

57/76

SUPREME COURT OF VICTORIA

R v BRAHAM & MASON

Lush J

29 October 1975 — [1976] VicRp 56; [1976] VR 547

EVIDENCE – AT TRIAL – EVIDENCE GIVEN OF A PHONE CONVERSATION OF ACCUSED AND HIS SOLICITOR OVERHEARD BY POLICE OFFICER IN POLICE STATION – ACCUSED DID NOT INTEND THE PHONE CALL TO BE CONFIDENTIAL – WHETHER DETAILS OF CONVERSATION ADMISSIBLE WHETHER PROTECTED BY THE CLAIM OF PRIVILEGE.

Braham, after a record of interview, telephoned his solicitor from the Police Station. During this call he admitted his involvement in the offence, stating that he had made a statement but wanted advice as to whether he should sign it. The Crown did not lead evidence of this, but counsel for a second accused sought to cross-examine Inspector Phelan who heard the conversation. The Court took the view that although Braham had not been arrested, for all practical purposes he was no longer a free agent. Counsel for Braham claimed that the conversation was privileged.

HELD: No claim of privilege. Questions of the conversation allowed.

1. Each case must be examined to see whether the communication was one which should be classed as confidential. The fact of the presence of a third party should be examined to see whether that presence indicates that the communication was not intended to be confidential, or whether the presence of the third party was caused by some necessity or some circumstances which did not affect the primary nature of the communication as confidential.

2. So far as the situation between Braham and Inspector Phelan at the time was concerned, it was most likely that Braham considered that there was no reason why Inspector Phelan should not hear the conversation because what he was telling his solicitor was in substance what he had been telling Inspector Phelan for the last hour or more.

3. There was no real sign that Braham had any intention that this was to be a confidential communication. Rather it was intended to be an explanation why he was telephoning the solicitor and was intended to be a mere repetition of what Inspector Phelan already knew.

4. The claim for privilege did not arise in the present case. Accordingly, counsel was permitted to ask questions of the police officer concerning the conversation with the accused.

LUSH J: From the discussion that took place between counsel and myself before the luncheon adjournment, a precisely defined point for ruling emerged. The facts relevant to the point are these. At the committal proceedings Inspector Phelan gave an account in his evidence in chief of the fact that the accused man Braham, at the end of the taking of the record of interview, telephoned his solicitor. Of that conversation in the deposition Inspector Phelan said this:

"He then made a phone call to a solicitor, and during that conversation admitted his involvement in this offence, and stated that he had made a statement about it. He asked advice as to whether he would sign it. We then returned to the interview room where he agreed that the record of interview was correct, but declined to sign it on legal advice."

He was cross-examined on this matter and said:

"I couldn't tell you the exact words. He just admitted his part in that robbery as I have detailed it from reading the record of interview. I have not made a note of what he said. I was not particularly interested in what he said."

In the present trial the Crown, for reasons which may be guessed at, did not lead this evidence. Inspector Phelan was cross-examined by Mr Duckett for Braham, and no reference was made to the conversation in that cross-examination. However, when Mr Lazarus, for the second accused man, Mason, cross-examined Inspector Phelan, a discussion began during which Mr Lazarus made

it clear that he wanted to ask the witness about this conversation. Mr Duckett objected to the giving of the evidence concerning the conversation on the ground that this was a communication to a solicitor for the purpose of obtaining advice, and that it is privileged; and he said that the mere fact that a statement or a communication comes to the knowledge of some other person does not deprive it of its quality as a privileged communication.

He referred, while agreeing that the actual circumstances of the case were very different, to a case of *Feuerheerd v London General Omnibus Company Ltd* [1918] 2 KB 565. He argued that there was at stake an important principle and that it would not tend to the proper administration of justice if evidence could be given of communications made by telephone from places where arrested men are held, to their solicitors.

The fact that the communication was made in the presence of Inspector Phelan led Mr Duckett to submit that that was a circumstance that his client could not, in the circumstances avoid. Factually, I accept this submission and I should make it clear that, as I appreciate the position, although at this stage the evidence does not indicate that Braham had been arrested, it indicates clearly that he had for all practical purposes passed the stage of being a free agent.

There is, as far as I know, little authority on the point. There is in the Australian edition of *Cross on Evidence*, at p300, a reference to a New South Wales case, *Re Griffin* (1887) 8 LR (NSW) 132. In that case a solicitor was acting for two clients between whom a bill of sale had been drawn, and one of the two clients having become insolvent, and the solicitor being examined in the insolvency, a question was asked whether that client stated in the presence of the solicitor and the other client that he was unable to meet his liabilities. The question was relevant to the setting aside of the bill of sale. Objection was taken on the ground that as the statement was made by the insolvent to his solicitor, it was privileged.

In the course of his judgment, Innes J used these words:

"Besides, was the statement confidential at all? It seems to me that if a statement is made in the presence of a third party there can be no privilege properly so called. The only privileged communications are those made between a solicitor and client when they are alone."

I am unable to accept, if I may say so, with respect, Innes J's categorical statement that the presence of a third party will always destroy privilege and that privilege can only exist when the solicitor and client are alone. It appears to me that any particular situation must be examined a good deal more subtly than that. However, the reason why his Honour made those observations was that he was examining the question whether the particular communication in that case was confidential, and the necessity that the communication for which protection is sought must be confidential is also referred to by *Cross* at the page to which I have referred.

In my opinion, each case must be examined to see whether the communication was one which should be classed as confidential. The fact of the presence of a third party should be examined to see whether that presence indicates that the communication was not intended to be confidential, or whether the presence of the third party was caused by some necessity or some circumstances which did not affect the primary nature of the communication as confidential; and it is with these matters in mind that I look at the situation here.

I do not regard it as decisive that Braham did not ask to be alone when he spoke to his solicitor, but I find in the circumstances described as I have set them out, no real indication that this communication was intended to be confidential, or that it was only made in the presence of Inspector Phelan as a matter of necessity. It appears to me that so far as the situation between Braham and Inspector Phelan at the time was concerned, it is most likely that Braham considered that there was no reason why Inspector Phelan should not hear the conversation because what he was telling his solicitor was in substance what he had been telling Inspector Phelan for the last hour or more.

In the present case I think that there is no real sign that Braham had any intention that this was to be a confidential communication. Rather it was intended to be an explanation why he was telephoning the solicitor and was intended to be a mere repetition of what Inspector Phelan already knew.

I have been concerned by Mr Duckett's argument that this kind of evidence may, if it came to be tendered regularly, raise a question of importance, but I think that the situation in any case in which any party to proceedings seeks to lead evidence of this kind will have to be examined individually as I have endeavoured to examine the facts in this case.

The case cited by Mr Duckett does not assist me. Privilege was claimed for a document containing a statement by the plaintiff and a witness which was by mistake given to the claims officer of an insurer, who was seeking information for the defence. The claim for privilege was upheld, but it was a claim for privilege from discovery, made by the defendant who had the document.

I propose to allow Mr Lazarus to put the proposed questions to Inspector Phelan. Order accordingly.

Solicitor for the Crown: John Downey, Crown Solicitor.

Solicitor for the accused: George Madden, Public Solicitor.
