26/7

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

NOT RECOMMENDED

AP 62/89

IN THE MATTER of an Appeal against conviction in the District Court.

729

BETWEEN _____ HEKE of _____, Mangere, Unemployed.

APPELLANT

AND POLICE c/o Crown Solicitor Meredith Connell

RESPONDENT

Hearing & Judgment: 26 May 1989

Counsel P.J. Driscoll with H.S. Parata for Appellant
H. Leabourn for Respondent

ORAL JUDGMENT OF ANDERSON J.

The appellant is a lad of 16 who was convicted after a defended hearing in the Children and Young Persons Court at Otahuhu on 20 February 1989. He was sentenced to corrective training, which sentence he may well have completed by now. Counsel for the appellant acknowledges that there is little practical effect in relation to the appellant in pursuing the appeal at this stage but that it is important that the Court declaim upon the necessity for observance by police personnel of certain principles directed to ensuring fairness in the treatment of young people.

The appellant was charged with burglary. He was found in the general vicinity of the place where the burglary

occurred. In the course of his apprehension, perhaps not so much in the way of arrest but for questioning purposes, he was bitten by a police dog. He was interviewed by a police officer who took no steps to ensure compliance with general instructions providing wherever practicable for young persons to be interviewed in the presence of a parent or responsible independent adult.

Evidence was given by the interviewing officer of certain alleged oral admissions. No written statement was taken. No full record of the interview was completed. The police officer made some notes in his notebook allowing him to give evidence in the following way:

> "Acting on information received, I went to the address of ..... Here I located the defendant ..... I then put the defendant in the back of my police patrol car and went back to the Otahuhu Police Station. At the Otahuhu Police Station I cautioned telling him that he was not obliged to say anything but anything he did say may be given in evidence. I then asked if he knew anything about a burglary that at happened at (address). said No. I again asked if he knew anything about the burglary to ..... as it had only happened that night and was only a few houses away from the house in which he was found by Police earlier that night. firstly said that he was standing on the road and that his two associates had got into the house through the window. He later changed his mind and said that he got in too. I then asked what he did inside. He said that he got a cask of wine from the fridge of which he drunk across the road. I then asked how they got out of the house. He said through the window. I asked him what they did after this. He said that he went down to another address on ..... I asked if he wanted to make a statement about the incidents that he had been involved

> in. He said no that he did not. I then arrested and charged with burglary. Two burglaries."

The first question that comes to mind is the legal basis upon which this lad who was not arrested until some considerable time later was "put ...in the back of my police patrol car" and taken to the Otahuhu Police Station. The most favourable view that can be taken of the matter is that he was in fact arrested at that point. Having been so arrested or otherwise taken into custody he was interrogated without any steps being taken to ensure that a parent or responsible adult was present.

A reading of the evidence in chief based upon the police officer's notes clearly suggests to my mind that there were elements of cross-examination of this interrogation in custody. I cannot accept, for example, that the appellant would spontaneously change his mind about his involvement and the extent of it without some prompting. Further, the words noted as following the denial of involvment in a burglary:

> "I again asked if he knew anything about the burlgary to ... as it had only happened that night and was only a few houses away from the house in which he was found by the police earlier that night"

clearly indicate that issues such as presence and the locality and the timing of the offending were put to the appellant in order to challenge his denial of involvement. This must amount to cross-examination so as to bear on discretion.

Mr Leabourn for the respondent has helpfully and very correctly reminded me of the inestimable advantage of a Judge at first instance being able to see and assess witnesses in a trial. This advantage allowed the learned District Court Judge to assess the appellant as somewhat streetwise and to come to a view after reviewing the subjective evidence that there had not been unfairness. The learned District Court Judge held in the course of his judgment as follows:

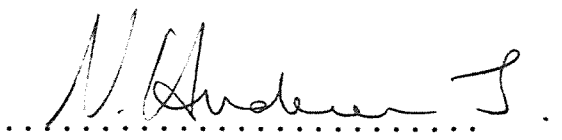
> "Each case applying settled principles of law must be decided on its own facts."

The Judge at first instance found, as I have indicated, that the appellant was streetwise and dealt with the police officer with reasonable assurance. There was a finding that the spirit of the General Instructions had been breached, that the notes of interview were not shown to the appellant, that he was not asked to sign such notes, but that overall there was in all the circumstances not such unfairness as ought lead to the rejection of the confession. This view is arrived at notwithstanding that it was common ground that the boy had quite proximately to this taking into custody and interrogation been bitten by a police dog. The learned District Court Judge found that there was no evidence that tbe boy actually sought treatment. With respect, one might have thought that the obligation to ensure medical treatment lay on those who were older and wiser than him.

I do not need to review the numerous cases that particularly in recent times have been concerned with the interviewing of young persons in custody. In the general area of discretion relative to the admissibility of confessional statements it is to be observed that the Court of Appeal has confirmed that not merely the particular case but the generality of cases falls to be considered in this area which imports policy decisions. That is judicial policy decisions. In this case, the learned District Court Judge erred in my respectful judgment in confining attention to the subjective aspects of the case and in not considering at all the wider issues of general relevance. For example, there appears to be no consideration of the possible consequences of admitting a confessional statement taken from a 16 year old who may have been taken into custody in the police car without legal formalities having been observed; who was suffering from a wound inflicted by a police dog, in respect of whom no attempt at all was made to ensure compliance with General Instructions relating to the interviewing of minors and whose ability to challenge the tenor and subtleties of the interrogation has been greatly diminished by a failure to take full notes of the course of the interview. If a confessional statement is admitted in those circumstances one fears that there might unconsciously be imbued an idea that the rules directed to fair play are irrelevant. In coming to that

view I would not wish it thought that I am unmindful of the very onerous and stressful task of the police, particularly in dealing with youthful persistent offenders. Nevertheless the rules are there to be honoured by observance and not by breach.

For these reasons I uphold the appeal. The conviction is quashed. There will be no order for costs.



N.C. ANDERSON J.

Solicitor for the Appellant — P.J. Driscoll
P.O. Box 43192
Mangere

Solicitor for the Respondent — Crown Solicitor
Auckland