8. It is quite clear that the managers were not investigating officials under the *Crimes Act*. The sole question in this appeal is whether the Magistrate proceeded upon the incorrect footing that they were. The answer to this question will be provided by a consideration of his Honour's reasons. Along the way it will be necessary to consider whether it was open to his Honour to exclude the evidence in the exercise of his general unfairness discretion.

DID THE MAGISTRATE INCORRECTLY TREAT THE MANAGERS AS INVESTIGATING OFFICIALS?

9. The process of reasoning of the Magistrate is revealed by the transcript of the hearing. This transcript reveals that his Honour's main concern was that the managers did not caution Mr Azzopardi about his rights. In other words, they did not say words to him like (to use the example given by the Magistrate): "We have reason to believe that you were involved in thefts. We want to ask you some questions in relation to those thefts. However, if you consider that the answer may incriminate you, you don't have to answer those questions."

10. Counsel for the DPP submits that the Magistrate must have treated the managers as investigating officials under the *Crimes Act* because only officials of this kind are required by statute to administer a caution before questioning suspects. I cannot accept this submission for the following reasons.

11. First, the Magistrate did not at any time say that the managers were investigating officials under the *Crimes Act*. If he had been of this view, he would have referred to the rules laid down in that Act for the conduct of interviews by investigating officials. For example, before questioning by such officials can commence, the person must be informed that "he or she does not have to say or do anything but that anything the person does say or do may be given in evidence."^[4] The person must usually be informed that he or she has the right to communicate with a friend, relative and lawyer.^[5] Interviews must usually be video-taped or video-recorded, depending upon the circumstances.^[6] The Magistrate referred only to the failure of the managers to caution Mr Azzopardi and to the search of his bag. These concerns can relate to civilian investigators as well as to investigators who have police-like powers.

12. Secondly, the Magistrate used language that made clear he knew he was dealing with

company managers using civilian powers, not investigating officers using statutory powers. He described the managers as "civilians" and said there were problems with such persons being involved in "police or investigative work." The clear inference here is that the problems in the case arose because the managers were not properly trained investigators like the police and similar investigating officials. In several parts of the transcript his Honour contrasted the approach of the managers with that of the police.

13. Thirdly, the transcript reveals that the Magistrate considered the evidence of the managers and the informant to be "inadmissible" because Mr Azzopardi had not been cautioned and because his bag had been illegally searched. This was an exercise of his Honour's general unfairness discretion to exclude evidence, for which, in the case before him, there was an amply sufficient basis.

14. The general unfairness discretion is available to a court "to exclude evidence where it considers that it would be unfair to the accused if it were admitted in the sense that this would or might render his or her trial unfair."^[7] Evidence of a confession or admission, although voluntarily given or made, might be excluded if –

"in the light of all the circumstances the confession has been made in conditions which render it unjust to allow the accused's own words to be given in evidence against him...The discretion is a discretion to exclude and is to be exercised in the interests of fairness and justice to the accused."^[8]

15. The proper exercise of the general unfairness discretion requires a consideration of matters of fact and degree in the light of all of the circumstances of a given case.^[9] The objects of bringing wrongdoers to justice and ensuring the fair trial of accused persons are weighed in the balance.

16. It is not only the conduct of police or investigating officials under the *Crimes Act* that might give rise to the possible exclusion of evidence under the general unfairness discretion. The conduct of civilian investigators, such as store detectives, loss controllers and security personnel, might also do so.

17. The instant case is an example of how this might happen. The evidence before the Magistrate revealed that, apart from the interview with the managers and the discovery of the screwdriver set in Mr Azzopardi's bag, the case against him was wholly circumstantial. The evidence showed that the managers, who were his bosses, asked Mr Azzopardi, a cleaner, to come into a room where he was outnumbered three to one. They told him why he was being interviewed, but not that he did not have to say or do anything and, if he did, it could be given in evidence. He was asked to open his bag and he said he would not, which was his right. According to the evidence of the managers, this issue "went back and forth" until Mr Azzopardi said the managers could open it. They did so and found the screwdriver set. The police arrived later, but by then the bag had been opened. Mr Azzopardi told the police he was innocent. (As it happened, the evidence of the police did not add anything material to the prosecution case.)

18. It was on this evidence that the Magistrate exercised his general unfairness discretion to exclude the prosecution evidence, the important part of which was the evidence of the managers. This was not a case where it was only the failure to caution that led his Honour to exclude the managers' evidence.^[10] A fair reading of his reasons reveals that he was concerned about a number of problems – the failure to caution, the circumstances in which the bag was searched and the general conduct of the interview. It was open to his Honour to exercise his general unfairness discretion in these circumstances.

19. The unsatisfactory situation confronting Mr Azzopardi was graphically illustrated by the reaction of the managers when he told them he was recording the interview on his mobile telephone. They instructed him he "wasn't allowed to do that" and he deleted the recording. The managers expressly denied him the right to make what the police are usually obliged to provide, namely a recording of the interview.^[11]

20. As the Magistrate said, the managers could have taken other action that may well have led to a different result. They could have called the police and asked Mr Azzopardi to wait until they arrived. If he refused, they could have effected a citizen's arrest^[12] and detained him until

the police arrived. This is a prudent procedure commonly followed by civilian investigators such as store detectives, loss controllers and security officers. In all likelihood, the police would then have conducted a professional investigation and interview during which Mr Azzopardi's rights would have been respected and the rules laid down in the *Crimes Act* would have been observed. The police would have discovered the screwdriver set in Mr Azzopardi's bag as they would have had the power to search it with or without his consent. There could have been no valid objection to the admissibility of evidence obtained by the police through this process, although the fate of the prosecution might still have been doubtful because, as one of the managers candidly admitted in evidence, there was a possibility that someone other than Mr Azzopardi put the screwdriver set in his bag.

21. It cannot be said that civilian investigators have no right to ask question of suspects and the Magistrate did not so decide. "The power of inquiry, of asking questions, is a power which every individual citizen possesses...[although he] cannot compel an answer..."^[13] But if civilian investigators do ask questions of suspects, the conduct of the interview may be put in issue in any trial, as occurred in the present case. It cannot be said that civilian investigators are legally obliged to caution suspects of whom they intend to ask questions and the Magistrate did not so decide. But before asking any questions, it would be prudent for investigators to inform suspects that they do not have to say or do anything and that anything said or done may be given in evidence. If this is not done, this may be used as a basis to have evidence excluded in the exercise of the court's general unfairness discretion. Such a failure, on its own, may not be a sufficient basis upon which to exclude the evidence.^[14] But taken together with other circumstances, as in the present case, such a failure may well result in evidence being excluded. A debate about the admissibility of evidence obtained in these circumstances can be avoided if civilian investigators call the police and get them to conduct the interview and investigation.

CONCLUSION

22. Mr Azzopardi was charged with theft from his employer. The main evidence against him was obtained during an interview conducted by three of his managers. He had no lawyer or union representative present and he was not informed of his legal rights. The Magistrate dismissed the charge after deciding that the evidence of the managers (and the informant) was inadmissible.

23. The DPP has appealed. The ground is that the Magistrate made an error of law by incorrectly treating the managers as investigating officials under the *Crimes Act* (who are obliged to inform suspects of their legal rights) rather than civilian investigators (who are not so obliged).

24. The appeal will be dismissed because the Magistrate, in excluding the evidence, did not treat the managers as investigating officials who failed to inform Mr Azzopardi of his legal rights as required by the *Crimes Act*. His Honour treated the managers as civilian investigators and excluded the evidence in the exercise of his general unfairness discretion.

25. The circumstances of this case show it can be hazardous for civilian investigators to interview criminal suspects, all the more so if they conduct interviews without informing them of their legal rights. The way they conduct interviews may result in evidence being excluded in the exercise of a court's general unfairness discretion. The most prudent course is for civilian investigators to call the police.

^[1] Section 92(1) of the *Magistrates' Court Act* 1989 allows a party to a criminal proceeding to appeal to the Supreme Court of Victoria on a question of law from a final order of a magistrate.

^[2] Section 464A(3) provides: "Before any questioning (other than a request for the person's name and address) or investigation ... an investigating official must inform the person in custody that he or she does not have to say or do anything but that anything the person does say or do may be given in evidence."

^[3] Section 464 defines an "investigation official" to mean "a member of the police force or a person appointed by or under an Act (other than a member or person who is engaged in covert investigations under the orders of a superior) whose functions or duties include functions or duties in respect of the prevention or investigation of offences..."

^[4] Section 464A(3) of the *Crimes Act*.

^[5] Section 464C(1) of the *Crimes Act*.

^[6] Section 464H(1) of the *Crimes Act*.

^[7] *DPP v Moore* [2003] VSCA 90; (2003) 6 VR 430; (2004) 39 MVR 323 at 342 per Chernov JA; see also at 353-354 per Eames JA and *Rozenes v Beljajev* [1995] VicRp 34; [1995] 1 VR 533 at 549; (1994) 126 ALR 481; 8 VAR 1 per Brooking, McDonald and Hansen JJ.

^[8] *R v Oates* [1979] Tas R 203 at 205 per Oates J.

^[9] *R v Lee* [1950] HCA 25; (1950) 82 CLR 133 at 154; [1950] ALR 517 per Latham CJ, McTiernan, Webb, Fullagar and Kitto JJ.

^[10] Compare *Bessell v Kryskiewicz* (1997) TASSC 101, 29 August 1997, Cox CJ.

^[11] See s464H of the *Crimes Act*.

^[12] See s458(1) of the *Crimes Act*.

^[13] *Glough v Leahy* [1904] HCA 38; (1905) 2 CLR 139 at 156-157; 11 ALR 32 per Griffith CJ.

^[14] As in *Bessell* (1997) TASSC 101, 29 August 1997.

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