IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY

M 35/96

BETWEEN **INWOOD**

Appellant

A N D **POLICE**

Respondent

Hearing: 10 October 1996

Counsel: G P Barkle for Appellant
J E Maze for Respondent

Judgment: 11 October 1996

ORAL JUDGMENT OF HERON J

Solicitors:

Fletcher Vautier Moore, Nelson for Appellant
Maze & Associate, Nelson for Respondent

This is an appeal against conviction for driving a motor vehicle on Queen Street, Richmond, whilst the proportion of alcohol in the appellant's breath exceeded 400 micrograms. The actual reading was 449 micrograms.

In the early morning of 10 May 1996 the appellant was stopped by a police patrol car. It was a random stopping. The appellant was subjected to a passive testing device and as a result of that proving positive underwent a road side breath screening test. The appropriate procedures were followed and he failed that test. He was then required to accompany the police officer to the Richmond Police Station, to undergo an evidential breath test, blood test or both. Although there is some dispute about it, the police officer said that he gave the appellant at this point, and in conformity with proper procedure, a direction in accordance with the New Zealand Bill of Rights Act 1990 to the effect that he was entitled to instruct a solicitor in private without delay.

The appellant having being returned to the police station was then subjected to a conclusive evidential breath testing device, and in light of the reading was then entitled to, within a period of 10 minutes, to elect whether he wanted to take a blood test or not.

The evidential breath test was completed just after 2 am and following the result he was duly charged and later released on condition he did not drive within 12 hours. During the time that he had available to him to elect to take a blood test, a telephone was nearby. He said then that he was further given advice to the effect that he could ring a solicitor but in the end, whilst he used the phone, he did not ring any lawyer.

This case involves a consideration as to whether the appellant understood the Bill of Rights advice that he was given either at the road side or in the motor vehicle on the way to the police station, shortly after he had been stopped and failed the breath testing device . There is some evidence that similar advice was given in the car to the appellant. In the car at the time was an individual, not a policeman, who was apparently there as an observer. Whilst the appellant has no recollection of receiving

any advice on the roadway, he does recall some conversation relating to telephones whilst in the car, but says that he was unsure if this conversation was directed to him.

The issue that I have just referred to, as to the appellant's understanding, is raised because of the condition the appellant suffers, namely dyslexia, combined I find, with an inability to understand at least at first instance, simple instructions.

Called to give evidence was his employer who said the appellant had reading and writing difficulties and also a "bit of trouble understanding some things". He said that work instructions had to be given to him in a manner that he could understand and described in fairly simple terms. The employer said that he made sure he was understood by getting him to repeat what he had been instructed and by doing this he could gauge how fully he understood matters. He did not except on rare occasions give him instructions in writing because of his disability, but if written matters were required to be communicated they had to be carefully read to him. As the employer said, anything that was "a wee bit complex like that" the employer would sit down with him and run through it.

The employer was cross-examined, the emphasis being on whether a stranger would be able to detect such disability or lack of understanding, at first appearance or on casual observation. The employer thought it was unlikely but thought there might be some noticeable ability not to understand.

The appellant as I have said, indicated he did not recall being given the Bill of Rights advice on the roadway, as the police officer had said, and which the Judge found had been correctly delivered to him at that time. The appellant has been working for his present employer for about 10 or 11 years so his particular attributes and weaknesses would be well known. This was the first occasion that he had ever been in police custody or for that matter in court. He was in special classes up to the fourth form and said that he could not understand difficult words that have other sort of meanings. He said basically the reading and writing standards he had were not up to the ability of his age. He said that the company had helped him out heaps in the last 10 or 11 years

from troubles that he had, and I understood that to be troubles understanding or difficulties which had developed from that.

The picture presented was of a somewhat simple youth although he acquitted himself reasonably well in cross-examination, and as Mrs Maze rightly said he used words and concepts that perhaps gave the lie to any lack of understanding. It is common ground that the suspect in these cases must be shown to have understood, subjectively understood in my assessment, the Bill of Rights advice, and any question as to that has to be answered by the trier of fact. Generally speaking, the appellant must point to some evidence which would overcome the normal assumption following a conversation between a police officer and an arrested person, and the inferred comprehension of what is said. In dealing with this point, which was raised in the Court below, both in cross-examination and submission, the Judge said:

> "The argument in the present case is that the Defendant was confused by reason of his failure to understand or comprehend what was going on, and this state of confusion was brought about by his dyslexia.
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> The difficulty with that argument is that the Defendant did not inform the Police about his predicament until after he had the Bill of Rights caution and after he had undergone the evidential breath test and a positive result had been achieved, and the Defendant was being spoken to about the possibility of a blood test and the form was being shown to him. It was only at that point in time that the officer was made aware of the difficulty. There was nothing in the evidence to suggest to the Officer, prior to that point, that the Defendant suffered from any disability or lack of comprehension. There was no suggestion that the Defendant was so intoxicated that he could not understand or comprehend what was being said to him. The Defendant was co-operative and complied with the request made by the Officer. There was no suggestion that he queried the Officer as to what was happening at the time. The Defendant was compliant and went along with the requests made of him. This would logically lead the Officer to conclude that the Defendant knew and understood what was going on."

Just as the cross-examination of the appellant's employer had focused on the outward manifestations of the condition, so did the Judge's finding and I think he may have been mislead by the emphasis that was put on that. The authorities were recently considered by Penlington J in *Browne v Police* Hamilton Registry, AP 6/95, 16 June 1995, where he concluded after reviewing the authorities:

> "The Court of Appeal, with the possible exception of *Cullen*, appears to have opted for a subjective test. And a number of High Court Judges - McGechan, Fraser and Blanchard JJ - have applied that test. Stated simply, the prosecution is required to establish that the suspect did in fact understand his rights. Those cases have also made it clear that where those rights have

> been adequately explained, then there is strong inference that the explanation has been understood. In a case where there is evidence to the contrary then the prosecution is required to prove on the balance of the probabilities that the suspect did in fact understand the explanation. A subjective test accords with the right centred approach required by the Bill of Rights."

And as referred to by Penlington J in that judgment, I also cite *R v Mallinson* 1993 1 NZLR 528 (CA) and the judgment delivered by Richardson J:

> "To be "informed" of the right to a lawyer is to be made aware of it. The purpose is to provide a fair opportunity for the person arrested to consider and decide whether or not to exercise the right. The obligation on the arrester or other officer concerned is to communicate clearly to the person arrested that he or she has that right. No particular formula is required so long as the content of the right is brought home to the person arrested. To us the language of S.23(1)(b) may save argument later. In the end whether or not the obligation was satisfied must turn on what was said and what is to be implied from what was said in the particular context and circumstances.
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> ...
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> Unless there are circumstances calling for obvious care and further inquiry there is no reason for not taking the accused's answers at face value. If following advice as to the right to a lawyer the accused responds affirmatively to the question whether he or she understands the position, the obvious inference is that the accused did indeed understand his or her rights. But more than a bare statement of the S.23(1) right and a bare acknowledgement of understanding is likely to be required where, for example, the person arrested is intoxicated or under drugs or appears to have a mental or physical disability which could interfere with his or her comprehension of the rights. *The crucial question is whether it was brought home to the arrested person that he or she had those rights*. That is not the same question as whether the police were justified in assuming that he or she did understand them. To look at it simply from the perspective of the police officer would mean that the person arrested who did not in fact understand the position would not be able to make an informed choice with respect to the exercise or waiver of the guaranteed right."

But for the evidence of the employer and of the appellant himself I agree that there would be little to suggest that the appellant did not understand the Bill of Rights advice he received.

I have taken a different view of this case with respect to the learned Judge in the Court below, and I think there ought to have been an assessment in light of the condition explained as to whether the Bill of Rights advice was understood. There is perhaps one piece of evidence to suggest that it was not understood, simply because the appellant did not recall it being given. Failure to recall can be equally consistent with a lack of understanding even though as the Judge found, the advice was delivered. The Judge had the benefit of seeing an experienced police officer give his evidence, and could rightly have taken the view that he must have complied with what he said was his long

standing practice. The fact that the appellant did not recall it, is I think a pointer, if but a small one, to the likelihood that when given the advice, he possibly did not understand it. In this case I think that is critical.

The appellant underwent an evidential breath test where he was entitled to a further blood test in light of the reading, and the deprivation of that right excluded the possibility that the reading may have provided a defence for him. The case could be remitted to the District Court to make its finding in that regard. I think on the evidence I can do that. I have reached the view that the prosecution have failed to establish on the balance of probabilities that this particular accused in these circumstances understood the Bill of Rights caution. No criticism can be made of the police officer in that regard, because he may not have demonstrated these indicators at an early stage. On the other hand, the cases indicate that where there is such a significant disability such as an inability to read or write, then the police officer would be wise to insist that the appellant obtained legal advice, and to arrange that for him. It is accepted in this case that any difficulties the appellant had in this regard, were communicated to the police officer but that was done at the time, and understandably so, when the appellant was confronted with written material, such as is given prior to the election whether to undertake a blood test.

It is common ground that if a Bill of Rights caution is not given then evidence subsequently obtained should *prima facie* be excluded. There is no reason for not applying that principle here.

It is not necessary to go into the second ground of the appeal. They tend to merge into the one. The second ground was whether he understood the subsequent direction as to his entitlement to take a blood test. Had legal advice been obtained, I think it is inevitable that a blood test would have been called for. It is of interest to note that in the evidence in chief of the policeman, he did not say that the appellant had explained his difficulties to him, although he quickly acknowledged that in cross-examination, saying at that time the appellant also became distressed. I think also that the appellant may have been out of his depth at this point, and it was only then that a greater degree

of realisation came to him and he was in a position to perhaps more comprehensively understand his rights.

For those reasons I am satisfied that the prosecution should not have succeeded in this case and the appeal is accordingly allowed. The conviction is set aside and the fine and order for disqualification are quashed.