HIGH PRIORITY

IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 460/91

THE QUEEN

v.

ZANE LEONARD GOODWIN

Coram:	Cooke P. Richardson J. Casey J. Hardie Boys J. Gault J.
Hearing:	11, 12, 17 and 18 March 1993
Counsel:	R.J. Laybourn and A. Shaw for Appellant Solicitor-General J.J. McGrath Q.C., J.C. Pike and Nerissa Barber for Crown
Judgment:	26 March 1993

JUDGMENT OF THE COURT DELIVERED BY COOKE P.

The facts of this case appear from the judgments delivered in this Court on 25 November 1992 and reported in 9 C.R.N.Z 1. They need not be repeated. Those judgments dealt only with the issues arising under s.23 of the New Zealand Bill of Rights Act 1990. It became necessary to restore the case for further argument on other questions. The argument having been heard, we are giving judgment as soon as possible. On this occasion the Court is unanimous in its conclusion, and we are able to dispose of the case in one relatively brief and simple judgment.

At the further hearing the grounds of appeal argued against the appellant's conviction for manslaughter were that the evidence of an alleged admission by the appellant to the police on which the conviction was founded should be excluded because of breach of s.22 of the Bill of Rights Act and also because of unfairness in its obtaining such as to require a ruling out at common law; and that in any event the verdict cannot be supported having regard to the evidence (the ground available under s.385(1)(a) of the Crimes Act 1961).

The Bill of Rights Point

Section 22 of the New Zealand Bill of Rights provides 'Everyone has the right not to be arbitrarily arrested or detained'. For the purpose of the present judgment it is enough to deal with the right not to be arbitrarily detained. Unfortunately the issue under s.22 was not raised directly at the trial or in the argument leading to the first decision of this Court, although some observations on the section were made in the judgments in this Court. It is an issue quite closely related to, albeit not identical with, those arising under s.23, both sections being concerned in certain ways with the general subject of deprivation of personal liberty. It arises on the same evidence. Nothing substantial has been put before us to suggest that the Crown could call any significant further evidence bearing on it. In these circumstances, having regard in particular to the fact that personal liberty is at stake, we think it right to allow s.22 to be specifically relied upon for the appellant, even at this late stage.

The first question under s.22 is whether the appellant was detained at the time of his statement to the police on which the prosecution was founded. The

position of the Crown at the hearing leading to our first decision was as stated in the written summary of the Crown's submissions:

> In this case the Crown accepts as it must the finding of the trial Judge that the appellant was detained from the time Constable Ratapu directed him to remain in the foyer. That state of affairs continued it was ruled beyond the statement by Detective Bass that the appellant was not under arrest.
>
> There was no arrest because the Judge found no intention to or contemplation of a charge.

At the further hearing in this Court the Crown contended that the concession that the appellant was detained should be taken to apply only for the purposes of s.23 and not for the purposes of s.22. The distinction is unreal and some members of this Court consider that the Crown should not now be allowed to put forward arguments under s.22 inconsistent with the concession. Other members of the Court consider that in any event the concession was rightly made and that, disregarding the concession, the proper conclusion is that the appellant was detained within the meaning of s.22.

The reasons for the latter view are as follows. At a criminal trial, if a Bill of Rights-based objection to evidence is to be taken for the accused, an evidential foundation is needed to raise the issue: see for instance *R.* v. *Latta* [1990-92] 3 N.Z.B.O.R.R. 1; *R.* v. *Cordes* [1990-92] 3 N.Z.B.O.R.R. 26. At one stage in the further argument in the present case it appeared to be suggested for the appellant that a mere claim by counsel is sufficient to raise a Bill of Rights issue. But any such suggestion became qualified in the debate between bench and bar; and we reaffirm that an evidential foundation must exist. Of course it must be a real foundation, in that from the prosecution evidence and any cross-examination thereon, or from any evidence called for the defence, there must appear substantial

reason for exploring the Bill of Rights point. Once that stage is reached, the onus falls on the Crown to prove that there was no relevant breach of the Bill of Rights.

In the present case the appellant gave evidence on the *voir dire* that after the six-hour interview, when about to leave the police station, he asked Constable Ratapu whether he could leave but that the constable told him to stay and sit down. Regarding the crucial subsequent interview by Detective Bass which commenced at 5.16 p.m., he said that he wanted to get out of the station and asked a number of times whether he could go but was told not until they had finished questioning him. The evidence of the appellant's mother that about 8 p.m. she was told that he was not going to be released affords some corroboration, when it is borne in mind that he was not in fact released until some time after 9.17 p.m. The appellant denied that Detective Bass told him that he was not under arrest. There was thus an ample evidential foundation for the claim of detention.

On no standard of proof (this judgment need not be lengthened by discussing whether the criminal or the civil standard is appropriate) has the Crown negatived detention. For his part Constable Ratapu said he could not remember what happened but it could have been as the appellant described. Detective Bass claimed that he told the appellant that he was not under arrest, and the trial Judge accepted that evidence, but this is inconclusive in the light of the police claim or view that arrest and detention are not synonymous. If the detective said that the appellant was not under arrest, he might well only have meant, in accordance with the argument for the Crown at our earlier hearing, that he was not formally charging him, nor at that moment expecting to do so. Certainly he did not claim that he had in any way indicated to the appellant that he was free to go.

In the result the case must be approached on the basis that he appellant was detained at the material time, either because the Crown should not be allowed to limit its concession or because that is in any event the proper basis of approach on the evidence.

The next question under s.22 is whether the detention was arbitrary. 'Arbitrary' is a somewhat elastic word. Dictionary definitions include *discretionary*, *despotic*, *capricious*. Black's Law Dictionary, 5th ed. (1979), includes among its definitions *without fair, solid and substantial cause*; *that is, without cause based upon the law*, citing *U.S.* v. *Lotempio*, D.C.N.Y., 58 F. 2d 358, 359. Chambers English Dictionary, 7th edition (1988), gives as its first definition *not bound by rules*.

Judicial and equivalent authority is also divergent. In article 9(1) of the International Covenant on Civil and Political Rights, which corresponds to the New Zealand s.22, the Human Rights Committee of the United Nations held in 1990 that to avoid arbitrariness a remand in custody must not only be lawful but reasonable and necessary in all the circumstances: *van Alphen* v. *The Netherlands,* Comm. No. 305/1988, GAOR, 45th Sess., Supp. No. 40, (A/45/40) 1085 at p.1125, para. 5.8. On that view it would appear that unlawful detention is necessarily arbitrary, unless the Committee was influenced by the reference in the article to unlawful as well as arbitrary deprivation of liberty. The long title of the New Zealand Bill of Rights Act states in (b) that it is an Act 'To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights'. Whether a decision of the Human Rights Committee is absolutely binding in interpreting the New Zealand Bill of Rights Act may be debatable, but at least it must be of considerable persuasive authority. Similarly, in the same year in *van der Leer* v. *The Netherlands*, 12/1988/156/210, p.6, para. 22, the European Court of

Human Rights, considering whether detention was 'lawful' for the purposes of Article 5(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, held that the purpose of such provisions is 'to protect individuals from arbitrariness'. So too in a well-known passage in *Sharp* v. *Wakefield* [1891] A.C. 173, 179, Lord Halsbury L.C. in speaking of discretion distinguished what is 'arbitrary, vague, and fanciful' from what is 'legal and regular'.

There is also a line of Canadian authority that, for the purpose of provisions of the Canadian Charter of Rights and Freedoms and the Canadian Bill of Rights referring to arbitrary detention or imprisonment, what is required to negate arbitrariness is *both* specific authorisation under existing law and reasonableness or just cause: see for instance *Iron* v. *R.* [1987] 3 W.W.R. 97, 117. That is also the view favoured by Professor Peter Hogg in his *Constitutional Law of Canada* 3rd ed. (1992) 1073. Other Canadian judicial authority favours a rather less exacting test. Thus in *R.* v. *Duguay* (1985) 18 D.L.R. (4th) 32, 39-40, it was said that if a person making an arrest honestly though mistakenly believes that he has reasonable and probable grounds, but the Court finds that the facts fall just short of establishing that lawful justification, the arrest could nevertheless not be said to be arbitrary. More importantly for present purposes, however, the actual decision of the Ontario Court of Appeal in *Duguay* was that detention for the unlawful purpose of questioning or further investigation is arbitrary. On appeal to the Supreme Court of Canada, the Crown conceding that there had been a breach of s.9 of the Charter, the majority of the Court declined to interfere with the ruling that the evidence so obtained should be excluded: see (1989) 56 D.L.R. (4th) 46.

On the present argument some reference was made for the Crown to the drafting history of s.22 of the New Zealand Act as appearing from the 1985 White

Paper *A Bill of Rights for New Zealand* and an Interim Report of the Justice and Law Reform Select Committee in 1990. But, in relation to the present question, we find nothing sufficiently cogent in that material to require express discussion in this judgment. Likewise we note without discussing the submission for the appellant that such materials should not be allowed to 'freeze' the interpretation of a living instrument such as a Bill of Rights.

A comprehensive ruling on the meaning of 'arbitrary' in s.22 is not now called for. We leave open the possibility that there may be some limited exceptions to the principle that in general unlawful detention will be arbitrary detention. We have in mind such cases as detention unlawful yet imperative for the safety of the detainee or other persons, or detention in good faith for reasons falling just short of reasonable and probable grounds under ss.36, 37 or 38 of the Crimes Act 1961, as envisaged in *Duguay*.

What is clear is that detention for questioning on suspicion of a crime or for some other reason is not lawful under the present New Zealand statute law. That has been stated by this Court and other Courts again and again in recent years and earlier. It is enough to mention *Blundell* v. *Attorney-General* [1968] N.Z.L.R. 341. It was common ground in the argument before us. It is a well-established and basic principle, and at least in the absence of special circumstances an infringement of it must be held to be arbitrary. In the present case there were no pressing reasons of personal safety or the like nor any other special circumstances which could be thought to warrant or excuse the detention. Further than that we need not now go. We add that if the whole period of detention be regarded as attributable to Constable Ratapu's direction, the result is no different. The constable gave no reason for it, but the most plausible reason is that he thought that further questioning might be needed. And, of course, the constable's direction would have

had no significant consequence if Detective Bass, on finding the appellant waiting, had told him that he was free to go.

The remaining issue under s.22 is whether the evidence obtained during the arbitrary detention should be excluded. Equally clearly the answer must be Yes. As noted in *Ministry of Transport* v. *Noort* [1992] 3 N.Z.L.R. 260, 274, Canadian case law has moved to the point that, where a confession has been obtained after a violation of Charter rights regarding counsel, proof of a causal link is not insisted on before the evidence is excluded. In New Zealand we think that at the least the Crown must establish, as indeed Crown counsel accepted, that breach of the right did not cause or contribute to cause any inculpatory statement. That onus is certainly not discharged here. The inherently coercive effect of detention combined with the nature of the questioning may well have induced such admissions as the appellant made.

The most effective remedy for the breach of the appellant's s.22 right is exclusion of the evidence. The existence of any other remedies is immaterial. We hold that the limited admissions made by the appellant during the interview should be excluded from evidence. It is not in dispute that, in that event, there is insufficient evidence to support a conviction. In the opinion of the majority of the Court, the appeal against conviction must succeed on this ground.

A serious question also arises as to whether in any event the evidence should be excluded under the common law principles considered in *R.* v. *Wilson* [1981] 1 N.Z.L.R. 316, but there is no need to lengthen this judgment by going into that question.

The Manslaughter Verdict

By contrast it would not be right to fail to grapple with the entirely separate question whether, even if the challenged evidence were admissible, it would be sufficient to support the conviction for manslaughter. Though peculiar to the particular facts, it is an important question in the case. Regrettably the unusual history of the case has meant that we have not had occasion to consider it earlier, but it has now been fully argued. One member of the Court prefers to decide the case solely on this ground.

The baby, aged seven weeks, died on 25 February 1991. She had been in the Waikato Hospital from 17 to 22 January 1991 under examination and testing because she had been having seizures. The anti-convulsant phenobarbitone had been prescribed. A CAT scan was performed during this period and later, on 20 February 1991, there was a readmission when an EEG was performed. None of the tests detected any causes for the seizures; but small bleeding, particularly at the base of the brain, could have been missed. The pathologist called for the Crown, Dr Viggiano, testified that in his autopsy on 26 February 1991 he discovered both old (more than three weeks) and new (less than four days) injuries to the brain, apparently caused by a series of traumas which could have included shaking or impact injuries. There had been subdural bleeding at the base of the brain stem and subarachnoid bleeding on the surface of the brain. There was also some tearing of the brain tissue. He could not say that it was pathologically proved what caused the baby to die, but attached importance to the collection of blood round the brain stem. He assumed that there had been a recent episode of trauma after a doctor and a Plunket nurse had found nothing wrong with the child on 22 February.

Called for the Crown at the trial, the 19-year old mother of the child, with whom the appellant had been living, gave evidence of having shaken the baby herself. In particular she said that a couple of days before the baby died and after the brain scan on 20 February she found that the baby was not breathing and shook her for three or four minutes until she started breathing again. She had not told anyone of this previously and in his final submissions at the trial the Crown prosecutor invited the jury to treat this evidence as a fabrication.

The Crown case throughout the trial and since has been that the appellant contributed to cause the child's death by shaking her. The relevant admission obtained from the appellant during the second interview on 28 February 1991 was to the effect that on 20 February 1991, before the EEG on that day, he had shaken the child for about a minute to stop her crying; he had shaken her 'real hard' with her head going up and down and also sideways; she had gone limp and then slept for half an hour, waking up screaming or crying.

The indictment was as follows:

	THE CROWN SOLICITOR AT HAMILTON CHARGES THAT:
Crimes Act 1961 Ss. 177, 160(2)(a) & 171	(1) ZANE LEONARD GOODWIN between the 12th day of January 1991 and the 25th day of February 1991 at Taumarunui by unlawful acts, namely assaults, caused the death of Amber Cherie Goodwin and thereby committed manslaughter.

It will be noticed that a number of unlawful acts, namely assaults, were charged. This reflects the discovered indications of a series of traumas. The trial Judge correctly directed the jury in terms of *R.* v. *Smith* [1959] 2 Q.B. 35, 42-3,

that the Crown had to prove that the shaking admitted by the accused was an operative and substantial cause of the baby's death.

In that setting the following passages in the cross-examination of the pathologist assume major significance:

> Q. At best you could only say that these separate injuries could be contributing factors to the child's death?
> A. No. I think that they caused the child's death.
> Q. Cumulatively?
> A. Yes.
> Q. On an individual basis at best, you could only say on an individual basis that the particular injury could have contributed to the child's death?
> A. Right.
> Q. And I understand your evidence to be that the cumulative effect was, to use Mr Morgan's expression, that the brain stopped sending signals to the baby to breathe?
> A. Right.

And again:

> Q. Now I think we have a misunderstanding here, we start upon the basis that there are old and new injuries to the brain?
> A. Right.
> Q. That it's possible that the cumulative effect of all these injuries led to the baby's death?
> A. Right.
> Q. That individually you can't say any more than the individual injuries could be a contributing factor?
> A. Right.

The net result of the pathologist's evidence is thus no more than that the one episode of shaking to which the appellant admitted *could* have contributed to the

death. Although the admission was to quite a violent shaking, on the pathologist's evidence it apparently could not have accounted for the fresh injuries found in the autopsy.

The circumstances are highly suspicious and it is of course possible that there were more episodes of shaking by the appellant, or that the pathologist was incorrect either in his opinion about when the recent injuries were inflicted or in some other way. But the evidence is insufficient to warrant any such conclusion beyond reasonable doubt. Nor did the summing-up leave the case to the jury on that basis. It would seem that the Crown relied only on the admitted shaking on 20 February.

The case is very near the borderline, but the standard of proof required to establish a criminal charge has to be borne in mind. With some reluctance we are forced to the conclusion, having regard particularly to what the pathologist said, that the evidence did not support a finding beyond reasonable doubt that any acts of the appellant caused or materially contributed to cause the death. This is a second ground, altogether independent of the Bill of Rights one, for holding that the conviction for manslaughter cannot stand. On both grounds the appeal must be allowed, the conviction quashed and a verdict of acquittal entered.

From one point of view it is unfortunate that because of the unusual course that the case has followed the appellant has served imprisonment for some 15 months before this result. On the other hand there can be no doubt that the child was seriously assaulted while in the care of the appellant and the child's mother. The second ground of our decision merely means that even if no evidence were excluded the conviction for manslaughter could not stand. The criminal proceedings against the appellant are now, however, at an end.

R B Cooke P.

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