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R v Beresford

IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

T.13/90

R E G I N A

v.

CRAIG MARTIN BERESFORD

Hearing: 17th and 18th April 1991

Counsel: A.D. Garland for Crown
N.H. Soper for Accused

Ruling: 17th April 1991

RULING (NO. 1) OF WILLIAMSON J.

Two objections to evidence have been made by Counsel for the Accused this morning. I have heard evidence in relation to those objections as well as argument both for and against the objections.

The first objection is to evidence which it is proposed should be called from an undercover Police Constable relating to a conversation which he had with a man, Ruben Kawana, and the Accused on Sunday 6th May 1990 at Nightcaps. In the depositions and in the brief of evidence prepared for this trial the Police Constable states that Ruben Kawana had, during the course of a conversation between the three men, said "We'll get you some more mushrooms. We'll go out and get them this week. We'll let you know Thursday night." Prior to these statements being made by

Kawana, the Accused had been participating in the conversation relating generally to mushrooms and the effect which they had.

For the Crown it is submitted that these statements by Kawana to the Constable, while in the nature of hearsay, are admissible because they are statements made in the presence of the Accused when he was reasonably called upon to make a response. Accordingly it is contended that his silence in such circumstances is evidence of the truth of the statement made by Kawana.

For the Accused Counsel argues that it is significant that at the time the statement was made by Kawana there was no overt indication by him that he was referring to himself and the Accused and nor was there any observed response by the Accused to what had been said. It is submitted that there being no acceptance or acquiescence by the Accused in relation to a statement which may or may not have been referring to him, then the contents of that statement cannot be admissible against him.

As is so often the case in relation to objections of this nature, the decision must depend upon the exact circumstances. A Judge is required in such a situation to consider the totality of the circumstances in which an Accused was placed at the time. I refer to the manner in which this test is stated by the Court of Appeal in the case of R v Duffy [1979] 2 NZLR 432 at 438. In my view the circumstances in relation to this case are not so exceptional as to take the case outside the ordinary rule. In particular, I am not satisfied that the

Accused's mere silence in this situation could safely be regarded as any form of admission and accordingly, in my view, it is not admissible. That does not mean, of course, that the Police Officer cannot give evidence of a conversation taking place between himself, Kawana and the Accused concerning magic mushrooms and the effect which those mushrooms have. The general nature of the conversation about that topic is admissible but the particular statements by Kawana referred to are not for the reasons I have given.

In relation to the second matter of objection, namely objection to the Constable referring to notes made by him subsequent to the conversations taking place, I have heard evidence from the Constable as to the times and dates involved and as to the general circumstances in which he was required to work as an undercover constable. Because of time restraints I will not detail all of those now, other than to record that in relation to the remaining conversation of importance, that is a conversation on the 11th May 1990, the evidence is that that conversation between the Accused and the Constable took place between 12.30 and 4.30 that day and that it was recorded in the Constable's notes at about 6.30 p.m. that day. The position about notes of this nature used to refresh a person's memory is that the person may refer to writing provided it is sufficiently contemporaneous with the events in question or made so soon afterwards that the Judge considers that the transaction is then fresh in the memory of the witness. I am satisfied in this case that the notes were made so soon afterwards that the conversation would have been fresh in the memory of the Constable.

Counsel for the Accused referred to a decision of Fisher J. in the case of Gavin Leslie Johnson, T.43/89, Rotorua Registry, 10 May 1990. In that case Fisher J. ruled that, in so far as the Constable desired to give evidence of exactly what a person had said, then he should do so relying on his memory and without reference to notes. His Honour said that if such evidence was purported to be given as verbatim exact records of precise words used then the record should be made contemporaneously.

I accept that it would be undesirable to attempt to lay down any hard and fast rule as to what particular individuals might be expected to recall in particular circumstances. In this case the Constable has said that he recorded to the best of his ability his general recollection of the purport of what had actually been said by a person. In my view, given all of the circumstances in this case, that procedure was not only a reasonable one but also one upon which a Judge may have confidence that the record was made at a time when the conversation was sufficiently fresh for it to be brought to the memory of the witness by those notes.

The prejudice which is minimised by the decision of Fisher J. is that which occurs when reference to a written record conveys to a jury some particular importance and almost scientific precision about particular words used. That is not the case here. Rather it is the general nature of a conversation which is the subject of the application.

For the reasons given then, the objection in relation to this matter is overruled.

J.