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IN THE COURT OF APPEAL OF NEW ZEALAND

CA118/2009
[2009] NZCA 165

THE QUEEN

v

THOMAS JAMES TOCKER

Hearing: 27 April 2009

Court: Robertson, Chisholm and Gendall JJ

Counsel: P J Norcross for Appellant
J Pike for Crown

Judgment: 4 May 2009 at 9 am

JUDGMENT OF THE COURT

A Leave to appeal against pre-trial ruling is granted.

B The appeal is dismissed.

C Order prohibiting publication in news media or on internet or other publicly accessible database until final disposition of trial. Publication in law report or law digest permitted.

REASONS OF THE COURT

(Given by Chisholm J)

[1] Mr Tocker faces trial in the District Court at Christchurch on two counts of aggravated robbery and one of intentionally damaging a motor vehicle by fire. In a pre-trial ruling Judge Holderness held that an interview on 16 March 2008 known as the "notebook interview" was inadmissible but that a written statement made by the accused immediately following the notebook interview was admissible.

[2] Pursuant to s 379A(1) of the Crimes Act 1961 Mr Tocker seeks leave to appeal against the ruling that the written statement is admissible. He contends that the inadmissible notebook statement "tainted" the written statement, thereby rendering the written statement inadmissible.

Background

[3] On 14 March 2008 a person entered a Christchurch pizza store armed with what was believed to be a Molotov cocktail and forced staff members to hand over money. The following day, at approximately 9pm, a similar robbery was carried out at a Christchurch service station.

[4] Shortly after the service station robbery a Subaru motor vehicle was set alight and the police received a telephone call from a person who observed two men running from the burning vehicle to a white Ford Falcon that was parked nearby. From the registration number of the Ford Falcon provided by the caller the police established that the vehicle belonged to the appellant.

[5] On 16 March 2009 the police went to the appellant's address to execute a search warrant. Around eight police officers attended. The officer in charge had assigned Detective Tinkler to interview the appellant.

[6] Although there was a conflict between the evidence of Mr Tocker and that given by Detective Tinkler about the circumstances leading to the appellant accompanying the officer to the police station, Judge Holderness found that

Mr Tocker voluntarily accompanied the detective. At the police station the detective told Mr Tocker that the police were investigating aggravated robberies at the pizza store and service station where Molotov cocktails had been used by the offender and that the "offending vehicle" had been burnt out. The appellant responded:

> "I don't know anything about any aggravated robberies or any burnt out car. I went down to Caledonian Road at about 9.00pm last night to pick my car up.

It is not disputed that this evidence is admissible.

[7] Without providing the accused with a caution or his Bill of Rights the detective then put eight questions, known as the "notebook interview", to Mr Tocker:

Q. Is that your white Falcon you're referring to?

A. Yeah it's been sitting there for two to three days.

Q. When did you leave the vehicle in Caledonian Road?

A. It's been there for 48 hours. I tried driving it to the supermarket, it broke down and I left it there.

Q. Who picked you up from there?

A. No one, I walked home. At lunch time on Friday I got my mum to take me to the vet. On the way home we stopped to get some petrol to put in the Falcon. Mum bought me $8 worth of gas and we got the petrol at the Mobil Service Station in Bealey Avenue. Last night I took the petrol can from home and walked down to Caledonian road by myself to pick up my car. I took the petrol can with me.

Q. What sort of petrol can is it?

A. I've got a couple, 5 litre plastic red ones.

Q. Where is the can now?

A. It should be in the Falcon. I'm actually wondering if it's still on the side of the road.

Q. And you started the car okay?

A. No, really roughly and it was petrol related. It normally runs on LPG.

Q. So what day did your car break down in Caledonian road?

A. It must have been Thursday.

Q. How close to the Caledonian Hotel was it?

A. Just at the end of the houses by the Caledonian car park.

Judge Holderness ruled that this interview was inadmissible and the Crown has not sought leave to appeal against that ruling.

[8] Immediately following the notebook interview Mr Tocker was cautioned and given his Bill of Rights. He then made a written statement.

[9] In his written statement Mr Tocker said that his Falcon car had run out of petrol on Thursday and that he went by himself to pick it up on the Saturday night (15 March 2009) at around 9pm. He said that he used a five litre red plastic petrol container. Mr Tocker said that he did not know anything about the burnt out Subaru, but that his friend who owned the Subaru had told him on Friday night that the Subaru had been stolen. When told by the detective that a small cap from his petrol container had been found by the burnt out car, Mr Tocker had no comment to make. He denied knowledge of the robberies.

[10] Judge Holderness ruled that this statement was admissible and Mr Tocker seeks leave to appeal against that ruling.

[11] On 19 March 2009 Mr Tocker was interviewed again. It is common ground that this interview is admissible and it is unnecessary to make any further reference to it.

Pre-trial ruling

[12] Evidence was adduced before Judge Holderness on both 15 October 2008 and 23 January 2009. The second hearing arose from a change in the Crown's stance (which has no immediate relevance to this appeal). The transcript before us arises from the hearing on 23 January 2009.

[13] Mr Tocker challenged the admissibility of the notebook interview on two grounds: first, it had been unfairly/improperly obtained; secondly, he had not been given a caution or his Bill of Rights before the interview began. Judge Holderness rejected the first ground, but upheld the second ground. He concluded that once the accused had placed himself at the scene of the burning Subaru and had acknowledged being the driver of the Falcon when it left the area, the Detective ought to have cautioned the accused and given him his Bill of Rights.

[14] Admissibility of the written statement was challenged by the accused on the basis that it had been "tainted" by the notebook interview. Having rejected the defence allegation that the notebook interview was effectively a "dummy run" for the later statement (based on *R v Dacombe* HC WHA T990189 1 April 1999) Judge Holderness continued:

> [44] I am also unable to accept Mr Kerr's submission that the written statement is tainted by the notebook interview. In my view a reading of the written statement discloses that the notebook interview did not give Detective Tinkler any advantage over the accused that was unfairly or improperly used as the written statement was taken. Furthermore, I am satisfied that the detective did not rely on the notebook interview in any inappropriate or illegitimate manner. At no point did the detective specifically refer to any matter that the accused had mentioned in the notebook interview.
>
> [45] The detective's questions during the taking of the written statement touched first on the accused's Falcon vehicle. Next, the accused's friendship with the owner of the Subaru was discussed. This friendship had not been the subject of any questions during the notebook interview. In relation to the robbery offences and the arson of the Subaru the written statement was exculpatory.
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> [46] Prior to the taking of the written statement the accused acknowledged that he understood the Bill of Rights advice he had received. Having been asked if he would consent to a video taped interview the accused indicated that he would prefer to make a written statement.

[15] After weighing the evidence given by Detective Tinkler and by the accused on both 15 October 2008 and 23 January 2009, the Judge concluded that the written statement had not been improperly obtained, and ruled it admissible accordingly.

Was the written statement properly admitted?

[16] Before us there was no attempt to pursue the "dummy run" argument. Instead Mr Norcross concentrated on the argument that there was effectively a continuous dialogue from the notebook interview to the written statement and that if Mr Tocker had been cautioned before the notebook interview he might have exercised his rights and declined to make the written statement. In all the circumstances, submitted Mr Norcross, it would be artificial to conclude that the written statement was unaffected by the notebook interview. He contended that *R v Johansen* CA487/99 2 December 1999, *R v Williams* CA101/00 31 July 2000, and *R v Ene-Louis Alo* [2008] NZLR 168 (CA) supported these arguments.

[17] Two arguments were advanced by the Crown in response. First, although the Crown had not sought leave to cross-appeal against the Judge's ruling that the notebook interview was inadmissible, that ruling was in fact wrong and this should be taken into account when determining whether the written statement was admissible. Second, even if the first point is not accepted, the notebook interview did not taint the written statement which was correctly held by Judge Holderness to be admissible.

[18] This Court explained in *R v Ene-Louis Alo*:

> [21] The reason why post-caution admissions are excluded where there has been an earlier breach of the Judges' Rules is because once the first admission is made, the suspect becomes committed to the interview process, including the admission which has already been made. This appears clearly enough from *R v Williams* CA101/00 31 July 2000 at [28] and *R v Johansen* CA487/99 2 December 1999 at [25] …

Whether the suspect has become committed to the interview process is, of course, fact specific. We turn therefore to the facts of this case.

[19] Before the notebook interview began the accused had admitted that he had gone down Caledonian Road at about 9pm to pick up his car. In other words, he placed himself in the vicinity of the Subaru car about the time it was set on fire. That admission had been made with full knowledge that the police were investigating the two robberies and the burning out of what the police believed was

the "offending vehicle". Thus, in the overall context, the admission was of some significance.

[20] If the accused was committed to the interview process (and we doubt that this was the case) it must have been because of his admission prior to the notebook interview rather than any admissions made during the course of the notebook interview. We agree with Judge Holderness that although the written statement was provided immediately after the notebook interview, that interview did not provide the detective with any advantage over the accused that was unfairly or improperly used when the written statement was being taken. We do not accept Mr Norcross' submission that it would be artificial to conclude that the written statement was unaffected by the notebook interview. In all the circumstances the written statement arose from a new phase in the interview process which did not attempt to build on the earlier notebook interview phase.

[21] When giving evidence before Judge Holderness the accused acknowledged that he had understood his rights after he had been cautioned and given his Bill of Rights following the notebook interview. He also acknowledged that, having been given his rights, he was asked whether he wished to have a video interview or make a formal written statement, and that he elected to make a written statement to "help clarify". Significantly there was no suggestion that he felt compelled to make the written statement or that he was in any way confused about his rights. We also note that the written statement is largely exculpatory.

[22] Our conclusion is that Judge Holderness was right when he concluded that the notebook interview did not taint the written statement. It is admissible accordingly. Given that conclusion it is unnecessary for us to consider the Crown's argument that the Judge's ruling about the admissibility of the notebook interview was wrong.

Result

[23] Leave to appeal is granted but the appeal is dismissed.

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