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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

AS No. 51 of 1990

BETWEEN:

THE QUEEN
Plaintiff

AND:

MICHAEL WINSTON SANBY
Defendant

CORAM: KEARNEY J

RULING ON THE VOIRE DIRE (No.1)

(Delivered 12 November 1992)

The application

I rule this morning on an application by the accused to have excluded from the evidence to be adduced before the jury, testimony by 2 Police officers, Sergeants Voyez and Cull, relating to a conversation they say they had with the accused at Perth airport on 16 August 1990. A note of this conversation, said to have been written contemporaneously with it by Sergeant Cull, is in evidence as Exhibit D1 on the voire dire; it indicates that the conversation commenced at 2.37 pm.

As this is an application under s26L of the Evidence Act, made before the jury is empanelled, I have as yet a very limited knowledge of this case. It is desirable to set out some of the general background, as I understand it from material to which counsel have referred me.

General background

A hot air balloon piloted by one Antony Fraser crashed outside Alice Springs on 13 August 1989, killing the 13 persons on board. It crashed as a result of a collision between its envelope and the basket of a hot air balloon piloted by the accused. The basket of the accused's balloon penetrated the envelope of Mr Fraser's balloon and somehow tangled with a rope mechanism inside that envelope; this led to a velcro-attached panel in the envelope coming off, with the result that there was then a big gap at the top of Mr Fraser's envelope through which the hot air in that envelope rapidly escaped, leading to the collapse of the envelope and to the balloon plummeting some 2000 feet to the ground.

A Coroner's inquest into the crash commenced in Alice Springs before the Coroner, Mr Barritt SM, on 5 February 1990. The accused had not then been charged with any offence arising out of the crash. However, in view of what senior counsel assisting the Coroner, Mr Gaffy QC, was believed to be about to say in his opening address to the inquest, the accused's then counsel Mr Reeves unsuccessfully sought to have the accused charged by the Police, so that he would then have the protection of the normal statutory procedure applicable these days to anyone charged with a crime - that is, the provisions of Part V of the Justices Act, which provide for the preliminary examination by a Justice of a charge of an indictable offence.

As I say, the accused was not in fact charged with any offence. The inquest continued. Mr Gaffy in his opening suggested that there had been gross negligence on the accused's part as the pilot of the higher balloon, in failing to keep a proper look-out and in failing to give way to Mr Fraser's balloon which was flying beneath it. He also suggested that the accused's balloon was descending at the time of the collision and that he was flying without appropriate instruments. In short, he suggested that the accused had been grossly negligent in piloting and managing his balloon, to such a degree that his

negligent conduct was criminal, and his criminal negligence was the primary cause of the collision.

The inquest continued for a considerable period of time, though at one stage there was a lengthy adjournment. Counsel made their final addresses on Monday 13 August 1990 and Tuesday 14 August 1990. On 13 August Mr Gaffy submitted that the collision had been caused by the negligence of the accused in flying his balloon, negligence to such a degree that he had unlawfully killed those who had died in the crash. On 14 August the Coroner adjourned the inquiry until Monday 20 August, for decision; in fact, the inquiry resumed on Friday 24 August.

Meanwhile on Thursday 16 August an Information was laid before a Justice in Alice Springs by Sergeant Puxty, alleging that the accused had unlawfully killed Antony Fraser on 13 August 1989; see ss100 and 102 of the Justices Act. A Warrant for the arrest of the accused was issued on 16 August in Alice Springs by Mr Barritt SM, as a Justice of the Peace; see s103 of the Justice Act. A facsimile copy of that Warrant was sent from the CIB in Alice Springs to Sergeant Voyez, then at the Australian Federal Police office at Perth Airport, Western Australia, apparently at 4.03 pm on 16 August; see Exhibit D5.

The basis of the application

Mr Hore-Lacy of counsel for the accused submitted that on 16 August 1990 the accused had been apprehended and taken into custody by the Western Australian Police officers Voyez and Cull, whilst he was a passenger on an aeroplane at Perth Airport. The aeroplane was then shortly to take off for Zimbabwe. The officers later had a conversation with him at the airport. The accused was not cautioned at any time while he was in their custody there. He was not informed by them of the fact that 13 charges of manslaughter had been preferred against him.

Against this alleged factual background Mr Hore-Lacy had 2 submissions. First, any admissions in the accused's conversation with the Police officers at the airport were legally inadmissible, and must be excluded from the evidence before the jury, because they could not be shown to have been made voluntarily; that is, the Crown could not show that they had been made in the accused's free exercise of his choice to speak or be silent. Second, if (contrary to the first submission) it was shown that those admissions had been made voluntarily, and were hence admissible as a matter of law, in the exercise of its discretionary power to exclude legally admissible admissions the Court should not allow evidence of those admissions to be placed before the jury, because in all the circumstances in which they had been made it would be unfair to use them as evidence against the accused. Mr Hore-Lacy described this succinctly as the "*Lee* discretion"; that is, the "unfairness" discretion referred to in *R v Lee* (1950) 82 CLR 133 at 145, 148 and 150-151. The unfairness must arise from the circumstances in which the voluntary admissions were made. Some "substantial reason" should be shown to justify a discretionary rejection; *R v Lee* (supra) at 154. Any impropriety on the part of the Police has to be evaluated, in the particular circumstances of the case, to determine whether it is unfair to allow the accused's admissions to be used against him.

Mr Hore-Lacy observed that as at 16 August 1990 there had been an inquest; that at its commencement on 5 February 1990 the Police had been invited to charge the accused but had declined; that he had been without legal representation for much of the inquest; and that he had been spoken to already by the Police in Alice Springs, and by Aviation Authority officers. He submitted that the two Western Australian Police officers must have known that the accused as at 16 August 1990 had legal representation and advice; and that they knew far more about

the balloon incident than they professed to, when speaking to the accused that day. Mr Hore-Lacy referred me to pp928-930 of the transcript of the inquest on 24 August 1990 when Sergeant Voyez related the contents of his conversation with the accused at Perth Airport on 16 August 1990; that evidence appears to follow the contents of Exhibit D1, from which he was then refreshing his memory.

The evidence on the voire dire

Two witnesses testified on the voire dire.

(1) Voyez

Detective Sergeant Voyez testified that on 16 August 1990 he received a telephone call in Perth from Detective Farrow of the Alice Springs CIB. Detective Farrow told him that a Warrant for the arrest of the accused would be sent over from Alice Springs. Detective Voyez went to the Perth airport and spoke with some Qantas ground staff at the entrance to a Qantas aeroplane, then waiting on the tarmac and bound for Zimbabwe. He then boarded the plane. The Qantas staff indicated to him where the accused was sitting in the plane. He then went up to the accused, identified himself as a police officer, and "asked him if he would mind leaving the plane with me"; he may have added "we'd like to talk to you outside". He said that the accused agreed to do so: "he stood up immediately and we walked off the plane." He said he was going to talk to the accused "about the fact that - - - there would be a warrant for his arrest in my possession". He agreed that in fact he did not speak to the accused about the Warrant, explaining that the reason was that "there was no warrant in existence".

As they left the plane and entered the terminal proper, where Detective Cull joined them, he said:-

"- - I had another brief conversation with Mr Sanby just to outline to him why I'd asked him off the plane, and wanted to speak to him about matters that had arisen recently in Alice Springs, the inquest and things in

relation to that." (p231)

He asked the accused to accompany him to the Federal Police office within the terminal building, and the accused agreed.

The three of them then went to the Federal Police office. He asked the accused to wait at a separate office, outside his hearing. He said that he first told the accused:-

"- - that I was going to speak to the Alice Springs Police to see what the state of play was, what the situation was in regard to why we got him off the plane."

He then made a telephone call to the Alice Springs Police and spoke to Superintendent Tilbrook. He was told that there was now a problem in obtaining the Warrant, which the Alice Springs Police were trying to sort out; "they were having trouble finding Mr Barritt". After explaining the situation to his own office in Perth, he told the accused "that we were having some problems, and I just let him know what was happening". He said he told the accused that the Warrant was for "matters arising from the inquest"; he said he did not know "what it was going to be specifically for". After about an hour, he and Detective Cull went to the accused's room and had the conversation in question with the accused; he explained "I couldn't leave Mr Sanby just sitting on his own for no apparent reason". He agreed that he did not tell the accused "that he could get back on the plane", but stated that the accused "could have done so".

He said he did not know that the accused was being represented at the inquest. He was not aware whether there were any tape-recording facilities in the Federal Police office airport premises. He said he had not "turned his mind" to what he would do if the accused refused to get off the plane at his request, or wanted to get back on it. He agreed that he had never cautioned the accused and asserted that he "had no need to give [the accused] a caution". He said the accused was "not

in custody", though when he received the Warrant he would have arrested the accused. He considered the accused "didn't appear to be upset". He said the Warrant was faxed from Alice Springs at 4.03 pm, while the conversation with the accused had lasted about 1 hour from 2.37 pm.

He was cross-examined at some length as to the extent to which he had complied, during his conversation with the accused, with the "Commissioner's guidelines for questioning suspects" (Exhibit D2) then applicable in Western Australia. He explained that although Guideline 3-3-24 said that Police should "always attempt to record statements in the least disputable form", and this pointed to the use of an audio tape if not a video tape of the interview, neither had been used in this case because "we didn't have the facilities". Further, he asserted, "we didn't require the facilities"; he explained this, saying that the guidelines related to the questioning of suspects and the accused was not then a suspect. By this he meant that he himself did not then suspect the accused; "we took notes of a conversation that we had with Mr Sanby". He said:-

"You saying you don't believe he was a suspect; is that why you didn't caution him?---I mean, I - the reason I haven't cautioned him is because I - I'm not required to caution him because I'm not going to charge him. And also I don't have to caution him because I'm not concerned at that stage that what he's going to tell me may be used in evidence; otherwise I'm duty-bound to inform him of that."

He said at p260:-

"I'm saying in this particular case, I - - did not apprehend, arrest or charge at that stage, Mr Sanby. I had no need to caution him.

- - -

Q. Yes, but he may not have realised it would be used in evidence?---Well, I didn't realise it was going to be used in evidence, otherwise he would have been cautioned.

- - -

But you said you didn't think it was going to be used in evidence. What was the purpose of it?---It's a record of our interview."

He explained further at p262:-

"I'm saying that - - I had no evidence before me; the warrant wasn't in existence, okay? When I spoke to Mr Sanby.

- - -

- - - it was not my intention when speaking to Mr Sanby - it was not in my mind when speaking to Mr Sanby that that particular interview may be later used in evidence."

Similarly, he explained that Guideline 3-3-28 relating to an accused's "Adoption of written confessional evidence" was not observed because -

"- - - those orders and instructions are in relation to the questioning of suspects or the accused, it even says in the orders 'the word of the accused'. Now, at that stage, as I've said, Mr Sanby was not a suspect and we hadn't accused him of anything. - - -"

He said that he had the conversation with the accused which is in question in these proceedings "without any instruction at all or clearance at all from the Alice Springs detectives", and that this was a common practice.

(2)Cull

Detective Sergeant Cull also testified on the voire dire. His account of the events of 16 August 1990 generally corroborated that of Sergeant Voyez.

He said at p270:-

"Was there any need to issue him with a caution prior to

that?---No, because we hadn't reached the stage where we understood that he was going to be charged.

- - -

So far as you're concerned, up until the time at least that you left police headquarters to head back to the arm of the major crime squad, was the accused, Sanby, in your custody?---Well, when the - - - warrant was received at the Federal police offices, he was advised that it was there - in that being the case then he became under our custody.

What about prior to that?---No."

He explained that when he wrote Exhibit D1, he was "speed writing".

At p279 appears the following passage of his evidence:-

"Thank you. Then why didn't you tell him that the first interview may be used in evidence against him?---When.

When you first interviewed him at the Perth airport?---Because we didn't know that it would.

Did you think that it may be used in evidence?---It was a possibility, I suppose.

Well, why didn't you tell him there that it was a possibility it may be used in evidence?---Because he could quite easily have walked out the door and would never have been used.

Because he would have quite easily walked out the door. Were you prepared to let him go if he'd walked out?---Yes, if we hadn't got enough for our powers of arrest.

Or if the warrant hadn't come through?---Yes.

Did you tell him he could get on the plane if he wanted to?---I don't think that was said.

Did you tell him the plane's about to leave without him? He'd better make up his mind as to whether he wanted to stay and spend the afternoon talking to you or whether he wanted to get on the plane?---I don't believe I said that."

He denied that the accused had been put into a room at the airport with one-way glass, and that the door of the room was locked on him.

At p284 appears the following:-

"If he had said to you, 'Look, I'm going now' or 'I want to go', what would you have done?---Given the situation that was current at that time prior to us having a warrant, I think Mr Sanby would have been on his way.

You would have allowed him to go?---I think so.

- - -

It should have been quite apparent to him that he was entitled to go, do you think, if he'd wanted to?---Yes.

And what was it about the situation that might have indicated that to him?---As I said, our very relaxed attitude in relation to speaking to him. There was no authoritativeness there, like as I explained, 'Stand against the wall, spread your legs' or something, as you see on the movies from the US, it was rather more as if you and I were sitting around a coffee table."

At p290 there appears:-

"You knew very well, did you not, that he was a suspect as far as the Northern Territory Police were concerned at the time you spoke to him at the Perth Airport?---My understanding of the whole matter was very limited. I understood that a warrant may be issued. I didn't understand the basis for it, I didn't understand what had gone on, I didn't understand what had given rise to his criminal responsibility in relation to an offence.

- - -

Your instructions were to go out and speak to the man on the grounds that a warrant may be issued?
---That's my understanding.

What, just to tell him that a warrant may be issued?---Well as soon as the warrant had arrived, then we would arrest him."

The submissions by the accused

Mr Hore-Lacy submitted that the Court should find:-

1. That the Perth detectives were told that a Warrant was going to be issued, and not that its issue was a mere possibility. I do not make that finding, on the evidence. Clearly the Alice Springs Police intended to try to have a Justice issue a Warrant under s103 of the Justices Act. The evidence goes no further than that.
2. That the two Perth officers went to the airport to take the accused from the aircraft and detain him. I do not make this finding, on the evidence. The two officers were impressive witnesses. I consider that if the accused had refused to leave the aircraft, that would have been the end of the matter; the flight left shortly afterwards. The accused acquiesced in Voyez' request to leave the aircraft, in my opinion, because he did not consider that he could freely leave the country; but that did not arise from the behaviour of Voyez.
3. That the accused should have been cautioned because:-

a) The Perth Police officers knew more about the circumstances surrounding the issue of the Warrant than their evidence disclosed. I do not accept that submission, on the evidence; it is clear that the lapse of time between officers of the Perth Airport Customs notifying the Alice Springs Police of the accused's departure, those Police seeking assistance from the Perth Police before the aircraft left, and the two Perth Police officers arriving at the airport shortly before its departure time, was such that

meant that there could have been very little time for any briefing of Voyez by Farrow.

4. That the Perth Police were in dereliction of their duty, by failing to ascertain the circumstances surrounding the issue of the Warrant, before taking the action about which they had testified. I do not consider that they bore any such onus to ascertain those circumstances surrounding the issue of the Warrant, in view of the obvious urgency of the matter, and the approach which they adopted towards the accused.

5. That the accused must have regarded himself as in custody at the time. I accept this. I think that the accused considered that by attempting to leave the country he was doing something wrong; driven by this internal pressure he considered that he had no choice but to accept Voyez' invitation to leave the aircraft. Equally, I am satisfied that the accused was not compelled by Voyez to leave the aircraft. I do not consider that the Police gave him reasonable grounds for believing, or caused him to believe, that if he were to try to leave he would not be allowed to do so. There can be no doubt that he would have preferred to leave the country; however, once the Police arrived, I have no doubt that he felt that that option was no longer open to him. He did not consider that he would be allowed to leave.

6. That weight should be given to the failure by the Perth Police to caution the accused, particularly the failure to tell him that anything which he said could be used in evidence against him. Further, that the significance of a lack of caution could be seen by comparing his moderated answers on the

video tape (in a later interview in Perth where he was cautioned) with his answers in this conversation.

I accept these strictures. I consider that in view of the nature of the subject matter which the Police were raising with him, they should have administered the caution to him at an earlier stage.

7. That if the conversation is admitted in principle, further submissions will be put for the purpose of having various parts of it excluded on the basis that their probative value is outweighed by their prejudicial effect. These parts will include a possible admission that the accused had not kept a vigilant look-out. I note this submission.

8. That recent cases such as *McKinney v The Queen* (1991) 171 CLR 468, dealing with the need to warn a jury where Police evidence of a confession made in custody is disputed and its making is not corroborated, indicate a growing dissatisfaction with admissions in conversations which are not tape-recorded or audio-recorded. I accept that. The subject conversation was held on 16 August 1990; at that time the audio-taping of Police interviews was common. It would have been preferable had that been done.

9. That in the light of point 8, the failure to comply with the Commissioner's Guidelines should be looked at with much disfavour. Mr Hore-Lacy noted that there had been failures -

a) in that because the accused was not Voyez' suspect, the Police considered that he did not have to be cautioned. I accept that the accused was clearly a suspect, in the circumstances, and should have been cautioned.

b) in relation to the guidelines designed to ensure that the

evidence before the Courts is in its least disputable form. I accept that.

I consider that the procedure adopted by the Police was not such as to be likely to cause the accused to make untrue admissions. I do not consider that the failure to comply with the guidelines had some material effect on the accused.

10. That there should be grave suspicion as to whether the note Exhibit D1 was written at the time of the conversation. I reject that submission, on the evidence.

11. That the accused was not told that a Warrant was going to be issued against him, or of the charges to be contained therein. I consider that the Perth Police told the accused all they knew, in that respect.

The submissions by the Crown

Mr Flanagan QC correctly observed that it had not been suggested to the witnesses that the conversation as recorded in Exhibit D1 had not taken place, or that the content of the note Exhibit D1 was untrue.

He also observed that the accused had chosen not to testify on the voire dire; he submitted that the Court could thereby have greater confidence in accepting the testimony of the Police witnesses. I accept that submission; I should say that in any event I have no hesitation in accepting the Police officers as truthful witnesses on the voire dire.

Mr Flanagan submitted that it was perfectly clear, particularly in the light of the contents of the later video-taped interview, where there was constant reference back to topics raised in the airport conversation, that the accused was continually co-operating in the answering of questions. I accept that submission.

As to the lack of caution, he submitted that in any event the accused must have known of his rights, in view of his previous experience in Alice Springs and the legal advice to which he deposed on the later video tape as having received there. However, I consider that this does not take into account the very different position in which he now believed he found himself, in Perth; I do not consider that the accused should be taken to have known of his rights, in that situation.

Mr Flanagan submitted that the accused showed a considerable willingness to speak to the Police. I agree.

He submitted that the Perth Police did not know whether the accused was legally represented or not. I accept that submission, and also that they did not know a great deal more about the accident than they were "letting on", as had been suggested.

Conclusions

I am satisfied on the balance of probabilities that the admissions made in the conversation at the airport on 16 August 1990 between the accused and Voyez/Cull, a record of which appears in the note Exhibit D1, were made voluntarily. I am not satisfied that those admissions should be excluded as a matter of discretion from the evidence to be placed before the jury, because I am not satisfied that it would be unfair in the circumstances to allow those admissions to be used against the accused.

This ruling leaves open for further submissions, the question as to whether any particular part or parts of the conversation of 16 August should be excluded from the evidence to be placed before the jury, on the ground that their probative value is outweighed by their prejudicial effect, or that they are not relevant.

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