

DISTRICT COURT OF SOUTH AUSTRALIA

(Criminal)

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R v BAIN (No 2) **Criminal Trial by Judge Alone**

[2018] SADC 88

Reasons for Ruling of Her Honour Judge Chapman

20 August 2018

CRIMINAL LAW - EVIDENCE - CONFESSIONS AND ADMISSIONS - STATEMENTS - RECORDS OF INTERVIEW - DISCRETION TO EXCLUDE

Accused charged with two counts of supplying a controlled drug - interviewed by police as part of a coronial investigation into the death of his partner but also as a suspect for supplying her with methylamphetamine - application to exclude interview on basis it would be unfair to admit it at his trial.

Held: Interview excluded in exercise of discretion - at the time of the caution the police failed to make accused aware of the nature of the crime about which he was to be questioned - further, when police did advise accused of the nature of the crime, he was not cautioned.

R v Fieldhouse (1977) 17 SASR 92; *R v Szach* (1980) 23 SASR 582; *R v Murphy* (1996) 66 SASR 406, applied.

R v BAIN (No 2)
[2018] SADC 88

- 1 The accused is charged with two counts of Supplying a Controlled Drug to Another¹. It is alleged he supplied methylamphetamine to his then partner, Ms Samantha Vanzati, on 8 May 2014.
- 2 The accused sought an order excluding evidence of his interview with the police which was conducted by Detective Johnson on 14 February 2015. I granted the application and made an order excluding evidence of that interview on the basis it would be unfair to admit it in the trial of the accused. My reasons follow.

Events leading up to the interview

- 3 On 10 May 2014, the partner of the accused, Samantha Vanzati, died. A coronial investigation took place into her death. On 15 May 2014, Sergeant Clauge took a notebook statement from the accused which was signed by the accused (the notebook statement).
- 4 In February 2015, Detective Michelle Johnson was conducting investigations on behalf of the Coroner into Ms Vanzati's death. By that stage, she had the notebook statement and statements from three civilian witnesses, one of whom said she saw the accused supply Ms Vanzati with methylamphetamine. Detective Johnson also had a toxicology result showing the presence of methylamphetamine in Ms Vanzati's blood at a time close to her death and an autopsy report.
- 5 On Thursday, 12 February 2015, Detective Johnson and Detective Hunt went to the accused's home in Murray Bridge. There is some dispute about what was said at that time, however, there is general agreement that the accused was asked to go to the police station as a part of the investigation of Ms Vanzati's death.
- 6 The accused was interviewed at the Murray Bridge Police Station on Saturday, 14 February 2015. There is some dispute about how he got there on that day. The accused gave evidence the police attended at his address and gave him no choice but to go with them to the police station. Detective Johnson could not recall going to the accused's residence on the Saturday and did not think that occurred.
- 7 There is also some dispute about what, if anything, was said to the accused by the police before the recording equipment was activated.
- 8 Detective Hunt, who was with Detective Johnson at all relevant times, did not give evidence on the voir dire. For the reasons that follow, I do not consider I need to resolve those disputed issues.
- 9 On the day of the interview, Detective Johnson was effectively wearing two hats. One was as investigator for the coroner into the death of Ms Vanzati. The other was as investigator of the supply of methylamphetamine to Ms Vanzati. The

¹ Section 33I(1)(a) of the *Controlled Substances Act, 1984* (SA)

investigations were not one and the same. Indeed, during the interview, Detective Johnson disavowed any connection between the two². The latter investigation carried with it potential criminal liability on the part of the accused.

- 10 At the start of the interview, Detective Johnson did not tell the accused she was investigating him for the supply of methylamphetamine. She expressly told him that he was not under caution. When she did caution the accused, she did not reveal that line of investigation³. Toward the end of the interview, when she did reveal that line of investigation⁴, she did not caution the accused in that regard.

The interview

- 11 The interview unfolded as follows:

- Detective Johnson stated that on Thursday afternoon she and Detective Hunt went to the accused's house and asked him to attend at the police station in relation to a statement that he provided to the police involving the death of Ms Vanzati. The accused agreed that occurred.
- Detective Johnson stated she *just wanted to sort of talk to you about your statement*. The accused said he was unable to read the statement. Detective Johnson said she would read it to him to refresh his memory. Before she did that she said:

Q6 You are not under caution at the moment.

- Detective Johnson gave evidence she did not know why she said that; she thought it was a mistake.
- Detective Hunt wrote something down and showed it to Detective Johnson. That appeared to prompt her to say:

Q7 And you are not under arrest, ok, so we just wanted to talk to you about this at the minute.

- Detective Johnson proceeded to read from a typed version of the notebook statement. From time to time the accused made comments. He either gave further information or indicated something was not correct.
- After reading the notebook statement Detective Johnson said:

² See questions 104 and 119 in the interview, VDP1

³ See questions 56 – 58 in the interview, VDP1

⁴ See question 98 in the interview, VDP1

Q55 Okay, so except for things you've told me in there everything else is true and correct, is that what you are saying?

A Yep

Q56 Okay, well I am going to ask you further questions about what you said in here Colin.

A Yeah.

Q57 You are not obliged to answer them.

A Yep.

Q58 Okay but anything you do say may be taken down and given in evidence at a later time so do you understand what that means. Do you understand that caution?

- The accused then answered *Yep* and gave a very long answer about matters relating to a woman who he had seen at the house on the relevant day. He suspected Ms Vanzati was injecting amphetamines afterwards.
- Detective Johnson then said the following:

Q77 Yeah, alright the reason I wanted to ask you to come here mainly is, can you tell me who, who was, when you got out of Prison the 5th of May?

A Yeah

Q78 Who was living at Sam's house with Sam?

There was then discussion on that topic. During that discussion Detective Johnson asked the accused whether he realised that she had been conducting investigations, talking to lots of people about Samantha. He said he did. She said she had found out a lot of things in the course of that investigation. There was some discussion about the deceased not having had cancer.

- The accused then made certain statements (underlined) which the prosecution wished to rely upon as admissions:

Q96 Yeah, um we've got some statements from people, obviously I don't really want to disclose who those people are, you are going to figure it out, it is pretty simple to figure it out, but um they're suggesting that?

A Saying that I killed her I know.

Q97 No, no they're not saying that?

A Heaps of people running around town saying

Q98 Listen, no I will tell you exactly what they've said and then you can comment if you want. They said you supplied Samantha with four bags of we believe was amphetamine. Ok, some for her to use herself at her leisure and some for her to sell on the day she collapsed, on that afternoon?

A Nah it's not true

Q99 Um, I've got people saying that a man came to your house on the day or the day before?

A Yep

Q100 And sold you some drugs, quite a lot of drugs. We've also got a conversation that Samantha's had with someone saying that you supplied her with drugs?

A No.

Q101 Ok, we've also got someone saying that they handed you the drugs back afterwards?

A Yeah, Linda gave me drugs yeah

Q102 She gave you drugs?

A (Inaudible) 3 bags was in that right, Sam's brother even seen it and I said to Sam can you hold this for me it's mine, and all that was in it was there was .7 in each bag, that's not even \$300 worth.

Q103 Yeah ok, Yeah I'm not, I'm not suggesting that?

A And it was still sealed when I got it back coz (inaudible) on top of it and it was still sealed when I got it back

Q104 I'm not suggesting that you killed her, what I'm suggesting Colin is you've supplied her the drug you've admitted to supplying her with drugs in your statement over the time, you are both drug users?

A Yeah.

Q105 I'm suggesting that you are not being truthful in this statement and you supplied her with drugs and she took them of her own free will?

.....

Q113 Yep, ok. Alright, so you did supply her with some drugs that day?

A Yeah to hang on to.

Q114 To hand on to yeah?

A Yeah.

.....

Q119 Yeah ok well I'm not suggesting you had any control of the drugs that went into her system, I'm not suggesting that, but what I am suggesting is that you have given her some drugs, ok, supplied her with some and it's an offence to supply people with drugs. Do you understand that?

A Yeah but I didn't give her drugs to use I gave them to her, to hang on to for me and it wasn't used, it wasn't touched.

- 12 At the time she commenced the interview with the accused, Detective Johnson agreed she had 'a pretty solid suspicion' that the accused supplied Ms Vanzati with drugs. In my view, she was at the 'accusatory stage' of her investigation of the supply of methylamphetamine to Ms Vanzati. Counsel for the Director conceded that the absence of a caution at that stage was 'not ideal'.
- 13 In terms of fairness to the accused, counsel for the Director relied upon the caution given part way through the interview, the fact the accused was someone who had been cautioned by the police many times before and that the accused must have understood he was implicated in something serious. Detective Johnson gave evidence she did not tell the accused she was investigating him for supplying Ms Vanzati with drugs when she did caution him because 'it was obvious to him why we were talking to him. He understood that we were investigating the death of Samantha and she most likely died from heart problem with also having amphetamines in the system. Rumours were spreading around the whole town he murdered someone. He understood that the matter was being investigated'⁵.
- 14 Later in her evidence, however, Detective Johnson agreed she was effectively wearing two hats at the time of the interview. As to whether she thought that would have been clear to the accused, she said 'I'm not sure, I don't know if it would have been. I believe he understood that we were investigating her death and that's why we were speaking to him to ascertain what happened on the day that she died or apparently collapsed and then subsequently died'⁶.
- 15 I find that the accused was a suspect at the commencement of the interview. In fairness, he should have been told at the outset that the police were investigating the supply of methylamphetamine to Ms Vanzati (which was not an investigation into who killed her) and cautioned. The fact that Detective Johnson did caution the accused part way through the interview confirms she thought she was at an accusatory stage in regard to that investigation. Her evidence was essentially to that effect. The unfairness to the accused was that she did not make it clear what he was being cautioned about. Circumstances may be such that fairness to the suspect requires the police to make a person aware of the nature of the crime concerning which he is about to be questioned⁷. I consider this was one of those occasions. The mind of the accused was diverted by the existence of a coronial investigation and the rumours around town. He said during the interview that he

⁵ Transcript, p32

⁶ Transcript, p34

⁷ *R v Fieldhouse* (1977) 17 SASR 92; *R v Szach* (1980) 23 SASR 504 at 582; *R v Murphy* (1996) 66 SASR 406 at 414

thought people were saying he killed Ms Vanzati. Contrary to the submission of counsel for the Director, he was not in the same position as the co-accused Peterson in *R v Fieldhouse*⁸. Mr Bain's mind was not directed towards the real charges and he was therefore disadvantaged. As is evident from the statements made by Detective Johnson during the interview⁹, there was a material distinction between the lines of inquiry. It was necessary for that to have been brought to the mind of the accused when he was cautioned or alternatively, for him to have been cautioned when that distinction was made clear. I accept his evidence that when he was cautioned he did not understand he was being investigated for the criminal offence of supplying methylamphetamine to Ms Vanzati.

- 16 In the exercise of my discretion, I excluded the evidence of the interview on the basis that it would be unfair to the accused for it to be admitted at trial.

⁸ (1977) 17 SASR 92 at 97

⁹ See questions 104 and 119 in the interview, VDP1