Court Notes

By Mark Hunter, SFNT

Dumoo-v-Garner
Supreme Court No. JA66 of 1997
Judgment of Kearney J delivered 23 February 1998

CRIMINAL LAW - CONFESSIONS - EXCLUSIONARY DISCRETIONS - RIGHT TO SILENCE

The appellant was a mature Aboriginal man from Pt Keats. He was convicted by a magistrate on 1 May 1997 for having brought liquor into a restricted area and having there consumed the liquor. The only evidence against the appellant were incriminating admissions made by him in his interview with police.

It was not in dispute that *Anunga* guideline (3) had been breached by the failure of interviewing police to ask the appellant to explain, phrase by phrase, the meaning of the caution administered by police.

The Magistrate was satisfied that the confession was voluntary and refused to exclude the interview in the exercise of the "fairness" discretion (*R v Lee*). In relation to a Police General Order in the same terms as *Anunga* guideline (3), the Magistrate stated:

"If such a guideline existed (at the time), it is wrong and should be rephrased".

On appeal before Kearney J, the Appellant argued that in establishing voluntariness it is incumbent upon the Crown to prove on the balance of probabilities that the Appellant knew before he made admissions that he had the right to speak or remain silent, and that he spoke in the exercise of that right.

The appellant further argued that the *Lee* discretion and the "public policy" (*Bunning v Cross*) discretion were separate exclusionary discretions requiring separate consideration. His Honour was referred to the fact that, contrary to s140 of the *Police Administration Act*, the interviewing officer failed to inform the Appellant of his right to communicate with a friend or relative.

HELD

1. The *Anunga* guidelines must be observed by the Courts. Neither *Anunga* guideline (3) nor Police General Order Q2.5.3 is wrong.
2. The appellant's admissions were voluntary in a legal sense but the attempt by the police to comply with the *Anunga* guidelines was wholly inadequate.
3. The fact that an accused was unaware of his right to silence does not, of itself, prevent his confession being categorised as voluntary but this fact may be relevant on the question of whether his will was overborne.
4. The breach of s140 did not render the appellant's voluntary admissions unreliable, but they should have been excluded in the exercise of the "public policy" discretion in view of that illegality and the failure of police to comply with the *Anunga* guidelines.

ORDER

The appeal is allowed, convictions quashed and an acquittal substituted.

APPEARANCES

Appellant:
Counsel - Thomson
Solicitors - NAALAS

Respondent:
Counsel - Rowbottam
Solicitor - DPP

COMMENTARY

Kearney J referred in his judgment to the line of authority (commencing with *Collins*) for the proposition that the exercise of the right to speak or remain silent is contingent upon an understanding of that right. His Honour declined to follow those authorities.

In adopting the ratio of the New South Wales Court of Criminal Appeal in *Azar* (1991) the Supreme Court has now gone beyond the decision of Mildren J in *Nundhirribala* (1994)

In *Nundhirribala* the issue was not the appellant's understanding of his right to silence (which was admitted) but whether he understood that what he said could be used as evidence. In that case Mildren J held that a confession could be voluntary even where an accused person is not "fully" aware of his legal rights.

Kearney J observed in his judgment that by virtue of the decision of the High Court in *R v Swaffield* (unreported, 20 January 1998) what was formerly known as the "public policy" exclusionary discretion is now the "overall discretion" as enunciated by Toohey, Gaudron and Gummow JJ.

Palmer -v- Regina
High Court of Australia No. M4 delivered 20 January 1998.

CRIMINAL LAW - SEXUAL C FENCES - LIMITS OF CROS EXAMINATION OF ACCUSE

In this decision the High Court f first time reviewed conflicting au ties from the States as to wheth accused may be cross examined complainant's motive to lie.

The appellant was convicted o ous sexual assaults against a fou year old girl who accompanied hir ing his rounds as a process server appellant had denied the allegatio raised an alibi at trial.

Senior Counsel put to the com ant that she had taken a fancy t appellant and her allegations "...some sort of pay back on him for indiscretion he doesn't even l about".

The complainant denied she w ing, asking senior Counsel "Why v I be lying anyway?". The Crown ecutor was then permitted to cross e ine the appellant as to the absence c knowledge on his part of a motive f complainant to lie.

The Victorian Court of Appeal u mously dismissed an appeal, follov line of South Australian and Vict authorities dating from 1969.

The appellant urged the High C to follow a line of Queensland and South Wales authorities. The co ing arguments were summarised by J as follows:

Arguments Against Permitting Questions of an Accused on Moti

- No witness can give factual evi about the motives of another.
- Such questions may irretrievably the burden of proof to the accus the mind of the jury.
- The absence of motive may te legitimise the complaint.
- A blanket prohibition (where th cused has not raised the issue) a potentially prejudicial speculati the jury.

Arguments for Permitting Ques (and Requiring Directions)

- Jurors will ask themselves the que

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anyway.
- Most people will not accuse a person of a grave criminal offence without having a proper basis for doing so.
- Lawyers cannot ensure that witnesses will always comply with a prohibition.
- Juries can act properly on judicial directions regarding the way to deal with the issue of motive.

HELD

(Per Brennan CJ, Gaudron, Gummow and Kirby JJ) (McHugh J dissenting)

1. The trial miscarried.
2. the fact that an accused has no knowledge of any fact from which a motive of the kind imputed to a complainant in cross examination might be inferred is generally irrelevant.
3. A complainant's account gains no legitimate credibility from the absence of evidence of a motive to lie.
4. It may nevertheless be appropriate in cases for counsel or the judge to put arguments to the jury relating to the vaildity of a motive to lie which has been asserted in relation to a witness.

A majority of the High Court found the verdict of the jury unsafe and unsatisfactory in view of the strength of the alibi raised by the appellant. The Court therefore quashed the convictions and entered verdicts of acquittal in their place.

APPEARANCES

Appellant

Counsel: Kent QC and Simon
Solicitors: Kemp & Associates

Respondent

Counsel: Morgan-Payler QC & Silbert
Solicitors: DPP

COMMENTARY

It appears that the Supreme Court of the Northern Territory has never been called upon to rule on this issue.

The appellant served almost two years of the sentence imposed by the trial judge before he was released by the High Court.

When is an Offence Committed? – Section 2 of the Criminal Code as a Zen Koan

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knowledges the centrality of *Criminal Code s 31* to offences which do not prescribe a mental element. Under *Criminal Code s 2*, the argument would be that s 31 stands apart from other excuses as it is a prescribed mental element. This argument suggests the lack of the word "excuse" in *Criminal Code s 2* matters not, s 31 is a prescribed mental element and the offence is not committed unless (within the s 31 terminology), an accused person intends the act, omission or event or foresees it as a possible consequence of their conduct.. In practice, s 31 *Criminal Code (NT)* provides the fault element for virtually all offences - importantly it must be noted there is controversy on whether *s 31 Criminal Code (NT)* applies to those offences which prescribe a mental element, a majority of the Court of Appeal having found that it does not. There has also been a suggestion by a recent Court of Appeal bench that the Court might be prepared to reconsider *Pregelj*.

A number of offences prescribed in the *Criminal Code (NT)* are prefaced by the term "unlawfully" which is defined as "without authorisation, justification or excuse". Plainly, an offence is not "unlawful" if it is committed without authorisation, justification or excuse, however, this cannot be reconciled easily with *Criminal Code (NT)* s 2 which may, depending on the interpretation adopted, impose criminal responsibility on conduct which is excused. The textual difficulties are heightened given the "indiscriminate" use of "unlawfully" throughout the *Criminal Code (NT)* and given that no offences prescribed in other statutes contain the term "unlawfully".

Section 2 Criminal Code is rarely raised in argument, hence there are no reported decisions dealing with its effect on criminal responsibility. The section is troubling given it has all the appearances of being so central to criminal responsibility. Perhaps it is best ignored - but that would be against the ideal of sound practice and would not resolve the koan. "When is an offence committed?" I conclude this cannot be answered through utilising our usual legal skills. I await enlightenment. In the meantime, consider this: the world is blue (like an orange).

– Jenny Blokland, General Counsel to the DPP