

## **EM v THE QUEEN (S59/2007)**

Court appealed from: New South Wales Court of Criminal Appeal

Date of judgment: 3 November 2006

Date of grant of special leave: 9 February 2007

The appellant was charged with three offences (murder, aggravated assault with intent to rob and firing a firearm with disregard for safety) in relation to a home invasion on 7 January 2002 and five aggravated robbery offences in relation to a home invasion on 17 January 2002.

A trial before Shaw J and a jury commenced on 1 September 2003. The Crown case on the first set of offences (the Logozzo offences) relied substantially on admissions made by the appellant in a conversation with police officers on 15 May 2002. After a voir dire hearing Shaw J ruled that the evidence of the conversation was not admissible. The Crown appealed pursuant to s 5F of the *Criminal Appeal Act* 1912 (NSW). The Court of Criminal Appeal upheld the appeal. The Court did not rule that evidence of the conversation was admissible, but rather left it to the trial judge to make further findings of fact and to exercise his or her discretion accordingly. A second trial commenced before James J and a jury in October 2004 in which a further voir dire hearing was conducted. James J ruled that the evidence of the conversation of 15 May 2002 was admissible in part. On 3 November 2004 the appellant entered pleas of guilty in respect of the aggravated robbery offences and on 26 November 2004 he was found guilty by the jury in relation to the Logozzo offences.

The Crown case was that when Mr and Mrs Logozzo returned home in the early hours of 7 January 2002 they were approached by two masked men and ordered inside. One man held a rifle and the other held a handgun. There was a scuffle between Mr Logozzo and the assailant with the rifle and Mr Logozzo was shot at by the man with the handgun. On the Crown case, the appellant was the man with the handgun. Mr Logozzo later died.

On 15 May 2002 detectives, each wearing covert listening devices, went to the appellant's premises. The appellant got into the police vehicle and was told that he was not being taken to the police station and that he was not under arrest. The detectives drove to a park. In the course of the drive one of the detectives reminded the appellant that he did not have to say anything to the police. In the course of the conversation the appellant made certain inculpatory statements. Before James J, the appellant contended that this conversation was inadmissible by virtue of either s 85, s 90 or s 138 of the *Evidence Act* 1995 (NSW) ('the Act').

James J found that the accused was told several times on 15 May that he did not have to say anything to police and was reminded of the written summary under Part 10A of the *Crimes Act* which he had been given on 24 April when previously interviewed by the police. His Honour was satisfied that the appellant understood that he did not have to say anything to the police.

His Honour found that the appellant would not have spoken to the police on 15 May if he had known that the conversation was being recorded, and that the police knew of this belief. His Honour further found that the appellant did not know that the conversation was being recorded and, indeed, believed that it was not. The police were also said to know that the appellant believed that

the conversation was not being recorded and that they did not disabuse him of such belief. His Honour found that those factors were not sufficient of themselves to satisfy him that it would be unfair to the appellant to use evidence of the admissions made in the course of that conversation.

His Honour found that the appellant believed that if the conversation he had with the police officers was not recorded, evidence of the conversation could not be used against him in criminal proceedings. That was a belief which the appellant had formed himself independently of anything said or done by the police. Police officers had not set out to induce in the appellant a belief that, if what he said to them was not recorded, evidence of what he said could not be used against him. However, part of the conversation was found to be inadmissible on the basis that one of the detectives had intended to induce or promote a belief on the part of the appellant that, if he spoke to the police about the shooting, what he said would not be used disadvantageously to him. This impugned the appellant's freedom to choose whether to speak to police.

The appellant appealed. The appeal focused on the application of s 90 of the Act. Giles JA (Grove and Hidden JJ agreeing) noted that s 90 called for an evaluation of whether or not, having regard to the circumstances in which the admission was made, it would be unfair to the accused to use the evidence. His Honour found that the evidence should not have been excluded under the s 90 discretion and that there was no miscarriage of justice by virtue of its admission. The appellant contended that James J erred in principle in regard to s 90 by focusing on the intention of the detectives rather than all the circumstances of the conversation. Giles JA found that his Honour's application of s 90 was not in error in this respect.

The Court also rejected a ground of appeal that the trial judge should have warned the jury about the potential significance of the fact that the appellant believed that what he said could not be used in evidence against him.

The grounds of appeal include:

- The Court of Criminal Appeal erred in upholding the decision of the trial judge that, pursuant to paragraph (b) of s 90 *Evidence Act 1995* (NSW), it would not be unfair to the appellant to use evidence of admissions made by the appellant on 15 May 2002.
- The Court of Criminal Appeal erred in failing to find that, having regard to the circumstances in which the admissions were made by the appellant on 15 May 2002, and in particular the failure of the police to give the second part of the standard caution to the appellant, it would be unfair to the appellant to use the evidence.