Supreme Court Notes

by Anita Del Medico

CRIMINAL LAW - EVIDENCE - Admissibility - Division 6A *Police Administration Act* - electronic recording of confessions and admissions - a person suspected of having committed a relevant offence - whether one continuous process of "questioning" of two questionings separated by time and place.

R v Maratabanga (23/6/93) Mildren J

M, an Aboriginal, was charged with two counts of rape.

Application was made pursuant to s 26L *Evidence Act* for the trial judge to determine the admissibility of certain confessional evidence which the Crown sought to adduce at trial, namely (i) the audio and video tapes of the formal record of interview; (ii) the tapes of a video re-enactment; and (iii) an admission of guilt made to the watchhouse commander who formally charged the accused.

It was argued that the evidence was inadmissible because the accused's statements were involuntary; that they were inadmissible by virtue of s 142 of the *Police Administration Act* ("the Act") and that the Court ought not exercise the power to admit them given by s 143 of the Act; alternatively, that the Court ought to reject the statements in the exercise of its discretion. Prior to his arrest, the accused had had a conversation with the investigating officers which had not been electronically recorded.

No caution had been administered. At the latter stages of this conversation, the accused had admitted he had had "sex with that woman".

It was argued by the defence that this resulted in a failure by police to comply with s 142 of the Act, as the accused was, albeit at this early stage of the investigation, "a person suspected of having committed a relevant offence" within the meaning of s 142. Furthermore, it was argued that the subsequent questioning of the accused (recorded by the audio and video tapes sought to be excluded) was all part of the one questioning and that the failure to electronically record the pre-arrest conversation resulted in all subsequent recorded conversations being rendered inadmissible.

Held, finding (i) admissible and (ii) and (iii) inadmissible:

(1) The first question is whether the accused was at any time during the pre-arrest interview "a person suspected of having committed a relevant offence" within the meaning of s 142. The provision does not specifically state who it is that must suspect the accused of having committed the relevant offence, but it is obvious the Legislature must have intended the suspicion to have been formed by the police officer, or if there is more than one officer present when the admission or confession is made, by at least one of the police officers present at that time.

Section 142 does not provide for the suspicion to be reasonably held (contrast s 123 where the police officer's belief must be on reasonable grounds) but encompasses a subjective enquiry only.

The kind of suspicion required must be such as to engender a belief, whether reasonable or not, and whether or not proof is lacking, in the mind of the police officer that the person being questioned is probably guilty of the relevant offence.

On the facts, neither investigating officer entertained such a belief until close to the end of the conversation when the admission was made.

Consequently, there was no legal obligation to electronically record the pre-arrest conversation.

(2) Even if the accused was "a person suspected" within the meaning of s 142, it does not necessarily follow that the subsequent record of interview, (i), would be inadmissible because of the failure to electronically record the earlier conversation.

Section 142 applies to any "questioning", whether or not it is a questioning under s 140 and it is not qualified by the phrase "under s 137(2)".

It can apply to admissions made before questioning: s 142(1)(a). In order for s 142(3) to operate to prevent the record of interview from being admissible it would be necessary to find the accused made one confession in the course of questioning between the time just before his arrest to the time he was formally charged, rather than a finding that there were "two confessions, each made at a different time and place...".

It is a question of degree in each case as to whether there was one questioning or two and judges are going to have to be astute to ensure that police do not try to avoid s 142 by fragmenting their questioning by time and place. On the facts, there was not one "questioning" within the meaning of s 142(1)(b) of the Act.

Pollard v R (1992) 110 ALR 385, followed.

(3) Although the police complied with s 140(b) of the Act, they failed to electronically record the conversation they had with the accused concerning his right to communicate with the prisoner's friend of his choice (s 141). However, Division 6A does not provide that a failure to electronically record that conversation renders any subsequent confession inadmissible. The failure to comply with s 141 (and s 142(2)(a) - informing the accused that he is entitled to a copy of the electronic recording on request), were trivial breaches of Division 6A and do not invoke an exercise of either the unfairness or public policy discretions. [It was further found that the interview was voluntarily made and that no breach of the Anunga Guidelines had ensued.]

(4) The video re-enactment was inadmissible on the basis that it had been unfairly obtained.

The caution administered by the police officer was inadequate and the conversation as to whether the accused was willing to participate in the re-enactment had not been electroni-

cally recorded, or at all.

Although the prisoner's friend had been present, he was not in a position to advise the accused if he had sought advice, as for much of the time he was well separated from the accused.

(5) The admission of guilt by the accused to the watchhouse commander upon being formally charged was inadmissible because it had not been electronically recorded.

Section 142 applies to admissions made before and during questioning. At the time when this admission was made, the accused had been invited to say anything if he wished, in respect of the charge. This was a questioning in the relevant sense; his reply should have been electronically recorded.

His Honour was not satisfied that it would be in the interests of justice to admit this admission pursuant to s 143.

Application pursuant to s 26L of the *Evidence Act.*

J Lawrence, instructed by NAALAS, for the applicant/accused.

R Wallace, instructed by the DPP, for the respondent/Crown.

'Potboiler' clauses: beware the pitfalls

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within the arbitration clause in question.

His Honour observed that he reached this conclusion with some regret because he had no doubt that there would be much evidence in the arbitration proceedings (for breach of contract) which would also be relevant in any court proceedings involving *Trade Practices Act* claims or claims in relation to misleading representations.

Lessons from the Cases

It is clear enough that "potboiler" clauses merit far greater attention than is traditionally given to them.

The aforementioned cases illustrate this point.

It is thus necessary for lawyers to ascertain just what clients wish to restrain in "restraint clauses".

Perhaps it is more important for lawyers to examine their standard "arbitration" precedents.

The writer is in strong agreement with the views expressed by French J.

An arbitration clause which gives rise to a dual forum of dispute resolution is not a situation which many clients would welcome and, if this does occur, clients will, no doubt, and quite rightly, blame their lawyers for it.

If this situation results and the covenant in quesiton has not been worded to accord with a client's specific instructions, it is not beyond possibility that a lawyer drafting such a covenant may find herself or himself liable for his or her client's costs in resolving the dispute in one or other of the forums.

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Mediation for AAT

The President of the Administrative Appeals Tribunal, Justice O'Connor, has extended the Tribunal's mediation programme to all jurisdictions from this month.

Justice O'Connor said she proposes to carry out a full evaluation of the programme in the middle of next year.

Mediation is available within the Tribunal for the juristictions of social security and customs in all registries and for taxation cases on a trial basis.

Other mediation services will be provided in jurisdictions or registries where mediation is requested and the Tribunal is in a position to provide the service(s).

ILSAC lives

The federal Attorney-General, Michael Lavarch, has re-established the International Legal Services Advisory Council (ILSAC).

ILSAC's charter is to promote the export of Australian legal services and to develop closer legal co-operation in the Asia Pacific region.

Appointed to ILSAC for three years were: Sir Laurence Street (Chair), Elizabeth Nosworthy (ex-officio as representative of the Australia-Indochina Legal Co-operation Programme), David Bailey, Patrick Brazil, Philip Clark, Michael Ahrens, Catherine Walter, James Creer, Prof Michael Pryles (private practitioners), Prof David Flint, Prof Malcolm Smith (university reps), Peter Levy (Law Council of Australia), and representatives from five government departments.