

THE QUEEN

v.

LEALOFI KIRIFI

Coram:

Cooke P.
Casey J.
McKay J.

Hearing:

9 September 1991

Counsel:

Lowell P. Goddard Q.C. for Crown
Mary F. Tuilotolava for Respondent

Judgment:

9 September 1991

JUDGMENT OF THE COURT DELIVERED BY COOKE P.

This is a case reserved on a question of law under s.380 of the Crimes Act 1961. The facts and issues are fully set out in the case signed by the District Court Judge. It is convenient to reproduce the case virtually in full:

1. ... During the trial I reserved for the opinion of the Court of Appeal a question of law arising during the trial at the request of the Crown Solicitor. The following is the case stated pursuant to Section 380 of the Crimes Act 1961.

2. The Indictment

The respondent was arraigned on 17 June 1991 on the following indictment:

The Crown Solicitor at Auckland charges that LEALOFI KIRIFI and THOMAS TETU on 2 November 1990

at Mangere, wilfully set fire to a 1986 Toyota motor vehicle the property of Hura Tuhura.

3. The Voir Dire

Counsel for the accused Kirifi sought a voir dire in relation to the evidence of Constable Farrant and Detective Constable Belz. The evidence of the latter officer included a video interview of the accused. Because of the nature of the evidence the voir dire took place before the Crown opened its case to the jury. Following my ruling on the voir dire I directed, by consent of counsel, the jury to return a verdict of not guilty against the accused Kirifi. After the verdict of not guilty had been given, I ordered a discharge of Kirifi pursuant to Section 380(4) of the Crimes Act 1961 and reserved this point of law.

With respect to the accused Tetu, I ordered a retrial.

4. The Facts

I found the following facts to be proven:

- (a) At about 9.00 p.m. on 1 November 1990 the complainant parked his undamaged 1984 Toyota motor vehicle in front of his Mangere address at 7 Kambalda Street five metres or so in from the street.
- (b) At 12.10 a.m. on 2 November, as a result of being woken up by a family member, the complainant found his car on fire with burn marks down the front left passenger's doors and dents in that door.
- (c) At about 12.20 a.m. Constable Farrant was working a routine uniform Police patrol in that area. He saw a group of four persons, including the accused Kirifi, coming out of an alleyway which formed the pedestrian access between Kambalda Street and McKenzie Road. The accused came on to McKenzie Road.
- (d) Constable Farrant chased the accused up McKenzie Road and after catching up to him told him he wanted to talk to him. The accused Kirifi was handcuffed to a fence. He broke the fence and after Constable Farrant attended to some other matters, he apprehended the accused again, took the handcuffs off and placed him in the rear of the Police vehicle.

- (e) The accused was taken to the Mangere Police Station and placed in Detective Belz's custody. Detective Belz had seen but had not spoken to the accused Kirifi before the accused was placed in his custody.
- (f) Detective Belz took the accused Kirifi to the Otahuhu Police Station because the electronic recording equipment was being used at the Mangere Police Station.
- (g) As the same problem was encountered at the Otahuhu Police Station, the accused was moved to the Gordon Road Police station in Otahuhu where he was interviewed. The interview was video taped over a period of 54 minutes between 2.44 and 3.38 a.m. and contained admissions by the accused Kirifi of his involvement in the offence charged.
- (h) Both Police Officers conceded they had never told the accused he was entitled to have a lawyer present. Detective Belz cautioned the accused at a fairly early stage of the interview.
- (i) At the conclusion of the interview the video tape was replayed to the accused. After most of the tape had been replayed to the accused it is recorded at the foot of page 51 of a transcript running to 52 pages (a copy of which is annexed) that the accused Kirifi asked Detective Belz:

"Will I be able to get a lawyer
or something?"

The Detective's answer to this question and subsequent questions and answers appear on pages 51 and 52 of the transcript.

- (j) After the video interview the accused was arrested by Detective Belz.

5. The Issues at the Voir Dire

The accused did not give or call evidence on the voir dire. No submissions were addressed to me on the question of fairness and no breach of the Judges' rules was alleged.

6. The admissions made in the interview were challenged on the grounds of a breach of

Section 23(1)(b) of the New Zealand Bill of Rights Act 1990 ...

7. The Crown accepted that the accused was both under arrest and detained from the time he was first apprehended by Constable Farrant.

8. My Findings on the Issues

I found that the arrest occurred at 12.20 a.m. and the accused Kirifi was not formally arrested and charged until after 3.38 a.m.

9. During that period the accused was not advised of his right under the abovementioned section of the Bill of Rights.

10. In my view the detention was illegal. There was a breach of Section 23(1)(b) but it did not automatically follow that the statement should be excluded.

11. Although no submissions had been addressed to me on fairness, I considered that the conduct of the Police on this occasion was unfair. I came to this conclusion upon a consideration of the general circumstances, and in particular the circumstances:

- (a) That there had been general confusion at the scene;
- (b) While the accused appeared to have been chased by the Constable and apprehended twice, the facts were that he was somewhat perfunctorily handcuffed to a fence;
- (c) The accused was then placed in a Police car and then taken not to one Police Station but to three;
- (d) He was not told why he was detained until just over two hours later, without being told why he was under arrest until just over three hours later.

While the time period itself was not particularly extreme, I considered that what happened within it was very telling. At page 5 of the transcript of the interview the accused said:

"Like, a ah, you guys are not gonna force me to say anything".

I considered that that showed the accused felt under undue pressure.

12. There was no suggestion made that the Judges' rules were breached. A proper caution had been given. On its face the statement was entirely proper.

13. In the circumstances that I have outlined I was left with the uneasy impression that the accused had been put under unfair pressure by being handcuffed to a fence and driven round from pillar to post before being cautioned and questioned.

14 I concluded that the confession made by the accused Kirifi was obtained by a subtle form of compulsion and pressure that made it inadmissible and that it had not been saved by Section 20 of the Evidence Act 1908. I found that there had been a breach of s.23(2)(b) and coupled with that was the fact that the general circumstances were so unacceptable that they operated unfairly to the accused and outweighed competing circumstances such as the public interest in the detection and prosecution of crime. I found that it was the combination of the specific breach and the general unfairness that persuaded me to rule the oral admissions contained in the video interview inadmissible.

Question of Law for the Court of Appeal

15. I state the following question for the Court of Appeal:

Was I correct in deciding to exclude from the jury by ruling inadmissible, the oral admissions contained in the videotaped interview of the accused, Kirifi, by Detective Constable Belz?

DATED AT Auckland this 26th day of July 1991

P.I. Treston
District Court Judge

The primary point for consideration is the meaning of s.23(1)(b) of the New Zealand Bill of Rights Act 1990:

23. Rights of persons arrested or detained - (1)
Everyone who is arrested or who is detained under
any enactment -

...
(b) Shall have the right to consult and instruct
a lawyer without delay and to be informed of that
right;

For the Crown Miss Goddard, who has had a
difficult argument to present today, has contended that
the words 'who is detained under any enactment' are
disjunctive and that the words 'under any enactment' do
not qualify the prior phrase 'who is arrested'. So far
we accept her argument. But then she has taken the
further and courageous step of contending that the word
'arrested' should be interpreted to mean formally
arrested. Such an interpretation would markedly limit
the scope of the right declared by Parliament. We can
see no justification for doing so, especially in
considering a measure of this general kind. Whether a
person is arrested is generally a question of fact, as is
recognised by the line of Auckland High Court cases cited
to us for the Crown, namely *R. v. Nikau* (T. 45/91;
ruling 23 April 1991), *R.v. Butcher and Burgess* (T.2/91;
ruling 11 June 1991), and *R. v. Edwards* (T. 273/90;
ruling 28 February 1991). Of course, if words of formal
arrest are used there can be no question but that at
least at that time the suspect has been put under arrest,
but we are satisfied that no magic incantation is
required. One test that may be applied is that referred
to by Hillyer J. in *Edwards*:

It is settled law that an arrest can occur only where there has been physical seizure or touching of the person with a view to his detention (a mere touch will suffice, but presumably the intent must be made clear to the arrestee by words or otherwise) or the utterance of words of arrest, coupled with acquiescence or submission on the part of the arrestee. (See *Adams Criminal Law and Practice in New Zealand*, 2nd Ed. 2490.)

It is unnecessary to determine now whether that test is exhaustive. Suffice it to say that it is a test clearly satisfied on the voir dire evidence and the District Court Judge's findings of fact in this case. The accused was seen coming out of an alley in the vicinity of the scene of the crime. He took to his heels at the sight of the police. He was chased and apprehended and handcuffed to a fence. He escaped temporarily through breaking down the fence, but he was re-apprehended a short time later and from then until the time when he was formally charged, a period of some hours, he was continuously in police custody in vehicles or at the police station. The finding that he was under arrest throughout that period is inevitable. Nor can there be any dispute but that he was not informed of his right to consult and instruct a lawyer without delay until almost the very end of the interview, by which time he had made damaging admissions. Thus there was a plain breach of his right under the latter part of s.23(1)(b).

As well as finding such a breach, the District Court Judge concluded that the accused's confession was obtained by a subtle form of compulsion and pressure. He regarded this as coming within the 'other form of compulsion' which rules out the applicability of s.20 of the Evidence Act 1908. We are not now concerned directly with the Judge's ruling on that aspect, though we should add that it involves a finding of fact with which this Court would be slow to interfere on a case reserved on a question of law. Nor is this an occasion for a full review of the scope of s.23(1)(b). We think it enough to say that the statutory provision, like other similar provisions in the Act, cannot be treated as a dead letter and that, where a plain breach of the right declared by Parliament has been established, it is a proper course for the Court to rule out an admission or confession obtained in consequence.

There may be cases where, although the suspect has not been informed of his right, the conclusion can be drawn that some such information would have made no difference: that even if told of his right he would nevertheless have made an admission. This case cannot be put into that category. The accused indicated that he placed some value on the right to consult a lawyer by the remark that he made at the end of the interview. If he had been expressly informed of that right much earlier,

it cannot be assumed that he would still have proceeded to make a damaging admission before obtaining legal advice.

It seems to us that, once a breach of s.23(1)(b) has been established, the trial Judge acts rightly in ruling out a consequent admission unless there are circumstances in the particular case satisfying him or her that it is fair and right to allow the admission into evidence. What such circumstances might be is not a matter upon which the Court is now required to give any ruling. The position is that, far from being so satisfied, the trial Judge here thought that there had been a subtle form of compulsion arising partly from the necessarily quite violent procedure of arresting the accused and the continued custody in police vehicles and at the stations thereafter. There is apparently no suggestion that any of that occurred with his consent. Whether or not what occurred should in total be labelled as a form of compulsion or positively unfair, the case certainly is not one in which the trial Judge was affirmatively satisfied that it was safe to admit the evidence. That is enough to warrant, and indeed require, the upholding of his ruling.

Before parting with the case, we should add that the interview itself, of which a video transcript was

taken, seems to have been conducted perfectly fairly so far as the questions asked and the accused's answers go. So no criticism can be levelled at the interviewing officer in that connection. Further, it may well be that he was not aware of all the preceding history, in particular the handcuffing incident.

For these reasons the question in the case must be answered Yes, with the consequence that the acquittal of the accused stands.

R B Cooke P.

Solicitors:

Crown Law Office, Wellington, for Crown
Mary Tuilotolava, Auckland, for Respondent