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IN THE MATTER of an appeal from a determination of
the High Court at Wanganui

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Appellant

A N D

JOSEPH HOHEPA MALLINSON

Respondent

Coram: Cooke P
Richardson J
Casey J
Hardie Boys J
Gault J

Hearing: 30 July 1992

Counsel: J C Pike and A F D Cameron for Crown
J G Rowan for respondent

Judgment: 30 September 1992

JUDGMENT OF THE COURT DELIVERED BY RICHARDSON J

The question arising on this case stated is whether on the facts as found Neazor J ought to have concluded that the present respondent Joseph Hohepa Mallinson had been accorded his rights under s23(1)(b) of the Bill of Rights Act.

When arrested initially on a minor and unrelated charge and taken to the police station, Mallinson told the arresting officer that "he understood that he was being fingered for some armed holdups; that he wasn't particularly concerned about this as he would get a solicitor who would get him off when he returned to prison". He was not told of his right to a lawyer at that time.

About an hour later he was interviewed by another police officer. That officer began the interview by cautioning Mallinson (in a standard form); advised him that he had the right to consult and instruct a solicitor (but without adding "without delay" or words to similar effect); informed him that he was not obliged to make a statement; and asked him if he understood, to which Mallinson replied that he did. Following the interview Mallinson was charged with three aggravated robberies.

On a pretrial application Neazor J determined that the statements obtained by the police were inadmissible. He held that it was necessary for the Crown to show that it was conveyed clearly to Mallinson that he had the right to consult and instruct a solicitor before questioning began and that if he wanted to exercise the right that would be facilitated. Both were required so as to ensure that the person arrested understood what he or she was being offered. The Judge concluded that it was not a proper approach to accept as sufficient what the police officer said at the beginning of the interview together with Mallinson's acknowledgment that he understood what had been said to him. Having reached that conclusion the Judge was satisfied that Mallinson's subsequent statements had to be excluded. In his view there was no basis for concluding that what he termed the ordinary consequence of exclusion should not follow.

At the subsequent trial Neazor J ruled that without the statements there was insufficient evidence to support convictions on the aggravated robbery counts. He directed the jury to return verdicts of not guilty so that his ruling on the admissibility of the statements could be challenged in this Court.

The question stated for our opinion is whether the Judge's decision was erroneous in point of law and in particular whether he was correct in concluding that there was an onus on the Crown to prove that:

- (a) It was conveyed clearly to the suspect that he had the right to consult and instruct a solicitor before questioning began; and
- (b) The suspect understood the substance of the right and that the exercise of the right would be facilitated if the suspect wanted to exercise it.

In deciding those questions it is convenient to consider the relevant requirements of s23(1)(b) in a series of steps.

1. Section 23(1)(b) declares that everyone who is arrested shall have (i) the right to consult and instruct a lawyer without delay; and (ii) the right to be informed of that

right. Both rights arise on arrest and for the right to consult a lawyer without delay to be effective the right to be informed must be accorded immediately on arrest.

- ✓ 2. The temporal expression "without delay" is not synonymous with instantly or immediately. It is a negative injunction - not to delay - which in the absence of any further qualification necessarily imports as the test whether the delay is reasonable in all the circumstances having regard to the purpose of the right. The relevant interests which s23(1)(b) protects are the ascertaining of one's legal rights and obligations and representation by an independent adviser. If the right is to be effective it must be exercisable before the legitimate interests of the person who is arrested are jeopardised. That includes not prejudicing one's legal position by words or conduct without the opportunity for legal advice.
- ✓ 3. To be "informed" of the right to a lawyer is to be made aware of it. The purpose is to provide a fair opportunity for the person arrested to consider and decide whether or not to exercise the right. The obligation on the arrester or other officer concerned is to communicate clearly to the person arrested that he or she has that right. No particular formula is required so long as the content of the right is brought home to the person arrested. To use the language of s23(1)(b) may save argument later. In the end whether or not the obligation was satisfied must turn on what was said and what is to be implied from what was said in the particular context and circumstances. Even though no particular words are used the context may make it clear that the right to a lawyer is immediately exercisable; and so, in relation to any subsequent use of answers to police questioning, that the right is exercisable before any questioning begins.
- ✓ 4. There are three elements of the protective right: the right to consult a lawyer; the right to instruct a lawyer; and the exercise of those rights without delay. In that regard it is important that anyone arrested be made aware that he or she can exercise the right to a lawyer without delay, that is as soon as reasonably possible in the circumstances. The requirement is not satisfied if the person arrested may reasonably be left with the impression that access to a lawyer is not available until after any questioning is finished.
- ✓ 5. Where the admissibility of a statement made to the police is challenged on the grounds of a specific breach of the Bill of Rights, the Court has to determine whether the accused was accorded the particular right claimed to have been breached. In that situation we consider that the ordinary rules as to onus of proof in relation to the admission of such evidence should apply. Accordingly the burden of establishing the admissibility of the statement rests on the Crown just as it does where, as will often be

the case, it is also challenged on fairness grounds. The standard of proof to be applied is a matter upon which full argument will be needed in an appropriate case.

Unless there are circumstances calling for obvious care and further enquiry there is no reason for not taking the accused's answers at face value. If following advice as to the right to a lawyer the accused responds affirmatively to the question whether he or she understands the position, the obvious inference is that the accused did indeed understand his or her rights. But more than a bare statement of the s23(1)(b) right and a bare acknowledgment of understanding is likely to be required where, for example, the person arrested is intoxicated or under drugs or appears to have a mental or physical disability which could interfere with his or her comprehension of the rights.

6. The crucial question is whether it was brought home to the arrested person that he or she had those rights. That is not the same question as whether the police were justified in assuming that he or she did understand them. To look at it simply from the perspective of the police officer would mean that the person arrested who did not in fact understand the position would not be able to make an informed choice with respect to the exercise or waiver of the guaranteed right.

7. Informing persons arrested of their s23(1)(b) rights ordinarily carries with it the obvious implication that they are entitled to exercise those rights. But there is no duty on the police when informing persons arrested of their right to a lawyer to go on to give advice designed to facilitate the exercise of that right. The police officer may decide to do so in order to assist in the understanding of the right. But any duty to facilitate the manner of its exercise is not triggered until there is an indication by the person arrested of the desire to consult a lawyer. What, if anything, is then required of the police will depend on the particular circumstances.

8. The Bill of Rights is not a technical document. It has to be applied in our society in a realistic way. The question is whether what was done gave practical effect in the particular circumstances to the rights protected by the particular guarantee, here s23(1)(b). And anyone complaining of a breach of the Bill of Rights must, as the Canadian Courts say, invest the complaint with an air of reality.


We turn to consider the specific questions of law reserved by Neazor J. Mallinson was not told at the time of his arrest of his right to a lawyer. That did not happen until he was interviewed an hour later. Clearly there was a breach of Mallinson's rights in that regard under s23(1)(b). Implicit in question (a) is the

assumption by the Judge that although not accorded on arrest such a breach of the right to be informed may be excused at the remedy stage if the only issue is the admissibility of a police statement and the accused was informed of his rights before questioning began.

It was common ground by the end of the argument that as a statement of principle the objective test expressed in question (a) was correct in law. The obvious addendum, noted in point 3 above, is that no particular formula is required so long as explicitly or implicitly the substance of the right is adequately conveyed. An omission of express reference to "without delay" or words to similar effect is not necessarily fatal. Where, as here, a suspect was informed that he was entitled to consult and instruct a lawyer and that he was not obliged to make a statement, the proper inference should ordinarily be that he must have understood that both rights were exercisable immediately - that he was entitled to consult a lawyer before answering any questions.

We turn next to question (b). The first difficulty with Neazor J's approach is that to say that the Crown must prove that the suspect actually understood the substance of the right requires some explanation. Unless there is an evidential basis justifying a contrary conclusion, proof that the police advised the suspect of the s23(1)(b) rights should lead to the inference that the suspect understood the position - see point 5. Second, there is no general obligation on the police in informing arrested persons of the right to a lawyer to state that the exercise of the right will be facilitated either in general or in a specific manner if the suspect wants to exercise it - see point 7.

Neazor J ran the two paras (a) and (b) together. It is not possible to determine from the case stated or from his judgment what weight he gave to particular elements of (a) and (b) in deciding that the breach of s23(1)(b), which he found, required the exclusion of the accused's statements. In these circumstances we are satisfied that the directed verdicts cannot stand and there will be an order for a new trial.



Solicitors

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