IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

3/12

T. 126/93

REGINA

2130

v

TAWHARA

Hearing: 22 September 1993

Counsel: A.J.F. Perkins for Crown
M.J.Levett for Accused

Judgment: 22 September 1993

ORAL JUDGMENT OF FISHER J

The accused and four others face trial in the High Court on alternative charges of attempted murder and injuring with reckless disregard. This accused challenges the admissibility of a series of confessional statements allegedly made to the police. The Crown seek a ruling under s 344A of the Crimes Act as to the admissibility of those statements.

Factual Background

On the evening of 20 February 1993 the accused and his four co-accused went to the Eastside Tavern at Otara, Auckland. While they were there, the accused's brother and co-accused, Donovan Tawhara, fired a shotgun which struck and slightly injured the complainant. All five accused then departed from the scene in a vehicle driven by this accused.

Interviews

At 11 am on the following morning, 21 February 1993, Detective Brazier went to a house at Bairds Road, Otara where he located this accused. The accused agreed to

accompany the detective to the police station. On the way to the police station the accused said that he had been at the tavern the previous night with his brother Donovan.

Upon arrival at the police station the detective installed the accused in an interview room and then returned shortly after to conduct an interview. This interview was conducted by question and answer with brief hand-written notes recorded by the detective. It is common ground that the notes are selective only and do not purport to record everything said. There is some dispute as to the timing of certain warnings given by the detective but it is common ground that during this phase the detective cautioned the accused in terms of the Judges Rules and also advised him of his right under the Bill of Rights Act to consult and instruct a solicitor without delay. He also went on to say that the accused had the right to refrain from making a statement. This part of the interview lasted about 40 minutes commencing at 11.35 am. The interview was punctuated by odd occasions during which the detective left the interview room.

At the expiration of that interview there followed a period during which the accused was left on his own. The detective had discussions with his superior officer and other police officers who had been interviewing other suspects. At about 1.15 pm the detective then took the accused to a room specifically designated in the police station for the purpose of conducting video-taped interviews. There he conducted a purported video interview which lasted for approximately 15 minutes. At the end of that interview the detective discovered that he had not properly activated the controls of the video recording machine and that the interview had not been recorded as intended. The detective thought that this discovery came part-way through the interview. I prefer the accused's version that the realisation came only at the end of this interview, when the detective went to play it back to the accused. That would be the logical time for this discovery. I found the detective's recollection as to what it was that prompted him to check the machine somewhat unconvincing, albeit innocently so.

It is clear that, having told the accused about the recording failure, the detective said that he would like to repeat the interview to gain a record of what the accused had already said. The accused readily agreed to this and the exercise was then repeated, this time successfully. That interview ran from 1.36 pm to 1.58 pm. It followed broadly the same sequence as the earlier two interviews. In the earlier two interviews the accused had admitted conveying his brother and others to the tavern in the car and claimed that the first time he had seen his brother with a gun was at the tavern. However in the third and final interview the accused admitted that he had seen his brother obtain the gun at a house before they set out. Earlier he had denied seeing his brother load the gun but in this third and final interview he

agreed that he had seen his brother load the gun in the car. Those two points are potentially relevant to foresight and criminal responsibility on the accused's part.

Grounds of Objection

For the accused Mr Levett objected to evidence of all three interviews. He cited a number of specific grounds but emphasised that in the end it was their cumulative effect which justified exclusion on the broad ground of unfairness. Before arriving at a global conclusion I must deal with each of the specific grounds.

1. Bill of Rights warning not given until later in the interview

The detective said in evidence that he had given the accused the Bill of Rights warning as the very first step in the first of the three interviews. That is denied by the accused who says that it was at the end of the first interview that he received that warning. On this question I prefer the evidence of the detective. The reference to the Bill of Rights warning is contained in the detective's notebook at a place in the chronological sequence which would be expected on his version. Secondly the accused, at the request of the detective, has signed his name opposite that warning. The accused's explanation that he thought that he was signing as to the correctness of his name and address is unconvincing given the position of the signature. Thirdly, the accused's evidence as to the timing of the warning was initially equivocal. For these reasons this ground of objection is not upheld.

2. Accused not told of voluntary lawyer list

While accepting that the Bill of Rights warning given by the detective complied with the literal requirements of s 23(1)(b) of the New Zealand Bill of Rights Act, Mr Levett submitted that the circumstances of this case required that the warning include reference to the existence of a voluntary lawyers list. In his submission, the critical factors which made this necessary were that the accused must have presented to the detective as an impoverished person, that as this was a Sunday lawyers would be difficult and expensive to obtain, and that the prospective charge of attempted murder was a particularly serious one. He combines that with the accused's evidence now that he thought that he would be unable to pay for a lawyer and that being a Sunday he thought he would have to pay for one immediately if obtained. For those reasons Mr Levett submits that for all practical purposes the Bill of Rights warning given to the accused was ineffective.

So far as I can see the answer lies in ***R v Mallinson*** 1 NZLR 528. There the Court of Appeal held with reference to the Bill of Rights warning that "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". On that approach I would have thought that having received the initial Bill of Rights warning from the detective, it was for the accused to indicate in some way that he wished to exercise it, albeit that he could see certain difficulties in the way of doing so. Only then would the detective have an obligation to take matters further by explaining how it was that effect could be given to the right. ***Mallinson*** seems to indicate that in the usual case such matters can normally be left until there is an affirmative reply to the initial inquiry to see whether the suspect is interested in trying to seek the services of a lawyer at all. Otherwise it might be difficult to say just how far the police should go in trying to foresee and forestall in advance whatever practical concerns might assail the suspect. The police are not mind-readers. It is not much to ask of a suspect that he or she simply show some interest in the subject when it is first raised. In ***Mallinson*** the Court no doubt had it in mind that it is rather easy to later invent or rationalise misunderstandings alleged to have interfered with the exercise of the right to a lawyer when the real reason may have been nothing more than the fact that the suspect did not want one.

Mr Levett pointed out that in ***Keni v New Zealand Police; Batistich v Ministry of Transport*** CA 98/93, 3 September 1993 at p.11 the Court of Appeal appeared to leave open the possibility that an accused person should be told of the availability of the voluntary lawyer list as a matter of routine. In ***Keni*** the Court of Appeal had commented in response to such a submission that "It is unnecessary to decide this case to enter into that territory". But I doubt whether ***Mallinson*** on that point was intended to be nullified by such an equivocal side wind. Nor do I find it easy to draw any realistic distinction between advice as to the means by which the lawyer access right could be facilitated in terms of the availability of a telephone, telephone directories, visits to or by lawyers etc. on the one hand, and the means by which such a lawyer might be paid for, or obtained from a volunteer roster list, on the other. All seem to me to have to do with the means by which the basic right is to be facilitated.

I acknowledge that in the end these matters are not to be decided by fact-specific rules but rather by reference to the substance and effect of the warning given in the circumstances of the particular case. If the spirit of s 23(1)(b) is to be complied with, the right to speak to a lawyer must be presented to the suspect as one which is meaningful and useful to him. However ***Mallinson*** seems to indicate that at least in the usual case that would be the result of using the words of the very statutory provision itself. In some special cases it might be an empty exercise to even mention the subject of lawyers without fleshing out from the beginning the way in which their genie-like potential could be converted into a reality. But generally

speaking it appears that so long as it is conveyed to a suspect that there is a right to a lawyer, it is up to the suspect to respond with some indication, however wistful and despairing, that he or she would have liked to take advantage of it before the police can be expected to go the extra mile of explaining how that can be brought to pass.

In this case it was Sunday, the accused was not conspicuously wealthy, and he faced a potentially serious charge. On the present state of the law those points do not appear to qualify as special reasons requiring the detective to go further than the basic advice contained in the wording of s 23(1)(b) unless and until the accused displayed some interest in the subject. This ground is not upheld.

3. Breach of Rule 9 of Judges Rules

Mr Levett pointed out that in terms of Rule 9 of the Judges' Rules any statement taken by a police officer should, whenever possible, be taken down in writing and signed by the suspect after it has been read over to the suspect and after the suspect has been invited to make any desired corrections.

It is common ground that in the first interview that procedure was not followed. To begin with, the record made by the police officer did not purport to be a comprehensive, or even fully accurate, record as to what was said. Certainly no attempt was made to read it back or to give the accused an opportunity to correct it. Indeed the detective candidly said that at the time he was not worried about ensuring that the record he made was entirely accurate since he saw that discussion as essentially an exploratory one as a preliminary to a formal video-taped interview later, as distinct from an interview conducted for evidentiary purposes in itself.

In my view Rule 9 ought to be invoked in this case. It is more than a mere technicality. There is a real danger here that the detective's recollections and record of the interview could be inaccurate. It could also be unfair to the accused, given the lack of opportunity to correct those inaccuracies. For those reasons the content of the first interview will be ruled inadmissible.

4. Coercive element in the first two interviews

Mr Levett submits that the fact that the first interview was not properly recorded, and that the second was not recorded at all, is a reason for rejecting evidence as to the third, notwithstanding the fact that the third was fully and accurately recorded by video-tape.

I accept that the sequence on this occasion was undesirable. It seems to me that where the police intend to conduct a video-taped interview it is an undesirable practice to conduct a preliminary interview first, particularly one which is inadequately recorded. That course will inevitably expose the police to the very type of allegations which have followed in this case. It returns the police to the old situation in which, because there is no video-tape record of the first interview, allegations will be made (perhaps with justification) as to what went on then, and hence the prejudicial effect which those events might have had upon the video-taped interview which followed. The whole point of video-taping an interview is to escape disputes of that nature. If there is some compelling reason for conducting an initial interview which is not video-taped, then at the very least the police should be scrupulous to ensure that all the old conventional principles, with particular reference to Rule 9 of the Judges Rules, are observed in that earlier interview.

The second interview in this case, that is to say the abortive video interview, is in a different category. I accept the detective's evidence that the failure to record was entirely accidental. That sort of thing is bound to happen from time to time. I would have thought that in that situation the wise thing to do the second time around would be to summarise as far as possible the circumstances and content of the previous interview and to obtain the suspect's acknowledgment that the summary is accurate and comprehensive, before going on to ask any further questions of a non-leading nature. If this acknowledgment is properly given and permanently recorded it should go a long way to avoiding allegations later that the ultimately recorded interview was tainted by something prejudicial or coercive which had occurred during the abortive interview.

However, the mere fact that the ultimate interview has been preceded by unrecorded interviews is not per se a reason for rejecting evidence of the ultimate interview. The lack of a record of the earlier interview is in itself neutral. What matters is whether as a question of fact what took place during the earlier interview might have in some way impacted unfairly upon the ultimate interview. Once the matter has been put in issue it is for the Crown to exclude that possibility.

In this case if one accepted the detective's account of the preceding interviews there could be no factors vitiating the final interview. That is to be contrasted with two criticisms made by the accused. These turned out to be rather more innocuous than Mr Levett had foreshadowed in his opening. The first boiled down to the allegation that there was a degree of cross-examination. The accused says that during the first interview the detective left the room briefly and when he returned he told the accused that he knew that the accused was lying. The inference was of course that the detective had in the meantime obtained more incriminating evidence from another source. Cross-examination during interview is technically a breach of Rule 7 of the Judges Rules. Some latitude is usually allowed on this aspect. If sufficiently oppressive it could have resulted in rejection of the content of the first interview. The evidence is not sufficient to show that the boundary was crossed. In any event I have already rejected evidence of that interview. I do not say that cross-examination during an earlier interview is entirely irrelevant to the admissibility of a subsequent interview but the connection is certainly more remote. The jury will see a video-tape of the ultimate interview. To a large extent they should be able to judge for themselves whether the accused was speaking freely and spontaneously or whether he appeared to be someone who had been worn down by earlier oppressive cross-examination. This ground is not made out.

The accused's other criticism of the detective was that during the initial interview he said at one point "tell the truth and you should be allright" in a context which implied that it was his brother who would be prosecuted. Mr Levett submitted that the detective had effectively tricked the accused into co-operating in return for immunity from prosecution. I accept that the detective told the accused to tell the truth. Although the detective does not remember saying so, it is also probable that he said that the accused's brother would be the one who was most at risk in the whole affair. That would have been perfectly consistent with the facts as understood at that time, namely that it was the brother who had taken the gun and fired it at the complainant. But I do not think that the detective went so far as to hold out the expectation that if this accused co-operated he could rely upon freedom from prosecution. Of some importance I think is the evidence, accepted by both the accused and the detective, that the accused was fully co-operative throughout this whole matter and was always happy to answer questions. The accused was unable to remember for much of his evidence why it was that during his period at the police station he changed his mind and decided to give a fuller account of events. If the notion of some bargain with the detective had been uppermost in his mind as the factor which tricked him into giving the full story in the final interview, I would have thought that he would have no difficulty in remembering that. My conclusion is that the allegations of coercion or bargain during the earlier interviews cannot be sustained.

Failure to advise accused that he did not have to participate in the final video interview

Mr Levett submitted that at least by the end of the abortive video interview, the detective must have known that the accused would be charged with a serious offence, if not attempted murder. He submitted that with that conclusion he ought to have advised the accused that he did not have to co-operate in going through the video interview again.

I accept that the detective must have appreciated that the accused would face a serious charge, at least by the end of the abortive video interview, and probably earlier. However, the main significance of that conclusion was that it would have triggered any unsatisfied obligation to give the customary caution under the Judges Rules. In itself it was not a reason for desisting in further attempts to obtain a video-taped interview. To record such an interview can be as important to a suspect as it is to the police. As to a warning that he did not have to take part in a repeat of the abortive interview, it is common ground that the accused had already been given the customary caution "You do not have to say anything and anything that you do say may be taken down and given in evidence". The whole point of the caution is to remind the suspect that he does not have to say anything. In this case it is repeated at the commencement of the final interview. Following neutral introductory matters the following exchange is found:

" Q. Um.. I have to tell you again that you're not obliged to say anything, but anything you do say.. anything.. sorry, you're not obliged to say anything unless you wish to do so, but anything you do say will be recorded and maybe shown in evidence. D'you understand that?

A. I understand it.

Q. Also, that you have the right to consult and instruct a lawyer without delay ..

A. Yep.

Q. ... you have the right to refrain from making any statement, you understand that as well?

A. I understand.

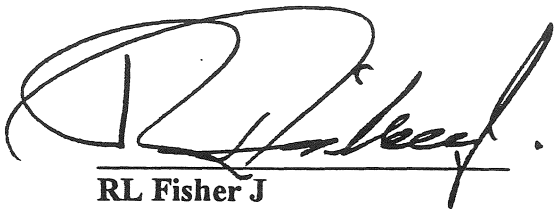
Q. O.K. We'll just go through what happened yesterday .."

That in essence is the warning called for by Mr Levett.

Overall Conclusions

In the end one should stand back from the details and ask whether in all the circumstances it would be unfair to allow the Crown to adduce evidence as to the interviews. I have already accepted that it would be unfair to allow evidence as to the first of the three interviews. There has been no attempt by the Crown to adduce any evidence as to the second interview. All that remains is the third and final interview. Taking all the circumstances in the round I do not consider that it would be unfair to admit that evidence.

Evidence as to the first interview is excluded. Evidence as to the final interview is ruled admissible.



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