06/92

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v POLLARD

Young CJ, Fullagar and JD Phillips JJ

19 August, 20 September 1991 — (1991) 56 A Crim R 171

CRIMINAL LAW – CONFESSIONS AND ADMISSIONS – MADE ON TAPED INTERVIEW – PREVIOUSLY QUESTIONED IN UNRECORDED INTERVIEW – WHETHER ADMISSIONS MADE DURING QUESTIONING – WHETHER QUESTIONING IS ONE AND INDIVISIBLE – RIGHTS OF PERSON IN CUSTODY TO COMMUNICATE WITH CERTAIN PERSONS – WHETHER PERSON IN CUSTODY INFORMED OF RIGHTS: *CRIMES ACT* 1958, SS464C, 464H.

Section 464C of the *Crimes Act* 1958 ('Act') provides, so far as relevant:

"(1) Before any questioning ... commences, an investigating official must inform the person in custody that he or she ... may communicate with ... a friend or relative ... or a legal practitioner ... and ... the investigating official must defer the questioning ... to enable the person to make ... the communication."
Section 464H of the Act provides, so far as relevant:

"(1) ... evidence of a confession or admission ... is inadmissible ... unless ... if the confession or admission was made during questioning at a place where facilities were available to conduct an interview, the questioning ... was tape recorded."

In an unrecorded interview, P., a suspect, was questioned at the Frankston CIB office concerning his involvement in the commission of an alleged offence. Whilst being conveyed to the St. Kilda Road Police Complex, P. volunteered an admission in the police car, and later at the Complex (after being informed of his rights to communicate with certain persons) made admissions in a video-tape recorded interview. Subsequently at the trial, it was submitted that the evidence of the admissions was inadmissible because it breached the provisions of the Act in that P. was not given an opportunity of exercising his rights and that the whole of the questioning of P. was not tape recorded. The trial judge ruled that the video tape was admissible. Upon application for leave to appeal against conviction—

HELD: Application dismissed.
1. The obligation to defer questioning arises when the person in custody indicates a wish to exercise the rights given by the Act. In the present case the language used by the investigating official indicated that P. had a present entitlement and that he could exercise any of those rights immediately. As P. gave no indication, there was no obligation to defer questioning and accordingly, there was no breach of s464C of the Act.

2. Whether a confession or admission is made "during questioning" is a question of fact in each case. In the present case, the questioning of P. was not one and indivisible, and it was open to the trial judge to conclude that the questioning of P. commenced at St. Kilda. As the questioning at St. Kilda was tape recorded, the admissions made were not inadmissible by virtue of s464H of the Act.

THE COURT: [1] This is an application for leave to appeal against conviction. The applicant was charged in the County Court with six counts of rape, one of attempted rape, one of causing injury intentionally, one of indecent assault and one of rape with aggravating circumstances. He pleaded not guilty to all charges. The jury by direction returned a verdict of not guilty on one count of rape and they also acquitted the applicant of two other counts of rape and of the count of causing serious injury intentionally. On the remaining counts the jury returned verdicts of guilty. The application for leave to appeal does not depend upon any close examination of the events giving rise to the charges and those events can therefore be stated briefly.

The offences were committed on the night of 23rd/24th January 1990. During the early evening of 23rd January the applicant met the prosecutrix at a caravan park where he had been drinking with friends. The applicant made advances to the prosecutrix and subsequently took her to a motel instead of to her home. The couple booked into the motel as man and wife and for about three hours after they arrived in the motel room they engaged in a variety of sexual practices which it is unnecessary to set out in any detail.

At the trial the applicant gave unsworn evidence during which he said that he believed that the prosecutrix consented to the various sexual acts which took place and thus the question whether she had in fact consented was the principal issue at the trial. **[2]** The applicant was arrested two days later, 26th January 1990, when he was intercepted by police on the road and taken to the Frankston C.I.B. office for questioning. The applicant denied at once that he had raped the prosecutrix but he did not deny that he had engaged in sexual activities with her.

The applicant was placed in an interview room at Frankston where he was told by police the substance of the statement which the prosecutrix had made. Some further questioning ensued but the conversation was not tape recorded and no evidence of it was led at the trial. The applicant was subsequently conveyed to the St. Kilda Road Police Complex. On the way the police discouraged the applicant from discussing the matter but not until after the applicant had said: "This shouldn't have happened" and when asked what he meant, he said: "This obsession, this thing in the back of my head. It possessed me. That's why I did those things with the girl." At the St. Kilda Road Complex an extensive interview was conducted which was recorded on video-tape. During that interview the applicant admitted most of the activities which the prosecutrix alleged but said that she was a willing partner.

At the trial counsel for the applicant sought to have the video-tape excluded from evidence on the ground that it was involuntarily obtained or alternatively that it should be excluded as a matter of discretion on the ground that it was unfairly obtained or that it would be unfair to admit it **[3]** against the applicant. It also seems to have been contended that the interview was illegally or improperly obtained. The learned trial judge heard evidence and considered these submissions on the *voir dire* after which his Honour ruled that the video tape was admissible. The application for leave to appeal challenges certain parts of His Honour's reasons for admitting the tape. The applicant supported by argument and relied upon only one ground of appeal which read:

> "(1) The Learned Trial Judge should have refused to admit into evidence the video taped interview with the Applicant on the following grounds:
>
> (a) Its admission was contrary to section 464H *Crimes Act* 1958.
>
> (b) The prosecution had not established that it was obtained voluntarily.
>
> (c) It should have been excluded in the exercise of the Trial Judge's discretion in that it was improperly obtained and/or would have been unfair to admit it against the Applicant."

Paragraph (a) of this ground makes it necessary to set out section 464H of the *Crimes Act* 1958 as inserted by the *Crimes (Custody and Investigation) Act* 1988 (No. 37 of 1988) which came into operation on 15 March 1989. [*The Court then set out the provisions of s464H and continued*) ... **[5]** It should also be noticed that by section 464(2) it is provided that "tape-recording" includes audio recording and video recording.

The contention of counsel for the applicant was that the questioning of the applicant began at Frankston and was completed at St. Kilda. He submitted that evidence of the applicant's confessions or admissions at St. Kilda Road was inadmissible because the whole of the questioning at both places had not been tape recorded and that therefore the evidence was inadmissible by reason of section 464H(1). In other words counsel contended that the questioning of the applicant was one and indivisible. The learned trial judge held that the section applied separately to the Frankston CIB and the St. Kilda Road Complex. His Honour said:

> "In my opinion the provisions of section 464H apply to the 'place where facilities were available to conduct an interview.' They clearly apply equally to the Frankston CIB and to the St. Kilda Road Complex. They apply in my view separately. The activities at each place must be looked at within the limitations of 464H(1)(d)."

If paragraph (d) of section 464H(1) is examined it will be seen that it speaks of "questioning at a place". If a confession is made during questioning at a place where facilities are available to conduct an interview and the questioning and anything said by the person questioned is tape recorded, the confession is not rendered inadmissible.

It was common ground that there were facilities at Frankston for the audio-taping of

interviews but not for the video-taping of them and that both facilities were available at St. Kilda Road. **[6]** It is not difficult to examine section 464H and to discover difficulties in its construction such as the meaning of the phrase "where facilities were available to conduct an interview" but without attempting a definitive exposition of the section it is possible to see that the events in this case illustrate sufficiently the operation of the section.

(1) The applicant was questioned at Frankston. It was not contested that Frankston was a place where facilities were available to conduct an interview. The questioning was not tape-recorded. The Crown made no attempt to lead evidence of anything the applicant said to the police which would have been inadmissible by virtue of section 464H(1).

(2) The applicant volunteered an admission in the car between Frankston and St. Kilda. It could not be said that the admission was made "during questioning" unless the questioning at Frankston and St. Kilda was one and indivisible. But no reason appears why it should be so regarded. Nor could it be said that the admission was made at a place where facilities were available to conduct an interview. Thus the admission did not cease to be inadmissible by reference to paragraph (d) or (e) of subsection (1). How then could it be admitted? It might have been excepted from the prohibition in sub-section (1) pursuant to paragraph (c) upon the basis that it was made before questioning (at St. Kilda) if the substance of the admission was later confirmed and the confirmation tape-recorded. Its admissibility was not debated at the trial or before us but its admission into evidence cannot have led to a miscarriage of justice because there was nothing in the **[7]** admission that was not said again in the course of the interview at St. Kilda.

(3) The applicant was questioned at St. Kilda. That was a place where facilities were available to conduct an interview. The questioning was tape recorded: the evidence of the confessions or admissions were not rendered inadmissible. Section 464H(1) could have rendered that evidence inadmissible only on the view that the questioning at Frankston and at St. Kilda was one and indivisible, but as we have already said no reason appears why it should be so regarded.

There may arise cases in which it is necessary to decide various questions of fact, e.g. was the confession or admission made before the commencement of questioning as in the car incident referred to above, was it made "during questioning", was it made at a place where facilities were available to conduct an interview, was the questioning and anything said by the person questioned tape recorded, and so on. But none of those questions arise in this case. It was said that if the questioning of a suspect is not regarded as one and indivisible the way would be opened for abuse of the section.

But although it was contended at the trial that by conducting the unrecorded interview at Frankston the police obtained an unfair advantage or "insight" into the applicant's state of mind, it was never suggested either at the trial or in this Court that the police had deliberately refrained from recording the interview at Frankston in order to defeat the limitations imposed by the section. His Honour's careful consideration of the evidence on the *voir* **[8]** *dire* and his assessment of both the applicant and the police officers of their evidence on the *voir dire* and his assessment of the actors in the video-taped interview exclude the possibility of this Court's concluding that there was a deliberate attempt on the part of the police to circumvent the limitations of the section. If there were ever such an attempt the Court would have ample power to exclude any evidence improperly or unfairly obtained. Ground 1(a) must therefore fail.

The grounds in paragraphs (b) and (c) were argued together. The contention was that section 464C was not complied with. That section reads: [*The Court set out the provisions of the section and continued*] ... **[9]** The applicant was not given the information prescribed by section 464C(1) when questioned at the Frankston CIB. but the opening of the video-taped interview of the applicant by Senior Detective Minisini at the St. Kilda Road Police complex on 26th January 1990 reads as follows:

> "Q 1 Mark, do you agree that the time is now 12.25 p.m.?
> A Yeah.
> **[10]** Q 2 Mark, I'm going to speak to you today in relation to an allegation of rape, which occurred at the Seaford Hotel, in Seaford on - er - Tuesday the 23rd of January 1990. Before I speak to you about those matters, I must inform you that you are not obliged to say or do anything, but anything you say or do may be given in evidence. Do you understand that?

A Yes.
Q 3 I must also inform you of the following rights. You may communicate with or attempt to communicate with a friend or relative to inform that person of your whereabouts. You may communicate with or attempt to communicate with a legal practitioner. Do you understand these rights?
A Yes.
Q 4 Could you state for me your full name, thank you?
A Mark Raymond Pollard.
Q 5 And, your age and date of birth?
A My age is 25. Born on the 26th of November 1964.
Q 6 And, your correct and current address?
A 53 Roberts Street, Frankston."

It was submitted that what was said in that passage was not a compliance with section 464C(1) because the police did not afford the applicant an opportunity of exercising the rights given to him by the sub-section and did not defer the questioning to enable the applicant to make or attempt to make the communications contemplated by the sub-section. Thus, it was said, that the questioning was illegal and that the videotape should have been excluded as involuntarily made or that at least the learned judge should have taken the breach of the section into account when considering whether to exclude the tape in the exercise of his discretion.

[11] At the trial the argument based on section 464C formed part of the argument for the exclusion of the videotape as involuntarily obtained and as unfair. Before us it was developed with more particularity and it is necessary to look at the section in some detail. Section 464C(1) is expressed in mandatory terms. The investigating official must defer the questioning. But what does that mean? Plainly it would not seem to require the deferral of the questioning if the person in custody indicates that he does not wish to exercise any of the rights given to him by the sub-section. The sub-section described the purpose of deferring the questioning and there can be no obligation to defer the questioning if that purpose would not be served. That is borne out by sub-section (2) which spells out what the investigating official must do if a "person wishes to communicate with a friend, relative or legal practitioner". The obligation to defer, which is imposed by sub-section (1), is an obligation which is to be read and understood in the light of sub-section (2). The purpose of deferring the questioning is a necessary consideration in determining what is "a time that is reasonable in the circumstances", the time for which the questioning must be deferred in pursuance of the obligation imposed by sub-section (1).

It is difficult however to discern in section 464C(1) any obligation to defer the questioning unless the person in custody indicates that he wishes to exercise the rights given to him by the sub-section. In this case, the applicant gave no such indication and section 464C(1) did not **[12]** in terms oblige the interviewing policeman to defer his questioning. Section 464C(1) commences with the requirement that the investigating official inform the person in custody of his right to make the communications referred to in the subsection. In this case, the applicant was told what he might do, in the very terms of paras. (a) and (b) of the sub-section and the sub-section does not require more. It was suggested that the investigating official should ask, after informing the person in custody of his rights, whether he wishes the opportunity to exercise those rights. Such a course, which is sometimes followed, is undoubtedly prudent and might even be said to be required as a matter of fairness. The sub-section does not however in terms require the investigating officer to say more than was said in this case. On the other hand, the purpose of the section is plainly to permit the communication to be made before the questioning proceeds, if that is the wish of the person in custody and that purpose could be frustrated if the investigating official were free to continue the questioning without allowing the person in custody to express any wish in the matter at all.

In a case like this where the applicant does not express his wishes before the questioning proceeds, the requirements of section 464C(1) will have been satisfied only if, in all of the circumstances of the case, it was reasonable for the investigating official to have concluded that the person in custody did not wish to attempt any of the suggested communications at least for the time being.

[13] In the circumstances of this particular case, we think that it was reasonable for the interviewing policeman to conclude that the applicant did not wish to attempt any communication

for the time being. In conveying the information required under section 464C(1) the investigating official is bound to make it plain that the entitlement described is a present entitlement. It would make nonsense of the legislation if the person in custody were not made aware that he could if he wished attempt the communication immediately. That was done in this case. The language of the sub-section was used and that language is of present entitlement. Further, the information was conveyed in conjunction with the caution required by section 464A(3) and there can be no doubt but that that caution can only be understood as conveying a present entitlement. The applicant was told that he need not answer questions if he did not wish to do so; he was told that he might communicate with a friend or relative to tell them of his whereabouts; and he was told that he might communicate with a legal practitioner.

In all the circumstances that was sufficient to convey plainly enough to the applicant that he was entitled to exercise any of those rights immediately. That having been done, we see no need for the investigating official to have done anything further in this particular case. It has long been the practice for the police, after giving the caution which is now required expressly in section 464A(3), to proceed with the questioning without first asking the person in custody whether he wishes to exercise his right to silence. It is reasonably concluded **[14]** from the fact that, if he answers the questions, he is choosing to do so of his own free will – although in any given case it is always open to the person in custody to seek to prove the contrary at his subsequent trial. Much the same can be said to follow from a failure by the person in custody to respond to what he has been told in pursuance of section 464C(1). It may be inferred from his silence and from the fact that he then proceeds to answer the questions that are put to him that he does not wish to exercise, at least for the time being, the right to attempt any communication with another. In default of any indication to the contrary from the person in custody, the questioner is free to proceed – but of course always at the risk that the person in custody may seek to prove the contrary at his subsequent trial.

For these reasons, we think that there was in this case no breach of section 464C(1) made out. We reject the submission that in every case the investigating official must ask, after informing the person in custody of his rights, whether he wishes the opportunity to exercise those rights. In our view, the further questioning was not unlawful in this case and it is unnecessary for us to consider what the consequences would have been if it were. It is sufficient to say that there is no general rule that evidence must be rejected because it has been unlawfully obtained: *Cleland v R* [1982] HCA 67; (1982) 151 CLR 1 at p9 per Gibbs CJ; 43 ALR 619; (1983) 57 ALJR 15.

At the trial the argument based upon section 464C formed a part of the argument for the exclusion of the video tape as involuntarily obtained or as unfair. Should the learned Judge have rejected the further questioning as **[15]** unfair, even though there was, in our view, no breach of the requirements of section 464C(1)? His Honour gave full consideration to the question of fairness and took into account that there had been no recording of the questioning that occurred at Frankston and the contention of counsel that the information given to the applicant at St. Kilda Road in pursuance of the requirements of section 464C(1), was too late and pointless. His Honour reviewed the evidence and having seen the applicant in the witness box and having seen the whole of the video-tape concluded that the taped record of interview had been made voluntarily. His Honour then went on to consider whether the confession had been "obtained in circumstances that would render it unfair to use it against the accused." (*Cleland*, at p5). In this part of his ruling the learned judge again referred to the contention that the applicant having been informed of his rights was not given any opportunity to avail himself of them. Having considered this point and all other relevant matters, his Honour concluded:

> "In all these circumstances I am not satisfied that circumstances have been shown to exist which warrant me exercising my discretion to exclude the video record of interview because the same was unfair."

No basis appears for a conclusion that in exercising his discretion not to exclude the video tape on the ground of unfairness his Honour's discretion miscarried. Finally it was submitted that the breach, as it was called, of the provisions of section 464C(1) produced a situation in which the video tape should have been rejected pursuant to the principle affirmed in *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561. The rule in that case, as Dawson J pointed out in *Cleland* at p34,

> "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 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."

It is sufficient to say that the learned trial judge does not appear to have been invited to exclude the video tape on that ground and we know of no circumstances which require us to consider it here. Accordingly the grounds in paragraph (b) and (c) of ground 1 fail. None of the other grounds was argued and we see no reason to give them detailed consideration. The application must be dismissed.

APPEARANCES: For the Crown: Mr B Bongiorno, QC with Mr C Hollis-Bee, counsel. JM Buckley, Solicitor for the DPP. For the applicant Pollard: Mr G Thomas, counsel. Simon English, solicitor.
