N2LR
18/11

IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY AP93/94

1117

BETWEEN N.Z. POLICE

Appellant

MEDIUM PRIORITY

A N D ELLIS

Respondent

Hearing: 12 October 1994

Counsel: R.P. Bates for Appellant
S.J. O'Driscoll for Respondent

Judgment: - 2 NOV 1994

JUDGMENT OF HOLLAND, J.

This appeal is brought by the police by way of Case Stated under s.107 of the Summary Proceedings Act 1957. It arises from the decision of the District Court at Dunedin to dismiss an Information brought against the respondent charging him with driving a motor vehicle while the proportion of alcohol in his breath exceeded the prescribed limit.

In the Case Stated the Judge has stated the facts proved or admitted under 24 paragraphs and has then added:- "I determined that the Information should be dismissed". The Judge has gone on to add some three pages of his reasons which he describes as "being more fully set out in my oral decision of 31 May 1994" and then states the questions for the opinion of the Court as follows:-

"1. Was I right to hold that there is a breach of s.23(1)(b) of the New Zealand Bill of Rights Act where the Police confine the right to consult and instruct a lawyer without delay to the right to take those steps only in respect of a person who is a lawyer.

2. Was the evidence capable of supporting a finding that the Respondent had communicated to the Constable that he wished to obtain advice from a lawyer?

3. Was I right to hold that the principle expressed in Knapton v Police 10 CRNZ 575 could apply to the facts in this case?

4. That having found the Respondent was aged 22 1/2 years and a student at Otago University then in the circumstances under which the evidential breath test was undertaken was I correct in upholding the alternative defence submission:

   (a) That the evidence obtained from the evidential breath test had been unfairly obtained; and

   (b) That the unfairness had been such that the resulting evidence ought to have been excluded?

5. That in the circumstances under which the Respondent made enquiries from the Enforcement Officer as to what would happen if he did not accompany her and upon his being informed that in those circumstances she would arrest him for failing to accompany her, was the Officer also required to have informed the Respondent that if such a situation was to occur and if she was required to arrest him, then she would also make him aware that bail may be available to him?"

Section 107 of the Summary Proceedings Act 1957 requires the appellant to state in writing a case in the prescribed form

setting out the facts and the grounds of the determination and specifying the question of law on which the appeal is made. That case is to be submitted to the Judge who is required to settle, sign and transmit it to the Registrar. The prescribed form is set out in the Summary Proceedings Regulations 1958. It provides for the grounds of determination on which the appeal is based to be stated. While an attempt to summarise the grounds of the decision as required by the prescribed form of Case Stated is in most cases appropriate, an additional attempt to add to the reasons expressed in the judgment, as appears to have occurred in this case, is usually not helpful. It tends to blur the statement of the grounds in the Case. If the grounds cannot be succinctly stated the judgment should be included in the Case without addition.

The oral decision dismissing the charge was filed with the Case Stated but neither the Case nor the Judgment set out clearly the basis on which the charge was dismissed. It is clear that the Judge found that at the time the respondent was taken to the police station for the purpose of undergoing an evidential breath test, a blood test, or both, the police committed a breach of the New Zealand Bill of Rights Act 1990. It is equally clear that as a result of that breach the Judge dismissed the charge. I assume that the charge was dismissed on the basis that the Judge ruled inadmissible the evidence obtained subsequent to the breach of the New Zealand Bill of Rights Act 1990 and that accordingly there was no evidence on which a conviction could be entered.

As was stated by Cooke P. in Ministry of Transport v Noort; Police v Curran [1992] 3 N.Z.L.R. 260 at p275:-

> "But I have no doubt that it is consistent with the Bill of Rights Act to say at least that evidence obtained immediately after a violation should not be admitted unless the prosecution proves that it would have been forthcoming or discovered whether or not there had been a violation."

Jurisdiction

It occurred to me that on this basis there may be need to consider the provisions of s.108 of the Summary Proceedings Act 1957 which provide:-

> "No determination shall be appealed against by reason only of the improper admission or rejection of evidence."

Neither counsel had considered this section. Counsel for the Crown, following an adjournment, referred me to a helpful decision of Henry J. in Police v Gray [1991] 6 C.R.N.Z. 701. I was of the view that I needed to hear submissions on the meaning of that section. I accordingly reserved judgment, indicating that written submissions should be made first by counsel for the appellant, and secondly by counsel for the respondent.

I have now received those written submissions. In short, it is submitted on behalf of the Crown that I should follow the decision of Henry J. in Gray by holding that there were questions of law in issue in addition to a question solely of admissibility, namely whether there had been a breach of the Bill of Rights Act 1990, or unfair conduct on the part of the Enforcement Officer, and that because of those additional questions of law s.108 does not apply.

It is submitted for the respondent that Gray should not be followed and that the circumstances do not give rise to any distinction

between questions of law and questions of admissibility as decided by Henry J. in Gray at p707 where he held:-

> "if there is a question of law at issue in addition to the question of admissibility, s.108 does not apply even if the question of admissibility is directly related or even fundamental to that issue".

Notwithstanding that the Judge reached this conclusion, he followed his finding immediately with the observation:-

> "In conclusion I note that the section appears long to have outlived its purpose. The present status and jurisdiction of the District Court cannot be compared with the limited jurisdiction exercised by the Justices in the early days. Furthermore, the right of general appeal to this Court now available through s.115, untrammelled by the restrictions of s.108 which applies only to the case stated procedure, would appear to leave the section as something of an anomaly."

I have no difficulty in concurring with those observation but note that although nearly four years has passed since the judgment there is no proposal known to me to amend the Summary Proceedings Act in this respect.

The question before Henry J. arose from a ruling in the District Court, on a voir dire held during a trial of a charge of being unlawfully in possession of cannabis, that evidence of an admission of such possession, be excluded because it had been obtained unfairly. The Information was dismissed on the ground that the admission or the confession being excluded, there was no evidence of possession. The Crown appealed. Henry J. held that the exercise of the discretion to exclude evidence had been made on a wrong basis. In finding that s.107 did not assist the respondent he said:-

> "The substance of this appeal is that there was no evidence to establish the offence charged."

He quashed the dismissal of the Information and remitted it to the District Court for rehearing.

I do not see any way in which the decision in Gray can be legitimately distinguished from the facts presently before me. Henry J. fully considered the history of the section and the relevant authorities. I do not repeat that history in this judgment.

I agree with the submissions of counsel for the respondent that the decisions of Ireland v Connelly [1902] 21 N.Z.L.R. 314, and Ah Lim v Holmes [1923] N.Z.L.R. 102, referred to by Henry J. did not compel him to hold as he did in Gray. Likewise I am not persuaded that the decision of Reed J. in Quirke v Davidson [1923] N.Z.L.R. 546 also referred to by Henry J. is decisive of the issue before him and before me.

If the issue had come before me before the decision in Gray I may easily have been persuaded that the question of law, i.e. the discretion to exclude evidence because of an alleged breach of the Bill of Rights Act 1990, and the question of unfairness, were solely ones of a determination reached as a resultof the improper rejection of evidence and that it is too much of a short cut or a precipitate application of a full stop to hold that the Crown's appeal is that the determination was based on the fact that there was no evidence of the offence before the Court when the whole basis of the appeal is that such evidence was not before the Court because the Judge had wrongly rejected it as being inadmissible.

It may well be that the intention of the Act was to impose a further restriction to the substantial restrictions contained in the Act in relation to appeals by prosecutors by excluding from the right of appeal

on a question of law given to the prosecution, a question of law involving the admissibility or rejection of evidence.

However, I am faced with the carefully considered decision in Gray. I am not bound by the decision but I consider that in the interests of comity in the application of the law, I should follow it. It is not a case where I am convinced the decision is wrong. I accordingly find, as did Henry J., that "the substance of this appeal is that there was no evidence to establish the offence charged", and the appeal is not barred by s.108.

Substance of Appeal

Although the case stated is quite lengthy, the issue arising on the appeal is a narrow one. The respondent was stopped while riding his motor cycle in a Dunedin street. He was asked if he had been drinking and replied that he wished to speak to his lawyer. No reply is recorded but the respondent was required to speak into a passive alcohol tester which gave a "fail" reading.

The respondent was then told, in accordance with the Transport Act 1962, that he was required to undergo a breath screening test forthwith. The respondent did not immediately agree to undergo this test but suggested to the enforcement officer that the matter might be dealt with by taking the keys off him. He was again asked to undergo a breath screening test. He then inquired of the enforcement officer what would happen to him if he did not undertake such a test. He was correctly informed that he would be required to accompany the enforcement officer back to the police station to undergo an evidential breath test, blood test, or both. The respondent then asked what would happen if he did not go back to the police station and he was informed

by the enforcement officer that she would arrest him for failing to accompany her.

The respondent underwent the breath screening test which he failed to pass. He was then told that he was required to accompany the enforcement officer to the Dunedin Central Police Station for the purpose of undergoing an evidential breath test, blood test, or both. He was told that he had the right to consult or instruct a lawyer without delay and in private. The respondent then repeated to the enforcement officer what he had earlier said, namely, that he was an Otago rugby player and had played for the All Blacks and requested that she take the keys from him and warn him. She again requested the respondent to accompany her and again informed him of his right to consult and instruct a lawyer without delay and in private. The respondent did accompany the enforcement officer to the Dunedin Central Police Station where he was, for the third time, informed of his right to consult and instruct a lawyer without delay and in private, and a form to this effect was explained and given to him and he signed it, acknowledging that the advice had been given.

The respondent said that he wished to ring his father, and in reply was told by the enforcement officer that at that stage he had only the right to instruct a lawyer in private. She asked the respondent if his father was a lawyer and the respondent said that although his father was not a lawyer, his father was as good as a lawyer. The enforcement officer offered the respondent a list of lawyers, but the respondent replied that he wished to phone his father. The enforcement officer inquired where the respondent's father lived and was told that he lived in Wellington. He was told that he could telephone his father in Wellington on the police line after the breath testing procedures were completed. A further request was made to ring his father and the

enforcement officer repeated that during the breath testing procedures the respondent only had the right to consult and instruct a lawyer in private. The enforcement officer did not ask the respondent why he wanted to telephone his father, but again asked him if he wanted a lawyer. Upon the reply being given "No, I do not want a lawyer", the evidential breath test was undertaken producing a reading of 847 micrograms of alcohol per litre of breath. The prescribed limit is 400 micrograms of alcohol. It was the result of this test that was the substance of the charge.

The respondent was then allowed to make a phone call to his parents' address in Wellington and later left the police station. It appears from the evidence given at the hearing that on the night in question the respondent's father was in Christchurch.

I turn now to the five questions raised in the Case Stated.

Question 1

The question is not aptly worded. Section 23(1)(b) of the New Zealand Bill of Rights Act 1990 provides:-

> "Everyone who is arrested or who is detained under any enactment ... shall have the right to consult and instruct a lawyer without delay and to be informed of that right."

It has been held that that right carries with it the right to consult and instruct in private: Police v Kohler (1993) 10 C.R.N.Z. 118. It has also been established that the obligation to inform carries with it the duty to facilitate access to a lawyer where appropriate. In R v Mallinson [1993] 1 N.Z.L.R. 528 it was said at p531:-

> "... Informing persons of their s.23(1)(b) rights ordinarily carries with it the obvious implication that they are entitled to exercise those rights. But there is no duty on the police when informing persons arrested of their right to a lawyer to go on to give advice designed to facilitate the exercise of that right."

It follows that in the ordinary case the duty to facilitate depends upon a request being made to exercise the right.

The New Zealand Bill of Rights Act 1990 and rights at common law do not include the right of a person arrested or detained to communicate with any person whom the person detained or arrested wishes. The right under the Act is to consult and instruct a lawyer and there is no right given to consult anyone else.

Once the person being interviewed has indicated an intention to facilitate that right it may be necessary to allow that person to communicate with someone other than a lawyer for the purpose of consulting or instructing a lawyer. The case of Knapton v Police (1993) 10 C.R.N.Z. 575 was such a case. It was clear in that case that the request to ring a spouse was intended to be made to assist in obtaining a lawyer.

In the present case, and on the facts stated in the Case Stated, there was no indication by the respondent that he wished to exercise any right given to him by s.23(1)(b) of the New Zealand Bill of Rights Act 1990. There was accordingly no breach of the Act for the police to refuse the respondent permission to telephone his father before the evidential breath test was administered.

Question 2

This question is stated by way of a question of fact rather than one of law. It is, however, answered in the answer to Question 1

which is that the evidence does not disclose any indication of the respondent wishing to facilitate his right to consult and instruct a lawyer under s.23(1)(b) of the Act.

Question 3

The answer to this question for the reasons explained in the answers to Questions 1 and 2 is "No".

Question 4

A Court exercising criminal jurisdiction has a discretion to reject legally admissible evidence unfairly obtained. That discretion is not unlimited and must be exercised on proper principles. I adopt what was said by Henry J. in Police v Gray (supra) at p708:-

> "Although the concept of unfairness is not limited to certain defined circumstances and no others, the conduct must still be able properly to be so classed in the text of the criminal prosecution process. In general I think it can be extracted from the case law cited in argument that to be so classified the evidence in question must result from or involve either:
>
> (a) an infringement of a recognised right, protection, or privilege;
>
> or
>
> (b) a breach of a recognised duty or obligation;
>
> or
>
> (c) something which so offends public conscience as to outweigh the wider public interest in securing the conviction of an offender."

A 22½ year old university student is not a "young person" and one would expect that his intelligence quotient was higher than the average person who is arrested or detained. I accepted the argument of counsel for the appellant that it was perfectly reasonable of such a

person living in a city away from his home to request permission to communicate with his father when he was in trouble.

I also consider that in the circumstances outlined to me, which may not be the full circumstances, it was perhaps unreasonable for the police not to have permitted the respondent to have made such a phone call. On the other hand, one must have some sympathy for the police. This incident took place between 12.30am and 1am on a Friday night or Saturday morning. Persons affected by liquor consumed during the evening are sometimes far from reasonable. This respondent was bound either to undergo an evidential breath test or to elect to have a blood test, or in the event of his failing to permit a blood sample to be taken to be prosecuted and convicted of failing to do so. He has a right to consult a lawyer. He does not have a right to consult anyone else.

As I have earlier stated, the facts before me support the view that a total refusal to permit a telephone call to the respondent's father may have been unreasonable but that was not the case. He was allowed to telephone his father after the test was completed. The law does not give an arrested or detained person an absolute right to telephone anyone other than a lawyer or a person to assist in obtaining a lawyer. There are proposals that such persons should have a right to make a telephone call to anyone. Some jurisdictions have by statute given such a right. There is no such right in New Zealand. The refusal, in the absence of such a prescribed right, is not such as "offends public conscience". Police stations are often very busy places at weekends around midnight. There are many calls on their time.

I am not persuaded that there was any element of unfairness in proceeding with the tests prescribed by statute once the respondent had indicated, as he did, that he did not want to consult a

lawyer. The answer to Questions 4(a) and (b) is in each case accordingly "No".

Question 5

This question arises from the decision of the Court of Appeal in Auckland City Council v Dixon [1985] 2 N.Z.L.R. 489, and the later decision of Police v Bishop [1991] 2 N.Z.L.R. 388. There are a number of decisions of the High Court following Dixon. It is difficult to establish a consistent approach. The various decisions were fully considered in a judgment of this Court delivered by Eichelbaum C.J. in Ellicock v Courtney (1992) 8 C.R.N.Z. 390. I agree with the decision of the Chief Justice when he said at p398 that he was:-

> "unable to accept the automatic vitiation theory developed in the High Court decisions purporting to follow Dixon. ... The ultimate question is whether there is a reasonable possibility of a causative link between the words or conduct complained of and the particular evidence relied upon, usually the result of the evidential breath test, or the blood test."

That was the test applied by the District Court Judge who found that the respondent was a cooperative young man not compelled to do anything. He said:-

> "I don't accept or believe that Mr Ellis only underwent the testing procedures because he was threatened with arrest and not told about bail."

I entirely agree with the District Court Judge that the fact that the enforcement officer did not refer to bail when she said, in answer to his request, that if he failed to accompany her he would be arrested, did not in any way vitiate the subsequent evidential breath test that was

administered. I prefer to answer the question in this way rather than the way in which it is worded in Question 5. It follows that the Judge was correct in declining to exclude the evidence on this ground.

As the Judge has erred in rejecting admissible evidence in the respects set out in answer to Questions 1 to 4, the appeal will be allowed. The Information is remitted back to the District Court to be decided in accordance with this judgment.

Solicitors:
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O'Driscoll & Marks, Dunedin, for Respondent