
AUSTRALIA / JUDGMENT

R v Hunter (No 7) [2014] NSWSC 1150

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Supreme Court

New South Wales

Medium Neutral Citation: R v Hunter (No 7) [2014] NSWSC 1150

Hearing dates: 4 July 2014

Decision date: 10 July 2014

Jurisdiction: Common Law - Criminal

Before: Button J

Decision: I do not exclude the evidence of the exchange of 21 June 2011 or the evidence of the exchange of 20 October 2011.

Catchwords: CRIMINAL LAW - EVIDENCE - admissibility - Evidence Act 1995 s 138 - exclusion of improperly or illegally obtained evidence - accused a vulnerable person - whether requirements of Law Enforcement (Powers and Responsibilities) Act 2002 and Law Enforcement (Powers and Responsibilities) Regulation 2005 complied with

Legislation Cited: Crimes (Administration of Sentences) Act 1999 (NSW), s 35

Criminal Procedure Act 1986 (NSW), s 281

Evidence Act 1995 (NSW) s 138

Law Enforcement (Powers and Responsibilities) Act 2002 NSW, s 99, Pt 9

Law Enforcement (Powers and Responsibilities) Regulation 2005, cll 24, 27, 33

Cases Cited: R v Powell [2010] NSWDC 84

Category: Interlocutory applications

Parties: Regina

Paul Andrew Hunter

Representation: Counsel:

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D Carroll (Accused)

Solicitors:

Office of the Director of Public Prosecutions (Crown)

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File Number(s): 2011/397367

Judgment

1Objection has been taken by defence counsel to the contents of two conversations between the accused and police officers in which it is alleged that he made admissions. The objection is based on s 138 of the Evidence Act 1995 (NSW) and is chiefly founded on the submission that, on each occasion, the police did not comply with the requirements of the Law Enforcement (Powers and Responsibilities) Act 2002 NSW ("LEPRA") and the Law Enforcement (Powers and Responsibilities) Regulation 2005 ("the Regulations").

Subject matter of objections

2The first conversation allegedly occurred on 21 June 2011, and the second conversation on 20 October 2011.

3The first conversation is contained in [16] of the statement of Senior Constable Hind-Spiteri of 12 January 2012, which became voir dire exhibit 2, and [22] of the statement of Detective Sergeant Evans completed 22 February 2012, which became voir dire exhibit 3. These passages are relevantly identical, and it is convenient to extract the relevant passages from the former statement. The portions of the first conversation that are objected to are emphasised:

Detective Sergeant EVANS said, "Paul my name is Detective Sergeant EVANS and this is Detective Senior Constable HIND-SPITERI. We are Detectives here at Mt Druitt."

Paul HUNTER said, "Yeah."

Detective Sergeant EVANS said, "Paul Detective Senior Constable HIND-SPITERI and I are investigating some matters and I want you to understand that you are not obliged to say or do anything and anything you say or do will be recorded and may later be used in evidence at court. Do you understand that?"

Paul HUNTER said, "Yeah."

Detective Sergeant EVANS said, "Paul I want you to understand that you are under arrest for and [sic] affray which occurred at 9 Livingston Avenue Dharruk. You are not obliged to say or do anything and anything you say or do will be recorded and may later be used in evidence at court. Do you understand that?"

Paul HUNTER said, "I was the one who got hit, he hit me."

Detective Sergeant EVANS said, "Do you understand what I said?"

Paul HUNTER said, "Yeah but he hit me."

...

Detective Sergeant EVANS said, "Paul I also want you to understand you are under arrest for the assault, serious assault upon Jason DIXON on 20th June 2011. You are not obliged to say or do anything and anything you say or do will be recorded and may later be used in evidence at court, Do you understand that?"

Paul HUNTER said, "Yeah, I was at Mt Druitt Hospital, you do the maths."

4The second conversation is contained in [46] of the statement of Senior Constable Hind-Spiteri of 12 January 2012, which became voir dire exhibit 2, and [6] of the statement of Sergeant Lowe of 12 January 2012, which became voir dire exhibit 6. Again, these passages are relevantly identical, and it is convenient to extract the relevant passages from the former statement. The portions of the second conversation that are the subject of objection are emphasised:

About 11am on Thursday the 20 October 2011 Detective Sergeant LOWE and I attended the Metropolitan and Remand Reception Centre at Silverwater. When there I saw Paul HUNTER taken into police custody in the police charge room situated there. After HUNTER spoke to the custody manager I heard Detective Sergeant LOWE say, "Paul HUNTER, I am Detective Sergeant LOWE from the Homicide Squad and this is Detective HIND-SPITERI you are under arrest for the murder of Jason DIXON. You are not obliged to say or do anything but anything you say or do will be recorded and may later be used in evidence. Do you understand that?"

HUNTER said, "I'm not saying anything I wasn't even there I was at the hospital."

Detective Sergeant LOWE said, "We have information that suggests otherwise. What we propose to do is ask you a number of questions that will be recorded on the DVD system."

HUNTER said, "No."

Detective Sergeant LOWE said, "Will you sign my notebook refusing to be interviewed."

HUNTER said, "No I am not saying or signing nothing."

Outline of the position of the parties

5To state the foundation of the objections simply, it is said that, on the first occasion, the police failed to comply with the requirement, pursuant to s 122 of LEPR, that the accused be cautioned and provided with a summary of Part 9 of that Act. It is also said that the police failed to comply with the requirements of the Regulations, in particular cl 27 and 33.

6As for the second occasion, defence counsel submits that the identical failings occurred. He also submits that, in truth, the accused was arrested for the improper purpose of being questioned, rather than being charged and brought before a court.

7The position of the Crown Prosecutor can be simply stated. She submits with regard to each occasion that informing the accused that he was under arrest, and of the offence for which he had been arrested, and of the fact that he had a right to silence, cannot be characterised as an "investigative procedure in which a detained person is to participate". Accordingly, there was no failing on the part of the police with regard to s 123 of LEPRA. As for s 122, she submitted that provision had indeed been complied with on each occasion.

8A number of documents were tendered by defence counsel on the voir dire. Two police officers, Detective Sergeant Evans and Detective Sergeant Lowe, were also cross-examined with regard to the events in question.

Findings of fact on the voir dire

9With regard to the first occasion, I make the following findings of fact, founded upon the documentary exhibits on the voir dire and the evidence of Detective Sergeant Evans in the witness box.

10On the evening of 20 June 2011, the police became aware that the deceased had been the victim of a serious assault. Thereafter a large number of police engaged in a variety of investigations.

11Sometime after 4:20 PM on 21 June 2011, the accused was arrested by Senior Constable Burton and Detective Mackie pursuant to a warrant. He was warned that he did not have to say anything, but anything he did say could be used against him.

12At about 4:53 PM that day the accused arrived at Mt Druitt Police Station and was brought in to the charge room.

13At 5:18 PM Senior Constable Clarke, who was then serving as the custody manager, contacted the Aboriginal Legal Service and spoke to a solicitor there, and informed her that the accused was being detained at the police station.

14At 5:30 PM a new custody manager, Senior Constable Horwood, began her shift.

15At about 6 PM Detective Sergeant Evans and Detective Senior Constable Hind-Spiteri spoke to the accused at Mt Druitt Police Station. Thereafter the conversation the subject of objection allegedly took place.

16At 6:07 PM Senior Constable Horwood provided the accused with a caution and summary of Part 9 of LEPRA.

17With regard to the second occasion, I make the following findings of fact, on the basis of the documentary evidence and the oral evidence of Detective Sergeant Lowe.

18 On 20 October 2011, the accused was conveyed from the MRRC to a police station located adjacent to that gaol. That occurred by way of an order made pursuant to s 25 of the Crimes (Administration of Sentences) Act 1999 (NSW). He arrived at 12 midday. At the same time, the custody manager provided the accused with a caution and summary of Part 9 of LEPR. Shortly after that, the conversation that is the subject of objection allegedly occurred. There was no dispute on the voir dire that the following conversation occurred immediately afterwards:

Detective Sergeant LOWE said, "It is just a matter of time before your [sic] charged with murder."

HUNTER said, "He hit me and your [sic] going to charge me?"

Detective Sergeant LOWE said, "No one from your family even wants to tell us about the assault on you."

HUNTER said, "Yeah because I've trained them well. They won't say nothing unless I give them the Okay."

Detective Sergeant LOWE said, "I tried Deanna, Paul junior both said no. It makes it hard when you act like you have something to hide."

HUNTER said, "We don't speak to cops."

(The first exchange has been separately excluded by me pursuant to s 281 of the Criminal Procedure Act 1986 (NSW); the latter two exchanges are not pressed by the Crown in the trial.)

19 Thereafter, at 12:05 PM, the custody manager made a call to the Aboriginal Legal Service and left a message on the answering machine.

Statutory framework

20 It is convenient at this stage to set out some of the provisions upon which the application for exclusion is founded.

21 Part 9 of LEPR is entitled "Investigations and Questioning". Neither that Part nor s 3 of LEPR provides a definition of "investigative procedure". Pursuant to s 111, the Part applies to persons who are arrested by police for an offence. Section 112(1)(b) permits the regulations to modify the application of the Part to Aboriginal persons. (There was no dispute before me that the accused is such a person.) Section 114 permits a person to be detained after arrest for the purposes of investigation for a limited period. Subsequent sections set out the mechanism of that detention.

22 Section 122 is as follows:

122 Custody manager to caution, and give summary of Part to, detained person

- (1) As soon as practicable after a person who is detained under this Part (a detained person) comes into custody at a police station or other place of detention, the custody manager for the person must orally and in writing:

- (a) caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence, and
 - (b) give the person a summary of the provisions of this Part that is to include reference to the fact that the maximum investigation period may be extended beyond 4 hours by application made to an authorised officer and that the person, or the person's legal representative, may make representations to the authorised officer about the application.
- (2) The giving of a caution does not affect a requirement of any law that a person answer questions put by, or do things required by, a police officer.
- (3) After being given the information referred to in subsection (1) orally and in writing, the person is to be requested to sign an acknowledgment that the information has been so given. [Emphasis added at s 122(1)]

23Section 123 relevantly is as follows:

123 Right to communicate with friend, relative, guardian or independent person and Australian legal practitioner

- (1) Before any investigative procedure in which a detained person is to participate starts, the custody manager for the person must inform the person orally and in writing that he or she may:
 - (a) communicate, or attempt to communicate, with a friend, relative, guardian or independent person:
 - (i) to inform that person of the detained person's whereabouts, and
 - (ii) if the detained person wishes to do so, to ask the person communicated with to attend at the place where the person is being detained to enable the detained person to consult with the person communicated with, and
 - (b) communicate, or attempt to communicate, with an Australian legal practitioner of the person's choice and ask that Australian legal practitioner to do either or both of the following:
 - (i) attend at the place where the person is being detained to enable the person to consult with the Australian legal practitioner,
 - (ii) be present during any such investigative procedure.
- ...
- (10) After being informed orally and in writing of his or her rights under this section, the person is to be requested to sign an acknowledgment that he or she has been so informed. [Emphasis added]

24 Regulations have been made pursuant to s 112. They are contained in Part 3 Division 3 of the Regulations.

25 Clause 24 of the Regulations makes it clear that an Aboriginal person is a vulnerable person for the purposes of the Regulations.

26 Clause 27 of the Regulations relevantly is as follows:

27 Support person may be present during investigative procedure

- (1) A detained person who is a vulnerable person is entitled to have a support person present during any investigative procedure in which the detained person is to participate.
- (2) However, a detained person who is a vulnerable person solely as a result of being a person of non-English speaking background is entitled to have a support person present only if an interpreter is not required to be arranged under section 128 (1) of the Act solely because of section 128 (3) (a) of the Act.
- (3) Before any such investigative procedure starts, the custody manager for the detained person must inform the person that the person is entitled to the presence of a support person during the investigative procedure.
- (4) If the detained person wishes to have a support person present, the custody manager must, as soon as practicable:
 - (a) give the detained person reasonable facilities to enable the person to arrange for a support person to be present, and
 - (b) allow the detained person to do so in circumstances in which, so far as practicable, the communication will not be overheard.
- (5) The custody manager must defer for a reasonable period any such investigative procedure until a support person is present unless the detained person has expressly waived his or her right to have a support person present.
- (6) An investigative procedure is not required to be deferred under subclause (5) for more than 2 hours to allow a support person to arrive at the place of detention.

...

27 Clause 33 of the Regulations is as follows:

33 Legal assistance for Aboriginal persons or Torres Strait Islanders

- (1) If a detained person is an Aboriginal person or Torres Strait Islander, then, unless the custody manager for the person is aware that the person has arranged for a legal practitioner to be present during questioning of the person, the custody manager must:

- (a) immediately inform the person that a representative of the Aboriginal Legal Service (NSW/ACT) Limited will be notified:
- (i) that the person is being detained in respect of an offence, and
- (ii) of the place at which the person is being detained, and
- (b) notify such a representative accordingly.
- (2) (Repealed) [Emphasis added]

28Finally, on the dates in question in 2011, s 99 of LEPRA was as follows:

99 Power of police officers to arrest without warrant

- (1) A police officer may, without a warrant, arrest a person if:
 - ...
 - (c) the person has committed a serious indictable offence for which the person has not been tried.
- (2) A police officer may, without a warrant, arrest a person if the police officer suspects on reasonable grounds that the person has committed an offence under any Act or statutory instrument.
- (3) A police officer must not arrest a person for the purpose of taking proceedings for an offence against the person unless the police officer suspects on reasonable grounds that it is necessary to arrest the person to achieve one or more of the following purposes:
 - (a) to ensure the appearance of the person before a court in respect of the offence,
 - (b) to prevent a repetition or continuation of the offence or the commission of another offence,
 - (c) to prevent the concealment, loss or destruction of evidence relating to the offence,
 - (d) to prevent harassment of, or interference with, a person who may be required to give evidence in proceedings in respect of the offence,
 - (e) to prevent the fabrication of evidence in respect of the offence,
 - (f) to preserve the safety or welfare of the person.
- (4) A police officer who arrests a person under this section must, as soon as is reasonably practicable, take the person, and any property found on the person, before an authorised officer to be dealt with according to law. [Emphasis added]

Submissions

29Turning to the submissions of the parties, defence counsel submitted that LEPRA and the Regulations had been breached on 21 June 2011. He submitted that the requirements of LEPRA and the Regulations should have been complied with before the conversation between the accused and Detective Sergeant Evans. He submitted in short that "the stating of the allegation and a caution by an investigator is an investigative step."

30As for the second occasion on 20 October 2011, he made the same submission. In other words, he submitted that the Aboriginal Legal Service should have been contacted well before the detectives travelled to the police station adjacent to the gaol. He also submitted that I would find that Detective Sergeant Lowe well knew that the accused would have been represented by either the Aboriginal Legal Service or Legal Aid with regard to other charges that he was facing as at 20 October 2011, and with regard to which he was bail refused. He submitted that a deliberate strategy had been adopted of not contacting the lawyers for the accused and seeking to obtain admissions from him without the presence of a lawyer or a support person. He submitted that the conversation that occurred after the accused indicated that he wished to say nothing supported that conclusion.

31Finally, he submitted that the applicant was in custody bail refused. Therefore, even though he had been transferred from the gaol pursuant to a s 25 order, he was subject to a commitment warrant. Accordingly, to the extent that he was arrested, that could only have been for questioning, a course that is impermissible at common law and pursuant to LEPRA.

32Defence counsel referred me to a single decision of a District Court judge in which an ERISP in which an Aboriginal person had engaged was ruled inadmissible: R v Powell [2010] NSWDC 84.

33As I have indicated, the Crown Prosecutor respectfully submitted that the application is misconceived. She submitted that it is quite correct that various responsibilities devolved upon the police pursuant to LEPRA and the Regulations. But she submitted that the police complied with them.

34She submitted that on 21 June 2011 the accused was given a caution and Part 9 summary "as soon as practical after" he became a person who was detained under Part 9, in accordance with s 122 of LEPRA. That is because the accused was arrested by Detective Sergeant Evans on various charges at about 6 PM, thereby engaging Part 9 of LEPRA. Prior to that time, he had been arrested and detained pursuant to a warrant. And she submitted that the evidence established that the caution and Part 9 summary were provided at 6:07 PM. In short, she submitted that a period of seven minutes or so must be "as soon as practical" after "about 6 pm".

35As for the interaction between the detectives and the accused on that evening, she submitted that one cannot characterise simply informing a person that he or she is under arrest, setting out the underlying offence, and informing a person that he she possesses a right to silence as an "investigative procedure". Accordingly, s 123(1) and the sections of LEPRA and clauses of the Regulations dependent upon it were not engaged.

36She made very similar submissions about the events of 20 October 2011. Indeed, on that occasion she submitted that the caution and Part 9 summary were given immediately upon the attendance of the accused at the police premises; namely, at 12 midday. After the interaction between the detectives and the accused, during which the accused indicated his refusal to be interviewed, she submitted that the Aboriginal Legal Service was contacted, perhaps unnecessarily. Again she submitted that there was no investigative procedure in which the accused participated on that occasion.

37Finally, she submitted that there was nothing inappropriate in the police arresting the accused on 20 October 2011.

Determination

38Having taken time to reflect, I respectfully accept the submissions of the learned Crown Prosecutor. I do not consider that informing a citizen that he or she has been arrested with regard to a particular offence, and informing him or her that he or she possesses a right to silence, constitutes an "investigative procedure". It follows that the responsibilities of the custody manager contained in s 123 of LEPRA and cl 27 of the Regulations had not arisen at the time of either of the exchanges that are the subject of objection.

39Nor do I consider that such a process is "questioning" for the purposes of cl 33 of the Regulations. It follows that the requirements of cl 33 of the Regulations did not arise at the early stage under discussion. Of course, the situation would have been different if the detectives on either occasion had proceeded to question the accused. But here the evidence subject to objection arose from the police complying with the law and informing the accused of his rights; it did not arise from an "investigative procedure" or "questioning".

40I respectfully accept the submission of defence counsel that, in engaging in the conversation that immediately followed the exchanges subject to objection on 20 October 2011, Detective Sergeant Lowe was exploring whether he could obtain information from the accused. I do not accept that it was merely a "chat", in the words of the Detective in the witness box. Nevertheless, that finding does not lead me to conclude that, in not telephoning the Aboriginal Legal Service before he attended at the police premises on 20 October 2011, the police officer was engaging in some sort of stratagem. In other words, I do not consider that it was improper of Detective Sergeant Lowe not to arrange legal representation prior to his attendance on 20 October 2011.

41Furthermore, I consider that the police were entitled to arrest the accused on 20 October 2011, pursuant to s 99(2) of LEPRA as it then was. In any event, I accept the submission of defence counsel that the liberty of the accused was being curtailed by the fact that he was bail refused on separate charges, and whether he was arrested or not made no difference to his liberty.

42Finally, whilst the experience in criminal law of the judge who excluded the evidence in *R v Powell* cannot be doubted, the facts of that case are markedly different to here, not least because the accused in that case engaged in an ERISP.

43In short, I consider that on each occasion the police complied with LEPRA and the Regulations.

Ancillary findings

44As against the possibility that I am wrong in my analysis of LEPRA and the Regulations, and there was indeed an illegality or impropriety on either occasion, I turn briefly and contingently to consider the factors contained in s 138(3) of the Evidence Act.

45On 21 June 2011, it is alleged that the accused said "I was the one who got hit, he hit me" and "yeah but he hit me." It is also alleged that, with regard to the assault on the deceased on 20 June 2011, the accused said "Yeah, I was at Mt Druitt Hospital, you do the maths."

46As I understand the Crown case, the proposition that the deceased assaulted the accused first is relied upon as a motive for retaliation by way of the fatal assault. The proposition that the accused was at Mt Druitt Hospital is alleged to be a lie on his part, setting up a false alibi. That proposition is in turn based on the fact that, by way of an affidavit tendered on the voir dire, his solicitor has deposed that her instructions are that the accused was indeed at the scene of the assault, but "the blows" were delivered by someone else.

47I assess the probative value of the evidence of motive and of a lie potentially demonstrating consciousness of guilt as very high: s 138(3)(a).

48I also regard the evidence as important in the proceedings: s 138(3)(b). Whether it may be the case that the Crown can demonstrate that the accused has said similar things on other occasions does not derogate to any substantial degree from the importance of the evidence.

49The offence alleged against the accused is exceptionally serious: s 138(3)(c).

50If, contrary to my analysis, there was a contravention or impropriety, I do not regard it as significant but rather as technical: s 138(3)(d).

51I do not consider that, if there was an impropriety or contravention, Detective Sergeant Evans caused it to occur deliberately or recklessly: s 138(3)(e). Rather, I consider that it was done accidentally.

52As for the International Covenant on Civil and Political Rights, it can be seen that Article 9 cl 2 was complied with, and in a sense that compliance is the subject of the objection. On my analysis, no other provision of that Covenant was breached: s 138(3)(f).

53If there was an impropriety or illegality, I consider it very unlikely that there will be any proceedings with regard to it: s 138(3)(g).

54Finally, it would have been difficult to obtain the evidence in question any other way: s 138(3)(h). By that I mean the evidence of motive and a lie was allegedly given by the accused in response to him being informed of his rights by police, and moments before he refused to engage in an ERISP.

55In short, even if I am mistaken in my statutory analysis, and there was some unwitting impropriety or contravention of the legislation or regulations in the events as they unfolded on 21 June 2011, I would be soundly satisfied that the test in s 138(1) of the Evidence Act has been made out; that is, that the desirability of admitting the evidence of that exchange outweighs the undesirability of admitting evidence that had been obtained in the way in which it was obtained.

56I adopt a very similar analysis with regard to the exchange of 20 October 2011. Again, the accused allegedly said "I wasn't even there I was at the hospital". On the Crown case, that is a direct contradiction of his instructions as conveyed by an affidavit sworn by his solicitor.

57If I am wrong in my analysis, I regard that evidence as very probative and very important in the proceedings: s 138(3)(a).

58Merely because it is a repetition in a sense of what was allegedly said on 20 June 2011 does not derogate from its importance to any large degree. That is because it demonstrates a settled readiness of the accused allegedly to lie to the police about the events in question: s 138(3)(b).

59The accused is on trial for the most serious offence known to law: s 138(3)(c).

60If there be an impropriety or contravention, I regard it as a technical one: s 138(3)(d).

61In the case of Detective Sergeant Lowe, I am not satisfied that he created any impropriety or contravention deliberately or recklessly, but rather accidentally: s 138(3)(e).

62I do not consider that any impropriety or contravention can be said to be inconsistent with the Covenant: s 138(3)(f).

63I do not consider it likely that other proceedings will be taken with regard to any contravention or impropriety: s 138(3)(g).

64And finally, it would have been difficult for the police to obtain the evidence in any other way, in that the evidence is of what the accused allegedly said to the police shortly before he refused to engage in an ERISP: s 138(3)(h).

65In short, with regard to the exchange of 20 October 2011, if it be the case that there was an impropriety or contravention, in considering the test contained in s 138(1) of the Evidence Act I would be firmly satisfied that the desirability of admitting the evidence outweighs the undesirability of admitting it, in the light of any putative impropriety or contravention.

Conclusion

66It is for those reasons that I do not exclude the evidence of the exchange of 21 June 2011 or the evidence of the exchange of 20 October 2011.

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