

NZLR

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

20/9

T.142/91

**LOW
PRIORITY**

R E G I N A

1817

v

H ROSE

Charge: Wounding with intent

Voir dire hearing: 16 September 1991

Oral Ruling: 16 September 1991

Counsel: G Hollister-Jones for Crown
 Mrs M F Tuilotolava for Accused

ORAL RULING OF HENRY J

The admissibility of evidence relating to the Police interview of the accused is under challenge. Mrs Tuilotolava puts forward three basic grounds in support of the application to exclude that evidence. First, that there was a breach of s.22 of the New Zealand Bill of Rights Act 1990, which provides that everyone has the right not to be arbitrarily arrested or detained. It was submitted that there was here detention within the meaning of that provision and that

as a consequence the interview which follows should be excluded from consideration by the jury.

The evidence discloses that this accused was regarded as a prime suspect for an alleged attack on the complainant and that the Police visited her residence having obtained a search warrant previously. Following entry to the premises, the carrying out of a search and the obtaining of some clothing of the accused, she was requested to accompany the officers back to the Glen Innes Police Station for the purposes of interview. She was there interviewed in an interview room at the Police Station. In my judgment those facts cannot constitute an arbitrary detention within the meaning of s.22. What happened was no more than is common practice in such a situation, namely a suspect being requested to accompany the Police for questioning. I do not think the section is designed to prohibit that sort of conduct and I find that there was no breach of s.22 of the Act.

The second submission relates to s.23 (1) (b) of the same Act, it being submitted that at either one of two alternative points of time the accused was arrested, and as is common ground she was not at the time advised of any right to legal representation. It was submitted that the interview evidence should

accordingly be excluded. The first point of time relied upon is when the accused was requested by the Police to accompany them in the Police vehicle to the Police Station. As Mrs Tuilotolava has pointed out, at that time the Police were in possession of evidence suggesting her involvement in the alleged incident. They were in possession of a description of her, in possession of a search warrant, and had by then taken possession of the clothing which it was thought she had been wearing on the day in question.

The issue of whether an arrest has or has not been effected is a question of fact and, as has been recently said by the Court of Appeal in Karifi (CA.252/91, judgment 9 September 1991), it is not necessary for that to have occurred for there to have been a formal arrest in the sense that the police officer has so indicated to an accused person and in fact then and there arrested that person in that formal manner. There must, however, be such a situation as in common parlance would constitute an arrest. In my judgment that had not occurred at the time this accused was requested to go to the Police Station. I do not think those actions in the whole of the surrounding circumstances can properly be construed as constituting an arrest. In the alternative, it was submitted that there was an arrest during the course of the interview

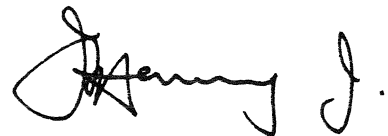
- the particular point of time Mrs Tuilotolava was unable to pinpoint during the course of argument. She relied on the fact that because the Police had during the progress of the interview obtained more information from the accused herself which would indicate her direct involvement in the incident, that they would then have formed the view that she would in due course be arrested, and that she was not then free to leave the Station had she chosen to do so. Mrs Tuilotolava was unable to point to any specific actions on the part of the police officer or officers involved which could constitute an arrest, and I am unable to discern any from the evidence. In my view there must be some positive action undertaken by a police officer before an arrest can be said to have resulted, and I can determine none in the present situation. The mere presence of an accused person at the Station being interviewed, and a growing realisation on the part of the interviewing officer that that person is involved and the likelihood that a formal arrest will shortly result in my judgment does not come within the meaning of s.23 (1) (b), and I find as a question of fact that there had not here been any arrest. It therefore follows that the provisions of the statute have not been breached and there is accordingly no warrant for excluding the evidence for non-compliance.

The third ground relied upon is the general one of unfairness and it is submitted that the Court should exercise its discretion to exclude on that ground. There is no doubt that this accused suffers from a disability, both physical and in relation to her conversational abilities. It is clear from the evidence adduced on the *voir dire* that she has a lowered level of understanding so far as being questioned is concerned, and a marked lower level of being able to make herself understood during the course of a conversation and in particular during the course of an interview such as was conducted here by the police officer. Some question has been raised as to the accuracy of answers given by her to the police officer. In my view those possible inaccuracies impinge only marginally on the Court's discretion to exclude. Whether all of what she said was properly recorded by the officer I think is really a matter for jury determination, assuming the evidence is otherwise held to be admissible.

There were some particular matters of concern raised in support of this ground for excluding the evidence, one being the accused's ability to understand the caution which was administered to her at the outset of the interview. Having heard her give evidence herself, in particular with reference to the giving of

the caution, I am satisfied that she did have an understanding of it, was aware of its content and nature, and elected nevertheless to continue to discuss the issues with the police officer. There is also some measure of concern as to other answers she gave which would perhaps indicate that the person to whom she was at times referring in respect of matters leading up to the incident and the use of the knife was someone other than a real person. That perhaps may indicate either a lack of level of understanding of the question, or perhaps a lack of level of understanding by the officer of her responses to it. But in my view those are matters which can properly be weighed by the jury in the light of the accused's own evidence on the matter, it having been indicated that the accused will in due course be giving evidence. I can find no reason which would require, in the interests of overall justice, the exclusion of the interview evidence from the consideration of the jury.

The application for exclusion will for those reasons be dismissed.



Solicitors:

Crown Solicitor, Auckland, for Crown
M F Tuilotolava, Auckland, for Accused