THE QUEEN v JIMMY BUTLER (NO.2)

Supreme Court of the Northern Territory of Australia

Kearney J

14 November 1991, at Darwin

CRIMINAL LAW - practice and procedure - alleged confession while in police custody - summing up - whether jury to be given *McKinney* warning when making of confession not disputed

CRIMINAL LAW - practice and procedure - alleged confession while in police custody - summing up - nature of *McKinney* warning - whether obiter dicta by High Court - effect of *McKinney* general rule of practice on discretion of trial judge

PRACTICE AND PROCEDURE - criminal law - alleged confession while in police custody - summing up - whether jury to be given *McKinney* warning when making of confession not disputed

PRECEDENT - criminal law - practice and procedure - *McKinney* warning - stare decisis in High Court - effect of changing social conditions on applicability of previous decisions

Cases applied:

McKinney v The Queen (1990-91) 171 CLR 468

Cases referred to:

Baker v Campbell (1983) 153 CLR 52
Carr v The Queen (1988) 165 CLR 314
Driscoll v The Queen (1977) 137 CLR 517
Duke v The Queen (1988-89) 83 ALR 650
John v F.C.T. (1988-89) 166 CLR 417
Longman v The Queen (1989) 168 CLR 79
MacPherson v The Queen (1981) 147 CLR 512
Perpetual Executors and Trustees Assn. of Australia Ltd v F.C.T. (Thomas' Case) (1949) 77 CLR 493
Ross v The King (1922) 30 CLR 246

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Solicitor for the Accused:	NAALAS

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. SCC 24 of 1991

THE QUEEN

against

JIMMY BUTLER
(NO.2)

CORAM: KEARNEY J

REASONS FOR RULING

(Delivered 14 November, 1991)

The application for a *McKinney* warning

Before I commenced to sum up on 30 October Mr Bauman of counsel for the accused asked me to warn the jury in accordance with the new rule of practice formulated by the High Court 7 months ago in *McKinney v The Queen* (1990-91) 171 CLR 468, when dealing with the accused's confessional statements to the police while in custody. In *McKinney* the majority of the High Court (Mason C.J., Deane, Gaudron and McHugh JJ.) said at pp.475-6:

"- - once the question of a warning is approached from the general perspective of want of reliable corroboration - - - it follows that what is appropriate is a rule of practice of general application whenever police evidence of a confessional statement allegedly made by an accused while in police custody is disputed and its making is not reliably corroborated.
- - -
The contest established by a challenge to police evidence of confessional statements allegedly made by an accused while in police custody is not one that is evenly balanced. - - - Thus, the jury should be informed that it is comparatively more difficult for an accused person held in police custody without access to legal advice or other means of corroboration to have evidence available to support a challenge to police evidence of confessional statements than it is for such police evidence to be fabricated, and, accordingly, it is necessary that they be instructed, as indicated by Deane J in [*Carr v The Queen* (1988) 165 CLR 314 at p.335] that they should give careful consideration as to the dangers involved in convicting an accused person in circumstances where the only (or substantially the only) basis for finding that guilt has been established beyond reasonable doubt is a confessional statement allegedly made whilst in police custody, the making of which is not reliably corroborated. Within the context of this warning it will ordinarily be necessary to emphasise the need for careful scrutiny of the evidence and to direct attention to the fact that police witnesses are often practised witnesses and it is not an easy matter to determine whether a practised witness is telling the truth. And, of course, the trial judge's duty to ensure that the defence case is fairly and accurately put will require that, within the same context, attention be drawn to those matters which bring the reliability of the confessional evidence into question. Equally, in the context of and as part of the warning, it will be proper for the trial judge to remind the jury, with appropriate comment, that persons who make confessions sometimes repudiate them." (emphasis mine)

The headnote to the report of *McKinney*, following the wording of part of the extract set out above, accurately indicates that the rule laid down by the High Court is:-

> "Whenever police evidence of a confessional statement allegedly made by an accused while in police custody is disputed and its making is not reliably corroborated, the Judge should, as a rule of practice, warn the jury of the danger of convicting on the basis of that evidence alone" (emphasis mine).

As indicated in the headnote, the *McKinney* warning is to be given when the police evidence of a confession allegedly made while the accused was in custody, is "disputed", and there is no reliable corroboration that he in fact made the confession. The new rule of practice takes away the discretion of the trial judge to decide whether in those circumstances, the facts of the particular case are such as to require that a warning be given, and to decide the nature of the warning. It substitutes a compulsory warning of a fairly standard type - "the substance - - should not vary significantly from case to case" (p.475) - irrespective of the facts of the particular case. Mr Bauman submitted that the word "disputed" in the rule should be interpreted very widely: that the warning should be given not only where the accused claimed he had not made the confession alleged - that is, where he claimed it had been fabricated in whole or in part by the police - but also where he disputed the police evidence relating to the confession, in any way. Initially Mr Wallace, the Crown Prosecutor, appeared to agree with this approach. After hearing counsel I declined to give the jury a *McKinney* warning; I now publish the reasons for that ruling.

The *McKinney* warning

The case against McKinney was based substantially on a police record of interview which he had signed. His signature was the only evidence independent of the police evidence which corroborated the making of the record and confirmed its contents. McKinney contended that the record had been fabricated by the police and that he had signed the fabricated document only because his will not to do so was overborne by assaults by the police.

McKinney was decided on 22 March 1991 and states what is now required throughout Australia when summing up to a jury on uncorroborated police evidence of confessional statements allegedly made while the confessionalist was in police custody. The general rule of practice it enunciates appears to be contrary to earlier High Court authorities going back almost 70 years to *Ross v The King* (1922) 30 C.L.R. 246. The principle of stare decisis applies in the High Court, exceptions being "allowed only with great caution and in clear cases"; see *Perpetual Executors and Trustees Association of Australia Ltd v F.C.T. (Thomas' Case)* (1949) 77 C.L.R. 493 at p.496. It is nevertheless clear that the High Court has power to review and depart from its previous decisions - see *John v F.C.T.* (1988-89) 166 CLR 417 at pp.438-9; and the observations of Brennan J in *McKinney* at pp.481-2, in *John* at p.451, and in *Baker v Campbell* (1983) 153 C.L.R. 52 at p.103.

However, the majority in *McKinney* did not consider that the new rule - a general or prima facie requirement that the warning be given in the circumstances outlined on p.3 - involved any conflict with the principle of stare decisis. They said at p.478:-

> "The central thesis of the administration of criminal justice is the entitlement of an accused person to a fair trial according to law. It is obvious that the content of the requirement of fairness may vary with changed social conditions, including developments in technology and increased access to means of mechanical corroboration. In these circumstances what has been said by the Court in the past - even in the recent past - cannot conclusively determine the content of that requirement. Where a majority of the Court is firmly persuaded that the absence of a particular warning or direction in defined circumstances will prima facie indicate that the requirement of fairness is unsatisfied and will give rise to the detriments of the miscarriage of justice and a need of a second trial, it is incumbent upon the Court, in the proper discharge of its judicial responsibilities, to enunciate a prima facie rule of practice that such a warning or direction should be given in those circumstances."

The majority considered at p.473 that since the decisions in *Carr* and *Duke v The Queen* (1988-89) 83 ALR 650 could not "be satisfactorily reconciled" and as there now existed "reliable and accurate means of audiovisual recording", it was "incumbent upon the Court to reconsider the whole question [of disputed uncorroborated police evidence of confessions made by persons in police custody.]"

At p.475 their Honours stressed that:-

> "- - it is the want of reliable corroboration that should attract a warning, rather than that the statement is oral or, as was put in argument in *Carr*, unsigned and uncorroborated."(emphasis mine)

They stated the rationale for the new rule of practice, at p.478:-

> "- - the basis [of the rule] - - is not a suggestion that police evidence is inherently unreliable or that members of a police force should, as such, be put into some special category of unreliable witnesses. The basis [of the rule] lies - - - in the special position of vulnerability of an accused to fabrication when he is involuntarily so held [in police custody], in that his detention will have deprived him of the possibility of any corroboration of a denial of the making of all or part of an alleged confessional statement." (emphasis mine).

The prelude to the *McKinney* rule

(a) *Carr v The Queen* (1988) 165 CLR 314

In enunciating the new rule in *McKinney*, set out at p.3, the majority at p.474 endorsed the views of Deane J dissenting in *Carr*, stating: "a rule of practice should be adopted for the future along the lines suggested by Deane J in *Carr*." In that case, in an unsworn statement in court, the accused had denied making admissions recorded in a document which the police testified the accused had read and agreed was correct, but refused to sign. The Crown case

depended almost exclusively on these alleged admissions, of which there was no independent corroboration. The defence stressed the prospect that the police had concocted this confession; that is, that they had "verballed" the accused. The case was fought on the issue whether the alleged confession had been made. So what was disputed was the police evidence, uncorroborated by independent evidence, that the oral confession had been made. The accused contended, inter alia, (as accused later did in *Duke* and *McKinney*) that there was a rule of practice that when the sole or substantial evidence was a disputed uncorroborated oral confession the judge should warn the jury of the danger of acting on it. The majority (Wilson, Dawson, Brennan and Gaudron JJ) held that there was no such rule of practice. Deane J, dissenting, said at p.335:

> "- - I would - - recognize a prima facie requirement that [certain specific warnings to the jury] be given in any case where the prosecution relies upon police evidence of disputed oral admissions allegedly made while the accused was under interrogation while in police custody and where the actual making of the admissions is unsupported by video or audio tapes, by some written verification by the accused, or by the evidence of some non-police witness. In addition, I consider that, as a prima facie rule, those specific directions should, in a case where uncorroborated police evidence of the making of a disputed oral confession is the only, or substantially the only, evidence against an accused, include a further warning to the jury pointing to the danger involved in convicting upon the basis of that evidence alone. That further warning should be to the effect that, while it is ultimately a matter for them, the members of the jury should give careful consideration to the dangers involved in convicting an accused person in circumstances where the only (or substantially the only) basis for a finding that his guilt has

> been established beyond reasonable doubt is uncorroborated and disputed police evidence of oral admissions allegedly made by him while he was held in custody by the police. It should be pointed out to the jury that, in such a case, the detention in police custody and the failure of the relevant authorities to institute an appropriate system for the mechanical recording of what is said in the course of police interrogation combine to render an accused peculiarly vulnerable to fabrication of evidence of oral admissions allegedly made while in such custody by effectively precluding any corroboration of his denial that he has made them." (emphasis mine)

His Honour stated a rationale for this "prima facie rule" at p.336:-

> " - - it would be to fly in the face of reality to deny that there is, throughout this country, a real and substantial risk of fabrication of police evidence of the making by an accused of oral admissions in the course of his interrogation while held in police custody." (emphasis mine)

The "reality" to which his Honour referred had become apparent, no doubt, from the many proven instances of widespread police mendacity in the eastern seaboard States, involving the concoction of evidence in criminal cases, (particularly "verballing"), established by investigations stemming from the late 1970's; for example, the Lucas Report of 1977 in Queensland, the Beach Report in 1978 in Victoria, the Williams Report of 1980 involving State and Federal police, and the Police Complaints Tribunal report on the Mannix case in Queensland in 1986. These repeated instances gave rise, inter alia, to public calls for the formulation by the Court of a rule of practice of the type ultimately

formulated in *McKinney*. The High Court had long been aware of the general problem; see, for example, its remarks on 10 August 1977 in *Driscoll v The Queen* (1977) 137 C.L.R. 517 at p.539. It is not suggested that any such widespread police malpractice exists in the Northern Territory. Deane J in *Carr* was concerned with the "real and substantial risk of fabrication", in certain circumstances; no such risk has been shown to exist in the Northern Territory. There is no uniform police culture, in this respect, throughout Australia. Yet, in the result, the High Court, by enunciating a nationwide rule of general practice in *McKinney*, has saddled Northern Territory criminal practice and procedure with the consequences of police malpractice in the eastern States. The effect, despite the assertion of the majority to the contrary at p.478, set out at p.6 above, is to "place police evidence in a special category of unreliability", as Brennan J put it at p.484, when the evidence is of the type dealt with by the rule; unfairly, in my opinion, since, in the Territory, there is no established basis for so categorizing police evidence of this type in all cases.

The practical result appears to have been a great upsurge in the number of voir dires since *McKinney* was decided, as counsel seek to take forensic advantage of the new rule of practice in situations where uncorroborated police evidence of a confession is relied on by the Crown. The forecast by Brennan J at p.485 of the unbalancing of the

even-handedness of the criminal trial, has already proved accurate.

It is clear from Deane J's observations throughout his opinion in *Carr* that his attention was there focussed on the situation where an accused disputes that a confession was made, in a context where the accused is "peculiarly vulnerable" to the risk of its fabrication. That was the factual situation in *Carr*; a majority (Brennan, Deane and Gaudron JJ) held that the conviction was unsafe and unsatisfactory because a warning should have been given in the circumstances of the case of the danger of acting on the police evidence of the confession.

Deane J referred to and distinguished previous authority on the question of the "prima facie" rule of practice he enunciated, at p.338:-

> "There is authority, both in this Court and elsewhere, supporting a refusal to recognize any such general rule of practice. That is not, however, conclusive since it is obvious that there is no underlying principle which precludes recognition now of such an absolute or prima facie requirement. The fundamental thesis of the administration of criminal justice in this country is that no person should be convicted of a criminal offence unless his or her guilt is established beyond reasonable doubt after a fair trial according to law. Central to that fundamental thesis is the requirement of fairness. The content of that requirement may vary according to circumstances, including developments in modern technology and an increased appreciation of the dangers mentioned above." (emphasis mine)

It can be seen that the majority in *McKinney* in the passage from p.478 set out at p.5 closely followed these words of Deane J.

At p.339 his Honour noted that:-

> "It is conceivable that the special circumstances of an extraordinary case might make it unnecessary to give a specific direction notwithstanding that uncorroborated police evidence of a disputed oral confession is relied upon. If e.g. an accused gives evidence and - - unmistakably confirmed the police evidence by the content of what he said - - -"

(b) *Duke v The Queen* (1988-89) 83 ALR 650

Carr was decided on 27 September 1988. In *Duke* decided less than 5 months later on 7 February 1989, the sole evidence on which the applicant had been convicted was again an unsigned record of interview, made this time while he was unlawfully detained by police (since he had been in custody for six hours during which the police had made no effort to discharge their statutory duty to take him before a justice "as soon as practicable"). The police evidence of his confession was uncorroborated. In an unsworn statement in court he denied making any admissions to the police. He sought special leave to appeal on the same ground, inter alia, as had been argued unsuccessfully in *Carr* that the trial judge had not complied with an alleged general rule of practice of the type later enunciated in *McKinney* and set out at p.3 above. Wilson, Brennan and Dawson JJ considered that *Carr* made it clear that there was no such general rule

of practice; so did Toohey J, dissenting on another aspect. The majority held that on the particular facts of the case, applying the same principle as in *Carr*, the trial judge had not erred in refraining, in the exercise of his discretion, from warning the jury against relying on the confession without scrutinizing it with care. Deane J, dissenting in the result, adhered to the conclusion he had expressed in *Carr*, stating at pp.657-8:-

> " - - the necessary recognition of a perceptible risk of [fabrication by police of evidence of an oral admission of guilt made by a person while in police custody] in this country entails acceptance of the fact that there is ordinarily a perceptible risk of an unfair trial, and even a miscarriage of justice, in a case where the prosecution leads and relies upon disputed and uncorroborated police evidence that the accused, while in police custody, made such an oral confession." (emphasis mine)

His Honour, however, did not expressly refer to the "prima facie" rule of practice he had enunciated in *Carr*, set out at pp.7-8 above, and did not expressly purport to apply any such general rule.

Conclusions

The majority in *McKinney* did not apply the new general rule (at p.3) to the case before it; the rule was for "future cases", and their Honours dealt with *McKinney* on the basis that in the particular circumstances of the case a warning should have been given (p.476). This was simply the application of the same general principle as had been

earlier applied by the respective majorities of the Court in *Carr* and *Duke*, though with differing results in those cases when the principle was applied to the respective facts. Brennan J, dissenting in *McKinney* as to the existence of any general rule of practice and in the result, pointed out at p.480 that this was simply an application of long-established law as conveniently stated in *Longman v The Queen* (1989) 168 CLR 79 at p.86, which:-

> "- - requires a warning to be given whenever a warning is necessary to avoid a perceptible risk of miscarriage of justice arising from the circumstances of the case." (emphasis mine)

Strictly, therefore, what the majority in *McKinney* had to say about the new general rule of practice was obiter dicta; it played no part in the resolution of the case before the Court.

In my opinion, a *McKinney* warning is required only when the making (and content) of an uncorroborated confessional statement to the police while in custody, is disputed. That was not the case here.

First, it was never suggested that the police evidence of the confession had been fabricated. That the accused had admitted what he was recorded as admitting was never denied. Although the question whether a confession was in fact made is a question for the jury - see *McPherson v The Queen* (1981) 147 CLR 512 - it was never a live issue

here. In addressing the jury Mr Bauman contended rather that there must be a doubt as to whether what the accused had admitted could be relied upon - that is, there was a doubt whether it was true - because of his state of intoxication at the time of the crime and other factors; he pointed to certain obvious errors in what the accused said. None of the factors upon which he relied involved a dispute with the police evidence; they concerned matters personal to the accused such as his unfamiliarity with the English language and police procedures, his misunderstanding of non-Aboriginal concepts, his inherent desire to please authority figures such as police and the effect of his long-term alcohol abuse. None of these bear upon the need for a *McKinney* warning; they are to be drawn to the jury's attention as matters going to the reliability of the confession, as part of the trial judge's general duty to ensure that the defence case is fairly and accurately put.

Second, in this case, in the terminology of *McKinney* at p.475, the confession was "reliably corroborated by independent material which - - unmistakably confirms its making." There was in evidence an audio-tape of a reading-back of the questions and answers by another police officer, punctuated at the end of each page by the voice of the accused agreeing that the questions had been asked and the answers given. Further, the accused was accompanied throughout the interview by the person he had selected as his "prisoner's friend" in accordance with the *Anunga*

guidelines; although Mr Bauman stressed the fact that the "prisoner's friend" had a hearing problem, I am satisfied that his hearing aid was fixed at a relatively early stage and it cannot be said, in terms of *McKinney* at p.475, that there was no "independent person who might confirm [the accused's] account."

For these reasons I declined to include a *McKinney* warning when summing up to the jury.

I observe that this was not a case where substantially the only basis for a finding of guilt was the confession in the record of interview. There were also the accused's admissions to neighbours of the deceased shortly after the death, that he had assaulted the deceased. There was evidence of his having been seen walking with Reynolds towards the deceased's house prior to the assault, and the somewhat dubious evidence of the alleged eye-witness to the assault, Curly Reynolds.
