03/81

SUPREME COURT OF QUEENSLAND

DANSIE v KELLY: ex parte DANSIE

Dunn J

11 September 1980 — [1981] Qd R 1; noted 56 ALJ 247

PROCEDURE – MOTOR VEHICLE ACCIDENT – DRIVER TAKEN TO POLICE STATION - DRIVER DENIED BEING DRIVER OF VEHICLE AND SAID HIS GIRLFRIEND WAS THE DRIVER – DRIVER'S GIRLFRIEND DENIED THE ALLEGATION – DRIVER THEN ADMITTED HE WAS THE DRIVER – DRIVER NOT CAUTIONED BY POLICE OFFICER – CHARGED WITH OFFENCE – CHARGE DISMISSED BY MAGISTRATE ON GROUND THAT DRIVER NOT CAUTIONED – EVIDENCE OF ADMISSION OF DRIVER EXCLUDED – WHETHER MAGISTRATE IN ERROR.

1. Whilst the magistrate regarded the breach of the Judges' Rules as enlivening his discretion to exclude the evidence of admissions, the magistrate was in error in not directing his mind to the question whether the questioning at the police station was unfair or otherwise improper.

2. Having regard to all the circumstances, the magistrate was in error in rejecting the evidence of the driver's admission that he was driving the motor vehicle at the relevant time.

The driver was seen to leave the scene of a single car accident. His description was given to police who located him 1 hour 10 minutes later in the street where defendant admitted he had been driving when the accident occurred. He underwent a preliminary breath test and was then requested to come to the police station for a breathalyser test. At the police station he denied he had driven the car and claimed that his girl friend had been the driver. She was then asked to the police station where she strongly denied the allegations in front of the defendant. Defendant then admitted he was the driver and he made a short statement to that effect. His admissions formed the only evidence of "driving".

The Magistrate found that the defendant was obviously in custody at the police station and that no caution had been given to him before he made his admissions there. In particular the Magistrate noted three salient points at which no warnings were given; viz;

> 1. The defendant was not informed he was not required to answer any further questions;
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> 2. He was not told that he was not obliged to be confronted by his fiancee; and
>
> 3. He was not told that he was not required to answer the further questions after the breathalyser had been brought into operation ...

The Magistrate then used his discretion to exclude the evidence of admissions made at the police station and concluded that was the end of the matter and the charges were dismissed. On review, the finding of the court delivered by Dunn J reads in part:

DUNN J: It is in my opinion clear from a perusal of the reasons given by the magistrate that he was of the opinion that, by virtue of the fact the respondent had not been given the usual warning at the police station, he had a discretion to exclude the evidence of the admissions which he was alleged to have made whilst he was there. Counsel for the respondent argued that the magistrate really meant much more than this – that he meant to convey that he had formed the opinion that the "confrontation" and subsequent questioning were, in all the circumstances, unfair and improper; and that the evidence had been excluded because it had been obtained by conduct of which the prosecution ought not to take advantage.

It was pointed out that this Court ordinarily construes *ex tempore* judgments of magistrates benevolently rather than critically, making fair allowance for pressure of work and the problems associated with the recording of reasons, especially in country centres. I agree that the Court

should not be pedantic and should be prepared to make fair implications. In this case, however, it is in my opinion impossible to imply a finding of unfairness or impropriety into the reasons, reading them as a whole and having due regard to the commendatory tone of the reference to the "decent" qualities of the appellant. My opinion is that the magistrate regarded the breach of the Judges' Rules as a matter which – standing alone – enlivened his discretion to exclude the evidence, and that he did not direct his mind to the question whether the questioning at the police station was unfair or otherwise improper.

It follows, in my opinion, that the magistrate misdirected himself with respect to the exercise of his discretionary power. This is made clear by reference to two passages in the joint judgment of five Justices of the High Court in *R v Lee* [1950] HCA 25; (1950) 82 CLR 133, p154; [1950] ALR 517. The first passage reads as follows:-

> "With regard to the Chief Commissioner's Standing Orders, which correspond in Victoria to the Judges' Rules in England, 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." (My emphases).

The second passage reads thus:-

> "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 against the accused."

Their Honours also quoted with approval a passage from the judgment of Street J (as he then was) in *R v Jeffries* [1946] NSWStRp 54; (1947) 47 SR (NSW) 284; 64 WN (NSW) 71, as follows:-

> '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."

I shall refer to one more case, *R v Voisin* (1918) 1 KB 531; [1918-19] All ER 491. That was a case in which the Court of Criminal Appeal held admissible a written statement which was voluntarily made by the appellant at a police station, notwithstanding that he had not been cautioned. I quote from the judgment of the court (at p539):-

> "The question as to whether a person has been duly cautioned before the statement was made is one of the circumstances that must be taken into consideration, but this is a circumstance upon which the judge should exercise his discretion. It cannot be said as a matter of law that the absence of a caution makes the statement inadmissible; it may tend to show that the person was not upon his guard as to the importance of what he was saying or as to its bearing on some charge of which he has not been informed. In this case the prisoner wrote these words quite voluntarily ... It is desirable in the interests of the community that investigations into crime should not be cramped."

Counsel for the appellant in this case urged the Court to exercise its own discretion in substitution for that of the magistrate; it is clear that we may do this if we have the materials for doing so. See *House v R* [1936] HCA 40; (1936) 55 CLR 499, at p505; 9 ABC 117; (1936) 10 ALJR 202. In my opinion, we have those materials.

We have before us the whole of the evidence of the appellant, and the magistrate's recorded reaction to that officer, whom he saw and heard; that reaction precludes us from supposing that there was entrapment or deliberate unfairness or extortion of admissions with a view to securing

convictions. There is nothing in the case to suggest that the respondent was not upon his guard as to the importance of what he said or wrote; the circumstances were such that he must have been upon his guard. There is nothing to suggest that his answers to questions were not voluntary in the relevant sense. There is no evidence that the respondent's fiancee was improperly persuaded to deny, in his presence, that she had driven the car on the night in question. There is no evidence that, after expressing a wish to speak through a legal representative, he was denied contact with a solicitor or induced to make the written statement. And the evidence was that his injuries were superficial and in no way incapacitating. In the circumstances, in my opinion, the Stipendiary Magistrate should have admitted the evidence which he rejected.
