3/12 KR

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

T 19/84

1465

REGINA

v.

G WATHNE

Hearing: 22 November 1984

Counsel: C.Q.M. Almao and P.J.Morgan for Crown
R.A.Houston Q.C. and T.R.Ingram for accused

Judgment: 23 November 1984

ORAL JUDGMENT OF BISSON J. ON VOIR DIRE EVIDENCE

Mr Houston, for the accused, has asked the Court to exercise its discretion and hold that certain evidence be held to be inadmissable. This is the evidence of two Police Officers who separately interviewed the accused and recorded certain questions put to him and his answers in reply. The accused had previously been interviewed for two and a half hours by Detective Sergeant Joyce and a long written statement taken on 26 January. Then, on 27 January, Detective Sergeant Joyce spoke to the accused again and recorded further questions and answers. Then on the night of Monday, 30 January, the accused, on returning home about 11.30 p.m. or a bit later from a weekend in Auckland, was met by the Police

and taken for interview by Detective Sergeant Goff at the County Council Chambers in Ngatea. This lasted from 12.04 for approximately three hours twenty minutes and it took the form of questions and answers which were recorded and signed by the accused as a correct record.

I have heard evidence by Detective Sergeant Goff, Detective Sergeant Joyce, the accused and his two parents. He must have been, to some extent, tired and had consumed some alcohol, but was not in such condition, according to the evidence, that the interview should not have taken place. This was a homicide case and a large number of Police were involved and I accept there was some urgency to interview this prime suspect again in the light of further information which had been received. His return home had been awaited and if he had arrived earlier, then of course the interview would have taken place earlier. I note that Detective Sergeant Joyce, in whom the accused's father had the greatest confidence, made arrangements for the interview to take place at this late hour of the day and I am satisfied that he would not have seen fit to remove the accused from his home for that interview if he was otherwise than in a fit state for it to take place.

Although the accused was not arrested or forcibly removed from his home, Detective Sergeant Joyce said he was persuasive in making the arrangements for the interview. It is nevertheless fair to assume the accused felt he had no option and I accordingly treat him as being technically in custody, but this is not crucial as Detective Sergeant Goff did give him a caution, which was appropriate in the circumstances.

The interview then proceeded, dealing with a number of topics such as the footwear being worn on the occasion of the fight which at a later point of time the other person in the fight was found dead. Then as to the speed of the car in which the accused left the scene; as to what various witnesses were able to say, particularly one B Clark; as to blood samples and patholigists' finding and other witnesses relating to seeing a person falling over a drum and someone lying on a seat at the Miranda property where the concert was held, and also as to his carrying of a knife on occasions.

This interview was, in my view, conducted fairly in the sense that the approach of the Detective Sergeant was not heavy-handed or oppressive. He quite properly put before the accused, who was then the prime suspect, information which had come to the knowledge of the Police. It gave the suspect, as I will call him at this stage, an opportunity to reply, that may assist the Police further, it may help the suspect if he is eventually charged and so that this was in the normal course of investigation and I see no occasion to take exception to that, provided that the information being put before the suspect is believed to be true and Mr Houston did not take issue with Detective Sergeant Goff proceeding otherwise than in a perfectly bona fide way in that regard. There is no suggestion of there being threats or intimidation in the course of this interview, but Mr Houston submitted that the cumulative effect on the accused, a young man, taking into account the time of night, that he must have been suffering, to some extent, from tiredness

and having taken alcohol and that he had been, to some extent, cross-examined so that the cumulative effect, Mr Houston submitted, was unfair and the result prejudicial to the accused - or put another way perhaps, the answers could not be looked upon as truly voluntary.

The case of Queen v Horsefall was mentioned, 1981, Vol. 1 N.Z.L.R. at page 116. At page 221, Mr Justice Cooke, in delivering the Judgment of the Court of Appeal, said:

> "The Judge has a discretion to refuse to admit in evidence a statement which has been obtained unfairly. As in many other branches of the law, the requirements of fairness cannot be captured in a rigid code.... unfairness to the accused is not susceptible of close definition."

Then again a passage cited from Queen v Wilson, 1981 Vol. 1 N.Z.L.R., page 316. At page 324, where again Mr Justice Cooke, in delivering the judgment of the Court of Appeal, has said:

> "But it is fundamental in the New Zealand system of justice that confessions obtained by overbearing the will of a person in custody by tactics amounting to compulsion will not be received in evidence. Whether a case is of that kind is a question of fact and degree."

This of course did not amount to a confession, but Mr Houston applies the same test, that the answers which are given which may be prejudicial to an accused person should not have been extracted from him when he is in custody as I have held he was technically in this case, by tactics amounting to compulsion. I see no evidence in this case of the interview in any way amounting to oppression or compulsion by the Police in regard to this accused.

Mr Almao has very properly accepted that a certain part of the evidence should be excluded and he does not seek to have it retained in the prosecution evidence. These were questions and answers which related to one B Clark, who did indeed give evidence before the jury so what he has to say about the matter has been given on oath in this Court and what was put to the accused at the time of the interview should be excluded, that the same principle as was annunciated in Queen v Halligan, (1973) Vol. 2 N.Z.L.R. page 158:

> "Where a suspect is being interviewed by a Police Officer and is told what some witness has said about him and asked to comment, if the suspect makes no damaging admission in reply, what was said by the Police Officer to the suspect is irrelevant and inadmissable as evidence."

Applying those principles and accepting the Crown's concession, I order that that part of Detective Goff's evidence which refers to Brian Clark is inadmissable.

Another part of the evidence which I have had to consider in particular, relates to knives and again Mr Almao has properly conceded that one question and answer should be excluded from the prosecution case and at the end of the day , Mr Houston was satisfied if the Court limited its order with regard to the evidence of Detective Sergeant Goff to those passages relating to B Clark and to this one question and answer, which is found at page 182 of the notes, line 22:

> "How did you get to the Sunburst Restaurant if it wasn't along the street?
> Answer: She is lying. I never had that knife. I never had a sheath knife. I never carried that sort of knife."

That is ordered as inadmissable on the Halligan principle and also that it is highly prejudicial without any probative value.

Apart from those two parts of the evidence, I hold the rest of Detective Sergeant Goff's evidence as admissible, as having not been obtained in an unfair or oppressive way.

As to the questions and answers ellicited by Constable Petrie, this was quite a different situation. After this long interview at the County Council Chambers, the accused was then taken to the Police Headquarters at the R.S.A. building, there to be detained in a small room by Constable Petrie while Detective Sergeant Goff was considering whether a charge should be laid. By this time it was 3.38 in the morning and it, in my view, was quite unfair for the Constable to start questioning the accused any further. The accused had already informed Detective Sergeant Goff that he did not wish to answer any further questions until he had seen a Solicitor and yet at this late hour, after a lengthy interview, the Constable elected to start all over again and he sought permission to do so and Detective Sergeant Goff gave him permission to do so and he then proceeded to ask questions and then record those questions and answers.

Before commencing that interview, he did not give the required caution because, as I have said, the accused was at that stage certainly in a state of technical custody. He was being held in a small room instead of being returned at once to his home. The Constable excuses his failure to give a caution by saying that the accused had already been cautioned by Detective Sergeant Goff,

but that had been hours before, in another building, and it was quite irregular and certainly not in compliance with the Judges' Rules or a sense of fairness or justice to start another interview without a further caution. The Constable endeavoured to claim it was not an interview. That, of course, is rubbish. The accused was being interviewed, a series of questions were addressed to him and they were recorded along with the answers, and then he was asked to read them over and to sign them as correct. If that is not an interview, I do not know what is.

Also, two of the questions in particular were loaded questions. Highly unfair because they introduced into them a statement which the accused had not made or accepted as a fact and so those questions were heavily loaded and highly unfair. For those reasons, I have no hesitation in ordering that the whole of the question and answer interview of Constable Petrie is inadmissible, having been obtained in an oppressive and unfair manner, and for that reason my order is that it not be given in evidence.