40/84

SUPREME COURT OF VICTORIA

R v LARSON and LEE

Hampel J

7 November 1983 — [1984] VicRp 45; [1984] VR 559; noted 9 Crim LJ 56

CRIMINAL LAW – EVIDENCE – INTERVIEW OF ACCUSED CONTAINING DENIALS – CONFESSION IN RECORD OF INTERVIEW – UNLAWFUL DETENTION BY POLICE – WHETHER CONFESSION VOLUNTARY – IF VOLUNTARY WHETHER UNFAIR TO ADMIT AGAINST ACCUSED – WHETHER EVIDENCE SHOULD BE EXCLUDED ON GROUNDS OF PUBLIC POLICY: *CRIMES ACT* 1958, S460.

At 5.08 pm., L. and a co-accused were spoken to by Police at a Solicitor's office and said that they did not wish to make a statement. They were arrested on a charge of murder and taken to a nearby Police Station, and placed in separate rooms. Until approximately 11.08 pm., L. remained in the same room, guarded at all times, and for almost the whole of the six hours, sat in the same room in a swivel chair in silence except for a few words exchanged with a Sergeant of Police and a Solicitor. At 11.10 pm., L. was interviewed by a member of the Homicide Squad and in that interview, denied his involvement in the offence. At 11.51 pm., a record of interview was commenced during which L. admitted the offence, and these proceedings concluded at 5.35 a.m. At 10 a.m., L. was brought before a Magistrate and remanded in custody. At the trial, a *voir dire* was conducted to determine the admissibility of the conversations between L. and the police officers, and of the record of interview—

RULING: Such evidence excluded.
(1) Once the question of the voluntariness of a confessional statement is raised, the Crown must establish, on the balance of probabilities, that such statement was made in the exercise of the maker's free choice to speak or to be silent.
***R v Lee* [1950] HCA 25; [1950] 82 CLR 133; [1950] ALR 517, applied.**

(2) A statement is not voluntary if the maker's will has been overborne, or the statement is a result of duress, intimidation, persistent importunity or sustained and undue insistence, or is obtained as a result of an inducement held out by persons in authority.
***McDermott v R* [1948] HCA 23; [1948] 76 CLR 501; [1948] 2 ALR 466, applied.**

(3) Notwithstanding that a statement may be shown to be voluntary, it may be rejected if it is established that it was obtained in circumstances rendering its use against the maker unfair and unjust.

(4) The combination of the police conduct, the character and personality of L. and the circumstances in which he was kept and questioned, made it unfair and unjust to use the statements against him.

(5) The conduct and attitude of the police as well as the age and limitations of L. amounted to a flagrant disregard of L.'s rights. Accordingly the evidence sought to be led was excluded on the grounds of public policy.

HAMPEL J: *[After setting out the circumstances surrounding the accused's being detained in custody, His Honour continued]:* ... **[275]** The accused did not give evidence on the *voir dire* but evidence was called from a highly qualified and experienced clinical psychologist, Mr Bernard Healey. He tested the accused, Larson, comprehensively in May and described the tests and the results in detail. No reason has been advanced why I should not accept and act on Mr Healey's evidence. It seems that Larson has an IQ of 80, which places him at the lowest end of the dull range of intelligence and at about 9% level amongst people of his age. His intellectual capacity was found to be the equivalent of the 12 - 14 age group. **[276]** Mr Healey also found Larson to be of depressive disposition and poor perception. Mr Healey had obtained a consistent history of poor performance at school, alcohol abuse and use of drugs such as Amphetamines and Heroin in relatively small doses.

In cross-examination, Mr Healey said that Larson had told him that Paul Swift had said to him, "You are gone now, Dad's coming". Larson had also said that he must have freaked out and fired the gun. Mr Healey was then asked the following question, at p161 of the transcript, "And most of all, he was able to, when he studied the contents of the record of interview, the account he gave you, as you have indicated, was consistent with the contents of that record?" to which he replied, "Yes".

On the basis of the whole of this material, Mr Francis submitted that the evidence of the interview, which commenced at 11.08 and of the record of interview which followed, should be excluded for one of two reasons, first, because the Crown has not shown, on the balance of probabilities, that it was voluntary, in the required sense and, because the defence had established, on the balance of probabilities, that it was unfairly and unlawfully obtained. The Crown contended that it had established voluntariness, and the accused had failed to establish a basis for the exercise of the discretion in his favour. There was no unfairness or illegality in the relevant sense, argued the Crown; even if there was illegality, that is, conduct in **[277]** breach of s460 of the *Crimes Act*, it was not of the kind which would call for the exclusion contended for.

Submissions by Counsel as to the facts and the legal principles appear in the transcript of the *voir dire* and need not be restated by me. The law, in relation to admissibility of evidence of confessional statements is well established. Once the question of voluntariness is raised, the Crown must establish, on a balance of probabilities that such statements were made in the exercise of the maker's free choice to speak or to be silent. If the person's will has been overborne, and the statements are the result of duress, intimidation, persistent importunity or sustained and undue insistence, they cannot be said to be voluntary.

They are also not voluntary if they are obtained as a result of an inducement held out by persons in authority: *McDermott v R* [1948] HCA 23; [1948] 76 CLR 501 at p511; [1948] 2 ALR 466; *R v Lee* [1950] HCA 25; [1950] 82 CLR 133; [1950] ALR 517. The admissibility of such evidence is not determined by propriety or otherwise of conduct by the police officers but by the effect of their conduct on the will of the person against whom such evidence is sought to be adduced: *Collins v R* [1980] FCA 72; [1980] 31 ALR 257 at p307. **[278]** The rejection of evidence on this basis, is the result of the application of a rule of law and does not depend on the exercise of a discretion.

However, the operation of the rule depends on the circumstances of each case, including the character and the personality of the individual whose will is said to have been overborne. Even if the statements in question are shown to be voluntary, there is still a discretion in the trial Judge to reject them if it is established by the accused that they were obtained in circumstances which would render the use of such statements against the accused, unfair and unjust.

It is clear from the discussion of the concept so enunciated in *R v Lee*, that what is improper or unfair depends on the circumstances of each case and should not be limited by attempts to define it. *Cleland v R* [1982] HCA 67; (1982) 151 CLR 1; [1983] 57 ALJR 15 at p17; [1982] 43 ALR 619 at 622. It is also clear that in the exercise of the discretion to exclude relevant and voluntary statements, which was enunciated in *R v Lee* and *McDermott v R*, considerations such as the conduct of the Police, whether lawful or otherwise, and considerations of public policy which demand that an accused should be protected against procedural or substantive unfairness, were all relevant.

Dawson J in *Cleland v R* at p28 (ALR at p641), whilst analysing the historical development of that discretion, said:

> "So it is that consideration of policy came to provide the justification, at least in part, for what was originally a rule of evidence and to play some part in the exercise **[279/80]** of the discretion. No longer was it simply a question whether confessional statements were unreliable and to be rejected for that reason. No longer was it simply a question whether it was unfair to the accused (in the sense of resulting in an unfair trial) to admit the statements. Instead, the discretion to exclude confessional statements was frequently expressed in terms which were more appropriate to the discouragement of improper or illegal methods of obtaining evidence than to the unfairness of admitting evidence against an accused person which may be unreliable or unsatisfactory."

He also went on to cite Dixon J in *R v McDermott* at p513, who referred to the practice as follows:

> "But whatever may be the cause, there has arisen almost in our own time a practice in England of excluding confessional statements made to officers of police if it is considered upon a review of all the circumstances that they have been obtained in an improper manner. The abuse of the power of arrest by using the detention of an accused person as a occasion for securing from him evidence by admission is treated as an impropriety justifying the exclusion of the evidence. So is insistence upon questions or an attempt to break down or qualify the effect of an accused person's statement so far as it may be exculpatory."

A further development in this area of the law concerning discretionary exclusion, flows from the decisions of the High Court in *R v Ireland* [1970] HCA 21; [1970] 126 CLR 321; [1970] ALR 727; (1970) 44 ALJR 263, **[281]** affirmed in *Bunning v Cross* [1978] HCA 22; [1978] 141 CLR 54, [1978] 19 ALR 641; 52 ALJR 561, and *Cleland v R* (*supra*). The first two of these cases concern themselves with the admissibility of "real" evidence and the last confirmed the application of this form of discretion to confessional statements. It is a more general discretion to exclude evidence of relevant facts ascertained or produced by improper or unlawful conduct by those whose task it is to uphold the law and the rationale of this principle is said to be found in considerations of public policy, namely, the undesirability that such conduct should be encouraged, either by the appearance of judicial approval or toleration of it or by allowing curial advantage to be derived from it. (See the comments of Deane J in *Cleland v R* at p23).

Two matters emerge from the Court's decision in *Cleland*. The first is that there is no general rule that the Court will reject evidence illegally obtained and, second, that the rejection of confessional evidence on this ground alone is most exceptional. (See also Brennan J's comments in *Collins v R* [1980] FCA 72; [1980] 31 ALR 257 at p317).

Dawson J, in *Cleland's case*, examined the correlation between what he treated as the two distinct discretions. At p28 of the Report, His Honour said:

> "But in my view there is a clear distinction to be drawn between the exercise of a discretion in pursuance of a policy of discouraging improper or illegal methods of interrogation and the exercise of a discretion to exclude evidence which might operate unfairly against an accused."

He went on to say, however, at p29:

> "That does not mean that the discretionary processes involved **[282]** have entirely separate areas of operation and that there is no overlap between them. Clearly, if a confessional statement has been obtained by the use of improper or illegal means but nevertheless can be shown to be voluntary, a discretion is exercisable by the trial judge to exclude it from evidence on the basis that to admit it would be unfair to the accused. The exercise of that discretion will not turn upon the policy considerations which must otherwise exercise the judge's mind in the case of evidence which is improperly or illegally obtained. It will entail a consideration of the result of such methods and whether it would be unfair to the accused to admit it in evidence in the sense that to do so would result in an unfair trial. If it would, then that is the end of the matter and the confessional statement will be excluded from evidence. If it would not, then there still remains to be considered whether the policy considerations referred to in *Bunning v Cross* nevertheless require the rejection of the evidence. The exercise of the latter discretion will not, in the case of confessional evidence, turn upon whether the admission of evidence will be unfair to the accused, for, if that were the case, the evidence would be rejected under the rules applying to confessional evidence."

Further, His Honour said:

> "The rule in *Bunning v Cross* posits an objective test, concerned not so much with the position of an accused individual but rather with whether the illegal or improper conduct complained of in a particular case is of sufficient seriousness or frequency **[283]** of occurrence as to warrant sacrificing the community's desire to see the guilty convicted in order to express disapproval of, and to discourage, the use of unacceptable methods in achieving that end."

These views find support in the judgments of the other members of the Court and this particular form of discretion is referred to as "residual", after the discretion based on the concept of unfairness has been exercised. Dealing with the particular questions which I have to consider, I find that the Crown has discharged the onus cast upon it of showing that the statements were voluntary. I agree with Mr Dee's submission, on behalf of the Crown, that the evidence shows, on the balance of probabilities, that the accused's will was not, in fact, overborne in the relevant sense, despite events of that afternoon and night and despite the conduct of the police to which I shall refer shortly, in another context.

However, in the exercise of my discretion, I propose to exclude the evidence of both the interview at the police station and of the record of interview at the CIB office. In my view, such exclusion is warranted on two bases, first, that these statements were obtained in such circumstances as would render it unfair that they should be used against the accused on his trial

and, second, that the statements were obtained unlawfully and public policy demands that they be excluded. There is, in this case, some overlapping between those two otherwise conceptually distinct discretionary **[284]** bases for excluding this evidence, in that the conduct of the police is a relevant circumstance, in my concluding that the statements should be excluded on the basis of unfairness in the *R v Lee* sense as well as the unlawfulness in the *Cleland v R* sense.

Soon after 5.00 pm. on this day, the police were prepared to arrest the two accused men. They then became aware that both of them had, presumably on legal advice, indicated that they did not wish to make any further statements. The accused, Larson, who had just turned 17 and who had all the limitations described by Mr Healey, was placed in a room where he sat in the one chair for some six hours with a number of police officers from time to time closely observing him, in almost complete silence. He was not told whether he would be questioned or what his situation was going to be. Although he had been made aware of his rights by his legal advisers, nothing was said to him by the police until much later in the night.

Having observed Larson in Court and having seen and heard the various police officers who guarded him, I am of the view that the accused was placed in a grossly unfair and tense situation, which was calculated to unnerve him and which produced reactions from him, particularly in his demeanour, which could be misunderstood and which were misinterpreted by the police officers.

For Detective Ryan to have come in at the end of this six-hour period and to have started questioning Larson without cautioning him must have been, to say the least, confusing and unfair to Larson. **[285]** Despite his being made aware of his rights, he started answering questions, which probably seemed at that time to be insignificant. When it came to the direct question about his involvement at Lockwood, he was cautioned and he attempted to rely on his legal rights and did not answer except for the comment already referred to. He was then told that he would be interviewed by way of a record of interview and then he was cautioned. By that stage, the caution, in my view, would have been a meaningless concept to him, having regard to what had transpired earlier.

The record of interview followed and lasted throughout the night. Why, apart perhaps from the point of view of the convenience of the police questioning him, it was necessary to persevere and continue at that stage is difficult to understand. **[286]** As Brennan J said in *R v Collins*, at p313:

> "The purpose of the discretionary power is not the protection of the accused from the risk of conviction: it is his protection from the risk of conviction upon a statement which it is unfair to use, and the "'unfairness' of using a 'statement' must arise from the circumstances under which it was made". The question is whether "in the light of all the circumstances, ... the statements or admissions of the accused have been extracted from him under conditions which render it unjust to allow his own words to be given in evidence against him", as Street J said in passage in *R v Jeffries* (1946) 47 SR (NSW) 284; 64 WN (NSW) 71 at p312, cited with approval in *Lee's case*. The administration of justice commences long before the trial, and the exercise of the discretion to reject a voluntary confession is calculated to avoid or annul unfairness to an accused person in the administration of justice in his case. The conduct of the police is, of course, a relevant factor because the police, by their conduct, do much to accord or deny fair treatment to an accused in the earlier stages of the administration of justice. *Lee's case* defines the approach: 'It is indeed, we think, a mistake to approach the matter by asking as separate questions, first, whether the police officer concerned has acted improperly, and if he has, then whether it would be unfair to reject the accused's statement. It is better to ask whether, having regard to the conduct of the police and all the circumstances of the case, it would be unfair to use his own statement **[287/88]** against the accused'."

Applying those tests, in my view, the combination of the conduct by the Police, the character and personality of the accused and the circumstances in which he was kept and questioned, all combine to make it unfair and unjust that these statements should be used against this accused in evidence at his trial. In reaching this conclusion, I have not overlooked the fact of what the accused said to Mr Healey, but I find those comments as they have come out do not affect my conclusion that these statements should be excluded.

In deciding whether statements should he excluded because they are unlawfully obtained, it is necessary, in my view, to look at the nature of the unlawful conduct and the setting in which it takes place. It is then necessary to balance the two competing considerations of public policy

and on that basis exercise a discretion by applying what Dawson J has described as the objective test.

Section 460 of the *Crimes Act*, provides that:

> (1) "Every person taken into custody for an offence (whether committed in Victoria or elsewhere) shall be brought before a Justice or a Magistrates' Court as soon as practicable after he is so taken into custody.
>
> (2) If no information is laid against the person arrested the Justice or court may discharge him out of custody but the discharge shall not affect any proceedings which may subsequently be taken in respect of the offence."

While the provisions of this section must be interpreted reasonably, and while it does not necessarily operate to prevent the questioning of suspects, it does not allow the holding of persons under arrest for questioning **[289]** in the circumstances which exist in this case. The words, "as soon as practicable", in the section refer to the time required to bring the person arrested before a Justice and not to the time which the police may choose to take after arrest to make further enquiries or conduct further investigations. The section is designed to safeguard persons in custody after arrest from being held by the police for questioning or further investigations or otherwise. In *Cleland v R*, Deane J at p26, made the following observations, when ordering a new trial, he said:

> "Since a new trial is being ordered, it seems desirable that I indicate that it is not apparent to me that the balancing of the relevant considerations of public policy did not favour the exclusion of evidence of the alleged confession. A police power or practice of arbitrary detention is, like a police power or practice of arbitrary arrest, a negation of any true right to personal liberty and a hallmark of tyranny. It is of critical importance to the existence and protection of personal liberty under the law that the restraints which the law imposes on police powers of arrest and detention be scrupulously observed. In a number of recent cases, judges of the Supreme Court of South Australia have rightly been at pains to emphasize the importance of observance by law enforcement officers of those restraints by excluding, on the grounds of public policy, evidence of a confessional statement obtained while an accused was unlawfully detained."

After referring to a number of South Australian cases, His Honour went on:

> "Again, it will be a matter for the trial judge on the material before him on any new trial **[290]** to determine whether the need to discourage unlawful conduct on the part of those whose task it is to enforce the law is outweighed, in the circumstances, by the requirement of public policy that, if the applicant be guilty, he be brought to conviction."

In the present case, the detention of the accused Larson was unlawful by 11.08 pm. He had been arrested for murder and held for six hours at a time when the police, although perhaps not apprised of all the details, were in a position to have questioned him and chose not to do so. The evidence shows that they did not consider bringing Larson before a Justice although there would have been no difficulty in making arrangements for that to be done. The mere fact that the local police were waiting for the arrival of the Homicide Squad from Melbourne does not alter the situation. There were a number of senior and experienced police officers, including an Inspector, available who could have questioned the accused, after his arrest, and taken him before a Justice, as required by s460. It is significant that, in *Cleland's case*, the Victorian police were waiting for the arrival of South Australian detectives for some hours. The Crown conceded in that case that, after about four and a half hours, the detention was unlawful as being in breach of s460. None of the High Court judges, who ultimately heard the case, seemed to consider that the concession was inappropriate.

In *Ireland's case*, Barwick CJ, said, at p335:

> **[291]** "Whenever such unlawfulness or unfairness appears, the judge has a discretion to reject the evidence. He must consider its exercise. In the exercise of it, the competing public requirements must be considered and weighed against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand there is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion."

The unlawfulness in the present case is not merely technical or insignificant (cf: *R v Curran and Torney* [1983] VicRp 77; [1983] 2 VR 133; (1983) 50 ALR 745). It relates to a breach of a fundamental right, guaranteed by Statute, to every citizen not to be wrongfully detained by the police. In the exercise of my discretion on this basis, I take into account the conduct and attitude of the police as well as the age and limitations of the accused, as forming the setting in which the unlawful conduct occurred. I find that there has been a flagrant disregard of the rights of the accused, Larson. In my view, if the principles of public policy underlying the exercise of this discretion are to be given any meaning in practice, the balancing of them must result in the exercise of my discretion in this case by excluding the evidence sought to be led.

Solicitor for the Crown: D Yeaman, Crown Solicitor.
Solicitor for the accused, Larson and Lee: J Gardiner, Legal Aid Commission.
