23/7

NZLR X

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

T.7/84

837 Appeal

THE QUEEN

v

J HUNTER

Hearing 2-6 July 1984

Counsel C. H. Toogood for the Crown
J. V. B. McLinden and M. S. Okkerse for the Accused

RULING OF ONGLEY J.

Monday 2 July 1984

The accused is charged with conspiring with two other persons to possess a Class A drug, lysergide, for the purpose of supply. Evidence proposed to be led by the prosecution includes tapes of five telephone conversations between the accused and one or other of the two persons with whom he is alleged to have conspired to commit the crime.

The tapes, amongst many others, were obtained by the Police purporting to act under the powers given by an interception warrant issued pursuant to Section 14 of the Misuse of Drugs Amendment Act 1978. The warrant was first issued at Auckland on 21 July 1983. It related to private communications at an address, Flat 1, Avenue, Beachhaven, Auckland, where the telephone was connected in the name of C B , one of the alleged

conspirators whose true surname is V . The warrant related to private communications. The warrant was renewed from time to time on the same terms except that the names of the accused and others added to the names of the parties whose communications were to be subject to surveillance.

Particulars of the five communications sought to be introduced in evidence are as follows:

A communication by telephone between B and the accused on 25 July 1983.

A communication by telephone between B and the accused on 8 August 1983.

A communication by telephone between B and the accused on 24 August 1983.

A communication by telephone between V and the accused on 28 September 1983.

A communicatin by telephone between B and the accused on 13 October 1983.

Of those communications the first second and fourth were initiated by a telephone call from the accused to the other party and in relation to the other communications the accused was the recipient of the call.

Mr McLinden bases his objection to the admissibility of the tapes in evidence on a number of different grounds which are identified in his written submission under these headings:

A. The conversations are all inadmissible because they do not constitute "private communications" between the accused and any other material perseon.

B. The conversation of Monday 8 August is inadmissible in whole or in part because of the provisions of Section 26 of the Misuse of Drugs Amendment Act 1978.

C. The taped conversation of Wednesday 28 September 1983 between the accused and C V should be inadmissible because V was not lawfully covered by the terms of the renewed interception warrant then in force in respect of the interception of that conversation.

After Mr McLinden had indicated the nature of his objections to the admission of the evidence leave was given for him to call evidence in the absence of the jury and the hearing of the objection then followed the procedure commonly adopted on a voir dire.

The evidence led by Mr McLinden was that of the accused himself and of a Police Officer, Detective Senior Sergeant Stretton. The relevant evidence on deposition already given by Mr Stretton was accepted as evidence upon this objection. It appears that from time to time prior to 14 July 1983 the accused had complained to Mr Stretton, who was his neighbour and was personally known to him, that his house was under Police surveillance and that his telephone was "bugged". On 14 July he sought an interview with Det. Snr. Sgt. Plucknett, the head of the Wellington Drug Squad, to make a similar complaint. Mr Stretton confirmed this evidence of complaints and there appears to be no doubt that the accused's home and work place had been watched by the Police. There is no evidence however that the accused's telephone had been monitored, as he believed it had been, and the taped communications all result from the interception in Auckland of calls on B telephone. Some exchanges between the accused and B indicate that both suspected that their conversation was being monitored but what grounds they may have had for believing that B telephone was monitored are not disclosed. However, the accused testified to his belief at the time, and that of Bellini also, that each of the communications sought to be introduced in evidence was being intercepted. After hearing the evidence Mr Toogood indicated that he felt that he could not contest that the telephone conversations were not "private communications" within the definition

contained in Section 10 of the Misuse of Drugs Amendment Act 1978. The definition reads as follows:

> "Private communication" means any oral communication made under circumstances that may reasonably be taken to indicate that any party to the communication desires it to be confined to the parties to the communication; but does not include such a communication occurring in circumstances in which any party ought reasonably to expect that the communication may be intercepted by some other person not having the express or implied consent of any party to do so:"

Both counsel take the view that the communications which were intercepted and of which a taped record is sought to be introduced in evidence fall within the exclusionary part of the definition. Accepting that view, it necessarily follows that they are not covered by the provisions of the 1978 amendment.

The submission made by the defence is that the intercepted telephone conversations should be inadmissible because they do not fall within the statutory dfinition of a "private communication". The Crown submits that they are prima facie admissible subject to the Court's discretion to exclude them if the view is taken that the evidence was unlawfully or unfairly obtained.

Section 25(1) of the Misuse of Drugs Amendment Act 1978 renders inadmissible evidence of private communications unlawfully intercepted, but, of course, once it is accepted that a communication, as here, is not

a private communication that section is not applicable to it. As an Interception Warrant may be obtained only in respect of private communication it must follow that the interception in this case was beyond the authority of the Warrant and the question then becomes whether evidence obtained by it is inadmissible for that reason alone.

In R v. Sang [1979] 2 All E.R. 1222 Lord Diplock described as "the fountainhead of all subsequent dicta on this topic" the statement of Lord Goddard C.J. in Kuruma Son of Kaniu v R. [1955] 1 All E.R. 236, 239. The general principle was stated thus:

> "In their Lordship's opinion, the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible, and the Court is not concerned with how the evidence is obtained."

A little later Lord Goddard added a qualification saying:

> "No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against the accused. This was emphasised in the case before this Board of Noor Mohamed v Regem and in the recent case of Harris v Director of Public Prosecutions. If for instance some admission of some piece of evidence e.g. a document, had been obtained by a trick, no doubt the judge might properly rule it out."

In Jeffrey v Black [1978] 1 All E.R. 555 Lord Widgery C.J. indicated how relatively rarely this discretion to exclude evidence is exercised in English Courts and went on to describe its ambit in this way:

> "But if the case is exceptional, if the case is such that not only have the police officers entered without authority, but they have been guilty of trickery or they have misled someone, or they have been oppressive or they have been unfair, or in other respects they have behaved in a manner which is morally reprehensible, then it is open to the justices to apply their discretion and decline to allow the particular evidence to be let in as part of the trial."

The existence of the discretion is recognised and the manner of its exercise in New Zealand illustrated by the judgments of the Court of Appeal in R v Capner [1975] 1 NZLR 411, Police v Lavalle [1979] 1 NZLR 45 and R v Horsfall [1981] 1 NZLR 116. Those decisions indicate that the Courts in New Zealand have closely followed the trend of the English authorities although since Sang it may be thought that the discretion has in the past been more liberally exercised here than it may now be in England.

I do not see this case as involving any such reprehensible conduct by the Police as should lead me to exclude the evidence of the tapes. So far as I have been made aware the application for a warrant to intercept calls was made in good faith and the warrant was executed in good faith. The warrant authorised only the interception of private communications but, fortuitously, other communications were intercepted which have been shown by later evidence not to be private communications. Mr McLinden contends that the Police should have been alerted by the content of the conversations to the possibility that the parties believed they were being

intercepted and have desisted from monitoring them. It is true that there are indications in the taped conversations that the accused and B suspected that their telephones were "bugged", to use the accused's terminology. In respect of the accused's telephone the suspicion was unfounded. What grounds they may have had for suspecting that V 's telephone was bugged has not been the subject of evidence but the existence of such a suspicion would not of itself have rendered the monitoring improper. It is only if the parties, or one of them, ought to have reasonably expected that the telephone calls may have been intercepted that the monitoring would be beyond the authority of the warrant. What the actual belief of the parties respectively might have been and the reasonableness or otherwise of the grounds upon which it had been formed were matters which would call for the exercise of a fairly fine judgment by those having the authority to decide whether to continue monitoring call or to abort the interception warrant. If they misjudged the position I do not think that was such an error as to justify exclusion of the evidence. There is nothing before me from which I would be prepared to draw the conclusion that the Police acted in bad faith and there is nothing that to my mind was in any way morally reprehensible in their conduct.

Mr McLinden submits that his client is prejudiced by the finding that the tapes are not within the ambit of the 1978 legislation in that he believes that he could have successfully opposed the admission of evidence of all or parts of them under Sections 25 or 26 of the 1978 Act. As to that I can only say that it was Mr McLinden's own submission that led to the finding. I do not regard the result as being unfair for that reason although I recognise that it may well be to the accused's disadvantage.

My ruling was given prior to compiling this record of my reasons which I informed Counsel would be delivered later.

I hold that the evidence of the tapes is admissible.