19/84

SUPREME COURT OF VICTORIA

MURRAY v SPOLJARIC

Crockett J

23 May 1984

EVIDENCE – PRIVILEGE AGAINST SELF-INCRIMINATION – EXTENT OF WITNESS' PRIVILEGE – WHETHER COMMON LAW RULE APPLIES OR PRIVILEGE LIMITED TO CHARGES OF TREASON OR OF INDICTABLE NATURE: *EVIDENCE ACT* 1958, SS26, 29.

S. was charged with offences of living off the earnings of prostitution and assisting in the management of a brothel. As part of the prosecution case, two 16-year old female prostitutes were called as witnesses; however, when they were questioned about their activities at their place of employment, the Magistrate warned them that they could refuse to answer those questions on the ground that their answers might incriminate them. Accordingly, the witnesses declined to answer the questions, and upon a submission of 'no case', the charges were dismissed. On order nisi to review—

HELD: Order absolute.
(1) The common law rule relating to privilege against self-incrimination for "any criminal charge" has been qualified by the provisions of s29 of the *Evidence Act* 1958.

(2) Notwithstanding the immunity concerning the testimonial non-compellability of a witness to answer any question tending to criminate himself as contained in s26 of the *Evidence Act* 1958, privilege in a witness can exist only if the court is of opinion that the answer to the question asked will tend to subject such witness to punishment for treason or for an indictable offence.

(3) As there was nothing in the questions asked which would provide reasonable ground to apprehend danger to either of the witnesses from her answer that she might be exposed to the risk of being charged with treason or an indictable offence, the Magistrate was in error in the ruling he gave.

CROCKETT J: **[1]** The principal point in contest in each of these orders to review was, and in my view, despite the wide ranging submissions of the respondent's counsel, remains, a short one. It has arisen in the following circumstances: The respondent was charged on information with offences under section 10(1) and 11(1) of the *Vagrancy Act* 1966. Those offences are "living **[2]** on the earnings of prostitution" and "assisting in the management of a brothel at 476 St. Kilda Road, South Melbourne" respectively.

The informations were heard in the Magistrates' Court at Melbourne. Material before the Court makes it plain that the prosecution case in relation to each offence rested for its success on the evidence of two 16 year old female prostitutes. Each was called to testify. The first girl, after giving formal evidence and stating her age, described the circumstances in which she had gained employment at premises at 476 St. Kilda Road, South Melbourne. She said that she worked at those premises as a prostitute. The senior sergeant of police who was prosecuting then announced to the court in response to a question put to him by the Stipendiary Magistrate, that the witness had not been charged with any offence nor had she been the subject of a "care application" in connection with her activities at the place of her employment. The Stipendiary Magistrate then said that because of the girl's age he intended "to warn her that she could refuse to answer any question that would lead to her being charged with any offence". The prosecutor submitted that the claim of privilege against self-incrimination arose only where the evidence could lead to the witness's being charged with an indictable offence. The ruling of the Magistrate on this submission was in these terms:

> "No Sergeant, it is for any serious offence and I consider these matters serious offence. Prostitution offences and offences that follow from prostitution carry gaol sentences and I consider them serious."

Following upon this ruling the witness was asked what she did at the premises. The Magistrate immediately interjected to say to the witness that before she answered the question

she should **[3]** know that she need not do so if she so wished. The witness thereupon said that she did not want to answer. The next question was one as to with whom it was that she had had dealings whilst she was on the premises. Once more the Magistrate told her she need not answer if she wished not to do so. The witness thereupon elected not to answer.

The second witness gave similar evidence and after stating that she worked at the same premises as a prostitute the Magistrate advised her of her right to refuse to answer any question that might incriminate her. The warning given was in terms similar to those he employed with regard to the previous witness. The result was that, when asked what she did at the premises and with whom she dealt there, she declined to answer in each instance. Similarly, when asked as to what activities she performed with clients at the premises, upon being warned that she need not answer she chose not to do so.

The remaining testimony consisted of some inconclusive evidence from a witness employed as a receptionist at the premises and evidence of a police interrogation of the respondent who apparently had been found on the premises. No evidence capable of being construed as an admission of complicity in either of the offences charged emerged from this interrogation. Accordingly, at the close of the prosecution case counsel for the respondent was successful in his submission that there was no case to answer in relation to each of the offences charged. Both were thereupon dismissed. In each case the informant obtained an order nisi to review the orders of dismissal on the grounds–

> "That the learned Stipendiary Magistrate misdirected himself as to the proper interpretation to be placed on section 29 of the *Evidence Act* 1958 in –
> **[4]** (a) (i) Each ruling by him that the witness Vanessa Louise Harris was entitled to refuse to answer the questions put to her by the Prosecutor, Senior Sergeant John James Ryan;
> (ii) Each ruling by him that the witness Christine Hawkins was entitled to refuse to answer the questions put to her by the Prosecutor, Senior Sergeant John James Ryan;
>
> (b) (i) Failing to direct the witness Vanessa Louise Harris to answer the questions put to her by the Prosecutor, Senior Sergeant John James Ryan;
> (ii) Failing to direct that the witness Christine Hawkins answer the questions put to her by the Prosecutor, Senior Sergeant John James Ryan."

I construe these grounds as requiring determination of the question whether, although section 29 of the *Evidence Act* 1958 was at no time specifically referred to in the course of the proceedings in the Court below, by reason of that section there was in the circumstances any privilege from answering questions to which either of the witnesses had a right. It was contended for the applicant that the common law principle has been qualified by the provisions of section 29 of the *Evidence Act* 1958 so as to limit the privilege to cases wherein the Court is of opinion that the answer will tend to subject the witness to punishment for an indictable offence. That section as amended by the *Crimes (Classification of Offences) Act* 1981 reads:

> "No witness shall on the trial of any issue joined or of any matter or question or on any inquiry arising in any suit action or proceeding whether civil or criminal be permitted to refuse to answer any question which is relevant and material to the matter in issue on the ground that the answer may expose him to any penalty or forfeiture or may disgrace or incriminate himself unless the Court or person having by law or by consent of parties authority to hear receive and examine evidence is of opinion the answer will tend to subject such witness to punishment for treason or an indictable offence."

[5] The common law rule relating to privilege against self-incrimination was described by Lord Goddard CJ in *Blunt v Park Lane Hotel Ltd* [1942] 2 KB 253 at 257 in these words:

> "The rule is that no one is bound to answer any question if the answer thereto would, in the opinion of the judge, have a tendency to expose the deponent to any criminal charge penalty or forfeiture which the judge regards as reasonably likely to be preferred or sued for."

For the respondent it was said that in relation to criminal proceedings section 29 has not served to abrogate the common law principle and that it has been expressly preserved by provisions in section 26 of the *Evidence Act* 1958. That section states:

> "Nothing herein contained shall render any person who in any criminal proceedings is charged with the commission of any indictable offence or any offence punishable on summary conviction

> competent or compellable to give evidence of or against himself; or (except as hereinafter mentioned) shall render any person compellable to answer any question tending to criminate himself, or shall in any criminal proceeding render any husband or former husband competent to compellable to give evidence for or against his wife or former wife competent or compellable to give evidence for or against her husband or former husband: Provided that nothing in this section shall affect or limit the provisions of the *Crimes Act* 1958 whereby in the circumstances there set out a person charged or his wife or former wife or her husband or former husband (as the case may be) may be called as a witness in a criminal proceeding."

Two considerations suggest themselves immediately. The first is that, no matter which of the rival contentions in relation to the primary question is correct, the Magistrate would appear to have applied the wrong test for determining whether it was appropriate for him to give to each of the witnesses the warning that he did. The matter has been debated before me on the basis that, either the common law rule that an answer need not be given by a witness to a question which has "a tendency to expose the deponent to any criminal charge" is **[6]** the correct test or, on the other hand, the test is that such immunity arises only if an answer to the question has a tendency to expose the deponent to a charge for an indictable offence. If the choice to be made is between these two tests then, as the Magistrate selected neither, the course he adopted was incorrect.

The other matter is this. Although the Judge is not obliged to warn a witness he is, of course, free to do so if he thinks the question asked is incriminating. Particularly might he do so if he considers that the witness is ignorant of his rights. In the present case, if the Magistrate did believe that either of the witnesses was in danger from prosecution if required to provide a self-incriminating answer in circumstances giving rise to a privilege then it was doubtless appropriate that he warn the witness that she need not provide such an answer. However, before determining that the witness was not obliged to answer any question put to her the Magistrate had first to determine whether, if the question were answered, the answer would have "a tendency to expose the witness to risk of the preferment of a criminal charge against her". The Magistrate was thus obliged to determine from the circumstances of the case and the nature of the evidence which the witness was called upon to give whether there was reasonable ground to apprehend danger to the witness from her answer. He had therefore to determine whether on its face the question was in the relevant sense incriminating, or, if not, whether the question sought material which might form a link in a chain of incriminating material.

In these circumstances it would be for the witness raising the privilege to point to material which indicated the incriminating character of the evidence sought by the questioner. See *R v Boyes* [1861] EngR 626; 121 ER 730; (1861) 1 B & S 311 and *Gamble v Jackson* [1983] VicRp 93; [1983] 2 VR 334. There would appear to **[7]** to be much to be said for the view that the questions asked, and as to which the Magistrate invited the witness not to answer if she wished not to do so, were not on their face seeking answers that were self-incriminating. On the other hand if it were to be said that such questions were seeking information that might form a link in a chain of incriminating material the Magistrate did not, as he should have done, require the witness to point to such material.

However, in respect of neither of these matters was a review of the Magistrate's ruling sought. Nor do I think that the grounds on which the orders nisi were granted are expressed with sufficient amplitude to permit this Court now to consider such questions. The primary question was argued on an assumption that the relevant questions if answered would reveal material that would be incriminating in the sense that it would have had a tendency to expose the witness to the risk of some criminal charge. The principal point for determination was, thus, whether the criminal charge to which the witness might by her answer have been exposed and in respect of which she was entitled to avoid incriminating herself was any criminal charge" or "an indictable offence".

The argument for the respondent was that section 26, which relates only to criminal proceedings, contains a number of discrete immunities relating to testimonial non-compellability. One of those immunities is that which is expressed in the words "Nothing herein contained ... (except as hereinafter mentioned) shall render any person compellable to answer any question tending to criminate himself..." It was said that the exception refers only to the proviso to the section which exempts from the operation of the non-compellability provisions the relevant provisions

of the *Crimes Act* 1958. It was further said that the exception is not to be construed as being a reference **[8]** to section 29. In addition to contending that this was the natural construction of the terms of the section, it was said that, if section 29 were intended to be excepted from the operation of that part of section 26 to which I have referred, one would have expected the exception to be expressed in such words as "except as hereinafter referred to in this Division" or some such-like expression.

An additional argument relied upon by the respondent was to the effect that a statutory provision said to be capable of changing a long established common law right should be interpreted as not intending any such change unless the intention of the legislature to that effect appears explicitly. It was said that this section 29 when read with section 26 does not do. It was further contended that this argument gained some support from the fact that the *Crimes (Classification of Offences) Act* 1981 took occasion to substitute for the words "felony or misdemeanour" in section 29 the words "or an indictable offence" but did not introduce any such words into section 26. It was argued that, by choosing not so to amend section 26, the legislature was thereby indicating that it was not intending to remove a witness's basic common law right not to answer any question that might tend to incriminate him even though the offence for which he might be so incriminated was something less than an indictable offence.

In my view this is not the correct interpretation to be placed upon section 26. In the first place, if all that section 26 required to be excepted was that to be found in the proviso then the words in brackets are unnecessary. As they do appear, a meaning has to be ascribed to them. The only possible meaning is that they are designed to have the relevant provision of section 26 read subject to the terms of section 29. Then, again, **[9]** as the relevant exemption in section 26, at least so far as it applies to criminal proceedings, is greater than that provided by section 29, if the exception did not extend to section 29 then that section, at least in its application in criminal proceedings, would appear to be completely superfluous.

It is true that the two sections cannot be read together particularly harmoniously, but any construction that would provide that much of section 29 was, in effect, inoperative is one to be avoided if possible. However, apart from these considerations, I think that an examination of the history of the two sections disposes of any doubt that the construction for which the respondent contends is incorrect. Section 26 derives from the English *Evidence Act* of 1851. There was then no proviso to the section. The reason is plain. An accused could not then testify at his trial. When he was permitted to give evidence it became necessary to enact the exception now to be found in the proviso. In England there is no section the equivalent of section 29 of the Victorian *Evidence Act*. Accordingly, there was no necessity to include in section 26 of the English Act the words in brackets. Nor has that section in the English Act ever included the bracketed words. They became necessary only upon the enactment of section 29.

The fact is that by the *Law of Evidence Consolidated Act* 1857, which enacted section 29 for the first time, at the same time introduced the words in brackets into section 26. This history of the legislation makes it plain beyond any doubt that, whatever is the immunity that is provided by the provision in section 26 immediately following the bracketed words, it is an immunity qualified by section 29. Accordingly, the privilege in a witness can exist only if the court is of opinion that the answer to the question asked will **[10]** tend to subject such witness to punishment for treason or for an indictable offence.

However, the respondent relied on two further arguments in an attempt to support the course which was taken in the Magistrates' Court. The first of such arguments was that, notwithstanding the definition of "indictable offence" to be found in section 322C(5) of the *Crimes Act* 1958 as amended by the *Crimes (Classification of Offences) Act* 1981, it can be said that the Magistrate was free to treat the term as meaning in the context in which it appears no more than a serious offence. At common law indictable crimes, apart from treason, were classified either as felonies or misdemeanours. As such they were tried on indictment. That is to say, trial took place before a jury. Non-indictable offences were known as summary offences. The *Crimes (Classification of Offences) Act* 1981 abolished the distinction between felonies and misdemeanours.

It was pointed out that, to enable the preservation of the operation of certain rules of law that depended upon the distinction, a number of offences is now statutorily prescribed as "serious

indictable offences" and that the expression "serious offence" is therefore known to and recognised in the law as a term capable of possessing special significance. The respondent's counsel cited no authority for his submission but, in fact, some indirect support for it might be thought to be found in a decision of the Divisional Court in *Pickup v Dental Board of the United Kingdom* [1928] 2 KB 459. In that case it was held that the words in the *Dentists Act* 1878 "convicted ... of ... misdemeanour" referred to a conviction whether summary or an indictment for any offence less than felony and are not confined to convictions on indictment for misdemeanour.

However, the decision has not been followed in **[11]** this country. In *Reynolds v Stacy* [1957] HCA 9; (1956) 96 CLR 454; [1957] ALR 303 the High Court took a different view of a similar section in the *Medical Practitioners' Act* of New South Wales. The section provided that a complaint that a registered dentist had been convicted of a misdemeanour would require an investigation of such complaint. It was held that the expression "misdemeanour" as so used referred only to indictable offences and did not include summary offences. From the leading judgment of the Court delivered jointly by Dixon CJ and McTiernan J (wherein there is to be found a detailed description of the historical distinction between the various classes of criminal offence) it appears that misdemeanour could in certain circumstances bear a wider meaning so as to include summary offences, although its usual meaning was that of an indictable misdemeanour.

I think it is clear from the reasoning in that judgment that, whilst in some connotations the expression "misdemeanour" might include a summary offence, what is clear is that an indictable offence is one "triable in the King's courts only on a presentment of twelve men or more"; see p460. As the distinction between felony and misdemeanour no longer exists and, apart from treason, offences are either indictable offences or summary offences it would appear plain now that the punishment to which a witness may be exposed and in respect of which he is accordingly entitled to immunity is only that referable to an indictable offence in the sense that it is an offence triable by jury. Moreover, an offence which was formerly a misdemeanour, and which at common law is thus to be tried on indictment, does not cease to be properly classified as an indictable offence because under some special statutory provision it might be dealt with summarily: see p463 and cf. section 322C(5) of the *Crimes Act* 1958.

[12] The remaining contention upon which the respondent relied in order to support the course followed by the Magistrate was that, although he referred to the claim of privilege against self-incrimination as arising in the case of "serious offences" and not those limited by the requirement that they be indictable offences, the fact is that each of the witnesses was subject to the peril of self-incrimination in respect of an indictable offence if required to answer the questions put to her. If this should be so then, even though the Magistrate applied a wrong test, it was not such as to have caused the hearing to have miscarried. It is difficult to know what the indictable offence (or, I might add, even the summary offence) is with respect to which any answer each witness was asked to give might relate and in respect of which by the Magistrate's intervention each was released from the necessity of giving. Prostitution as such is not an offence. The *Summary Offences Act* 1966 makes it an offence either to solicit or loiter in a public place for the purposes of prostitution. The premises in which each of the witnesses was working would appear not to fall within the definition of "public place" to be found in the Act. In any event such an offence is not indictable.

It was said that, if called upon to answer the questions asked of them, the witnesses might be required to disclose material capable of incriminating them as accomplices in the sense that they were aiders and abettors of the commission of the offences either of living off the earnings of prostitution or managing or assisting to manage a brothel. However, these offences are summary offences and to act as an accomplice in regard to them would be to commit no more than a summary offence. It was suggested even that there was a tendency, by reason of answers should they be given to **[13]** the questions asked, to expose the witnesses to the risk of prosecution for any one or more of the offences created by those sections to be found in sub-divisions (8A), (86), (8D) and (8E) of Division 1 of Part 1 of the *Crimes Act* 1958 as amended by the *Crimes (Sexual Offences) Act* 1980. Those sub-divisions create offences – which admittedly are indictable – that are described as "Sexual Offences Against Young Persons", "Acts of Sexual Penetration with Intellectually Handicapped Persons", "Procuration, Abduction etc." and "Unnatural Offences" respectively.

In the first place, there is no reasonable ground for suggesting that any answer that might be given would reveal complicity in any of these offences. In the second place, those offences with which a witness by her answer might be expected to disclose a connection are those in which her responsibility could be only as an aider and abettor. But this is a technical and not criminal responsibility. It is impossible to say that the statutory provisions are intended to render criminally liable as aiders and abettors the very girls for whose protection they have been enacted if the offence was committed upon themselves. See *R v Tyrrell* [1894] 1 QB 710.

Finally, it was said that the answers might have a tendency to expose the witnesses to prosecution for the offence of criminal conspiracy. Such conspiracy might be either to commit a criminal offence or to do an act contrary to public morals or decency although that act itself might not be criminal if done by one person. However, the gist of the offence of conspiracy is the agreement of one person with one or more others to commit an act. In my view there was nothing in the questions asked which would provide reasonable ground to apprehend danger to either of the witnesses from her answer that she might be exposed to the risk of being charged with criminal conspiracy. After all, as is observed in *Cross on Evidence* 2nd Australian Ed, at p268:

> "The Judge must come to the conclusion that such danger is real and appreciable with reference to the ordinary operation of law in the ordinary course of things, not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency so improbable that no reasonable man would suffer it to influence his conduct."

I consider, therefore, that none of the respondent's arguments is sustainable and as the Stipendiary Magistrate was in error in the ruling he gave the order nisi must be made absolute. In each case the order of dismissal will be set aside and each information is remitted to the Magistrates' Court at Melbourne to be re-heard before a different Magistrate. The respondent is to pay the applicant's taxed costs including reserved costs in each case. Respondent granted a Certificate under the *Appeal Costs Fund Act*.
