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SUPREME COURT OF THE NORTHERN TERRITORY at DARWIN

LIDDLE v OWEN

Gallop J

28 June, 17 August 1978 — (1978) 21 ALR 286

EVIDENCE – PRIVILEGE – CROWN PRIVILEGE – COMMISSIONER OF POLICE – PRODUCTION OF DOCUMENTS EXCLUDED IN THE PUBLIC INTEREST – REPORTS OF POLICE DEPARTMENTAL INQUIRY – STATEMENTS MADE BY POLICE OFFICERS – WHETHER PRIVILEGED: *POLICE REGULATIONS* (NT) R31(ii); *POLICE AND POLICE OFFENCES ORDINANCE* 1923-1971 (NT).

L. brought an action against O, a member of the Northern Territory Police Force, for damages for personal injury, alleging that O assaulted him twice in a short space of time. L. had made a complaint to O's superiors, and a departmental inquiry was made into his allegations. At the trial of the action, L. served a *subpoena duces tecum* upon the Commissioner of the Northern Territory Police Force, calling for production of the reports made as a consequence of the inquiry, and for statements made by O and by Constable T. who was present at the time of the alleged assaults. Both O. and T. had been interviewed by a police sergeant, and had been compelled to answer questions by the operation of r31(ii) of the *Police Regulations*, under the *Police and Police Offences Ordinance* 1923-1971. The Commissioner claimed privilege for these documents on the ground that they were of a class that should be kept secret in the public interest.

HELD: It would have been inappropriate in all the circumstances to inspect the documents so as to rule on the matter and it was not obligatory to do so.

1. The *Police and Police Offences Ordinance* and *Police Regulations* clearly require "unreserved communication", and the documents fall into a class of evidence the exclusion of which is demanded by the public interest.

Statement of Lord Lindhurst in *Smith v The East India Co* [1841] EngR 1248; (1841) 1 Ph 50 at 55, applied.

2. The documents came into existence in an atmosphere of confidentiality, involving the effective functioning of the Northern Territory Police Force.

3. The special position of police documents is well established and internal reports have been held to be covered by a claim of privilege.

4. The records of interview were made under sanction.

5. Accordingly, the claim of privilege would be upheld.

GALLOP J: The rule that privilege may be claimed in appropriate circumstances can be simply stated as follows: *[His Honour stated that relevant evidence must be excluded if its reception would be contrary to State interest, and continued] ...* 'State Interest' is an ominously vague expression. Broadly speaking there are cases in which evidence has been excluded because its disclosure would be injurious to national security, and other cases in which evidence has been excluded because its reception would be injurious to some other national interest (*Cross on Evidence* pp315-6). In this case it is contended that the claim of privilege ought to be upheld on the grounds that it would be contrary to the interests of the Public Service and the Northern Territory Police Force in particular, and therefore contrary to public policy to have the documents made public. Production of a document may be withheld in the public interest either on the grounds of its (1) contents, or else (2) because it belongs to a class which, on grounds of public policy, must as a class be withheld from production: *Duncan v Cammell Laird & Co Ltd* [1942] UKHL 3; (1942) AC 624; (1942) 1 All ER 587. The principles have also been stated in a different way by Mason J in *Australian National Airlines Commission v Commonwealth* [1975] HCA 33; (1975) 132 CLR 582; (1975) 49 ALJR 338 at 343; 6 ALR 433 at 441, as follows:

> 'Thus to sustain the claim of privilege it must appear that the public interest will be prejudiced because (1) the contents of the document are such that disclosure will have this effect, as for example, information the publication of which would injure national defence or diplomatic relations

> with other countries, for example, information of the kind involved in the *Asiatic Petroleum Case*; or (2) the document is of a class that should be kept secret in the public interest, as for example, Cabinet minutes, communications passing between departmental heads or a departmental head and his minister, notwithstanding that the contents are not such that their publication would injure the public interest (see *Conway v Rimmer*; *Rogers v Home Secretary* (1973) AC 388; (1972) 2 All ER 1057.'

Later (ALJR at 343; ALR 442) His Honour said:

> 'It is now firmly established by *Conway v Rimmer* and the more recent decisions of the House of Lords ending in *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* (1974) AC 405; (1973) 2 All ER 1169, that in considering a claim for privilege by the Crown the court must weigh the competing considerations and determine whether on balance the public interest is better served by production or refusing production.'

I did not think it appropriate in all the circumstances to inspect the documents so as to rule on the matter and I do not understand the authorities cited above to make it obligatory for me to have done so.

So far as the first class of documents are concerned, I was told that (1) they were reports which flowed from the fact that various statements had been obtained within the department from the defendant and other persons (meaning private individuals outside the Service.) The rule that certain evidence is privileged on the ground that its adduction would be contrary to the public interest has to be weighed against the public interest in the administration of justice that courts should have the fullest possible access to all relevant material.

In *Conway v Rimmer* [1968] UKHL 2; (1968) AC 910; (1968) 1 All ER 674; [1968] 2 WLR 998, Lord Reid pointed out the peculiar position of the Police and said (AC) at 953:

> 'It has never been denied that they are entitled to Crown privilege with regard to documents, and it is essential that they should have it.'

At p954 he said:

> 'It would generally be wrong to require disclosure in a civil case of anything which might be material in a pending prosecution.'

(See also per Lord Morris of Borth-y-Gest at p972).

In relation to the second group of documents in respect of which the claim is made, i.e. statements made by the defendant and Constable Thorn to the investigating superior police officers, such documents have in the past been held to belong to the class of documents which should be excluded on the grounds of public policy. In *Auten v Rayner* (1958) 3 All ER 566; [1958] 1 WLR 1300, the plaintiff brought an action charging a police officer, amongst others, with conspiracy to injure and defraud him, false imprisonment and malicious prosecution. The plaintiff required production of documents, including reports made by the police officer to his superior officers in the Metropolitan Police Force and communications passing between the Metropolitan Police Force and other Police Forces. A claim of privilege was made based upon an affidavit by the Secretary of State for Home Affairs. The Court of Appeal upheld the claim of privilege and refused to make documents available to the plaintiff.

The defendant had subpoenaed the accident file which belonged to the Police Department and privilege was claimed by the Commissioner of Police in relation to that file.

[Editor's Note by John E Wallace SM]: The following material arising from this case is contained for information and does not form part of the judgment. In *A-G for NSW & Anor v Findlay* (1976) ALJR 637, the High Court appears to hold that witnesses' statements are not as a class subject to professional privilege. Also, that the Magistrate may, subject to the establishment of a claim of privilege, make such statements available to the defence for inspection. This finding seems to assume that privilege may still be established in relation to the statements in Victoria.

However *Findlay's Case* seems to be limited to Committal Proceedings. The Full Court decision of *Bruce v Waldron* [1963] VicRp 1; (1963) VR 3 held that though a court has a duty to safeguard the public

interest from prejudice which might arise from compelling the production of a document where privilege is claimed the Court has in reserve a power to enquire into the nature of the document in question and to require some indication of the nature of the injury to the public interest. The Court may first determine for itself whether the objection is well founded.

The Northern Territory case seems a proper finding in relation to the Police Regulations of Northern Territory and would be persuasive to a Victorian Court. The position in Victoria appears to be one where the Court has a discretion in each case, being required to weigh the competing considerations and determine whether the public interest is better served by production or refusing production. See also *R v Charlton* [1972] VicRp 90; (1972) VR 758.]
