**[2016] QSC 320**

**QUEENSLAND SUPREME COURT**

**APPLEGARTH J**

**SC 1046 of 2015**

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| **R** | **Respondent** |
| **v** | |
| **GARRY REGINALD DUBOIS** | **Applicant** |

**BRISBANE**

**THURSDAY, 13 OCTOBER 2016**

**JUDGMENT (EX TEMPORE)**

[1] Mr Dubois applies to exclude at trial the evidence of former South Australian police officers James Robert Munro and John Nicholas Attwood, being evidence that was obtained on or about 7 July 1980. The basis of the application is that the alleged statements were not recorded as required by sections 436(4) or 437 of the *Police Powers and Responsibilities Act* 2000 and therefore, the alleged statements are prima facie not admissible in accordance with section 436(3). It is further submitted that no special circumstances, which would justify admission of the alleged statements in the interests of justice pursuant to section 439 of the Act. Alternatively it is submitted that in all of the circumstances it would be unfair to use the statements against the applicant. So this application concerns the statutory framework surrounding the recording of confessions and admissions made during police questioning and also the common law discretion to exclude evidence.

[2] The first issue is whether the *Police Powers and Responsibilities Act* 2000 – and its relevant

provisions, section 436 and 437 – apply to statements made before the Act was passed. I decided that issue on Tuesday by concluding that, as a matter of statutory interpretation, the Act did not so apply. However, I should consider in a precautionary way that if the Act's provisions do in fact apply to statements and questioning that occurred on or about 7 July 1980 in South Australia, whether the circumstances stated in the section of 439(2) exist so as to justify the admission of this evidence. Next I need to consider whether it would be unfair to allow the admission of this evidence at trial.

[3] The circumstances under which the applicant came to speak to Officers Munro and Attwood is detailed in the respective parties' written submissions. In the interests of brevity, I will not detail all of it. Munro was a detective sergeant of police. Attwood was a detective senior constable of police with a major crime squad. They were notified of warrants for Mr Dubois' arrest. According to their evidence, he was arrested in circumstances in which he initially resisted arrest. He was taken into custody in respect of warrants that had been issued in Queensland, both for murder and for drug offences. So there were two warrants. According to those officers, Mr Dubois was taken to the CIB Office and an interview was conducted. It does not seem as if the relevant exchange was typed up in Mr Dubois' presence. The precise circumstances in which the 2-page record of interview came to be typed are somewhat uncertain. Evidence has been given about that.

[4] The essence of the matter is that according to former officers Munro and Attwood the applicant was interviewed, and that resulted in what was noted, being the subject of the record of interview. It may be, according to what seems to have been Mr Munro's practice, that it was typed up shortly afterwards. But the two page record of interview was not shown to Mr Dubois, and he did not adopt it or sign it.

[5] The present importance of this is that in the record of interview Mr Dubois admits to knowing Billy McCulkin. He also admits to having met Mrs McCulkin and her children, although he said he hardly knew them. He also admits to having deliberately left Queensland despite being on bail on a charge in relation to cannabis.

[6] There is alleged to be later conversation and that is the subject of a four page statement given by Mr Attwood in which various statements are made concerning Mr Dubois'

relationship with Mr O'Dempsey and the like. There is some uncertainty as to whether these conversations occurred on 7 or 8 July 1980. Mr Dubois was handcuffed at the time he was remanded in custody and the conversations recorded by Mr Attwood relate to the circumstances in which he was in the precincts of the court, it seems, on 8 July 1980 when he was given his first appearance in the Adelaide Magistrates Court and a conversation that occurred after he came out of the extradition proceedings and was in a holding cell.

[7] It is obvious that neither of these interviews were electronically recorded. Mr Munro gave evidence at the committal that he was aware that some police officers at the time used tape recorders. That was not his practice. Mr Munro was not sure when the written record of interview was typed, that is, whether it was typed at the time of the conversation or later, although he thought it likely to have been typed at the time. He said he did not himself take any notes during the conversation. Attwood said that he thought that he had made notes at the time of the interview and he did not recall there being any typewriter in the interview room. He said he did not type the record of interview and could not recall whether it was typed at the time of the conversation or typed later.

[8] The record of interview itself records a caution and Munro said he gave that caution because it was something that was done if someone was to be charged. Munro says that the conversation would have only have lasted a few minutes, and that is consistent with the content of the record of interview.

[9] As to the watch-house conversation, if this conversation occurred, and this application proceeds on the basis that it did, it would appear that it was the applicant who volunteered comments. He was warned that such comments would be recorded and given in evidence, but he continued to speak. In essence, Mr Dubois said that he was guilty by association and was fearful that he would be killed. Importantly, in these conversations, Mr Dubois did not admit any responsibility for the murder.

[10] There are no existing notes of the conversation. Ms Attwood said at the committal that if he had made notes the applicant would have stopped talking. Attwood said he made long handwritten notes later, within about half an hour, but he does not know what became of them. He then made a typed record. It is apparent, and both officers acknowledge, that neither the notes nor the typed record was shown to Mr Dubois, even though, obviously,

there would have been an opportunity to do so. There was no requirement to tape record interviews at the time.

[11] I previously ruled that the provisions of the *Police Powers and Responsibilities Act* do not apply to statements made in 1980.

[12] The issue, accepting then that there was not compliance with the 2000 Queensland Act by the conduct of these officers in 1980 is, assuming I am wrong on that point of statutory interpretation, whether section 439(2) is engaged. It provides the court may admit the record, "only if having regard to the nature of and the reasons for the non-compliance and any other relevant matters the court is satisfied, in the special circumstances of the case admission of the evidence would be in the interests of justice." So I have a discretion to admit evidence if the *Police Powers and Responsibilities Act* has that retrospective effect if there are special circumstances, which make the admission of the evidence in the interest of justice.

[13] The applicant submits that there are no such special circumstances. It is submitted that the fact that there was no practice at the time or indeed any legal requirement at the time to tape record or to observe the other requirements contained in the *Police Powers and Responsibilities Act* (2000) does not qualify the circumstances as special or result in a conclusion that the interests of justice require the admission of the statements. Reliance is placed upon further submissions that are made in relation to the question of unfairness, to which I will return.

[14] It seems to me that in a case such as this, the fact that the statements were made and seemingly recorded in 1980 is a highly relevant matter and, for the reasons that have been discussed in some greater detail in the course of argument, the fact that no legal requirement existed either in Queensland or in South Australia at the time, nor was there any practice to tape record or observe the requirements that are now contained in section 437 of the Act is a circumstance which I regard as special. In essence, in 1980 neither the Queensland Police who were involved in this investigation nor the South Australian Police were to know that 20 years later the Queensland Parliament would enact laws which, assuming they were to apply retrospectively, would affect the manner in which they recorded the kind of statements that were made here. It would be in my view in the interests of justice,

all other things being considered, to permit the admission of evidence that was legally obtained and obtained in accordance with then prevailing practices.

[15] If, contrary to my earlier ruling on the point of statutory interpretation, the Queensland Parliament intended these provisions of the 2000 Act to have retrospective effect and to apply to statements that were made in 1980 then the inclusion of section 439(2) exists to deal with such cases as well as cases of statements that were made after 2000 where special circumstances might exist. I would regard it as a special circumstance that the relevant statement is made 20 years before the Act's enactment and the police conduct was in, as it were, blissful ignorance of the fact that the Queensland Parliament would enact laws some 20 years later. So that matter considered on its own seems to me not to be a reason to not apply section 439(2). Nor are the other matters that have been considered in the context of discussion about common law fairness sufficient to not exercise any discretion which I might have had under section 439(2). In short, the fact that the police conducted themselves according to what was then accepted practice and the legal requirements of both South Australia and Queensland provide special circumstances which justify the admission of the evidence.

[16] So far as common law unfairness is concerned the applicant submits that in all the circumstances it would be unfair to use the statements against him. For the reasons I have given I do not consider it is unfair because in 2000 the Queensland Parliament passed laws governing police recording in the light of experience gathered over the following decades.

[17] The applicant's submissions note that he was held in custody and that the form of caution was insufficient to identify what it related to. I do not accept that. It seems to me apparent from the context that the caution that was given when Mr Munro said:

*Is there anything you wish to say in answer to these matters bearing in mind that you're not obliged to say anything or answer any questions unless you wish to do so and that anything you say may later be used in evidence. Do you understand that?*

To which Mr Dubois is recorded as immediately responding:

*Yeah. I know all that. Yeah. That's it, isn't it. Fucking murder. That's not my go.*

This indicates that the warning was given in relation to the subject matters of both warrants and Mr Dubois understood that to be the case.

[18] It is true that Mr Dubois was not offered the opportunity or means to obtain legal representation. I cannot say what that would have resulted in. I am not prepared to assume that he was not aware, given his circumstances, of his ability to obtain legal representation and, of course, he was aware, according to this statement, of his right to silence.

[19] It is said that he was denied means of reliably corroborating the detail of the conversations, for example, by electronic recording. But that really turns upon whether it was reasonable or unreasonable or, indeed, unfair for these statements not to be electronically recorded. Perhaps it would have been better in retrospect if they had been, but the conduct of the police and the admissibility of evidence should be judged according to, amongst other things, what was regarded then as appropriate practice. It is said that there is no complete account of either conversation. It is true that there is no account of what may have been said in the police car or matters leading up to this.

[20] The Crown has excised from the record of interview what was, it seems, an offer by Mr Dubois to give the police officer $5,000. In any event it is unnecessary, I think, to the fairness of this trial to have in recorded form what may have been said in the police car or anywhere else.

[21] It is said that the applicant was denied means of reliably corroborating the detail of the conversations and that no original written recording of either conversation or a copy is available. I should add that the applicant, as I understand it, was indicted for murder in this court in or about 1981 and so there was some opportunity for him through his legal advisors to obtain evidence including this evidence if it was to be relied upon.

[22] It is submitted that doubt exists as to when some of the conversation occurred. That arises out of matters concerning the absence of entries in a particular diary. Although there may be some uncertainty as a result as to when these conversations occurred there seems little doubt about the arrest on 7 July 1980 at about 6.50 am. In the process that then ensued the documents themselves would seem to indicate that the first conversation commenced at 7.50 am on the 7th of July 1980 and the record would bear out when Mr Dubois was taken

to the court and would seem to support the sequence of events that appears in the relevant documents. Although some doubt exists as to how the written records of conversations were created, the evidence of Mr Munro about when the two-page record of interview probably was typed would seem to be plausible. It is not my function in exercising a discretion to exclude on unfairness grounds to embark upon questions of the reliability of this evidence, or to embark upon a determination of whether any such conversations occurred. I simply note that, at this stage, there is no attempt before me by the applicant to give evidence that no such conversations occurred. However, ultimately, it will be for the jury to determine that issue if it becomes a live issue at the trial.

[23] The appeal to the fairness discretion rests largely upon the proposition that the fairness of Mr Dubois' trial should be judged according to standards of fairness which currently prevail, and I readily accept that submission. However, as a general proposition, I would conclude that there is nothing particularly unfair about someone facing a trial which includes evidence which was obtained according to the law, practices and standards that applied at the time the evidence was obtained. There may be cases where scientific advances demonstrate, for example, that the collection of certain real evidence or other forms of evidence is inherently reliable and the means by which they were obtained give rise to problems of false implication.

[24] The problem of unsigned statements, by which I mean the problem of alleged statements not being either recorded or not adopted in writing by an accused or not electronically recorded has confronted the criminal justice system for decades. In 1990 in *McKinney v The Queen*, the High Court of Australia had to consider a particular issue concerning an uncorroborated police interview and adopted a certain prima facie rule. The court then did not accede to a rule that such evidence should be excluded on the grounds of fairness. Instead, the court considered that the requirements of a fair trial would be met, in most cases, by the practice that required the giving of a warning.

[25] The legitimate concerns that have been raised over the years and which are raised in relation to this kind of evidence call for a response that ensures both fairness to an accused and also, to some degree, fairness to police officers who are subject to false allegations of fabrication. The legal system has not required the automatic exclusion of such evidence. The response to these problems of records of interview which are unsigned has been one

of judicial warning. It seems to me that that is the appropriate response to concerns about potentially unfair trial.

[26] So by way of summary, there was a caution issued. It applied to both matters, in my view. There was no electronic recording, but that was not the practice, nor, on the evidence before me, was it seemingly practicable in a holding cell.

[27] There was not a practice of recording such conversations at the Adelaide CIB. Mr Dubois, himself, initiated some of these conversations. There was no police impropriety. What the police did was done according to governing practices and the law that governed them at the time. Concerns about unfairness can be met by appropriate directions in accordance with *McKinney* and other authorities.

[28] More generally, in a case where, presently, I am simply told these statements are going to be contested or the making of it was going to be contested, I have to proceed on the basis that they were made, subject to any later determination of the jury. It is not suggested that the contents of the statements are inherently unreliable. The fact that, on one view of the evidence which I heard this morning, neither Mr Munro nor Mr Attwood would have had occasion to be told that Mr McCulkin's name was Billy, provides some, albeit slight, support to the reliability of these confessions or admissions, however I place little weight on that.

[29] Ultimately, it seems to me that it is not unfair to permit evidence that was obtained in accordance with lawful procedures to be admitted subject to appropriate warnings, which the High Court has indicated are appropriate in most cases to uncorroborated police interviews. Accordingly, I decline the application to exclude the evidence of Mr Munro and Mr Attwood.