Date: 20020909
Docket: 1092606-07
2002 NSPC 026

IN THE PROVINCIAL COURT
Cite as: R. v. Bennett, 2002 NSPC 26

HER MAJESTY THE QUEEN

VERSUS

JAMES L. BENNETT

DECISION

HEARD BEFORE: The Honourable Associate Chief Judge R. Brian Gibson, J.P.C.

PLACE HEARD: Dartmouth, Nova Scotia

DATES HEARD: May 1, 2002
May 31, 2002
August 7, 2002

DATE OF DECISION: September 6, 2002

SUBJECT: Solicitor/Client Privilege

COUNSEL: Ann Marie Simmons, for the Prosecution
D. Brian Newton, Q.C., for the Defence

[1] The accused, James L. Bennett, is charged with the offences of care and control of a motor vehicle while impaired by alcohol, contrary to S.253(a) of the *Criminal Code* and care and control of a motor vehicle while the concentration of alcohol in his blood exceeded the limit prescribed by S.253(b) of the *Criminal Code*. The accused alleges that his S.10(b) *Charter* rights were violated in the course of his dealings with the police. He seeks an order pursuant to S.24(2) of the *Charter* excluding the results of a breathalyzer test which measured the level of alcohol in his blood.

[2] The accused testified during this *Voir Dire* to the effect that prior to providing breath samples for analysis, he was not permitted by the police to contact legal counsel of his choice. He testified that he was required to speak with a lawyer to whom the investigating officer placed a telephone call. I understand from the evidence that the call was made to Legal Aid duty counsel, herein referred to as duty counsel. He further testified to the effect that the telephone conversation with duty counsel was very brief, lasting approximately 15 seconds, occurred in the presence of the investigating officer, and that the advice given was inadequate. The following are relevant excerpts from the accused's testimony on the *Voir Dire* on Direct Examination by his counsel:

“Q. So what happened then in regards to this duty counsel, if anything, please?

A. I don’t know. He handed – he dialed a number, he handed...

Q. Who dialed the number?

A. He dialed the number.

Q. Who’s he?

A. Constable Mills.

Q. He dialed the number?

A. Yes, sir.

Q. Then what happened?

A. He handed me the phone and I just basically said hello, who are you.

Q. Okay. Do you know who you were speaking to?

A. No, he didn’t say. He said something I’m on duty for whatever and I said well, what are you going – what should I do and he said do whatever they tell you to do. And I said, well that’s a great help. He said, well, that’s all I can tell you and then the line just clunk, went dead.

Q. Now...

A. He hung up or it went dead.

Q. This was a male you were speaking to?

A. It appeared to be male voice.

Q. You presumed it was a lawyer?

A. I don’t know.

Q. Okay. Where was Constable Mills at when this conversation was taking place?

A. He was standing off to my left.

Q. Are you sure about that?

A. Absolutely positive.

Q. Where was the cadet at?

A. Standing in the doorway.

Q. Standing in the doorway. Now, this room you were in, did it have a door to it?

A. Yes.

Q. And what was the position or condition of the door during the phone call?

A. Well, the door was open. Like, we're backwards to, right, like we're facing opposite, hey. So relatively there's a door there.

Q. Yes.

A. Once I picked up the phone I was standing back to to the table.

Q. Yes.

A. Mills was standing to my left.

Q. Yes.

A. And Hood was just basically in the doorway.

Q. In the doorway.

A. Once I finished, Mills just took the phone and hung it back up.

Q. What was the condition of the door when the cadet was standing in it?

A. It was just– swung in open.

Q. Okay. Could you touch Mills if you had to?

A. Oh yes.

Q. How long would you estimate it was that you had this conversation with this gentleman?

A. Oh, it was very short. Might have been 15 seconds.

Q. Really?

A. Oh, very short.

Q. After you had the conversation with him, what's the next thing that happened?

A. We went back to the breathalyzer room."

And on cross-examination by the Prosecutor:

Q. So now let's get back, I'm sorry I took you off track, to what was said on the telephone with this male or female voice. You said who are you and they said duty counsel. You said I was driving along, not causing anybody any problem, what should I do? Did I get that right?

A. Yes.

Q. That's what you said to them?

A. I said what should I do, yep.

Q. What answer did you get?

A. They said do whatever they tell you.

Q. And then what happened?

A. I think I basically said that's not very good advice and click the phone went dead or they hung up.

Q. Is that the end of the conversation, Mr. Bennett, from start to finish?

A. Absolutely."

[3] The Crown now seeks to call duty counsel as a witness on this *Voir Dire*. The accused objects to this request, claiming that the conversation he had with duty counsel is privileged.

ISSUES

[4] The issues to be resolved are the following: 1) whether the conversation between the accused and duty counsel is subject to solicitor/client privilege; 2) if the conversation is privileged, whether the accused, through his testimony, has implicitly waived that privilege; 3) if the privilege was not waived, whether there are circumstances which would justify the reception

of evidence from duty counsel notwithstanding its privileged character; 4) if duty counsel is permitted to testify, what limitations, if any, should be placed upon the ability of the Crown to examine duty counsel.

[5] If the Defence establishes, on a balance of probabilities, that a solicitor/client relationship exists between the accused and duty counsel, the Crown then has the burden to persuade me, on a balance of probabilities, that the evidence ought to be received.

ANALYSIS

Is there a Privilege?

[6] I am satisfied that the conversation between duty counsel and the accused is privileged. Such contact and the conversation meets the four criteria under Professor Wigmore's widely accepted four criteria. See "Wigmore on Evidence" (3d) McNaughton Revision, 1961 Vol. XII, paragraph 2285, cited with approval in R. v. Poslowsky [1996] B.C.J. No. 2550, (B.C. Prov. Ct.) at para. 23:

> "1. The communications must originate in a confidence that they will not be disclosed.

> 2. The element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties.
>
> 3. The relation must be one which in the opinion of the community ought to be sedulously fostered; and
>
> 4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation."

[7] The absence of consideration is irrelevant to the issue of privilege. That, in my view, was inherently recognized in the decision of R. v. Campbell, [1999] S.C.J. No. 16 (S.C.C.) at paragraph 5 where the Court cited, with approval, the following from 8 Wigmore, Evidence, sec. 2292 (McNaughton rev. 1961):

> "Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived."

I am satisfied that a solicitor client relationship exists between the accused and duty counsel.

Was There a Waiver of the Privilege and if not, Must it Yield?

[8] Whether the privilege has been waived is a matter of fact. Stansfield, P.C.J. canvassed this issue thoroughly in R. v. Poslowsky, supra. At paragraph 27 he quotes from the decision in Lin v. Leung, [1991] B.C.J. No. 641, B.C.S.C. as follows:

> "Whether the privilege has been waived is always a question of fact... there is no concept of limited waiver when it comes to privilege. If privilege is invoked it covers all matters in respect of the relationship. If it is waived it is waived for all purposes relevant to the issues in dispute - the door is open to a full examination of the relationship limited only by the question of relevancy."

He then proceeds to quote at paragraph 28 from the decision in V.A.B. 19946 Holdings Ltd. v. Dynasty Investments Corp. [1989] B.C.J. No. 1886, (B.C.S.C.) wherein Wigmore on Evidence, p.636, was quoted with approval as follows:

> "There is always also the objective consideration that when his conduct touched a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final."

At paragraph 30 he refers to the decision in Mitchell v. Adegbite [1992] B.C.J.No. 2180, B.C.S.C. where he states and quotes as follows:

"Master Kirkpatrick went on to quote from Spoinka and Lederman in a passage entitled "Voluntary Waiver", at p.664 of their test, which reads in part as follows:

...Waiver is said to have taken place when documents over which privilege was claimed had been disclosed in proceedings in another jurisdiction...similarly if a client testifies on his or her own behalf and gives evidence of a professional confidential communication, he or she will have waived the privilege shielding all of the communications relating to the particular subject matter. Moreover, if the privilege is waived the production of all documents relating to the acts contained in the communication will be ordered." (Emphasis added).

[9] The foregoing cases referred to in R. v. Poslowsky are all civil cases. This Stansfield, J. recognizes at paragraph 34 where he states:

"While the foregoing confirms that there is no apparent reason why confidential communications should be protected any less or more in criminal than in civil contexts, one might suspect that the very different approaches to disclosure between civil litigants and criminal accused, and the right to resist self-incrimination, might lead to a more restrictive application of waiver principles. That suspicion seems to be borne out in the cases."

[10] Stansfield, J. proceeds to refer to the case of R. v. Li [1993] B.C.J. No. 2312, B.C.C.A. relative to the waiver of solicitor/client privilege in criminal cases. At paragraph 35 he states:

"In Li the Court of Appeal restated the proposition this way:

"It must also be remembered that the Crown is only able to rely upon otherwise privileged information that was necessary for (defence counsel) to disclose in order to answer the allegations that had been made against him. In other words the inferred waiver of privilege does not extend to all confidential communications. It is strictly limited."

[11] None of the cases provided by Crown counsel deal precisely with the factual situation presented in this case before me. However, in the case of R. v. Charbonneau, (1992) 74 C.C.C. (3d) 49 (Que.C.A.) at p.18, the court, referring to the case of R. v. Dunbar and Logan, (1982), 68 C.C.C. (2d) 13 at p.39, stated at page 18:

> "In R. v. Dunbar and Logan (citations deleted), Mr. Justice Martin stated:
>
> "Dean Wigmore states that when the client alleges a breach of duty by the attorney the privilege is waived as to all communications relevant to that issues: 8 Wigmore on Evidence, (McNaughton Rev.), p. 638. In McCormick on Evidence, 2nd ed., the author states at p.191:
>
> "As to what is a controversy between lawyer and client the decisions do not limit their holdings to litigation between them, but have said that whenever the client, even in litigation between third person, makes an imputation against the good faith of his attorney in respect to his professional services, the curtain of privilege drops so far as necessary to enable the lawyer to defend his conduct. Perhaps the whole doctrine that in controversies between attorney and client the privilege is relaxed, may best be based upon the ground of practical necessity that if effective legal service is to be encourage the privilege must not stand in the way of the lawyer's just enforcement of his rights to be paid a fee and to protect his reputation. The only question about such a principle is whether in all cases the privilege ought not to be the same qualification, that it should yield when the evidence sought is necessary to the attainment of justice." (Emphasis added)

[12] In R. v. Charbonneau the Court went on to state on page 18:

> "Similarly, in Re Regina and Speid (1983), 8 C.C.C. (3d) 18 at p.24, 3 D.L.R. (4th) 246, 37 C.R. (3d) 220 (Ont.C.A.), Mr. Justice Dubin, as he then was, reiterated:

> "Since a question of solicitor-and-client privilege may arise during the trial, we wish to make some additional observations. This court in the case of R. V. Dunbar and Logan (1982), 68 C.C.C. (2d) 13, 138 D.L.R. (3d) 221, 28 C.R. (3d) 324, accepted the broad proposition that the solicitor-and-client privilege must yield where to uphold the privilege would result in the withholding of evidence from the jury which might enable an accused to establish his innocence."

[13] The cases of R. v. Charbonneau, supra, and the case of Harich v. Stamp, et al (1979) 59 C.C.C. (2d) 87 (Ont.C.A.) dealt with factual situations where advice or conduct of a lawyer was impugned under oath by the former client. The accused's testimony, in my view, constitutes an allegation that the advice he received from duty counsel was ineffective. The accused might also be seen to be impugning the competence or integrity of duty counsel by testifying that the duration of the conversation with duty counsel was only 15 seconds and giving the impression that duty counsel prematurely ended the conversation. The accused has, through his testimony which is implicitly critical of duty counsel, sought to advance his S.10(b) application. If the Crown is not permitted to examine duty counsel, the accused gains an advantage at the disadvantage of the Crown. The principle of fairness dictates that that ought not occur when the Court is attempting to balance the interests of the individual and those of the State to reach a just

accommodation between those two interests. In the case of R. v. Harrer (1995), 101 C.C.C. (3d) 193 (S.C.C.) LaForest, J. states at page 201:

> "As in other cases involving broad concepts like "fairness" and "principles of fundamental justice", one is not engaged in absolute or immutable requirements; these concepts vary with the concept in which they are invoked; see Lyons, at p.45 C.C.C., p.237 D.L.R. Specifically here, one is engaged in a delicate balancing to achieve a just accommodation between the interests of the individual and those of the State in providing a fair and workable system of justice."

[14] Counsel for the accused submits that the accused did not waive the solicitor/client privilege. It is submitted that the disclosure by the accused of the conversation he had with duty counsel was inadvertent. It is submitted that the purpose of the accused's testimony was to address the issue of whether he had a reasonable opportunity to consult counsel and whether that consultation was meaningful. See R. v. Ellis, 2001 A.B.P.C. 83, citing at paragraph 27 the case of R. v. Sadownik (1988) 84 A.J. 91 (Alta.C.A.). The accused was also testifying on the *Voir Dire* to the issue of whether contact with counsel of his choice had been permitted or facilitated as case authorities would suggest is required. See R. v. Ross (1989) 46 C.C.C. (3d) 129 (S.C.C.) and R. v. Tremblay (1987), 37 C.C.C. (3d) 565.

[15] It is also submitted on behalf of the accused that disclosure of the conversation with duty counsel was uninformed relative to its implication as

a possible waiver of the solicitor/client privilege with duty counsel. Counsel for the accused relies on the principle of fairness and refers this Court, in an analogous way regarding the issue of waiver, to the cases of R. v. Bartle (1984), 92 C.C.C. (3d) 289 (S.C.C.) and R. v. Prosper (1994) 92 C.C.C. (3d) 353 (S.C.C.) which deal with the issue of waiver of the S.10(b) *Charter* right to retain and instruct counsel. Those cases state that waiver of the S.10(b) rights must be an informed waiver. It is therefore submitted that waiver of the solicitor/client privilege must also be informed to be effective.

[16] In the course of the *Voir Dire* the accused, while testifying, was given no caution as to the potential implication of testifying as he did. Thus it is submitted, if there was a waiver, it was uninformed. It is noteworthy that the accused testified on direct about his conversations with duty counsel. In fairness to counsel, the particular testimony given by the accused may not have been directly solicited by counsel. Nevertheless, it arose in the context of direct examination, given, I must presume, by the accused to advance his S.10(b) *Charter* breach application and ultimately to persuade this Court to order the exclusion of certain evidence. I am not persuaded that a trial judge, where an individual who is represented by counsel, is required to caution and instruct the witness on the issue of solicitor/client privilege and

waiver thereof. When a trial judge is dealing with an unrepresented accused there may be a requirement to assume the protective role and provide such a caution to the accused.

[17] It is clear in this case that the testimony of the accused was non-accidental. The accused wanted this Court to know about this conversation with duty counsel.

[18] This situation is not analogous to a situation where counsel, who ought to be claiming solicitor/client privilege, fails to do so and thus breaches the privilege by testifying as a witness. In such cases no objection need be made. The evidence that breaches the solicitor/client privilege is inadmissible. See Bell v. Smith (1968), 68 D.L.R. (2d) 751 (S.C.C.). I conclude that the Bell v. Smith case does not apply to situations where the client testifies to a privileged conversation with counsel and provides detail of their conversation.

[19] Quite frankly I fail to see how the accused can have it both ways. He cannot, through his testimony, impugn duty counsel's competence or integrity in an attempt to persuade the Court that he received ineffective advice and thus advance this S.10(b) application without being seen to waive the solicitor/client privilege. Further, his testimony, as to the length of the

conversation with duty counsel and whether it occurred in private, stands in stark contrast to that of Constable Mills.

[20] Defence counsel expresses concern that the Crown's purpose in calling duty counsel as a witness is to impugn the credibility of the accused. I am satisfied that that is not the Crown's intended purpose. If the accused had not impugned duty counsel's competence or integrity or raised questions about the effectiveness of the advice he received from duty counsel, I suspect the Crown would likely have taken the position that the Court ought to infer that the accused received adequate advice from duty counsel. The accused, by his testimony, according to the decisions in R. v. Li, supra, and R. v. Dunbar and Logan, supra, has put the Crown in a position where it must respond since it goes to the essence of whether there was a S.10(b) *Charter* violation and if there was such a violation, whether the breathalyzer test results ought to be excluded pursuant to S.24(2).

[21] Although I am satisfied that the Crown's intended purpose is not to attack the credibility of the accused, the issue of credibility is to be considered by the Court in respect of all witnesses who testified during the *Voir Dire*. As stated in Harich v. Stamp, supra at page 88:

> "I also agree with the appellant that the refusal by the learned trial judge to allow the plaintiff to call in reply the lawyer who had acted as counsel for the defendant in the criminal proceedings, deprived the plaintiff of another opportunity to fully challenge the defendant's credibility."

The accused, by electing to testify, implicitly puts the issue of his credibility before the Court.

[22] I conclude that this is a situation either where the accused has implicitly waived the solicitor/client privilege with duty counsel or, even if not waived, where the principle of fairness requires the Court to permit the Crown the ability to call duty counsel as a witness. I further conclude that the evidence sought from duty counsel is necessary to the attainment of justice, whether it be confirmatory of the accused's testimony or otherwise.

Limitations on the Crown's Right to Examine

[23] Just as the accused may not be asked questions during the *Voir Dire* as to the substantive trial issues, I am satisfied that duty counsel may not be asked questions with respect to conversations with the accused about the alleged offences. The Crown may, however, make inquiry of duty counsel as follows: 1) without disclosing any detail of what the accused said, whether

duty counsel had a conversation as to the circumstances that led to his arrest; 2) whether the accused, while speaking on the telephone, made any comment about whether he was in an area where he had privacy; 3) whether the accused raised any complaint as to difficulty he was having with respect to contacting counsel of his choice; 4) whether the accused sought advice from duty counsel; 5) whether advice was given; 6) the advice, if any, that was given; 7) whether the advice given was “do whatever they (the police) tell you” or to that effect; 8) the duration of the telephone conversation with the accused; 9) whether duty counsel spoke first with Constable Mills; 10) the detail of the conversation duty counsel had with Constable Mills.

[24] If there are other areas that the Crown seeks to examine duty counsel upon, those can be addressed immediately prior to the witness being called to testify.

R. Brian Gibson, J.P.C.
Associate Chief Judge