

25-10-91
R. Crime Appeal 227/91
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IN THE COURT OF APPEAL OF NEW ZEALAND

C.A. 227/91

C.A. 228/91

THE QUEEN

ORDER PROHIBITING
PUBLICATION OF NAMES
OR PARTICULARS ENABLING
IDENTIFICATION

v.

CRIME APPEAL 227/91

CRIME APPEAL 228/91

Coram: Cooke P.
Gault J.
Holland J.

Hearing: 19 September 1991

Counsel: R.J.E. Brown for Appellant Butcher
B.J Hart and R.W. Kee for Appellant Burgess
M.J. Ruffin for Crown

Judgment: 25 October 1991

JUDGMENT OF COOKE P.

This is a case stated under s.380 of the Crimes Act 1961, questions having been reserved for the opinion of this Court by Henry J. on ruling during a trial that police evidence of admissions by the two accused was admissible. The case centres on s.23(1)(b) of the New Zealand Bill of Rights Act 1990. It is desirable to set out the whole of s.23:

23. Rights of persons arrested or detained - (1)
Everyone who is arrested or who is detained under any enactment -
- (a) Shall be informed at the time of the arrest or detention of the reason for it; and
 - (b) Shall have the right to consult and instruct a lawyer without delay and to be informed of that right; and

- (c) Shall have the right to have the validity of the arrest or detention determined without delay by way of *habeas corpus* and to be released if the arrest or detention is not lawful.
- (2) Everyone who is arrested for an offence has the right to be charged promptly or to be released.
- (3) Everyone who is arrested for an offence and is not released shall be brought as soon as possible before a court or competent tribunal.
- (4) Everyone who is-
 - (a) Arrested; or
 - (b) Detained under any enactment -for any offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right.
- (5) Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.

In consequence of the Judge's ruling the accused changed their pleas of not guilty, both pleading guilty to aggravated robbery. They have been remanded for sentence and are on bail.

The Facts

The robbery was of a dairy at Patumahoe. It occurred at about 7.15 p.m. on Sunday 4 November 1990. Two men entered, one carrying a pistol, the other a rifle; one masked with a balaclava, the other with a monster or Hallowe'en mask. Money was taken and a woman was hit when an attempt was made to knock out of her hands a telephone with which she was trying to ring the police. She fell, suffering some bruising. The robbers made off in a car which the persons in the shop may not

be able to identify. A black vinyl bag was left in the shop by the robbers.

Two days later, at 3.15 p.m. on 6 November, Detective (now Sergeant) Siemelink took the accused Butcher (aged 22) from Abderry Farm, Glenbrook, where he was working, to the Papakura police station. Butcher had made a false complaint that his car had been stolen. In cross-examination on the *voir dire* the sergeant agreed that before speaking to Butcher at the farm he already had 'a pretty good idea' who were involved in the robbery. In an interview at the station Butcher made no incriminating statement, although he did say that the black bag could possibly have come from his car. Butcher told the detective of being with the accused Burgess and a man called Greg Lewis at one stage during the Sunday afternoon; he also told him where they lived..

The interview ended at about 5.40 p.m. Butcher was returned to Abderry Farm in a car driven by Detective Sergeant Henwood. On the way, at about 6.10 p.m., Detective Siemelink was dropped off at Outlaw Farm. Burgess (aged 20) and Lewis, the owner of the property, lived there.

The detective interviewed Burgess, obtaining a signed statement from him. Despite the detective's manifest scepticism, Burgess throughout the interview denied involvement in the robbery, but he did claim that

Butcher had admitted to it to him and had asked him to provide an alibi. The detective gave Burgess a warning that he did not have to say anything and that anything he did say might be given in evidence as to any offence he might have committed in helping Butcher. Burgess went on with an account of driving Butcher into Auckland and leaving him near the university. He mentioned that Butcher had said that he was going to report that Butcher's car, which he had used in the robbery, had been stolen. This statement by Burgess, much of which is no doubt false, was concluded at 8.50 p.m.

Detective Siemelink next went with Detective Sergeant Henwood to the Patumahoe hotel, where he spoke with Lewis. It appears that Lewis was the owner of the mask. As a result of what Detective Siemelink was told by Lewis the two police officers went back to Outlaw Farm, accompanied by Lewis. Detective Siemelink went into the house. In cross-examination he said that he ran in, because firearms were available to Burgess in his bedroom. He confronted Burgess and, according to his own evidence, told Burgess immediately that he was going to be charged in relation to the aggravated robbery of the Patumahoe dairy on Sunday 4 November 1990, adding that Burgess was not obliged to say anything, but anything he did say might be given in evidence. Nothing was said about a right to consult a lawyer. The detective demanded to be told the whereabouts of the pistol.

At the *voir dire* hearing Burgess claimed in evidence that Detective Siemelink spreadeagled him against the wall and searched him, and that the detective lost his temper and repeatedly swore at him. Henry J. preferred the evidence of the detective that none of this happened; the Judge regarded the evidence of Burgess as inaccurate and exaggerated. In this and all other matters material to the present judgment I rely upon Henry J.'s findings of primary fact. The Judge found that Burgess was not told that he was being arrested but was told that he was going to be charged.

Burgess soon admitted that the pistol was hidden in the ceiling, where Detective Siemelink found a dismantled air pistol ('a toy') in a green satchel. Further, Burgess admitted that a shotgun was buried in the garden. The shotgun proved to be in three parts. Burgess removed the barrel from beneath the house and handed it to the detective. He unearthed the stock from the flower garden, and elsewhere in the garden he located the butt under a dried bush. These too he handed over, and the detective assembled the firearm. Burgess admitted hiding the parts of the weapon on the Sunday night. He went in a police car and showed the police a roadside place where two pairs of overalls, respectively green and khaki, were found, and another place near a bridge where a mask was found.

They then went on to the Papakura police station, where the detective wrote up his notes regarding what had been said between himself and Burgess since 9.35 p.m. Burgess agreed that they were a true record and signed the notebook. There ensued a question and answer session, likewise recorded by the detective in his notebook and signed by Burgess at 12.23 a.m. It began with another standard caution but again with no reference to the right to consult a lawyer. Burgess gave a full account of how he and Butcher had carried out the robbery, he with the shotgun and Butcher with the pistol; he said that the shotgun was not loaded. They had used Butcher's car. The black bag belonged to Burgess. At 1 a.m. the detective formally charged Burgess with the aggravated robbery.

In the cross-examination of the detective on the *voir dire* there is the following passage:

Now if Mr Burgess had refused to answer any questions on the second occasion you'd have just arrested him, correct?

Yes.

Or if he'd chosen to say 'Look I'm going out the door, I don't want to talk to you, I'm off' you would have likewise arrested him, correct?

Yes.

So would you agree that the arrest and the charging by you was really a formality?.

He had not been arrested but he would have been arrested.

You'd gone into that house, having made your mind up that he was going to be charged, correct?

In the absence of any explanation to the contrary, yes.

Well you didn't tell him when you said 'You're going to be charged' did you?

No.

And I suggest to you officer that you held off - I'll put that another way - that you've recorded in your notes that you held off either arresting or charging him because you still wanted to get a confession to basically wrap the case up, is that true or false?

That is true.

I mean you knew, didn't you, that at the time of the interview, if you had arrested him or charged him you would not have been in as free a position if at all to carry on an interview, correct?

That is so.

And did you consider the provisions of the Bill of Rights about offering him a lawyer? Is that something you thought about in determining the time of the arrest, and the time of the charging?

Yes.

So would you agree, officer, that you basically stage-managed it, to leave it till later?

Yes.

And, indeed, did you ever tell him that he had the right to consult a lawyer at any time during the interview, either before or after charging him?

Yes.

When was that?

After he was formally charged.

Have you recorded it in my notes?

No it is part of my procedure after I formally charge somebody.

By now it was early morning. The weapons and some of the clothing used in the robbery had been recovered. One of the robbers had confessed and implicated the other. A less assiduous detective might have regarded the day's work as completed, but Detective Siemelink decided to carry the investigation to a conclusion without any delay. He went to the address in Mt Eden Road where Butcher was living, arriving there at 2.35 a.m.. In cross-examination he gave the following explanation:

And it was as a result of the admissions that Burgess made that you went to the address at Mt Eden in the early hours of the morning?

Yes.

Was there any particular reason for deciding to visit him at that time in the morning, Sergeant? Yes, to complete the inquiry. It couldn't have waited until the normal hours, say 7 or 8 o'clock in the morning? Our entire squad had been working already from 2 p.m. the previous day. So you wanted continuity? Yes there was little reason for us to go home and have 2 hours sleep and then come back.

Butcher was awoken by the arrival of the police. Again, so far as there is any difference, I adopt Henry J.'s findings of fact as to what subsequently occurred, disregarding anything to the contrary said by Butcher on the *voir dire*. Butcher was taken to the Papakura police station. While in the police vehicle he was told that he was going to be charged with the aggravated robbery. The detective's account of what was said is as follows, the abbreviations I.S. and H.S. standing for 'I said' and 'He said':

I.S. Graham you are going to be charged with the Aggravated Robbery of the Patumahoe Diary which occurred on Sunday 4th November 1990. You are not obliged to say anything, but anything you do say maybe given in evidence, okay?

H.S. Yeah.

I.S. Philip Burgess was arrested at 1.00 a.m. this morning for his part in the robbery and has told us everything including your involvement, do you wish to see his notes of interview?

H.S. No.

I.S. Where were you on Sunday the 4 November 1990 at approximately 7.00 p.m.

H.S. I'll get my lawyer.

I.S. Do you not wish to continue this interview?

H.S. I'll get a lawyer - do it through a lawyer.

I.S. Okay, any preference as to which lawyer?

H.S. No.

At 2.54 a.m. this interview was concluded.

The detective said that they arrived at the Papakura station at 4 a.m. He recorded the following conversation in his notebook, which Butcher signed:

I.S. Realistically, we are not going to be able to contact a lawyer at this time of the morning, what do you wish to do - talk to me or go over the other side?
H.S. I'll talk to you.
I.S. Understand that you don't have to say anything, but that anything you do say maybe given in evidence?
H.S. Yeah.
I.S. Where would you like to start?
H.S. Where would you like to start, may I read Mr Burgess's notes of interview?
I.S. Yes.

He said that he then gave his notebook to Butcher for the latter to read the notes of interview between the detective and Burgess. After Butcher had completed reading these notes, the interview recommenced:

I.S. We have also spoken to Greg who says he helped dispose of your car. Are you prepared to tell the truth about Sunday?
H.S. Yes.

The reference to 'the other side' indicated, in Henry J.'s view, the police cells. The detective said in cross-examination that it meant 'the main police area where he would be formally charged'. The transcript with which we have been provided has the word 'side' instead of 'charged', but it is clear enough that the detective was speaking of formal charge and formal arrest. It seems to me that nothing can turn on any difference on this point. What must have been conveyed to Butcher was

that if he did not talk to the detective he would in all probability be charged and detained. It may have been less clear what would happen if he did talk, although in the event that too was charging and detention.

There followed a question and answer session including full admissions by Butcher. The interview ended at 5 a.m. when Butcher was given the detective's notebook to read and sign, which he did. At 5.30 a.m. he was formally charged with the aggravated robbery. Like Burgess, he was kept in custody thereafter.

Breach of the Bill of Rights

Once the facts are collected, these cases virtually decide themselves. In short the rights of the accused under s.23(1)(b) were plainly violated and there is no ground for excusing the violations or admitting the confessions in evidence nevertheless.

The Judge found that throughout the 4 a.m. interview Butcher was under arrest. As to whether Burgess was under arrest from an early stage of the second police visit to Outlaw Farm, the Judge regarded the matter as not clear-cut but, without making any definite finding, inclined to the view that he was not arrested within the meaning of s.23(1). In *R. v. Kirifi* (C.A. 252/91; judgment 9 September 1991) this Court held

that whether a person is arrested is generally a question of fact; no particular form of words is required; and there, where the suspect had been handcuffed to a fence, there was no difficulty in finding that he had been arrested. One test mentioned, not necessarily exhaustive, was whether there has been a physical seizure or touching with a view to detention, or words of arrest coupled with acquiescence or submission by the arrestee. It is unnecessary to attempt an exhaustive definition, which indeed would be unwise, but in my opinion *de facto* detention in police custody with intention or contemplation that the suspect will or may be formally charged is arrest within the meaning of the New Zealand Bill of Rights Act. By *de facto* detention I mean (subject to the next paragraph) a situation in which the suspect is not free to go or in which what is said or done by the police causes the suspect reasonably to believe that he or she is not free to go.

There would appear to be no room for doubt that if the true position in fact is that the suspect is not being treated as free to go, that constitutes arrest for the purposes of this Act. The alternative of belief by the suspect, reasonably induced by the police conduct, is perhaps more arguable. While at present inclining in the interests of reality to the view that this also should be enough to amount to arrest, I refrain from a definite expression of opinion on the point in these cases where it need not be decided. In both these cases it is plain

on the evidence that the suspects would not have been allowed to depart. In working out judicially the scope of the New Zealand Bill of Rights Act it seems best to proceed gradually.

What can and should now be said unequivocally is that a Parliamentary declaration of human rights and individual freedoms, intended partly to affirm New Zealand's commitment to internationally-proclaimed standards, is not to be construed narrowly or technically. To be informed of a right to consult a lawyer without delay is, if anything, more valuable in the case of an unlawful arrest than in the case of a lawful one. The right is at least equally appropriate in both situations. But there is no reason to suppose that either arrest in this case was unlawful. There are no common law powers of arrest in New Zealand (*Police v. Cox* [1989] 2 N.Z.L.R. 293, 295) but as to each of the accused Detective Siemelink had at the time ample cause to suspect the commission of an offence punishable by imprisonment, so there was a power of arrest under s.315(2)(b) of the Crimes Act 1961. It may be as well to point out, however, that s.23 of the New Zealand Bill of Rights Act is not confined to lawful arrests. There is internal evidence in the section itself to show as much, for s.23(1)(c) affirms a right to have the validity of the arrest determined without delay by way of *habeas corpus* and to be released if the arrest is not lawful.

In the judgment of my brother Gault, which I have had the advantage of seeing in draft since preparing the present judgment, there is a collection of authorities on the meaning of 'arrest' at common law, beginning with a recent article by Professor Glanville Williams. It seems important to make it clear that the basic issue in the cases in that line has been what constitutes a valid or lawful arrest. The judgment of Macarthur J. in *Police v. Thomson* [1969] N.Z.L.R. 513 is a typical New Zealand instance. The question there was whether the defendant was guilty of escaping from lawful custody. Leading United Kingdom instances are the House of Lords cases *Spicer v. Holt* [1977] A.C. 987 and *Murray v. Ministry of Defence* [1988] 2 All E.R. 521. As already indicated, it would be inconsistent with the purposes of Bill of Rights safeguards and contrary to s.23(1)(c) to confine the New Zealand Bill of Rights Act provisions to valid or lawful arrests. On the other hand it is a long-standing principle of New Zealand law that every person has a right not to be held in custody by the police, against his or her will, for questioning prior to intended or possible charging. In an Act which is expressed to affirm rights, I see every reason for treating unlawful police custody for that purpose as an arrest. Of course this is not exhaustive. The Act also applies to lawful arrests and there may well be other kinds of unlawful arrest to which it applies.

Although primarily concerned with the issue of lawful arrest, the leading United Kingdom cases contain support for the view which I have expressed. Delivering the principal speech in *Murray* at 526 Lord Griffiths cited earlier observations in the Privy Council and House of Lords and concluded that, where a person was detained or restrained by a police officer before formal arrest and knew that she was being detained or restrained, that amounted to an arrest even though no words of arrest were spoken by the officer. His Lordship then went on to consider as a further question whether the arrest was lawful, holding that it was as in the circumstances it was reasonable to delay words of formal arrest until the house with a suspected I.R.A. connection had been searched.

In applying the foregoing view to the facts of the two instant cases, I agree with Henry J.'s finding³ that Butcher was under arrest throughout the 4 a.m. interview. With regard to Burgess it is to be noted that, as soon as he entered the farmhouse on his second visit, Detective Siemelink told Burgess that he was going to be charged with the robbery. In cross-examination the detective agreed, as has been seen, that (in his terminology) he would have arrested Burgess if the latter had refused to answer questions or attempted to make off. Burgess said in evidence that he was arrested. It was a reasonable belief or, as the Judge put it, a tenable conclusion for him to draw. I think that it would be playing with words

to contend that he was not arrested within the meaning of the Bill of Rights Act.

The relevant rights under s.23(1)(b) are to consult a lawyer without delay and to be informed of that right. Clearly there is significant delay if information of the right is deferred until the end of an interview in which damaging admissions are sought and obtained. Deferral appears to have been the detective's practice. However convenient to the police and conducive to the obtaining of convictions, it cannot be reconciled with the statutory rights of persons arrested or detained under any enactment.

In this respect New Zealand law is effectively in harmony with that of Canada under s.10 of the Canadian Charter of Rights and Freedoms, and that of the United States under the Fourth Amendment (rights not to be compelled in any criminal case to be a witness against oneself and not to be deprived of life, liberty or property without due process of law) and the Fourteenth Amendment (due process clause binding on States) as interpreted in *Miranda v. Arizona* 384 U.S. 478 (1964) and explained in *Kirby v. Illinois* 406 U.S. 682 (1972). It is true that in New Zealand rights are not constitutionally entrenched in the same way as the Canadian and United States rights. But the effect of ss.4 and 6 of the New Zealand Bill of Rights Act is that the New Zealand rights are to prevail unless there is an

enactment clearly to the contrary. In the present cases there is no suggestion of any such enactment.

In *Kirifi* this Court alluded to the possibility of a case where a suspect, even if told of his right to consult a lawyer, would still have made an admission. As in *Kirifi*, I do not consider that either of the present cases can be put in that category. Butcher showed that he wished to wait for legal advice by his remarks in the police car. He should not have been interrogated thereafter. As the Supreme Court of the United States has put it in the cases already cited, custodial interrogation is inherently coercive; and here there was a fairly specific threat of immediate formal charging and detention. As for Burgess, some questions were put to him in cross-examination by counsel then appearing for the Crown to the effect that he would have decided against a lawyer in any event, because he could not afford one. He acknowledged that possibility. It is not a possibility that consistently with the spirit of the legislation could be allowed to defeat his rights.

On the argument of the case stated the Judges of this Court were interested in the possibility that the detective's omission to inform Burgess of his rights could be supported because it was an emergency in which access to firearms had to be prevented. A police officer cannot be expected to be concerned with uttering warnings while his safety is threatened. Mr Ruffin for the Crown

referred us helpfully to *DeBot v. R.* (1989) 73 C.R. (3d) 129, 146, where Wilson J. in the Supreme Court of Canada accepted that time spent by a police officer in legitimate self-protection is not delay which has to be justified. I would respectfully adopt her approach. It is noteworthy that the approach of the House of Lords in the different (I.R.A.) setting of *Murray v. Ministry of Defence*, to which I have referred earlier, was essentially similar. But Mr Ruffin found himself unable to argue on this ground for admission of any of the evidence in question: he said that no damaging admissions were made by Burgess before Detective Siemelink had control of the situation. Once control was established, the officer was reasonably able to inform Burgess of his rights. As the officer frankly acknowledged in cross-examination, he stage-managed the questioning thereafter, deliberately postponing any mention of the right to consult a lawyer. It would be wrong for this Court to countenance such tactics.

The New Zealand rights affirmed in general terms by the 1990 statute cannot be hard-and-fast in their operation. As indicated in *Kirifi*, there may be circumstances in a particular case where, despite some degree of transgression of the rights, it is fair and right to admit a confession in evidence. For example there might be circumstances falling within or analogous to the concept embodied in s.5 - 'such reasonable limits prescribed by law as can be demonstrably justified in a

free and democratic society'. Or the breach of the Act might be trivial or inconsequential. The Bill of Rights Act has to be applied in our society in a realistic way. *Prima facie*, however, a violation of rights should result in the ruling out of evidence obtained thereby. The prosecution should bear the onus of satisfying the Court that there is good reason for admitting the evidence despite the violation. In the present cases there are no circumstances which could justify overriding or setting aside the rights or holding that the violations were immaterial. The *prima facie* principle should be applied.

The learned trial Judge took a different approach, though in a ruling during the trial when he may well not have had the opportunity of full reflection on the issue. The reasons given by him for his ruling show that he saw the provisions of the 1990 Act, notwithstanding that they protect rights which he described as 'fundamental', as but part of the overall picture to be considered by the Court in deciding whether it is fair to admit the evidence. In effect that would be to treat the statutory rights as elements, albeit at least nominally important ones, in the exercise of the jurisdiction of the Court to ensure fairness in criminal trials: a jurisdiction to which the Judges' Rules of 1912 and 1930, now in their literal form largely obsolescent in New Zealand for practical purposes, also belong.

In my opinion that approach cannot be right. Naturally it could have attraction for some Judges in that it widens the scope of judicial discretion. But, without derogating in the slightest from acknowledgment of the importance of the jurisdiction to ensure fairness, it seems to me that the New Zealand Bill of Rights Act cannot be relegated to the category of a relevant factor in exercising that jurisdiction. Certainly the Act is not entrenched. Still it is an affirmation of the basic rights of people in New Zealand. The correct judicial response can only be normally to give it primacy, subject to the clear provisions of other legislation. As already mentioned, other legislation is not an ingredient of these cases. They are fairly straightforward cases in which, when the facts are understood, the outcome is fairly obvious.

It is important not to confuse or commix the Bill of Rights and the Judges' Rules. The Rules in their literal form are not easy to apply and, as already suggested, largely obsolescent. The Courts have long accepted that they are no more than guidelines to be used in exercising in the particular matters to which they relate (e.g. warnings, cross-examination of persons in custody) the jurisdiction to ensure fairness. So far as is now relevant the New Zealand Bill of Rights Act is a wider and simpler measure. Its genesis is not judicial discretion but the increasing international recognition of basic human rights. It must be a prime duty of the

Courts to give effect to the Act in the absence of legislation to the contrary effect, and, while applying it with due caution, to be studious to avoid any temptation to write it down because it is unfamiliar. It will gradually become familiar.

No doubt foreseeing the outcome, Mr Ruffin drew attention to another important Canadian case, *Black v. R.* (1989) 70 C.R. (3d) 97. The facts in that case have some resemblance to those of the case of Burgess, in that the accused there had been unable to reach her lawyer in the middle of the night and a confession had been extracted from her thereafter. It was held that the accused had not clearly and unequivocally waived her right to counsel, with full knowledge of her rights. In my view the same applies to Burgess. But the decision is relevant in another way. It was held that real evidence, the discovery by the police of a knife, should not be excluded even though obtained after a Charter violation. Wilson J. said at 117, referring to comments of Lamer J. in another case, that the knife would undoubtedly have been discovered by the police, as a result of a search of the appellant's apartment, in the absence of the Charter breach and the conscription of the appellant against herself.

So too here, I would accept that the police would have made in any event a thorough search of the house and garden where Burgess was living and would have discovered

the air pistol and the various parts of the shotgun. That is arguable as regards the stock, but once they had found the barrel the police would have searched extensively for the other parts; and a burying would have been an obvious possibility. On the other hand, as counsel for the Crown recognised, the clothing and the mask in roadside locations are much less likely to have been found without guidance from Burgess. Their discovery should be ruled out as evidence derived from an inadmissible confession.

In the 4 a.m. interview Butcher told Detective Siemelink that he had bought the balaclava at a certain shop and that after the robbery he dropped it 'on the garage floor by the dog biscuits'. This may have been a reference to a garage at Outlaw Farm. I understood counsel to say that a balaclava was found there by the police. If so, I would likewise accept that a thorough police search would have discovered it in any event and would hold it admissible in evidence for what such evidence may be worth.

For these reasons I would hold that the inculpatory statements by Burgess and Butcher are inadmissible in evidence, for breach of the New Zealand Bill of Rights Act 1990, but that the finding of the weapons at the farmhouse where Burgess lived is admissible, and that the same applies if the balaclava was found there. The questions posed in the case stated

should be answered No. Pursuant to s.382(2)(b) of the Crimes Act 1961 a new trial should be directed. As requested by Mr Ruffin, this would give the Crown an opportunity of re-appraising the case and considering whether there is enough evidence against each accused to proceed to trial without the wrongly-obtained confessions. The Court being unanimous that the case should be dealt with in this way, there will be orders accordingly.

Addendum

Since drafting this judgment I have had the advantage of reading in draft the proposed judgment of Holland J. and wish to add the following observations in the light of his views.

The present law certainly allows an inference adverse to an accused to be drawn if he remains silent at trial in the face of evidence pointing to his guilt. Moreover, by virtue of s.366 of the Crimes Act 1961, the trial Judge may comment to that effect in his summing up to the jury. See on the whole matter *R. v. Coombs* [1983] N.Z.L.R. 748; *Trompert v. Police* (1984) 1 C.R.N.Z. 324; *R. v. Accused* (1988) 4 C.R.N.Z. 208. The accused is not bound to give evidence, but he refrains at the foregoing risk, so the expression 'right to silence' can be somewhat misleading. Where the expression is more appropriate is in relation to matters outside the trial.

As emphasised in *Coombs*, it is elementary that in general a suspect has a right to silence under interrogation by police or other law enforcement officers, whether before or after caution; and only exceptionally can an accused's silence under interrogation be evidence against him. I do not see sufficient ground for any discarding by the Courts of these well-settled principles.

As to police detention for questioning, in *R. v. Admore* [1989] 2 N.Z.L.R. 210, 212-14, decided in August 1988, I expressed concern about an apparent trend in New Zealand to stretch the law so as to enable interrogation in *de facto* custody; and I suggested that, if power to detain non-arrested persons for questioning was needed, it should be given frankly and expressly by legislation, accompanied by safeguards (such as videotaping). That suggestion has not been acted on. By contrast, the New Zealand Bill of Rights Act 1990 was enacted two years later. It is also significant that in the United Kingdom where this subject was among those extensively considered by the Royal Commission on Criminal Procedure, 1981 (Cmd. 8092), the Police and Criminal Evidence Act 1984 has conferred no power to detain non-arrested persons against their will for questioning. As mentioned in *Admore*, the English Royal Commission did not recommend any change in the principle that the duty to assist the police is a social one and not legally enforceable. Legislatures appear to be unwilling to take the step of authorising detention for

questioning, and I am not persuaded that at the present stage the Courts should urge such legislation. I would not be opposed to it, provided that there were adequate safeguards, but consider that this controversial matter is best left to the legislature.

As to the right to legal advice and as a corollary to be informed of that right, this is also widely recognised in countries having systems of law similar to our own. The Canadian and United States provisions have been mentioned earlier in the present judgment. In England similar rights are conferred by s.58 of the 1984 Act (consultation) and the relevant Code of Practice thereunder, C:3 (information). In *R. v. Samuel* [1988] Q.B. 615, 630, Hodgson J., delivering the judgment of the Court of Appeal, described the consultation right as 'one of the most important and fundamental rights of a citizen'. A conviction for robbery and a ten-year sentence were there quashed because a confession had been obtained after breach of that right. In *Absolam* (1988) 88 Cr.App.R. 332 the Court of Appeal in a judgment delivered by Bingham L.J. quashed convictions for cannabis dealing, on the ground of breach of the Code provisions regarding information of the right. This although the Code provision is not strictly mandatory but only a relevant consideration for the Court.

While welcoming consideration of this subject by the New Zealand Parliament as I suggested in *Admore*, I am

not at present convinced that legislation increasing the powers of the police in dealing with suspects is truly needed. Perhaps it is. Undoubtedly the detection and punishment of crime is an important social objective. On the other hand interference with personal liberty is nearly always a serious matter. It is not obvious that New Zealand should go further in authorising it than have the other countries which I have mentioned. It may be, however, that the New Zealand Parliament can be so persuaded. The question is linked with whether authority can be accompanied by adequate limitations as to time and other safeguards.

The case will be disposed of as already stated. As there may be a new trial, there will be an order prohibiting the publication in any report or account relating to the decision of this Court of the name, address or occupation of either of the accused, or of any other person connected with the proceedings, or any particulars likely to lead to their identification. This order will have effect until the conclusion of any new trial or any earlier termination of the proceedings.

R. B. Wilson P.

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R J E Brown for Appellant Butcher
M J Ruffin for Crown

Judgment: 25 October 1991

JUDGMENT OF GAULT J

The facts in this case are set out fully in the judgment of Cooke P.

Section 23 of the New Zealand Bill of Rights Act 1990 "affirms" certain fundamental rights of persons arrested (subs 1 to 4), detained under any enactment (subs 1 and 4) or deprived of liberty (subs 5). The Act does not provide remedies for denial of those rights.

I subscribe to the view that these and the other fundamental rights identified in the Act are to be recognised and assured without narrowing or technical interpretations. This will occur only if the Courts accord appropriate remedies. The legislature has chosen

to leave that responsibility unconstrained. As individual cases present fact situations for decision principles will be developed with assistance from other jurisdictions but with a proper focus upon New Zealand's needs and aspirations. In my view it is premature to attempt to formulate broad guidelines for the assurance of the rights included in the Act, their relationship in circumstances of conflict or their status compared with other long recognised rights and freedoms not included in the Act (see s 28).

Since the Act "affirms" the rights it is logical to consider "arrested" in s 23 by reference to the meaning of arrest at law prior to the passing of the Act. In spite of its antiquity the concept of arrest is not without its difficulties - see the helpful article by Professor Glanville Williams 'When is an Arrest' (1991) 54 MLR 408. In that article (p 410) he summarises the English position of arrest at common law;

"At common law, three steps had to be taken (not necessarily in any particular order) to effect a valid arrest (assuming that the arrester had power to arrest). One, the arrester had to detain the suspect physically, or to detain him symbolically by touching him-unless the suspect made this formality unnecessary by submitting to the arrest. Two, the arrester had to communicate to the arrestee his present immediate intention to make an arrest. Three, he had to state the ground of arrest, unless this was obvious. The second and third requisites are put into statutory form. . . in PACE [Police and Criminal Evidence Act 1984, vide 12 *Halsbury's Statutes* 4th p. 842 ff.]

In *Genner v Sparkes* (1704) 1 Salk 79; 91 ER 74, it was said there could be no arrest without touching the

defendant. The case report in Salkeld's Reports refers to the case of *Horner v Battyn* Bull. NP 62. This citation is repeated in the nineteenth century cases and is set out in full here:

If the bailiff who has a process against one, says to him when he is on horse back or in a coach, "you are my prisoner, I have a writ against you", upon which he submits, turns back, or goes with him, though the bailiff never touched him, yet it is an arrest, because he submitted to the process; but if, instead of going with the bailiff, he had gone or fled from him it could be no arrest, unless the bailiff laid hold of him."

The modern statement of the law is to be found in *Halsbury* (4th) Vol 1 para 693:

"Meaning of Arrest: Arrest consists in the seizure or touching of a person's body with a view to his restraint; words may, however, amount to arrest, if, in the circumstances of the case they are calculated to bring, and do bring, to a person's notice that he is under compulsion and he thereafter submits to the compulsion. An arrest may be effected with or without a warrant."

Two cases are relied on for this statement. First in *Alderson v Booth* (1969) 53 Cr App R 301, 303 Parker LCJ stated that no longer was an actual seizing or touching required to constitute an arrest. Arrest should be by the unequivocal words 'I arrest you' followed by the defendant's submission to this, but an arrest could be constituted by any form of words:

"which in the circumstances of the case were calculated to bring to the defendant's notice, and did bring to the defendant's notice that he was under compulsion ..."

In the second case *R v Inwood* (1973) 57 Cr App R 529 Stephenson LJ at 536 said: "Arrest is a question of fact, it depending on the circumstances of any particular case ...". The court considered it unwise to say that there should be any particular formula to be followed.

In New Zealand a general statement of what is an arrest is to be found in *Adams Criminal Law and Practice in New Zealand* 2nd Ed para 2490.

"There must be either (a) a physical seizure or touching of the person with a view to his detention (a mere touching will suffice, but presumably the intent must be made clear to the arrestee by words or otherwise); or (b) the utterance of words of arrest, coupled with submission or acquiescence on the part of the arrestee. The words, however, must be sufficiently clear to bring it home to the arrestee that he is in custody and not free to go. The mere use of words without either touching or submission cannot amount to an arrest. The law on this matter has been recently reviewed and clearly stated by Macarthur J in *Police v Thomson* [1969] NZLR 513, and it is only necessary to add a reference to the later case of *Alderson v Booth* [1969] 2 WLR 1252, which is to the same effect. In that case the words were, "I shall have to ask you to come to the police station ..."; and the man had done so. While the court thought that the words were, in their context, "words of command" such as "would bring home to a defendant that he was under compulsion", the justices had held otherwise, and, the question being one of fact, their decision could not be disturbed on appeal on law. In the case before Macarthur J, the words of arrest were perfectly clear, but the evidence as to submission was insufficient, and there had accordingly been no escape from lawful custody. An allegedly drunken driver had run away while the traffic officer locked the car. The magistrate thought that there would clearly have been acquiescence if he had handed over his keys, or had given an intelligible answer to the question who should lock the car. The only safe course in making an arrest without actual physical restraint is, it seems, to couple clear words with an equally clear touching."

Arrest must be accompanied by a specific intention. Glanville Williams in 'Requisites of a Valid Arrest' [1954] *Crim LR* 6, 15 says that not every imprisonment or detention constitutes an arrest:

"To be an arrest, there must be an intention to subject the person arrested to the criminal process - to bring him within the machinery of the criminal law; and this intention must be known to the person arrested. Arrest is a step in law-enforcement, so that the arrester must intend to bring the accused into ... 'the custody of the law'."

It may be said that arrest involves communication by clear words or conduct of the intention to arrest or detain with a view to legal process. There also must be either submission or (token) physical seizure. To my mind there is to be overt communication or seizure. The degree of formality will vary with the circumstances. A mere unexpressed belief of being unable to leave or unexpressed intention to arrest if there is an attempt to leave would not be sufficient.

I consider arrest is to be given no different meaning in the Bill of Rights Act. While these authorities may be directed to the elements of a valid (or lawful) arrest, I do not see that the Act is to be construed as providing for arrest that must be supplemented by some further words or acts to become a valid arrest. I agree, however, that s 23 is not to be confined to lawful arrest. An arrest in circumstances in which there is no power of arrest clearly is encompassed.

In *R v Nikau* (unreported) High Court, Auckland
 T45/91 23 April 1991 Wylie J took the position that an
 extended concept of arrest should not be applied to the
 Bill of Rights Act. He said:

"The Bill of Rights Act does not give a warrant to
 alter longstanding principles of law. It may be,
 undoubtedly is declaratory of rights, but that does
 not itself justify an over-turning of principles
 which have become enshrined in the law of the
 country over a long period of years. In my opinion
 specific statutory intervention would be required to
 effect such a change."

I agree with that view subject only to the
 qualification that the Courts necessarily will be
 required to adopt and develop interpretations and
 remedies appropriate to this significant statute.

In *R v Kirifi* C A 252/91, judgment 9 September 1991,
 after referring to *Nikau* and the High Court decisions in
 this case and in *R v Edwards*, High Court, Auckland
 T273/90, 28 February, 1991 this Court said:

"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."

In that case the suspect, apprehended while fleeing, initially was handcuffed to a fence.

When *Edwards* reached this Court (CA 83/91) judgment 27 September 1991, it was held unnecessary to consider in detail ss 22 and 23 of the Bill of Rights Act it being clear that there was neither arrest nor detention in the circumstances of that case. The Court went on to review the position of persons interviewed by police in the course of criminal investigation. The passage from Hillyer J's judgment which had been cited in *Kirifi* was repeated.

There is some further comment in the judgment in *R v Accused* CA 250/91, 27 September 1991 at p 8.

None of the decisions to date on the Bill of Rights Act can be said to turn on any broader construction of arrest than has been applied in the past. There are, however, some dicta indicating that may be favoured.

Without the assistance of more detailed argument than I have had to date I am not persuaded that arrest in the Act is to be construed as the equivalent of de facto custody as is the focus of enquiry under the Judge's Rules when questions of the cautioning of suspects is an issue.

That leads on to the meaning of "detained under any enactment". I take this to refer to the purported exercise of a right of detention conferred by statute.. Whether it is to be extended to detention necessary for the exercise of other rights such as the right to search or to administer tests such as under the Misuse of Drugs Act, the Customs Act and the Transport Act does not need to be considered now.

The words "under any enactment" were added after select committee consideration and constituted a departure from the wording of the Canadian Charter of Rights and Freedoms upon which s 23 appears to be based. The consequence seems to be that the section is limited to detention pursuant at least to claimed statutory authority and leaves wholly arbitrary detention a breach of s 22 but without the important further rights in ss 23(1) and (5). That notwithstanding, "detained under any enactment" clearly seems intended to mean something different from arbitrary detention and must be taken to relate to the exercise or purported exercise by officials of statutory powers of detention and perhaps nothing more. It is difficult to accept that s 23 rights are to be accorded by a customs officer who requires a traveller to wait a short time while baggage is examined.

I am not yet persuaded that "detention under any enactment" necessarily is to be applied to a police

interview which is found in all the circumstances to have reached the point of de facto custody. The Judge's Rules as they have been applied in our Courts continue to have application to the interview of suspects.

Where there has been the denial of a right conferred by s 23 the remedy should be appropriate to the circumstances. Subs (1), (2) and (3) are directed to the right to liberty and the recovery of liberty when a person is deprived of it. Subs (4) is directed to the right to refrain from self-incrimination. While the primary remedy for breach of subs (4) generally will be exclusion of evidence a breach of the earlier subsections may call for a quite different response.

While the rights under each of the subsections are separate and cumulative it can be argued that the denial of each should be considered separately for remedy. An arrested person may be prepared to make statements after being informed of the right not to do so yet may wish to consult a lawyer to secure early freedom, as on bail. Delay in permitting that consultation arguably should not affect the admissibility of statements. On the other hand denial of access to a lawyer with the purpose of extracting a confession should be met with exclusion. A clear example would be a promise to allow a person to consult a lawyer after a statement is completed.

I am of the view that there is a need for flexibility to ensure that the remedy is appropriate to the breach.

Where a denial of a right can be said to bear directly on the voluntariness of an incriminating statement or the obtaining of evidence few would argue that the evidence should be admitted. However, automatic exclusion would be a departure from the long established approach to evidence illegally obtained or evidence obtained in contravention of the Judge's Rules where exclusion is determined in the exercise of judicial discretion. Such a departure might be justified by the elevation of the rights by their inclusion in the Act, although there is a logical difficulty in imposing, without clear direction from the legislature, different remedies for the same breaches of the same rights as have long been protected by our law and are merely "affirmed". It is to be noted that express provision in the Canadian Charter directs exclusion if it is established that having regard to all the circumstances the admission of the evidence would bring the administration of justice into disrepute. Subject to interpretation that is considerably less than automatic exclusion.

In my view some care is needed to ensure that adoption of principles dictating exclusion, even prima facie, do not lead to effective automatic exclusion.

At present, until the implications emerge more clearly from experience, and the impact upon the detection and prosecution of crime - which may be said to be a fundamental community right - can be measured, I consider that the correct approach should be to exclude as a general rule evidence obtained by conduct clearly involving denial of the rights included in s 23 which can be said to have induced provision of the evidence in question. Where there is no clear breach, a purely technical breach or a breach which has not induced the provision of the evidence, exclusion should be in the discretion of the Court exercised on the basis of fairness and the interests of justice. Where deliberate steps have been taken to avoid the need to accord s 23 rights - as by delaying arrest - fairness may dictate exclusion of evidence obtained.

It is unnecessary to go further to decide this case. Burgess was confronted by the detective who ran into his home, immediately told him he was to be charged with the aggravated robbery and administered the standard caution. Few in Burgess's position would not have thought he was arrested. The detective acknowledged that formal arrest was delayed by him to avoid telling Burgess of his rights under the Bill of Rights Act because he wanted to get a confession. With respect to the Judge I consider that to admit the statement subsequently taken from Burgess would be to countenance unacceptable conduct and disregard of his rights. I agree with the conclusions of the

President as to the admissibility of the exhibits located in and about the house.

Butcher had indicated his wish to have a lawyer present when he was interviewed on the second occasion. When this was mentioned in the police car the questioning was correctly discontinued. At the police station on one view, Butcher voluntarily waived his right and agreed to answer questions. However, on another view, which cannot be excluded, he was subjected to unfair pressure to do so by the reference to the alternative of going "over the other side". He too had been told that he was going to be charged with aggravated robbery and was clearly to be held at the police station after being taken there at 4 a.m. Even in the absence of formal arrest the risk that Butcher's wish to have a solicitor present was over-ridden meant that fairness dictated exclusion of the evidence of the statements subsequently made.

I too would allow the appeal.



Solicitors

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ORDER PROHIBITING
PUBLICATION OF NAME
OR PARTICULARS
ENABLING IDENTIFICATION

CRIME APPEALS 227/91 AND 228/91

Coram: Cooke P
Gault J
Holland J

Hearing: 19 September 1991

Counsel: R.J.E. Brown for B
B.J. Hart and R.W. Kee for B
M.J. Ruffin for Crown

Judgment: 25 October 1991

JUDGMENT OF HOLLAND J

I have had the benefit of reading in advance the judgment just delivered by the President. I respectfully agree with him that this appeal should be allowed. However, I desire to add some comments of my own.

I do so, first, because the appeal has been brought before us by way of case stated pursuant to s.380 of the Crimes Act 1961, secondly because we are differing with the decision of the trial Judge, but more importantly because I have grave concerns as to the possible

implications of the provisions in the Bill of Rights Act 1990 without the introduction of other measures to ensure some balance between the rights of the individual and the need to bring law breakers to justice. I emphasise that the views I am about to express are mine alone.

With respect to the opinion of the trial Judge, I agree with the President that too little regard was given by him to the provisions of s.23 of the Bill of Rights Act 1990. The issue is not one solely of overall unfairness or injustice as he suggested. The question, as I see it is, that there having been shown to be a failure by the police to give the appellants the opportunity to exercise the rights given to them under the Act, are the circumstances such as will justify or excuse that failure, and permit evidence of a confession, wrongfully obtained, to be admitted as evidence? For the reasons more fully and eloquently expressed by the President I agree that in the case of these two appellants, if evidence of their confessions is permitted to be given at trial, there would be a substantial weakening of the provisions of the Act.

Where, as here, the two appellants have voluntarily admitted their guilt of a serious crime a court must give very anxious consideration to the issues involved before ruling such admissions to be inadmissible at their trial with the consequence of their possible acquittal of charges for which they are clearly guilty. The

compelling issue in this case is the right of a person suspected of committing a crime, who has been arrested, or who is in the presence of a police officer in such circumstances that he may reasonably believe that he is not at liberty to leave that presence, and not be free to do so, to consult and instruct a lawyer. That right is spelled out in s.23 of the Bill of Rights Act 1990 and has been persuasively explained in the judgment of the President.

The desire of Parliament and the Courts to protect individual rights must however be balanced by the need to ensure that those who commit crimes be brought to justice.

I do not wish for one moment to be thought in any way to be departing from the right of a person suspected of a crime to have legal advice at the earliest possible moment. Nevertheless I believe that a substantial proportion of persons convicted of crimes either at trial or after a plea of guilty, are convicted because of what they have said to the police on interview. Because of the right to silence and the refusal of the law to permit adverse inferences to be made from that silence, the normal legal advice given to a suspect is to say nothing. Once legal advice is available prior to interview, and once interviews are universally or even generally recorded by way of video, a large number of the grounds of suspicion as to the validity of confessions will

disappear. Is there then any reason why a Court should not be able to make an inference adverse to an accused if he remains silent at trial when the other evidence as a matter of logic points inevitably to guilt in the absence of a satisfactory explanation?

A further factor of concern arising from this judgment and the earlier judgment of this Court in R v. Kirifi (CA.252/91, Judgment 9 September 1991) is the likely inability of a detective to persuade a suspect to accompany him to the police station if the suspect is told of his right to legal advice before an interview proceeds. When legal advice cannot immediately or urgently be obtained the suspect is then likely to be let free and at this vital stage of police enquiries be able to destroy evidence, establish alibis and otherwise seriously hinder detection. It may well be that some limited form of detention for interviewing may be necessary in a similar way to that which exists in the United Kingdom.

For what my views may be worth I suggest that there is urgent need for consideration to be given as to whether the right to silence should not be qualified, whether there should not be a limited power to detain for enquiries and whether, in New Zealand, there is any purpose in retaining, in their present state, the Judges' Rules as indicia of the sort of conduct the Courts will permit when considering the admissibility of confessions.

I agree that the appeal should be allowed with the consequences set out in the judgment of the President.

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