

11/00; [2000] VSC 242

**SUPREME COURT OF VICTORIA**

***R v TRUONG HONG PHUC & ANOR***

**Vincent J**

**1 February, 16 June 2000**

**EVIDENCE – ADMISSIBILITY OF DNA EVIDENCE – DISCARDED CIGARETTE BUTTS – SAMPLES OBTAINED OUTSIDE VICTORIA – WHETHER SAMPLES COULD BE CLASSIFIED AS "INTIMATE" OR "NON-INTIMATE" – MEANING OF – WHETHER PROVISIONS OF S464 *CRIMES ACT* 1958 APPLY TO SAMPLES OBTAINED OUTSIDE VICTORIA – WHETHER EVIDENCE ADMISSIBLE: *CRIMES ACT* 1958, S464.**

1. In relation to the obtaining of samples pursuant to s464 of the *Crimes Act* 1958 ('Act'), whether the sample is classified as intimate or non-intimate, it is fairly clear that the provisions contemplate some physical touching or interference with the body of the suspect in order to obtain it. The collection of a discarded cigarette butt or the collection of an item of clothing known to be worn by the suspect would not attract their operation.

2. The provisions of S464 of the Act contemplate the availability of a procedure whereby an application may be made to a magistrate in Victoria for an appropriate order. The section does not operate in circumstances where suspects are in custody in other jurisdictions or where investigations are being conducted overseas.

3. However, whilst the provisions of s464 may not be applicable by reason of the fact that the investigation was pursued outside Victoria or that the sample was obtained from a witness rather than the accused, the admission of the evidence may be justified in the circumstances.

**VINCENT J:**

1. Prior to the empanelment of the jury, Mr Morrissey of counsel who appears on behalf of the accused Truong Hong Phuc objected to the introduction of evidence of the obtaining of samples of the DNA of two persons alleged to have been implicated in the kidnapping of the deceased, on the basis that, in each case, the admission of the evidence concerned would be contrary to provisions of s464 of the *Crimes Act* and important principles of public policy.

2. The questions arise against the following evidentiary background.

3. As I understand the position, it will be asserted by the prosecution that, very shortly after the deceased, Le Anh Tuan, was forced by three men into the boot of a motor vehicle in Regal Court, Glen Waverley, on 29 April 1996, a baseball cap was found outside the premises from which he had been abducted. On examination of this item, forensic scientists located the DNA of one or more unidentified individuals

4. Investigating police formed the suspicion that two of the abductors may have been a man, named Bui Tai Huu, and his brother, Bui Quang Thuan, both of whom had entered Australia shortly prior to the kidnapping and appeared to be associated with the main suspect, the accused Truong Hong Phuc. Not surprisingly, they were desirous of obtaining DNA samples from each of those individuals for comparison purposes. However, neither of the men was still in this country.

5. Bui Quang Thuan was eventually located in the United States. It appears to be clear and understandable that neither the police nor Mr Rapke, the senior prosecutor who was then consulted, considered that there was enough evidence to justify the commencement of extradition proceedings and not surprisingly, the investigators were reluctant at that point in their enquiries, which were by no means complete, to alert this suspect and possibly others, yet unidentified, who may have been implicated. The point should also be made, in this context, that the whereabouts of Bui Tai Huu were unknown at that time and the police were concerned that he might disappear completely if he became aware of their interest in him.

6. Consideration was given as to the appropriate course to adopt in that situation. This involved attention being given to a range of issues. They included questions related to the successful investigation of the circumstances surrounding the kidnapping and apparent murder of the deceased, the requirements of Victorian law with respect to the admissibility of any evidence that may be obtained, and also to the necessity for proper compliance with the law of the jurisdiction within which any evidence was acquired. The last consideration would, it was considered, be a matter of great significance if a later attempt to secure the extradition of the suspect was to be made.

7. Detective Sergeant Tragardh, whose evidence on the *voir dire* I accept, indicated that serious attempts were made to accommodate these various concerns in a proper and appropriate fashion. The investigators sought and acted, as they properly considered that they were obliged upon the legal advice given to them.

8. The suspect, Bui Quang Thuan, was interviewed in the United States by local police members in relation to a matter falling within their jurisdiction. No argument has been advanced on behalf of the accused that this interview was a sham or that the process itself was contaminated in some way. The suspect was permitted to smoke cigarettes during the interview. It has not been suggested that he was either requested or compelled to do so. At the conclusion of the process, his discarded cigarette butts were collected and sent for examination. DNA was detected and a profile prepared.

9. It appears that the possibility that Bui Quang Thuan could have been placed under surveillance and any discarded cigarette butts, or other items that he may have handled, subsequently collected was considered but discarded for a number of practical reasons, including problems which were foreseen with respect to the proof of the possession by him of any item collected and the establishment that any DNA located was his. It was indicated to the Victorian police members that the procedure, which was adopted, complied with the local law under which discarded cigarette butts were treated as abandoned articles. There would, accordingly, be no infringement of an individual's rights in collecting them. In this context, I should add that Detective Sergeant Tragardh indicated that, in the event that Bui Quang Thuan was extradited to Victoria, it was contemplated that, in order to avoid any dispute arising with respect to the admissibility of the evidence in proceedings against him, an application for a sample to be secured in accordance with Victorian requirements would have been made.

10. I think that I should here set out some relevant passages from the evidence of Detective Sergeant Tragardh.

"If I could hand you a further document. (Handed to witness:). What is that document that I have just handed to you?---That is an Australian Federal Police protected minute addressed to Detective Senior Sergeant Maher from senior liaison officer Shane Castles from Los Angeles, dated 11 June, 1997. If you could turn to the last page. Was that faxed on 12 June of 1997?

---It was faxed from Canberra on the 12th June 1997.

What is your understanding of that letter?---Basically sets out from the United States that they were notified by Detective Senior Inspector Rod Collins from the office Homicide Squad that request they proceed with the covert collection of DNA samples from Bui Quang Thuan in the absence of his brother. It gives 3 options that Shane Castles presents as possible ways to obtain the samples from the suspect.

All right. If you could just briefly describe what each of the options was?---One was to anticipate the suspect will return to his home in San Francisco at the conclusion of summer school in July and proceed with voluntarily attendance at the Emeryville police station and provide a statement. A second option was within the next four weeks in which the services of a local Police Department in (indistinct) Long Beach devise another scenario for the covert collection of DNA samples in line with the present circumstances and proceed accordingly. And number 3 which was the preferred option, was to continue with the current plan which will involve the travel of both an Emeryville PD and Oakland PD officer to Los Angeles with as soon as possible interview the suspect regarding a card club incident and achieve the other result.

Why do you say the option 3 was the preferred option?---Because they had a legitimate reason to interview him and I believe that that was the option that was - was most appropriate in terms of resources, time and it was a legal way to obtain samples.

And was that the option recommended by Shane Castles?---Yes, it was"

"Okay. All right. So option 3 was carried out. Could you advise the court how option 3 was carried out, what was done in relation to collecting the samples?---Well, as discussed in that, the previous minute, an officer from the Oakland Police Department by the name of Zbigniew Hojlo travelled to Los

Angeles with another policeman from Emeryville Police Department by the name of Frank Sierras, they met with the suspect at Long Beach college where he was studying and they spoke to him in an interview room or a room that was allocated by the security staff there at the college and they had an interview with him in relation to his involvement into a matter in the San Francisco area and he was permitted to smoke during that interview, and at the conclusion of that interview the cigarette butts were photographed in situ and then collected and labelled and several days later one of the police officers travelled to Australia with those cigarette butts".

"Did you at any stage contemplate using the forensic evidence provisions of the Victoria Evidence Act?---Yes, we did.

Was the result of those contemplations?---All my inquiries in relation to the forensic procedures legislation led me to the office of Public Prosecutions, the Federal Attorney General's Department, and the relevant authorities in the United States and I was told that they didn't apply. Were there any other options for obtaining the sample of DNA from Bui Quang Thuan considered?---Yes, we considered obtaining a court order.

Court order from where?---From the United States. And to do that we would require a mutual legal assistance treaty between the Australian government and United States government which would take time. And the other problem with that would alert the suspect as to his interest by the Australian law enforcement bodies.

When determining the best method by which to obtain the DNA samples from Bui Quang Thuan, what were your primary concerns? ---Primary concerns were to the admissibility of the evidence in the United States and in this court, Victoria, and also to ensure that they obtained so virtually not to alert the suspect.

Did you at any stage regard the method ultimately used to obtain the DNA samples from Bui Quang Thuan as being improper or illegal?---No."

"Had either of the Buis been in the jurisdiction, what procedure would you have followed?---I would have followed the local legislation in Victoria as I did with Le Than Long."

"Very well. At all times it was proposed to use this evidence on the trial of Bui Quang Thuan if he was brought back?---Yes

Did you have in mind if he was brought back, to make a formal request of the type that you made to Mr Long?---That is what we intended to do."

11. The other man, Bui Tai Huu, was located, at a later time, in Vietnam. He was known to be in Ho Chi Minh City from at least, September 1998. However, there was no extradition treaty in force between Australia and Vietnam and a delay of almost a year elapsed before Victorian police members were able to obtain permission from the Vietnamese authorities to interview him. He had, it seems, indicated preparedness to provide some co-operation to the police by that time.

12. An interview with this suspect was conducted in a prison in Vietnam by Australian police members. He also was permitted to smoke cigarettes. Again, cigarette butts discarded by him were collected. They were subsequently examined and DNA was found and profiled. Detective Sergeant Tragardh put the situation as follows in his evidence in chief.

"As far as obtaining DNA samples from Bui Tai Huu, did you make inquiries as to the most appropriate method?---Yes.

Who did you make those inquiries from?---Liaison officer Lauri Gray, who is an Australian Federal Police liaison officer in Hanoi, and the Office of Public Prosecutions in Victoria.

Who did you speak to at the Office of Public Prosecutions?---Mr Jeremy Rapke and Mr Bruce Gardner. What was the advice that they gave you?---This was similar to the United States whereas we were reliant upon the jurisdiction in Vietnam.

Now, did the situation that existed between Australia and Vietnam at this time, influence your decision in any way as to the manner of proceeding in Vietnam when you were over there?---We were very much bound by the Vietnamese authorities. We basically had to do what they told us. For example, when we were interviewing the suspect or prisoner, to interview the suspect we were given strict guidelines as to the time that was permitted, the manner that the interview was to be conducted and there was strict guidelines the whole way so everything over there was reliant upon advice from the Vietnamese authorities.

Can you describe what happened when you went over to Vietnam and met with Bui Tai Huu?---I met him in an interview room, for want of a better word, and he was introduced to me, and the other police that were present. We conducted an interview with him. Halfway through that interview the interview was suspended and Bui Tai Huu was returned to his cell where he had lunch. A couple of hours later we returned to the interview room and resumed the interview. At the conclusion of the interview, he was taken to another room next door, and we left the - as we left the gaol, and he was in the custody of the Vietnamese police, and he was searched, removed to his cell, and we returned to the interview room where he was searched and located cigarette butts from the floor of that interview room."

13. Counsel for the accused Phuc submitted that the obtaining of DNA samples from each of the two men contravened the provisions of s464Z of the *Crimes Act*. It was pointed out that neither was informed that the cigarette butts would be collected and tested. In neither case was the consent of the individual obtained to the collection of the sample, and in neither case was an order of a Magistrate secured for the taking of a sample in the absence of consent, although I do not understand counsel to have been contending that the obtaining of such an order was possible in either situation.

14. The section constitutes, it was asserted, a code which determines the admissibility of such evidence and is applicable wherever the sample is obtained. The question which is presented on this basis, it was argued, is whether the tests of admissibility under Victorian law have been met in a proceeding before a Victorian court. No authority was cited in support of this proposition.

15. In my opinion the argument is misconceived. I do not consider that it is necessary to set out the numerous obstacles lying in the path of its acceptance. It is sufficient to state that it is evident upon even the most casual perusal of the various provisions and subject matters encompassed by s464 that it was designed and intended to address certain investigative processes undertaken within this jurisdiction and the use of evidence so obtained in the trial of the person subject to them.

16. In my opinion, the collection of a discarded cigarette butt in an interview room in the United States or from the floor of a similar room in Ho Chi Minh City does not constitute the taking of a non-intimate sample within the meaning of s464Z. Whether the sample is classified as intimate or non-intimate, it is fairly clear, in my view, that the provisions contemplate some physical touching or interference with the body of the suspect in order to obtain it. The collection of a discarded cigarette butt or the collection of an item of clothing known to be worn by the suspect would not attract their operation. Further, the relevant provisions contained in s464 clearly contemplate the availability of a procedure, that is, an application to a Magistrate in Victoria for an appropriate order, in the event of a refusal to supply such a sample. The section was obviously never intended to operate in the circumstances presently under consideration and there is no basis upon which properly interpreted it could be seen to have this effect. Finally, it must also be borne in mind that neither of the individuals whose discarded cigarette butts were collected is presently on trial before this Court. The admissibility of any sample taken or obtained would not be dependent upon the operation of s464 in any event.

17. The legislature in enacting s464 has put in place a carefully crafted set of provisions designed to facilitate the conduct of the proper investigation of serious matters, to avoid abuse and allegations of abuse of power by investigators in the various sub-sections encompassed by it and to enable what may be extremely important evidence to be obtained whilst still respecting the rights and personal dignity of the suspected person. Many of its provisions would be either meaningless or incapable of application if the legislature intended that it would operate in circumstances where suspects were in custody in other jurisdictions or where investigations were being conducted overseas.

18. This does not mean that, simply because the statutory provisions may not be applicable by reason of the fact that the investigations are being pursued outside this jurisdiction, or that the sample is obtained from a witness rather than the accused, the principles upon which s464 is based may be ignored. As the Court of Criminal Appeal remarked in the quite different context of the admissibility of confessional evidence in *R v Warrell* [1993] VicRp 48; [1993] 1 VR 671 at 681:

"These concepts of voluntariness, fairness, and public policy are integral to the operation of our criminal justice system. They are designed to ensure that any finding of guilt arrived at, on the basis of confessional evidence, is not only reliable but that the evidence itself has been obtained in a socially acceptable fashion. It is important to keep in mind, in this context, that they are concerned not only with the recognition and protection of the rights of those who may be suspected of the commission of criminal offences, but that any such finding is not surrounded by an aura of possible injustice which compromises both the system and the society which supports it." (per Phillips CJ, Hampel and Vincent JJ)

19. A trial Judge must remain conscious, when considering the admissibility of evidence of

the kind encompassed by s464, of the same fundamental principles of fairness and public policy as those to which the Court there referred, acknowledging that they must govern the conduct of all our criminal trials.

20. Bearing those considerations in mind, and whether or not I am correct in my view of the interpretation and area of operation of the relevant provisions of s464, the situation with which the investigating police members were confronted must be regarded as exceptional and their responses to it were, in my opinion, considered and reasonable. There has been no suggestion of any abuse of power by them or other public policy consideration advanced which would militate against the admission of the evidence nor is there any basis for the exclusion of the evidence on the basis of its unreliability or unfairness to the accused in the circumstances. The admission of the evidence would clearly be justified in the circumstances.

**APPEARANCES:** For the Prosecution: Mr G Hicks, Mr A Moore and Ms K Judd, counsel. Office of Public Prosecutions. For the accused Phuc: Mr P Morrissey, counsel. Clarebrough Pica, solicitors. For the accused Van: Mr S Langslow, counsel. Stary George Myall, solicitors.

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