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[COURT OF CRIMINAL APPEAL, NEW SOUTH WALES]

GEOFFREY WALTER EDELSTEN

Carruthers, Allen and Badgery-Parker JJ

11 October, 3 December 1990

Evidence — Telephone interception — Whether valid interception — Statutory admissibility criteria — Whether discretionary admission error — Competing public interests — Accused's onus — Interception mens rea — Telecommunications (Interception) Act 1979 (Cth), ss 6(1), 63A(1) and (3).

Charge — Perverting course of justice — Whether restricted to obtaining improper adjournment — Whether differing from committal — "Tendency" to pervert.

The appellant, a medical practitioner, was convicted of soliciting F to assault another and of perverting the course of justice by improperly obtaining an adjournment of F's trial by falsely certifying that he was unfit to attend. Several appeal grounds related to admission of incriminating taped telephone conversations. It was argued that s 63A of the *Telecommunications (Interception) Act 1979 (Cth)*, which allows admission of intercepted evidence, did not apply as there was no interception within s 6(1) because Telecom equipment was not used. Even if the interception was valid the admissibility criteria within s 63A(1) were not satisfied. Alternatively, the substance of the offence as indicated differed from that dealt with at committal, contravening s 63A(3). It was contended also that the evidence should have been excluded on discretionary public interest grounds relating to unfairness, prejudice and the illegal taping. Further the judge failed to restrict the Crown case to the improper obtaining of an adjournment and did not direct that the jury must be satisfied that the medical certificate was false. It was also argued that the accused's acts must have the actual tendency to pervert the course of justice.

Held (dismissing the appeal): (1) The signal passed over the telecommunication system controlled by Telecom. Section 6(1) applies to "any means" of listening to or recording the signal. There was no warrant for reading down the section to require Telecom control of the interception equipment.

(2) Evidence includes any tape-recordings of relevant conversations. Section 63A(1) speaks of a person giving "in evidence", which the Crown did by tendering the tape. The draftsman left no room for argument.

Butera v DPP (Vic) (1987) 164 CLR 180 at 184; 30 A Crim R 417 at 418-419, followed.

(3) The additions to the indictment gave further particulars of the charge, which were consistent with the information upon which the committal took place. The substance of the charge remained the same throughout.

(4) To exclude evidence the accused must show a particular state of fact exists on a balance of probabilities. The discretion involves exclusion of otherwise admissible evidence, not its admission. Relevant prejudice must be something other than a tendency to show guilt of the crime.