IN THE COURT OF APPEAL OF NEW ZEALAND CA 47/95

THE QUEEN

v

WAKA TUNOA GREY

Coram	Hardie Boys J McKay J Blanchard J
Hearing	15 June 1995
Counsel	Rachael M Adams for Applicant J C Pike for Crown
Judgment	30 June 1995

JUDGMENT OF THE COURT DELIVERED BY HARDIE BOYS J

Waka Tunoa Grey applies for leave pursuant to s 379A of the Crimes Act 1961 to appeal against a pre-trial ruling that his statement to the police confessing to his participation in an aggravated robbery is admissible at his forthcoming trial. Admissibility is challenged on the grounds of breach of the rights affirmed by ss 22 and 23 of the New Zealand Bill of Rights Act 1990.

Late in the afternoon of 10 January 1994 Constable Neilson of the Greerton Community Policing Centre spoke to a young man who only shortly before had been

attacked by two youths and had had his money taken by a third who was with them. He identified one of his assailants as Grey, whom he knew. At about 6.50 pm the constable found Grey and another youth, Shortcliffe, in the vicinity. They were both clearly under the influence of alcohol or drugs and were "tensed up" and aggressive. She asked them to accompany her to the police station where she wished to ask them some questions. They agreed, and without incident went the short distance with her in her car. On arrival at the station, however, the constable, who knew there was no one else there, became apprehensive at Grey's manner. He said nothing, but in her words became very agitated and aggressive; his fists were at his side, tightly closed, he was tense, seething, "just about hissing". They were standing alongside the holding cell, and she asked Grey if he would wait there. He went in, and she locked the door on him. She then endeavoured to obtain assistance, but without success. Shortcliffe was standing by the counter or following her about as she did so, eating potato chips. Then after about 10 minutes, the complainant arrived: she had asked him to come for his injuries to be photographed. He at once pointed to Shortcliffe as one of his attackers. Shortcliffe then became agitated and aggressive, as Grey had been, and so the constable asked him too to go into the holding cell. He did, and she locked him in also. Immediately one or both of the youths began kicking or punching the cell walls and door. This made her unwilling to let them out until she had help. She dealt with the complainant, and then telephoned her Senior Sergeant. He was not home, but rang back in 10 minutes. That would have been at about 7.30 pm. He arrived with another officer at 8 pm. She then let Grey out of the cell. By then he had been there for a little over an hour. He had quietened down. She cautioned him and appropriately advised him of his rights under s 23 of the Bill of Rights Act and offered him a telephone and list of solicitors he could ring. He said he did not want to speak to a solicitor. It was decided that he should be interviewed by a detective, and he was kept waiting, probably in the waiting room, until a detective arrived. The detective commenced his interview at 8.55 pm., beginning with a further caution and further s 23 advice. Again Grey said he did not want to speak to

a solicitor. He impressed the detective as a pleasant young man (he was at the time just under 18 years of age) who was cooperative and readily answered the questions. He certainly made a full and frank confession, volunteering an account of what had occurred without prompting from the detective.

At the hearing of the Crown's application under s 344A for a ruling on the admissibility of the confession Constable Neilson and the detective gave evidence and were extensively cross-examined. The constable acknowledged that she could have let Grey leave, but that she wanted to keep him there for questioning. Grey did not give evidence.

The Judge did not consider that the journey in the car involved an arrest or a detention, but of course held that Grey was detained when he was locked in the holding cell. It is not entirely clear whether he thought that detention unlawful. However he thought that the circumstances were such as to bring the case within what was seen by this Court in *R v Goodwin (No 2)* [1993] 2 NZLR 390 at 394 as a possible exception to the general principle that unlawful detention will be arbitrary detention and so in breach of s 22 of the Bill of Rights Act. In that case, the possible exception was said to be where the detention is "imperative for the safety of the detainee or other persons", or "is effected in good faith for reasons falling just short of reasonable and probable grounds under ss 36, 37 or 38 of the Crimes Act 1961" (which give immunity to persons making an arrest in certain circumstances). In case he were wrong about that, the Judge went on to hold that in the absence of evidence from Grey, and in light of the caution and full Bill of Rights advice he was given twice before he made his incriminating admissions, the Crown had discharged its obligation to show there was no causal link between the breach and those admissions.

There can be no doubt that there was a breach of Grey's rights. Ms Adams submitted that the detention began when Grey accepted the invitation to go to the

station in the constable's car. We accept that in some circumstances such as these there could be a detention but in the absence of any evidence from the appellant we are not prepared to hold that what occurred at this stage was. But the point is not important, for locking Grey in the cell certainly was an unlawful detention. Constable Neilson did not purport formally to arrest him. She had no grounds for doing so with respect to his conduct in the police station, and although she may have had grounds to arrest him for the robbery, she had no present intention of doing so, as quite appropriately she first wished to learn his version of events from interviewing him. Her reason for locking him up was to detain him until, with the arrival of assistance, she could feel safe to undertake the interview. She had no right to do that. The police may not detain suspects for questioning. As was said in *R v Goodwin (No 2)* [1993] 2 NZLR 390 at 394, this is a proposition that the Courts have stated again and again in recent years. The locking of Grey in the cell was therefore unlawful. With all respect to the District Court Judge, we think it was also arbitrary. There was no occasion for it. One can appreciate the constable's anxiety, alone as she was in the station with two intoxicated youths. But this was a situation she had brought upon herself. It appears that she knew there would be no other officer at the station, yet she chose to take the youths there. And as she acknowledged in cross-examination, she could have made it clear to Grey that he was free to go. The circumstances were not such that locking him up was imperative for her safety. There was therefore a breach of s 22. Once having locked him up, one can understand why she did not want to release him. But she had brought that situation upon herself too. Thus the breach continued.

There was also a breach of s 23(1)(a) and (b). For there was plainly an arrest, as that expression is to be understood for the purposes of s 23. A majority in *R v Goodwin* [1993] 2 NZLR 153 at 181 accepted this proposition:

> If a police officer makes it clear to a suspect that he is not free to go and is to be interrogated by the officer on suspicion of a crime, that person is arrested within the meaning of s 23(1)(b) of the New Zealand Bill of Rights Act. Under the present law of New Zealand the arrest is not lawful.

Grey had been asked to go to the police station to be questioned, and the turning of the key on the cell door was as clear an indication as one could imagine that he was not free to go; more emphatic even than the handcuffing in *R v Kirifi* [1992] 2 NZLR 8. He was therefore arrested, and thereupon became entitled to be told the reason (s 23(1)(a)) and of his right to consult and instruct a lawyer without delay (s 23(1)(b)). The reason was not given to him at all. The information as to his entitlement to a lawyer was given an hour or so later. The Court has not yet had occasion to consider the right to a reason for the arrest as a distinct issue. It is usually bound up with the right to a lawyer, and that is how we think it should be considered in this case. The obligation to inform about the right to a lawyer arises on arrest and the information must be given as soon as practicable thereafter: *R v Mallinson* [1993] 1 NZLR 528. That obligation was not met, and there was therefore a breach of s 23(1)(b), as well as of s 23(1)(a).

In accordance with the way in which the law in this respect has up to now been developed, the onus is on the Crown to satisfy the Court on the balance of probabilities, regard being had to the gravity of the subject matter, that the breaches did not materially contribute to the obtaining of the confession: *R v Te Kira* [1993] 3 NZLR 257.

Ms Adams submitted that the Court should not assume that the breaches of s 23(1) were of no consequence. Her point was that had the requisite information been given at the proper time, Grey may well have exercised his right to a lawyer, who might then have advised him not to answer any questions. One could add that a lawyer might also have been able to persuade the constable that she had no right to

detain him further. However the fact that later, on two separate occasions, Grey declined the opportunity to speak to a lawyer when it was offered to him suggests that these are highly speculative possibilities. We are satisfied that the reality is that the breaches of s 23(1) had no bearing on the subsequent admissions.

The admissibility issue therefore turns on the effect of the wrongful detention, the breach of s 22. This was the question the District Court Judge addressed; the other does not appear to have been canvassed before him. He was satisfied that the onus had been discharged. We see no reason to take a different view. It is true that Grey had quietened down by the time he was let out. That may well have been due, as the Judge thought, simply to his having sobered up. It may also have been due to the fact that there was no longer just the woman constable there; there were now two men as well. There is however no basis in the evidence for thinking that he had been intimidated or cowed into subjection, so that his readiness to confess was a result of what had gone before. It is to be remembered that at the outset he was willing to go to the station and to be questioned. There is no reason to think he would not have made the same admission then that he did later. Later, his rights were fully explained to him on two separate occasions before the interview began. In the absence of evidence from him, the Court must accept the evidence of the interviewing detective as to his demeanour during the interview, and is entitled to draw from that evidence the conclusion that this was not a case of a suspect "softened up", in Ms Adams' words, by his experience. Ms Adams stressed Grey's youth and his lack of sophistication and experience with the police. There is evidence of his age, but none as to the other matters. However, the account he gave to the detective as to what had occurred that day, and the condition in which Constable Neilson found him, make it clear that he was no callow youth.

What for brevity is often called the prima facie exclusion rule does not mean that an inculpatory statement will always be excluded if it follows an arbitrary

detention. Aneed to be considered. Then, it is a matter of judicial judgmiot there is an appreciable causal link between the detention and onfess. The District Court Judge exercised that judgment and that he was in error in the conclusion to which he came.

The appeal is refused.

Solicitors

Adams & Horplicant
Crown Law O