



**Supreme Court of New Zealand  
Te Kōti Mana Nui**

**6 August 2015**

**MEDIA RELEASE – FOR IMMEDIATE PUBLICATION**

**THE QUEEN v SHIVNEEL SHAHIL KUMAR**

**(SC 115/2014) [2015] NZSC 124**

**PRESS SUMMARY**

**This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest [www.courtsofnz.govt.nz](http://www.courtsofnz.govt.nz)**

The appeal concerns the admissibility of incriminating statements made by the respondent, Mr Kumar, while he was in custody following his arrest on a charge of murder. The statements were made in the course of an 80 minute conversation with two undercover police officers in a cell. This followed a formal video interview in which Mr Kumar had denied responsibility for the murder, and which ended when Mr Kumar sought to speak to a lawyer. In the High Court, Venning J held the statements were admissible. On appeal, the Court of Appeal disagreed. The Supreme Court granted leave to appeal on the question whether the Court of Appeal was correct to conclude that the statements were improperly obtained and should not be admitted in evidence at trial.

Counsel were agreed that the assessment to be made was whether the undercover police officers had “actively elicited” the relevant information from the accused in the course of their conversation with him, so that they had conducted the functional equivalent of an interrogation. If the statements were actively elicited, the officers necessarily undermined Mr Kumar’s rights, in particular his right to refrain from making a statement, protected by s 23(4) of the New Zealand Bill of Rights Act 1990, and to be informed of that right.

Counsel for the Crown acknowledged that there had been active elicitation from a particular point in the conversation and accepted that,

consequently, statements made from that point should be excluded. However the Crown argued that earlier statements were not actively elicited or, if they were, they should still be admitted under the balancing test in s 30 of the Evidence Act 2006. Counsel for Mr Kumar submitted that active elicitation had been present from the outset and that all the statements made by Mr Kumar during the conversation should be excluded.

Because Mr Kumar's trial was scheduled to begin in early March, the Court released a results judgment unanimously dismissing the appeal on 26 February 2015. The Court has now released its reasons.

There are two judgments. In the majority judgment, William Young, Glazebrook, Arnold and O'Regan JJ have held that the fact police use subterfuge when dealing with a person who has been arrested or detained does not necessarily mean any resulting admission is obtained in breach of the right to refrain from making a statement, or unfairly. The Court has held the critical inquiry is whether the undercover officer actively elicited information from the suspect about the offending. In making this assessment, a court must consider both the nature of the exchange between the suspect and officer and the nature of the relationship between them. While it is relevant whether an undercover officer acting as a cellmate did no more than respond to what the suspect was saying in the same way that a true cellmate would have responded, the key consideration is whether the undercover officer directed the conversation in a way that prompted, coaxed or cajoled the suspect to make the statements. A conversation directed in that way would be the functional equivalent of an interrogation, and would accordingly be in breach of the suspect's rights.

The majority is satisfied that in this case, although Mr Kumar was talkative and spoke freely throughout the conversation, the undercover officers guided the discussion and were direct and persistent in their questioning on matters of interest to the police investigation. In doing so, the officers prompted Mr Kumar's responses and conducted the functional equivalent of an interrogation. Accordingly, the undercover officers actively elicited information about the offending from the accused.

The majority has also found that although it may be appropriate to admit evidence of part of such a conversation in some circumstances, such as where an undercover officer is generally passive and oversteps the mark only at particular points, in this case there was active elicitation from the outset.

Having found the statements were actively elicited and therefore improperly obtained in breach of Mr Kumar's right to refrain from making a statement, the majority has held that no part of the statements could be admitted under the balancing test in section 30 of the Evidence Act.

In her separate judgment, the Chief Justice agreed that the statements should be excluded as having been improperly obtained through

questioning in breach of Mr Kumar's right to refrain from making a statement. She differed from the other members of the Court, however, in her view that a statement would be improperly obtained from someone in custody by an undercover police officer in breach of sections 3 and 23(4) of the New Zealand Bill of Rights Act even if it did not amount to the "functional equivalent of an interrogation", the test adopted by the other members of the Court.

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