07/92

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v SHAW

Young CJ, Murphy and Nathan JJ

3, 4 October, 12 November 1991 — (1991) 57 A Crim R 425

CRIMINAL LAW – EVIDENCE – ENTITLEMENT OF PERSON IN CUSTODY – REQUEST TO SEE SOLICITOR BEFORE COMMENCEMENT OF INTERVIEW – QUESTIONING NOT DEFERRED – EVIDENCE OBTAINED UNLAWFULLY – WHETHER SUCH EVIDENCE INADMISSIBLE – WHETHER COURT HAS DISCRETION TO ADMIT OR EXCLUDE: *CRIMES ACT* 1958, SS464C, 464J.

1. Where, prior to the commencement of an interview with an investigating official, a person in custody made it clear that he wished to communicate with a legal practitioner, the investigating official was legally obliged by s464C of the *Crimes Act* 1958 ('Act') to defer questioning for a time to enable the person to communicate with his solicitor.

2. Where a breach of s464C of the Act occurs, it does not necessarily follow that evidence of the interview is inadmissible. By virtue of s464J of the Act, the court has an overriding discretion.
Per Nathan J: Compelling reasons would need to be established by the prosecution before a court should consider admitting evidence obtained in breach of s464C of the Act.

[*Note: The Court quashed the conviction and ordered a new trial because the Prosecutor's failure to call a crucial witness resulted in a miscarriage of justice. However, having regard to the construction of s464C of the Act, each member of the Court made observations. Ed.*]

YOUNG CJ: [*After setting out the facts, the grounds of appeal, the result of the Prosecutor's failure to call a witness and aspects of the* voir dire *before the trial judge, His Honour continued*] **... [12]** In this Court it was contended that the conduct of the police officers was in breach of section 464C of the *Crimes Act* and that by reason of the breach the evidence of the interview was inadmissible. A number of observations should be made about this submission.

(1) The point was clearly not taken at the trial and a serious question therefore arises whether the Court should permit it to be taken on an application for leave to appeal. As a general rule an applicant cannot rely in this Court upon a ground not taken below and great mischief is likely to follow from a departure from this rule save in a very special case. As however we propose to order a new trial in any event, it is not necessary to decide whether this is a case for departure from the general rule.

(2) Because the point was not taken at the trial the factual basis for the argument is not clear. The section requires an investigating official to inform a person in custody that he may communicate or attempt to communicate with a legal practitioner and must defer the questioning for **[13]** a time to enable that to be done. The Court has already in *R v Pollard* (20th September 1991, not yet reported) given some consideration to the requirements of the section in the course of which the Court said: "It is difficult 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." Moreover, as I have already pointed out the learned judge in the course of his ruling referred to the fact that after Bracken read to the applicant that he had the right to communicate with a legal practitioner, Bracken did ask if the applicant understood and the applicant answered, "Yeah." On the other hand if before the interview began the applicant had made it clear that he wanted to see a solicitor before he consented to being interviewed or to answer any questions, section 464C(1) would perhaps have required the police to defer the questioning for a time to enable the applicant to communicate with his solicitor. I express the conclusion tentatively because the matter was not investigated at the trial with this point in mind.

The fact that the applicant had made it clear before any questioning began that he wished to see his solicitor would not necessarily lead to the conclusion that there had been a breach of

the sub-section. When the video-taped interview began the questions which I have set out were asked and they were answered in the way I have indicated. If it were possible to conclude from the whole of the evidence including a viewing of the tape that notwithstanding an earlier request to see his solicitor the applicant was not seeking to have the interview deferred **[14]** although aware of his right to do so, the conclusion might be reached that there had been no breach of the sub-section. I am not to be taken as indicating that that conclusion would be the correct or only conclusion but rather that the matter should be fully investigated on a re-trial. It is preferable in this Court not to reach a conclusion for it could not bind the trial judge who would have to determine whether there had been a breach and if so what its consequences were, upon evidence which might possibly be different from that now before the Court.

Moreover the credibility of that evidence would be important and we do not have the advantage of hearing the evidence *viva voce*. The only evidence that could not be different would be the video tape itself. I have watched that tape and consider that if it stood alone it is unlikely that a judge would conclude that there had been a breach of the subsection. But of course it does not stand alone and it is for that reason that I think that the point should be properly and fully investigated on a re-trial. I do not think that we should say anything that would fetter the discretion of the trial judge on such a trial.

(3) If there were a breach of the requirements of section 464C it would not necessarily follow that evidence of the interview would be inadmissible. This matter was only briefly referred to in *R v Pollard* where it was said that there is no general rule that evidence must be rejected because it has been unlawfully obtained. It is a matter for the discretion of the trial judge. This view which is to be implied from a reading of section 464C is reinforced by a **[15]** consideration of section 464J, particularly paragraphs (c) and (d) of that section.

In the circumstances of this case I find it unnecessary to pursue further the ground of appeal which relies upon an alleged breach of section 464C or any of the other grounds of appeal. I have made the observations concerning the submission based on section 464C only because we are intending to order a new trial. For these reasons I would grant the application, allow the appeal and order a new trial.

MURPHY J: [*After dealing with matters not relevant to this report, His Honour continued*] ... **[11]** Section 464J clearly states and thus recognises that nothing in the sub-division 30A affects (*inter alia*)

> "(c) The discretion of a court to exclude unfairly obtained evidence.
> (d) The discretion of a court to exclude illegally or improperly obtained evidence."

Does this mean that s464C continues to operate subject always to the overriding discretion given to the Court by s464J(c) and (d)? I think that it does. The discretions referred to in s464J(c) and (d) relate on the one hand to "unfairly obtained evidence", and on the other to "illegally or improperly obtained evidence". In each case, the discretion being considered is to "exclude" **[12]** such evidence, and such discretion is not to be affected by sub-division 30A, whatever that means. Whilst sensing that there are hidden as well as patent difficulties to be found in the construction of s464C(1) and (2), it would seem that at least one purpose of s464J is to ensure that a proven breach of s464C does not result in the rejection as a matter of course of any confession or admission following such breach. Accordingly, it would be necessary for the learned trial judge to make a discretionary decision or two discretionary decisions. The first of those judgments would appear to have in part, at least, have been made. The learned trial judge was satisfied in the circumstances that the Crown had established that the confession contained in the applicant's record of interview (as video-taped) was voluntary. This finding could only have been made (subject to s464H(2)) if the confession was tape-recorded in circumstances set out in s464H(1).

The issues which however were revealed in *R v Ireland* [1970] HCA 21; (1970) 126 CLR 321; [1970] ALR 727; (1970) 44 ALJR 263 and *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561 were not issues simply of voluntariness of confessional evidence: cf. *Cleland v R* [1982] HCA 67; (1982) 151 CLR 1; 43 ALR 619; (1983) 57 ALJR 15. They concerned the difficult problems thrown up by the obtaining of evidence in contravention of the requirements of the law.

[13] The circumstances in which such evidence has been obtained have a real bearing upon the question whether it should, as a matter of discretion, be admitted. In *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561, Stephen and Aickin JJ, in a joint judgment traced the details of the case, which led them and Chief Justice Barwick and Jacobs J, to decide in that case that the evidence of the Breathalyser was admissible, although it had been unlawfully obtained by a mistake. They quoted what Barwick CJ had said in *R v Ireland* ([1970] HCA 21; (1970) 126 CLR 321; [1970] ALR 727; (1970) 44 ALJR 263) namely:

> "'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 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.'"

They then continued "That statement represents the law in Australia; it was concurred in by all other members of the Court in *R v Ireland* and has since been applied in a number of Australian cases." (141 CLR at 72). Their Honours drew the distinction to be seen between the law in England and the law as enunciated in *Ireland's Case*. In their joint judgment Stephen and Aickin JJ remarked (at p77):

> "Both liberty of the subject is in increasing need of protection as governments, in response to the **[14]** demand for more active regulatory intervention in the affairs of their citizens, enact a continuing flood of measures affecting day-to-day conduct, much of it hedged about with safeguards for the individual. These safeguards the executive, and of course, the police forces, should not be free to disregard. Were there to occur wholesale and deliberate disregard of these safeguards, its toleration by the courts would result in the effective abrogation of the legislature's safeguards of individual liberties, subordinating it to the executive arm. This would not be excusable however desirable might be the immediate end in view, that of convicting the guilty. In appropriate cases it may be 'a less evil that some criminals should escape than that the Government should play an ignoble part.' per Holmes J in *Olmstead v United States* 277 US 438 at 470; 72 L Ed 2d 944; 72 L Ed 944; 48 SCt 564; 293 USApp DC 105."

In *Bunning v Cross* their Honours noted several material facts relevant to the public interest considerations which in their view should have determined the discretionary issue. They were:

> (a) that the unlawfulness was not suggested to be other than the result of a mistaken belief on the part of the police officers concerning the cause of the applicant's uneven gait;
>
> (b) that the nature of the illegality did not affect the cogency of the evidence. However, Their Honours observed that cogency should, generally, be allowed to play no part in the exercise of discretion where the illegality is procuring the evidence is intentional or reckless (p77). There will be, as their Honours remarked, exceptions;
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> (c) that the ease with which the law could have been complied with may tend against the exercise of a discretion to admit evidence which is the product of "a deliberate cutting of corners";
>
> **[15]** (d) the nature of the offence charged. Some offences may involve considerations of public interest as, for example, in *Bunning v Cross* itself, where driving under the influence was the offence in question;
>
> (e) finally, their Honours considered that in *Bunning v Cross*, the relevant legislation was deliberately framed so as to circumscribe the police in the exercise of their powers to require motorists to undergo breath tests.

All of these considerations of public interest were relevant to the exercise of the judge's discretion when the issue was whether or not to exclude the illegally obtained evidence. It would appear that similarly, in the present case, considerations of the public interest were equally relevant to the trial judge's decision concerning s464C and it is not in my view apparent that he was asked to perform, nor did he perform, any balancing exercise. The present case is not, in my view, one in which a consideration of the material concerning s464C, particularly bearing in mind s464J, leads irresistibly to a conclusion one way or the other. There are issues of fact for decision as well as matters of law flowing from them. It may be important to decide whether the police deliberately flouted the law. It is not a case in which I feel confident to say as Barwick CJ said in *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54 at 65; 19 ALR 641; 52 ALJR 561, **[16]**

"There was nothing whatever to out-balance the public interest in the enforcement of the law." I would accordingly allow the application for leave to appeal, I would consider it as instituted, heard *instanter* and allowed. I would quash the applicant's conviction and order that he be granted a new trial.

NATHAN J: [*After dealing with matters not relevant to this Report, His Honour continued*] ... **[14]** In my view it must be that the pre-existing common law applies to the evidence obtained in breach of a statutory requirement of s464C and so much is explicit in s464J. The use of the encompassing abbreviation "etc" in the sub-title in concert with the terms of the subsection "Nothing ... affects ... the discretion of the court to exclude illegally obtained evidence" transports into the amendments the law relating to how a court should exercise that discretion. It is a principle that the nature of the discretion is defined by its statutory context. The law is best stated in [1970] HCA 21; (1970) 126 CLR 321; [1970] ALR 727; (1970) 44 ALJR 263:

> "Evidence of relevant facts or things ascertained or procured by means of unlawful or unfair acts is not, for that reason alone, inadmissible. This is so ... whether the unlawfulness derives from the common law or from statute. But it may **[15]** be that acts in breach of a statute would more readily warrant the rejection of the evidence as a matter of discretion: or the statute may on its proper construction itself impliedly forbid the use of facts or things obtained or procured in breach things so ascertained or procured is not necessarily to be admitted, ignoring the unlawful or unfair quality of the acts by which the facts sought to be evidenced were ascertained or procured. 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".

Consideration of the competing interests, to bring to conviction wrongdoers on the one hand, and the need to protect the citizen from unlawful and unfair treatment on the other, was further refined in *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561 where a joint judgment of Stephen and Aickin, JJ (with whom Barwick CJ agreed) ruled that the resolution required an objective test. They said:

> "What *Ireland* involves is no simple question of ensuring fairness to an accused but instead the weighing against each other of two competing requirements of public policy, thereby seeking to resolve the apparent conflict between the desirable goal of bringing to conviction the wrongdoer and the undesirable effect of curial approval, or even encouragement being given to the unlawful conduct of those whose task it is to enforce the law. This being the aim of the discretionary process called for by *Ireland* it follows that it by no means takes as its central point the question of unfairness to the accused. It is, on the contrary concerned with broader questions of high public policy, unfairness to the accused being only one factor which, if present, will play its part in the whole process of consideration".

[16] In my view, the underlined words of Barwick CJ in *Ireland* and those of Stephen and Aickin in *Bunning* are most apposite here. The amendments enact the procedure which must be followed by an investigating official, before and during an investigation, or tape-recording an interview. Sub-section H renders inadmissible confessions which have not been tape-recorded. In my opinion, the pre-emptive and mandatory terms of the section indicate that curial disapproval, at the very least, is required in respect of confessions obtained in breach of it. So far as the exercise of discretion is concerned cogent, even compelling reasons would have to be proven by the prosecution before a court should contemplate admitting evidence obtained in breach of this section. This particular argument was not put to the trial judge, but the fourth ground of appeal before us is sufficiently wide to encompass it. Therefore, in my opinion, although an appellate court should be cautious in entertaining arguments about admissibility not advanced at trial, this contention is of sufficient public import to overbear that caution.

The source of the amendments, the clarity of their terms, and the developed case law in this and other common law jurisdictions, lead me to the view that a court should employ great caution when exercising its discretion whether or not to admit evidence obtained in breach of s464C. In my view compelling reasons to do so would need to be established by the prosecution. The circumstances are likely to be rare and exceptional. This is particularly so if it is established the

breach was deliberate. I refer to *Bunning* and the concept of **[17]** securing "the broader questions of high public policy" in protecting the interests of individuals from unlawful treatment. It follows that the first ground of appeal is made out. Even if my conclusion stated above were not so firm one would need to be satisfied the video-tape was not obtained unfairly. Again this argument was not put directly to the trial judge, who dealt with inducement and importuning but not general unfairness. The principles relating to this kind of discretion are set out in *Bunning's Case* and also *Cleland v R* [1982] HCA 67; (1982) 151 CLR 1; 43 ALR 619; (1983) 57 ALJR 15. I need not repeat them ...

APPEARANCES: For the Crown: Ms E Curtain, counsel. JM Buckley, Solicitor for the DPP. For the applicant Shaw: Mr C Dane, QC with Mr OP Holdenson, counsel. Legal Aid Commission Victoria.
