

MARKS v THE QUEEN (M145/2006)

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 October 2004 of murdering his great aunt, Margaret O'Toole. The victim's body was found in the lounge room of her home by her brother on 17 April 2002. She had suffered trauma to the left side of her face, and had been dead for some time. Circumstantial evidence suggested that she had died on or about 7 April 2002, and an autopsy revealed she had suffered multiple skull fractures, probably caused by 15 to 20 blows with a hard blunt instrument such as a hammer. The appellant came under suspicion because he was one of the few people who visited the victim regularly, and he had recently borrowed money from her. He was interviewed by police on 6 May 2002. He admitted that he had a gambling problem and was heavily in debt, but he denied murdering Ms O'Toole.

In September 2002 the police set up "Operation Satchel" 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 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 background checks had to be made before he could be accepted into the gang. Ultimately, on 27 November 2002, a meeting took place between the appellant and the "boss" of the gang. The boss said that his inquiries had revealed that the appellant was a suspect in a murder, and he needed to know what had happened so that the situation could be handled. The appellant then made detailed admissions regarding the death of Ms O'Toole.

The appellant was then driven to St Kilda Road Police Complex where he was arrested and interviewed. He maintained that he had nothing to add to what he had said in the interview on 6 May 2002, in which he had denied committing the murder. At his trial, the appellant's counsel submitted that admissions he made to "the boss" should be excluded. The trial judge (Coldrey 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 unreliable. It was also argued that the trial judge erred in finding that the probative value of the statements made by the appellant outweighed any prejudicial effect. The Court found that the operatives to whom the admissions were made were not "persons in authority" for the purposes of the exclusionary rule. The appellant contented that his statements were inadmissible as they were involuntary in a basal sense, that is, that his will was overborne by a combination of promises

and tactics of bullying, haranguing and cajoling. The Court of Appeal found the trial judge's conclusion that there was no evidence that the will of the appellant was overborne, was open to him in the circumstances.

The grounds of appeal are:

- the Court below erred in failing to determine that the learned trial judge had erred in failing to find that both covert police operative "Rick Baxter" and covert police operative "Gary Butcher" were persons in authority;
- the Court below erred in failing to determine that the learned trial judge had erred in:
 - (a) not ruling as inadmissible on the basis of involuntariness the evidence of that which the Crown asserted were confessional statements made by the appellant to -
 - (i) covert police operative "Rick Baxter" on 27 November 2002;
 - (ii) covert police operative "Gary Butcher" on 27 November 2002.
 - (b) not ruling as inadmissible
 - (i) the evidence concerning the conduct of the covert police operatives with respect to the carrying out of the various "scenarios", including the evidence of the Crown witness Detective Sergeant Stephen Cody; 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.