

## **CLARKE v THE QUEEN (M147/2006)**

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 15 June 2004 of murdering a six-year old child, Bonnie Clarke. Bonnie was strangled and stabbed in her bed at her home in Northcote, on 21 December 1982. The appellant, who had been a boarder at the home until September 1982, was spoken to by the police in the months following the murder, but was never formally interviewed.

In February 2001 the Homicide Squad re-commenced its enquiries into the death of Bonnie Clarke. It set up an undercover operation whereby members of the Covert Investigation Unit of the Victoria Police impersonated a criminal gang, one member of which (known as "Terry") established a friendship with the appellant. Terry offered him the possibility of becoming a member of the gang, if he were approved by the boss ("Mark"). The appellant was told repeatedly that the gang relied upon a relationship of trust, loyalty and honesty between its members and Mark had to know the full truth about anything in the past which might bring police attention to the gang. On 3 June 2002 a member of the Homicide Squad ("Iddles") visited the appellant's home and left a message that he wished to speak to him. When the appellant rang Iddles two days later he was told that he would be required to provide a DNA sample and undergo a polygraph test. At his next meeting with Terry, the appellant was told that Mark could "fix" the lie detector and change the DNA sample, but only if he was "110% truthful" in "a job interview" that had been arranged with Mark later in the week.

On 6 June 2002 the appellant was taken by Terry to a city hotel to meet Mark. He was shown a document which purported to be a "progress report re investigation" signed by Iddles. It contained a conclusion that the appellant was the only suspect for the murder of Bonnie Clarke. Mark then said, "What do you want to do about it? Because I'm telling ya this is not going to go away... I can't have you hanging around with us." The appellant then told Mark that he had killed Bonnie Clarke, and described the circumstances in which she had died. Soon after the discussion with Mark, the appellant was taken by Terry to the offices of the Homicide Squad where he was arrested and a record of interview, in which he made relatively detailed admissions regarding the murder, was conducted. At his trial, his counsel's submission that the admissions he made to Mark, and the admissions in the record of interview, should be excluded, was rejected by the trial judge.

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, as unreliable, or as contrary to the general discretion. The Court found that the trial judge's conclusion that the appellant did not make the admissions in circumstances in which his will was overborne, was open on the evidence. With respect to the appellant's contention that the admissions were made in circumstances that

rendered them inherently unreliable, the court found that there was much material to support the appellant's admissions and his Honour was correct in rejecting the submission that the evidence should be excluded on that basis. The appellant's argument that he must have suffered severe forensic disadvantage as the evidence of the circumstances in which his statements were made involved the implication that he had serious criminal propensities, was rejected on the basis that the trial judge's approach involved a careful balance of the relevant considerations such as an assessment of the probative value of the evidence; some editing of the material to confine it to what was really required for the proper presentation of the prosecution case; and the provision of clear instructions to the jury as to the use to which the evidence could properly be put.

The grounds of appeal are:

- The Court of Appeal of the Supreme Court of Victoria erred in law in finding that the admissions made by the appellant to covert operative "M" on 6 June 2002 were voluntary.