NZLR

IN THE COURT OF APPEAL OF NEW ZEALAND CA 395/96

MEDIUM PRIORITY

THE QUEEN

V

KEOGH

Coram Henry J
Keith J
Barker J

Hearing and Judgment 29 October 1996

Counsel S P France for Appellant
P J Crombie for Respondent

Reasons for Judgment: 31 October 1996

REASONS FOR JUDGMENT OF THE COURT DELIVERED BY HENRY J

The Crown seeks leave to appeal a pre-trial ruling made in the High Court under s.344A of the Crimes Act 1961. The respondent faces two counts of unlawful sexual connection and two counts of inducing the performance on him of an indecent act. The complainant, a year old girl at the time of the alleged offending, is the daughter of the respondent's former partner. The evidence in question concerns disclosure by the respondent to a psychotherapist employed as a sexual abuse counsellor that he had induced the complainant to touch him in his genital area.

The disclosure was made on 2 February 1995, when the respondent saw the counsellor at the instigation of his partner. The counsellor mistakenly believed that the respondent was the victim of sexual abuse, and when at an early stage he ascertained that was not the position and that the respondent was not able to obtain state-funded counselling, said that there was no point in continuing the interview. The respondent then told the counsellor why he had come, and made the disclosure in question. He was advised to seek counselling from another service. The interview lasted about 20 minutes, and there was no further contact between the respondent and the counsellor.

On 20 February 1996 the respondent attended the Tauranga police station accompanied by his solicitor. He was interviewed about the present allegations which he denied, and a written statement was obtained. He had been cautioned and advised of his rights. At the conclusion of the interview the respondent was advised that he was being charged, and that he would be processed and taken to Court as soon as possible. His solicitor then left the police station. A short time later, in response to a question from the police officer, the respondent was able to confirm the identity of the counsellor to whom he had referred, in the latter part of the interview, as having seen. The officer asked for and obtained a written authority to obtain information from the counsellor. In the course of agreeing to this, the respondent observed that he had not said anything of significance to the counsellor.

In April 1996 the counsellor telephoned the respondent and told him that the police had been in touch with him and given him a copy of the authority. He requested the respondent's confirmatory authority to release the information to the police. At the hearing of the present application the counsellor deposed, and the Judge accepted, that he repeatedly reminded the respondent that if he gave his authority the admissions of sexual abuse of the complainant would be disclosed to the police. The respondent's evidence to the contrary, that he had not made admissions

to the counsellor, and that he had signed the authority because the police officer had threatened to obtain a warrant if he did not, was rejected by the Judge.

Although the counsellor did not expressly request to be excused from giving evidence of the disclosure, the Judge considered s.35 of the Evidence Amendment Act (No.2) 1980. It reads:

> "**Discretion of Court to excuse witness from giving any particular evidence** - (1) In any proceeding before any Court, the Court may, in its discretion, excuse any witness (including a party) from answering any question or producing any document that he would otherwise be compellable to answer or produce, on the ground that to supply the information or produce the document would be a breach by the witness of a confidence that, having regard to the special relationship existing between him and the person from whom he obtained the information or document and to the matters specified in subsection (2) of this section, the witness should not be compelled to breach.
>
> (2) In deciding any application for the exercise of its discretion under subsection (1) of this section, the Court shall consider whether or not the public interest in having the evidence disclosed to the Court is outweighed, in the particular case, by the public interest in the preservation of confidences between persons in the relative positions of the confidant and the witness and the encouragement of free communication between such persons, having regard to the following matters:
>
> (a) The likely significance of the evidence to the resolution of the issues to be decided in the proceeding:
>
> (b) The nature of the confidence and of the special relationship between the confidant and the witness:
>
> (c) The likely effect of the disclosure on the confidant or any other person.
>
> (3) An application to the Court for the exercise of its discretion under subsection (1) of this section may be made by any party to the proceeding, or by the witness concerned, at any time before the commencement of the hearing of the proceeding or at the hearing.
>
> (4) Nothing in subsection (1) of this section shall derogate from any other privilege or from any discretion vested in the Court by any other provision of this Act or of any other enactment or rule of law.
>
> (5) In this section 'Court' includes-
>
> (a) Any tribunal or authority constituted by or under any Act and having power to compel the attendance of witnesses; and
>
> (b) Any other person acting judicially."

The Judge held that in the circumstances the special relationship relied upon was tenuous, and on balance having applied subsection (2) declined to exercise her discretion to excuse the counsellor under that section. She also held that the written authority had not been obtained unfairly by the police, and that the process of obtaining the evidence in question had not been unfair. A submission by defence counsel that there had been breaches of the New Zealand Bill of Rights Act 1990 was not upheld. The Judge however ruled the evidence inadmissible, apparently on the basis of overall unfairness. The two factors relied upon for this conclusion were that the disclosure was obtained in the course of a special relationship, and the written authority had been obtained, by chance, without the respondent having the benefit of legal advice. Three issues call for consideration.

Section 35

We are satisfied that the Judge was right to decline to excuse the counsellor under the statutory provision. The issue of privilege raised by s.35 was discussed by this Court in ***R v Secord*** [1992] 3 NZLR 570. Here, the Judge's description of the claim to a special relationship as being tenuous was fully justified. In fact a counselling relationship as such never existed. At a very early stage the counsellor made it clear that he could not undertake the intended task because the respondent was not a victim of sexual abuse. The disclosure was then volunteered, when the respondent told the counsellor why he was there. Importantly, the respondent consented to disclosure to the police - not only by signing the form, but also more significantly in response to the counsellor's enquiry. Although Mr Crombie argued that the latter consent was given in equivocal terms, the tenor of the evidence and the Judge's findings make it clear that the respondent understood that the counsellor was seeking approval before speaking to the police. Further, the balancing exercise referred to in subs (2) of s.35 favours disclosure as being in the public interest.

Bill of Rights

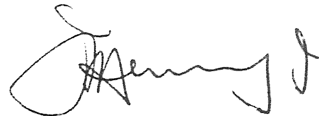
We also agree that there was no breach of either s.23(1)(b) or s.23(4) of the Bill of Rights Act. The respondent was advised of his rights at the outset of the police interview, and was accompanied throughout by his solicitor. The way in which the situation then developed after the solicitor left the police station did not mean that the respondent's rights were subverted, and did not necessitate repetition of the advice. The respondent was fully aware of his rights and there was no suggestion in the evidence that he was in any way prejudiced or disadvantaged. The arrest or detention of the respondent at the conclusion of the interview without again giving the rights advice did not in the circumstances result in any breach which gives cause for present concern. The further point that the Judge's Rules required the caution to be given again, a matter not argued in the High Court, advances the respondent's case no further.

Unfairness

In his responsible argument for the respondent, Mr Crombie placed particular reliance on this issue. He sought to support the Judge's conclusion by the additional reasons of breaches of the Bill of Rights and the failure to disclose the written authority to the defence prior to April 1996. We have already held that there was no breach of the Bill of Rights. We do not think that the failure to inform counsel of the existence of the written authority following a request made under the Official Information Act 1982, said to be due to an oversight, is a breach of any duty such as to give rise to concern for present purposes. The fact that disclosure was made to the counsellor in the circumstances we have detailed, combined with the further fact that the written authority was obtained without legal advice having been sought, does not in our view constitute unfairness which would justify exclusion of the evidence. The

evidence was not obtained by the employment of unfair means, as the Judge recognised.

For the above reasons leave to appeal was granted, the appeal allowed, and an order made to the effect that the evidence of the counsellor as to the disclosure of sexual misconduct is admissible at trial.



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