

TOFILAU v THE QUEEN (M144/2006)

Court appealed from: Court of Appeal, Supreme Court of Victoria

Date of judgment: 21 April 2006

Date special leave granted: 10 November 2006

The appellant was convicted on 16 October 2003 of murdering Belinda Romeo, a woman with whom he had had a sexual relationship. Ms Romeo's body was found by her mother in the bedroom of her flat on 29 June 1999. An autopsy revealed that she had died several days earlier, the cause of death being ligature strangulation. The appellant was interviewed by police on 14 July 1999. He told them he had last seen Ms Romeo at a hotel in the early hours of Sunday 20 June 1999.

In November 2001 the police set up "Operation Pink" which involved a series of 16 "scenarios" in which undercover operatives, posing as members of an organised criminal gang, approached the appellant and induced him to believe that they wanted him to join the gang. The process included emphasis being placed on a supposed code of truth, honesty and loyalty between all gang members, and the necessity for full disclosure of any past crimes which the police might still be investigating. He was also told that declaring any criminal activity would enable the boss of the gang to use corrupt contacts within the police force to "fix" any police investigations. On 17 March 2002 the appellant made admissions regarding the murder of Ms Romeo to one of the police operatives ("P"). On the same day, he was taken to Crown Casino to meet "the boss", to whom he made a detailed statement regarding the circumstances of the murder.

On the following day, the appellant was arrested and interviewed. He denied murdering Ms Romeo, and when the tape of his conversation with "the boss" was played to him, he said that he had pretended that he had committed a murder so that he could join the gang and he had fabricated what he told them. At his trial, the appellant's counsel submitted that admissions he made to "the boss" and other police operatives, and the record of interview of 18 March 2002, should be excluded. The trial judge (Osborn J) rejected that submission.

The appellant appealed against his conviction to the Court of Appeal (Callaway, Buchanan and Vincent JJA), on the grounds that the trial judge erred in failing to exclude the admissions as involuntary or as contrary to the general discretion. The appellant relied on the common law principle that a confessional statement is not admissible if it has been preceded by an inducement held out by a person in authority. The Court found that the trial judge was correct in finding that the operatives to whom the admissions were made were not "persons in authority" because such persons must possess, by reason of some lawfully held or conferred status or relationship with the maker of the statement, the capacity to influence the course of the prosecution, or the manner in which he is treated in respect of it. In this case,

the appellant believed he was dealing with a criminal gang acting outside and contrary to the interests of any legitimate authority.

The appellant also contended that his statements were inadmissible as they were involuntary in a basal sense, that is, that they had been secured by trickery and other conduct that effectively denied him the ability to exercise a choice to speak or remain silent. The Court of Appeal found the trial judge's conclusion that despite the fact that the appellant was fundamentally misled as to the context in which his confessional statements were made, he was not compelled to make them or threatened in such a way that it could be concluded that his will was overborne, was open on the material before him.

The grounds of appeal are:

- the Court below erred in failing to determine that the learned trial judge had erred in:
 - (a) not ruling as inadmissible the evidence of that which the Crown asserted were confessional statements made by the appellant to -
 - (i) covert police operative "Pat Austinn" on 17 March 2002;
 - (ii) covert police operative "Mark Butcher" on 17 March 2002- on the basis of involuntariness; and as a consequence,
 - (b) not ruling as inadmissible
 - (i) the evidence of the [second] record of interview conducted with the appellant on 18 March 2002;
 - (ii) the evidence concerning the conduct of the covert police operatives with respect to carrying out the various "scenarios", including the evidence of the Crown witness Detective Senior Sergeant Mark Robert Caulfield; and
 - (ii) the evidence of the covert police operatives carrying out the various (16) "scenarios" with the appellant and the conversations with the appellant whilst carrying out these scenarios.