LOW PRIORITY

24/9

AP 156/93

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

BETWEEN CROZIER
Appellant

1631

AND THE POLICE
Respondent

Hearing: 18 August 1993

Counsel: D.S.G. Deacon for the Appellant
M.T. Lennard for the Respondent

Judgment:

JUDGMENT OF HERON J

The appellant was convicted of a charge that he drove a motor vehicle on Burma Road while the proportion of alcohol in his breath exceeded 400 micrograms. He appeals from his conviction arising from a reserved decision given on 14 May 1992.

At 8.45 p.m. on 14 November 1992 he was required to undergo a breath screening test. As a result of that test, he was required to accompany a traffic officer for further testing. As the Judge observed, the details at his stage are not important. The only issue is a New Zealand Bill of Rights question, which the Judge described in this way:

> "On arrival at the police station the defendant was told by Constable Hobbs of the rights conferred upon him by s.23(1)(b) of the New Zealand Bill of Rights Act 1990, whereupon the defendant asked if he could telephone Mr Deacon. The defendant was unable to find that solicitor's telephone number in the book which the constable then handed to him (because the defendant did not have his spectacles with him), and the constable then, at the defendant's request, located the telephone number for him. Indeed the defendant accepted the constable's invitation to dial the solicitor's telephone number for him.

> Contact was made with Mr Deacon and the defendant then spoke to the solicitor. Whilst he did so the constable remained in the same room, seated at a desk, two or three metres at the most from the position where the defendant was standing using a telephone attached to the wall. The constable did not consciously hear what was said by the defendant, and he could not hear what was said by Mr Deacon. The constable was however in a position to hear what the defendant said to the solicitor, had he wished to do so. Apparently at Mr Deacon's request the constable spoke to the solicitor, after the defendant had spoken to the solicitor, when Mr Deacon told the constable that the defendant had been told to do what the constable asked him to do. After that the telephone hand piece was given back to Mr Crozier who replaced it."

The Judge observed that only the appellant and the constable were in the room. Another telephone in a separate room was then being used. The appellant gave evidence, which was unchallenged, that whilst he had been speaking to Mr Deacon he had wished to advise him about certain domestic matters. Mr Deacon was the appellant's solicitor and confidante, whom he had known for some 20 years. The private business related to marital difficulties which had given rise to his drinking earlier that evening, and the appellant was reluctant to disclose these matters.

Central I think to the decision in this case is the Judge's finding as follows. He said:

> "What in my view is significant in the instant case, and which distinguishes it from those to which the Court has been referred, is the fact that what Mr Crozier was inhibited from communicating to the solicitor was not information the solicitor's acquaintance with which could have availed the defendant. Whilst Mr Deacon was in argument able to illustrate, by reference to hypothetical scenarios divorced from this case, that beneficial legal advice could be conveyed before a decision was made whether or not to undergo an evidential breath test, the inhibition of the defendant was not apparently significant in depriving him of any advice that might have availed him."

The Judge reviewed a number of cases, including the High Court judgment of Kohler v Police Wellington Registry, 18/2/93 McGechan J, and also the passage in R v Karifi 7 CRNZ 427 at 431 which read:

> "It seems to us that, once a breach of s.23(1)(b) has been established, the trial Judge acts rightly in ruling out a consequent admission unless there are circumstances in the particular case satisfying him or her that it is fair and right to allow the admission into evidence."

He referred also to the passage in Kohler where McGechan J had said:

> "Even if neither exception applies, and there is breach, there of course remains the ultimate general question, always applicable as to whether the breach of rights has made any difference to the suspect's conduct."

The Judge said that he would qualify that further by limiting it to conduct "in relation to the matter upon which, or incidental to which, he has been arrested or detained or in respect of which (otherwise) he is at risk of incriminating himself." He gave an example of a solicitor wishing to talk about a conveyancing matter and had felt inhibited in doing so by the officer's presence, which he said could not avail him, in the circumstances and in summary because there was really no demonstrable connection between the absence of privacy and the likely conduct of the appellant.

By the time the matter came into this Court Kohler had moved on to the Court of Appeal. On the facts in that case very much the same situation as prevailed here had occurred, with the constable remaining in the room while making a telephone available and the defendant telephoning his solicitor. As with the present case the constable could not hear what the solicitor said, but at one stage took the telephone and spoke to the solicitor himself. The solicitor gave advice and told him to undergo an evidential breath test, which proved positive.

According to the defendant, he would like to have known whether he should take a blood test, and that he felt he could not ask the solicitor about that with the constable in the room. The District Court Judge was emphatic in finding against him on the facts. McGechan J accepted that an entitlement to confidentiality existed, but indicated there were two limitations on that right. First, a realistic prospect of criminal conduct if the suspect is left unsupervised; and secondly, where the suspect does not in fact require confidentiality, and in discussing the second of those matters said:

> "For a suspect to so reject confidentiality or to be so "unconcerned" he must either know of his entitlement and spurn it; or it must be shown that aware or not, in those circumstances would he have required confidentiality, a rather more onerous burden."

The Court of Appeal agreed with that two fold test but found McGechan J's overall qualification to the effect that if neither exception applied there remained the ultimate general question whether the breach had made any difference to the suspect's conduct a restatement of the second ground. In this case it is unnecessary to go into the discussion contained in Kohler relating to whether there had been a breach of rights. It is accepted in this case there had been. The real inquiry focussed on the second stage, and any grounds existing for departing from the rule of exclusion which follows once a breach has been shown. The learned President said:

> "The rule should be applied unless in the particular case there is a clearly identified good reason to the contrary; and that the fact that the prosecution might fail without the evidence in question is obviously not in itself a good reason."

Then of importance in this case, the President said:

> "Inconsequentiality - that is to say, proof (by the same standard) that knowledge of the right to privacy of conversation would have made no difference to the defendant - would also be a good

> ground for departing from the prima facie rule of exclusion. As McGechan J noted, this was the ground of the District Court Judge's decision."

The Court of Appeal found however there was no evidential basis for that finding. Of importance the President said:

> "And in a somewhat complicated situation it is not profitable to speculate on what the effect of private advice might have been. For example it is conceivable that the defendant would have elected a blood test. It might not have benefited him, but one cannot be certain."

In Robertson v Police 22/2/93 AP 366/92 Auckland Registry Henry J involved another case of breach of privacy. The facts were not dissimilar to these, the Judge in that instance finding there had in fact been a lack of privacy, the Judge holding that the test could well be "... in this particular set of circumstances a reasonable person would have concluded that a right of privacy to discuss his or her case without fear of being overheard had been afforded." As I have said, there is no such question arising in this case, the breach of privacy is acknowledged. But of importance also was that in the case before Henry J the Judge in the Court below had accepted the defendant's evidence that he felt inhibited by the officer's presence in discussing matters fully with the lawyer. The particular matter of concern to the appellant was the effect of a previous conviction which he did not wish to disclose to the officer. There was no discussion in that case as to the significance of the fact of a previous conviction or whether it would bear upon the advice he was to receive. In that case there were no grounds advanced for not applying the general exclusion rule, and so the case has limited value I suppose on the question which arises here as to whether the breach was inconsequential.

Mr Deacon said that one was not to know where instructions from this appellant might have led had he

been able to tell his solicitor of his private business and what had led up to the fact of why he had been drinking. Had he been able to give full instructions to his solicitor as to the events of the day and evening one is not to know whether that would have been relevant or not to advice the solicitor may have been able to provide. Mr Deacon put it on the basis that Kohler had refined the law and that unless there was waiver, inconsequentiality or some other operating cause such as drunkenness and aggressiveness, where the appellant had to be constantly observed, evidence obtained in the face of a breach of privacy was inadmissible because of the breach of s.23(1)(b). The onus is on the respondent to establish inconsequentiality. See R v Te Kira CA 280/92 14/5/93.

The respondent says that the appellant if afforded privacy would have discussed his marital problems and the fact that these led to him drinking that night, and that neither factor could have any bearing on the advice which was given or likely to be given.

Of some importance I think is the question asked in re-examination in the Court below, when the appellant said that when he had rung and spoken to his solicitor he did not tell him everything of the events of that night. He did not do so because he was not afforded the necessary privacy. I do not think the evidential foundation has been laid by the respondent to say that a completely uninhibited conversation might not have led to advice different from that given, or that it could not have made some difference. In the words of the Canadian authority, Le Page v R (1986) 54 CR (3d) 371 it would be purely speculative and generally unhelpful to delve into the detail of the solicitor client relationship. It may be some cases will expose that the conversation could not have been impeded in any way material to the defence. I do not think in the circumstances of this case, having

regard to the various technical provisions of the law in this field, that one can be certain that a full discussion of all matters that had occurred that evening might not have affected the advice that was given.

I am simply in a position where the Crown have not discharged the onus of proof. The appellant gave evidence, behaved himself in all respects at the police station, but was inhibited in what he said. He adhered to that version under cross-examination and in re-examination in the way that I have indicated. The Judge applied the words of McGechan J which have now been subjected to some further analysis, and added to those words in the way I have detailed above.

I am not sure the Judge has really directed his attention to the onus of proof in these circumstances. I for one would need to be satisfied that the Crown could demonstrate that in no way the information conveyed could have made any difference to the advice given. The conveyancing example the Judge has given is persuasive, but in this case the appellant has indicated that he did want to tell his lawyer of the events that evening, which led up to his drinking. Although probably near the border of inconsequentiality, and one is naturally suspicious as to that, it is I think in the overall interests to ensure that a not too rigorous analysis is made of what would be an otherwise privileged discussion, and the consequences that might arise from it, in determining whether the Crown have proved inconsequentiality.

The best means by which the rule can be observed so that these questions do not arise is to ensure that the conversation takes place without anyone able to overhear it. In my view, in light of the recent developments of the law, and with great respect to the Judge in the Court below, I do not think the Crown have established on the

evidence that the breach of the Act had been waived or was otherwise inconsequential, and that being so the evidence should not have been admitted. The appeal must be allowed, the conviction set aside and the fine and disqualification quashed.

Robertson J.

Solicitors
Deacon & Tannahill, Wellington for the Appellant
Crown Law Office, Wellington for the Respondent