NZLR

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

12/3

AP.366/92

MEDIUM PRIORITY

184

BETWEEN: ROBERTSON
of Auckland, Accounts Manager

Appellant

A N D: THE POLICE

Respondent

Appeal Hearing: 8 February 1993

Judgment: 22 February 1993

Counsel: M J Harte for appellant
Mrs A Kiernan for respondent

JUDGMENT OF HENRY J

This appeal is against a conviction entered in the District Court at North Shore on 24 November 1992 on one charge of excess breath alcohol driving. The only ground of appeal is that s.23 (1) (b) of the New Zealand Bill of Rights Act was breached in that the appellant, when detained, was not afforded the right of privacy for the purposes of consulting or instructing a lawyer.

It was submitted that the right given under s.23 (1) (b) to a detained person to consult a lawyer is to be construed as a right to consult in sufficient privacy to permit consultation without being

overheard by law enforcement officers. Judgments of this Court to that effect, which follow Canadian authority, include ***McKay v Police*** (Gallen J., AP.281/92, Wellington Registry, 25 November 1992) and ***Ministry of Transport v Batistich*** (Blanchard J., AP.207/92, Auckland Registry, 28 October 1992). No submission to the contrary was made on behalf of the respondent in the present case. The principle is in line with ***R v Uljee*** [1982] 1 NZLR 561 where evidence of a conversation between the accused and his lawyer overheard by a police officer was held inadmissible. As Cooke J. observed (p.569) it is in the public interest to allow consultations with a legal adviser to be uninhibited by fear of disclosure.

The relevant facts as found in the Court below can shortly be stated. The appellant when stopped by a traffic officer underwent a breath screening test which yielded a positive result. He then accompanied the officer to the Glenfield traffic base where he was advised of his right to consult and instruct a lawyer. He then made a telephone call to a lawyer following which he underwent an evidential breath test. During the 10 minute period relevant to the giving of a blood sample he again asked to be able to telephone his lawyer, which he did, and then subsequently declined to undergo a blood test.

When both telephone calls were made the traffic officer was seated at a desk in an office at the base, carrying out paper work. The telephone used by the appellant was in a passageway just outside that office, approximately ten feet away from the seated officer. The appellant and the officer were in sufficient proximity in these positions to converse with each other, which they in fact did briefly. Whilst the appellant was speaking to the lawyer the officer's back as he was

seated was to the appellant's back. It would have been possible for the officer to overhear the appellant's conversation with his solicitor, but he did not in fact hear any part of it. The Judge accepted, with some reservations, the appellant'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 disclosed to the officer. The Judge, relying on a dictum of Blanchard J. in ***Batistich,*** held that a fear of lack of privacy in this context must be a justifiable fear. He further held that the appellant was not justified in his stated belief that the officer could overhear his conversation and that the evidence of the evidential breath test was therefore admissible.

The first point to note, which is not in dispute, is that a basis for challenge to admissibility for breach of s.23 (1) (b) having been properly laid the onus lies on the Crown to satisfy the Court there has in fact been no breach. (***R v Mallinson*** (1992) 8 CRNZ 707,709).

In ***Batistich***, Blanchard J. referred to a "justifiable" fear of lack of privacy, and it was that test which the Judge applied in the present case. Although the word "justifiable" conveys the notion of reasonableness, for myself I would prefer to frame the test by reference to the more familiar concept of the reasonable person. Cooke P. in ***R v Goodwin*** (1992) 9 CRNZ 1 at p.7, in considering the question of arrest said :

> **"Inevitably the inquiry must focus on what was actually said or done to the person.**
>
> **Normally that has to be seen from his or her standpoint, but a purely subjective test would be dangerous. The**

> concept, familiar in many branches of the law, of a reasonable person in his or her shoes is apt. The ordinary test can only be whether what was said or done by the police caused the person reasonably to believe that he or she was arrested or detained under an enactment."

The inquiry therefore is whether 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. A belief, even honestly held, that such had not been afforded would not of itself establish a breach, although it would necessarily be evidence on that issue. A purely subjective test is not appropriate.

The Judge's finding that the fear held by this appellant was unjustifiable can I think be treated as a finding that it was not reasonably based. Mr Harte however submitted strongly that the finding was against the weight of evidence. The Judge reached his conclusion from the following facts :

(a) the parties were not in the same room

(b) there was a distance of ten feet between them

(c) they were facing away from each other

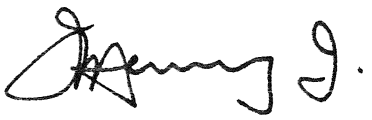
(d) there was no attempt by the officer to place himself in a position where he could overhear.

As against those factors, the last of which would seem to be at best only marginally relevant, the parties were within easy speaking distance of each other and did converse, there was no physical division of the area in which they both were, and the appellant did

not confer with his lawyer on the topic of his previous conviction by reason of the fear which it was accepted he did hold. On analysis I think the evidence establishes that there was, as Mr Harte submitted, an actual lack of privacy in the circumstances outlined. It is significant that the officer was in a position to hear the appellant speaking, whether or not he wished or intended to listen. Once the existence of that lack of privacy is accepted, as I think here it must, then it would be contradictory also to hold that a reasonable person would conclude that privacy had been afforded.

For those reasons I conclude that the evidence did not support a finding that the right of privacy required by s.23 (1) (b) had been afforded the appellant. There are no good grounds for not applying the consequence of exclusion of the resulting evidence, and Mrs Kiernan did not contend there were. It must follow that there is no sufficient admissible evidence to establish the charge.

The appeal is therefore allowed, and the conviction is set aside.



Solicitors:

Kensington Swan, Auckland, for appellant
Meredith Connell & Co., Auckland, for respondent