F W Guest Memorial Lecture 1992

RIGHTS AND RESPONSIBILITIES IN THE CRIMINAL JUSTICE SYSTEM

THE HON J BRUCE ROBERTSON*

Francis William Guest, MA, LLM, was the first Professor of Law and the first full-time Dean of the Faculty of Law in the University of Otago, serving from 1959 until his death in 1967. As a memorial to Professor Guest a public lecture is delivered each year upon an aspect of law or some related topic.

For almost 25 years Professor F W Guest's[1] contribution to the law and this University has been perpetuated by these annual lectures. Since the inaugural address by Peter Sim[2] in August 1968[3] an extraordinary range of legal and associated topics has been examined.

Non-lawyers often assume that the only significant matters in the courts are criminal cases. In deference to that and the understandable community sensitivity and interest in the criminal process, I turn to crime. My now brother judge, Penlington, eight year ago while a member of the Bar, discussed not dissimilar issues.[4] The shifts in emphasis over that time are revealing.

The possibilities within the criminal law are limitless. The most contentious area – sentencing – including the properly available options and the emphasis to be placed on the competing (and not always consistent interests) in punishment, deterrence, condemnation, protection and reformation, receives endless public airings. Bail is a perennial but sufficient numbers are already involved in the unseemingly scrambles to disavow responsibility if tragedy occurs. The proper powers of the police and the need for plea bargaining to cease being a dirty word[5] also require further elucidation. All inevitably involve degree and balance although that is often sadly lacking in the extreme public positions which are vociferously enunciated.

I turn to a narrower issue of whether our present processes and procedures really achieve an optimum result in 1992 – again an exercise in

* BA LLB(Otago), LLM(Virginia), Hon LLD(Otago). A Judge of the High Court of New Zealand.

1 As President of the Otago University Law Students Association at the time of Professor Guest's death, I had some involvemment in the moves which led to the formation of the F W Guest Memorial Trust.
2 Professor P B A Sim, Dean of the Faculty of Law in the University of Otago 1969-1980.
3 (1969) 2 Otago LR 1.
4 (1985) 6 Otago LR 1.
5 See Gareth Williams QC (Chairman of the Bar Council) *Law Times*, 3 March 1992.

balance. As a Judge my task is to administer the law as written by the Parliament and interpreted by the superior courts, but I note how it seems to be assumed that a legal framework and the principles which have developed are inalterable – something into which we are all locked. That is not the case. We can always alter the processes and procedures so as to reflect a more just, practical and acceptable approach to the detection of crime and adjudication of those charged if there is the will to do so.

I have raised these issues previously[6] with the predictable response of an enthusiastic embracing of the present framework.[7] Notwithstanding, I turn to first principles in discerning what is important, where emphasis is placed and how safeguards are maintained. The issue is not whether the present structure is adequate but whether it could be appreciably better.

Any analysis of the present, or proposals for the future must be rooted in basic social premises. It has been said that the general justifying aim of the administration of criminal justice is that the guilty should be detected, convicted and duly sentenced. In other words, crime control.[8] I do not disagree, although I would add ensuring that persons who are not offenders are never convicted, and to the extent possible, assisting crime prevention. That latter factor does not always receive sufficient recognition.

A substantial body within the legal profession can be counted on to strenuously defend the status quo.[9] Reform for the sake of reform is futile. But in the community there is a widely held view that the legal system is out of step with the community's expectations. Sadly, but accurately, the criminal process is seen as involving an extraordinary dollop of gamesmanship. There is justifiably a high degree of public confidence in what now occurs. But if proper balance can be maintained and the system improved one should never be fearful of exploring change. The outcry and public consternation following the discharge of Jason Irwin in December 1991[10] because of police failures to comply with the provisions of the Children, Young Persons and Their Families Act 1989 is a recent example of the anger, frustration and despair which can surface. That will probably increase, for the New Zealand Bill of Rights Act 1990 will have a significant impact upon the criminal process. It will have little effect on whether people break the law but a major effect on whether they are convicted.

6 After dinner address to Wellington District Law Society Seminar in June 1991 at the Chateau Tongariro reported in *Council Brief,* Issue 185, July 1991.

7 L H Atkins QC – *Council Brief,* Issue 186, August 1991.

8 See A J Ashworth, *"Concepts of Criminal Justice"* [1979] Crim LR 412.

9 For a recent summation of the debate on the right to silence and the response to any change see Steven Greer (1990) 53 MLR 709. A contrary view is to be found in A R N Cross, "The Right to Silence and the Presumption of Innocence – Sacred Cows or Safeguards of Liberty?" (1970-71) 11 JSPTL 66.

10 *R* v *Irwin* [1992] 3 NZLR 119. On 22 April 1992 in the High Court at Auckland the Crown consented to a discharge under s 347 of the Crimes Act 1961 of a murder charge after the Court of Appeal had ruled as inadmissible a statement of an accused person in *R* v *Narayan* (1992) 8 CRNZ 235. Mr Narayan had been tried previously and his confession was before the court. A jury was unable to reach a unanimous verdict.

I do not advocate any alteration in the onus of proof or the standard of proof. Substantial alterations in the onus exist[11] which are Parliament's responses to perceived community needs and attitudes. We have not turned into a fascist police state because of them.

Although further modifications can be considered, I do not see that as presently necessary. The prosecution should prove its case, and beyond reasonable doubt. If a defence could reasonably be true there should never be a conviction. What I suggest may make the task of the prosecution easier in situations where empirically there has been unlawful conduct. It will not ease the Crown burden nor increase the detriment for accused who have not by act or omission made themselves liable to conviction. I reject the approach that accused people have a right not to be convicted even when they have been involved in conduct contrary to the law. In that I suspect I am marching to the beat of a different drum to most criminal lawyers. Altering the system so there was a greater emphasis on the pursuit of truth and the protection of victims would be an improvement.

First I suggest a greater focusing on what is in contention. Although the Crown makes an allegation, it must prove it. Time and energy are wasted in proving matters are really not in issue. Section 369 of the Crimes Act 1961 allows for facts to be admitted.[12] Judges could do more to ensure that it is used. Benefits arise when depositions are read at a jury trial. But these mechanisms merely tinker, operating from the assumption that what exists is so good it must be maintained.

Compare civil proceedings.[13] Even in the most complex of commercial litigation,[14] parties are required to stipulate those matters which are in dispute and in respect of which proof will be required.

The objection to pleadings in criminal cases seems to be requiring an accused to announce in advance the issues which he or she intends to raise. Mr Justice Penlington in 1984 urged disclosure in criminal cases.[15] Disclosure of personal information relating to an accused by the Crown is now required.[16] Details of pertinent prior convictions of prosecution witneses is demanded.[17] What required forceful argument 8 years ago is now the norm.

There is still no collateral obligation upon an accused person to dis-

11 The doctrine of recent possession contained in s258(2) of the Crimes Act 1961 is in effect an alteration of the onus of proof which has existed for decades. Section 58(2) and (3) and 58G of the Transport Act 1962 involve presumptions which alter the onus of proof. To like effect are s 6(5) and (6) of the Misuse of Drugs Act 1975 dealing with supply of prohibited drugs.

12 "*369.* **Admissions** — Any accused person on his trial, or his counsel or solicitor, may admit any fact alleged against the accused so as to dispense with proof thereof."

13 See for example the High Court Rules 108 and 130.

14 These will normally be dealt with under High Court Rules 446A-446Q which were introduced in 1987 and involve specific and particular detail being provided.

15 Supra n 4.

16 *Commissioner of Police* v *Ombudsman* [1988] 1 NZLR 385.

17 *R* v *Wilson* unreported, Court of Appeal, 20 December 1991, CA 90/91, currently subject to an appeal to the Privy Council.

close his or her position. I see no basis in logic, or fairness why an even-handed approach should not be adopted.

In summary trials and in trials with a jury (in respect of which there will have been a preliminary hearing) if an accused does not give or call evidence (so no opening on that accused's behalf) the prosecution closes its case before there is a formal announcement of what points are being taken and what the case is actually about.[18] Seldom are persons charged who are unconnected with matters. The number of cases where the real issue is "you have the wrong person" shows how infrequently even accused think the police have it totally wrong but still time is wasted as proof of identity is put in issue — the tension between factual guilt and legal guilt. Those cases in respect of which there has been the wrong man defence can be high profile. Like Arthur Alan Thomas or Wayne Tamihere, but they are serious, not tactical, identity cases.

The others involve the manoeuvres as to whether the presence of the person can be legally established. It has nothing to do with any sensible concept of justice. It could be avoided if there was clarity over what is in dispute. Is the case about whether there was an attack or only who the attacker was? Even in the most serious of offending, only good could come from such a sharpening of issues. In a case of sexual violation by rape, no injustice arises if an accused person in advance defines the issue:
he was never there;
he was there but there was no sexual contact;
he was there and there was sexual contact but it was consensual.

In a murder trial:
is it accepted that a person died?
have the police charged the wrong person?
did he or she die at the accused's hand?
is the issue self-defence, or provocation?

Accused persons (or more accurately their lawyers) want to keep alive every avenue just in case there is a procedural slip — it's an option which in my judgment is not deserving of the high priority it presently enjoys. Lawyers delight in "getting people off". The phrase speaks volumes about the current operation.

Competent barristers usually have issues predetermined but too often the advantages of surprise remain a defence. It does nothing for a system of justice to include the potential for a case to be decided in that way.[19] The worst example is in drink/drive prosecuting where law enforcement officers waste countless hours being available to counsel whose function is to catch them in the procedural labyrinth. The hearing seldom has anything to do with the merits of the case or the legislative mischief. Lawyers are employed to avoid the reasonable consequences of the accused's own acts or omissions. It has nothing to do with justice.

18 In many jurisdictions in the United States a case begins with each side making an opening statement so as to crystalise the dispute and avoid the court having to receive unnecessary evidence.

19 A modified means of ameliorating the disadvantages which can flow from "ambush" is to be found in the Criminal Justice (Scotland) Act 1960.

Those who oppose formal pleadings necessarily approve what goes on. In my view it is neither just, fair nor sensible. I am not advocating something novel for notice of alibi is already required.[20] There can be rebuttal, or in an extreme case adjournment if total surprise is demonstrated.[21] In practice neither is efficacious. The system should with efficient common sense have the issues defined. Advocates of the status quo suggest it would alter the onus of proof. That is semantic gymnastics. The system of pleading, including all the sophisticated manifestations of the commercial list with defined issues, has not done that.

Parallels between civil and criminal cases are challenged, first, because the consequences of conviction are different as there is the possibility of freedom being curtailed. The liberty of the subject cannot be undervalued, but the dichotomy is more illusory than real. To be pursued in a civil suit with the potential of a damages award which would swallow a defendant's entire assets is of comparable magnitude and significance.

Secondly, it is argued that in a criminal case the contest is lop-sided because of the incredible resources of the state which are available to be marshalled.[22] That does not bear scrutiny. The "David and Goliath" analogy, trips easily off counsels' lips. A proper legal aid system ensures that disbursements are available to undertake investigative work, scientific analysis and the like when they are truly in issue. But how often in fact is that so. The results of blood analysis and fingerprinting seldom can be challenged. The scientific community treats DNA profiling in the same way.[23] The idea that in each individual criminal prosecution every resource of the police, Crown Research Institutes, Customs Department, Inland Revenue Department and all other Government agencies are on the team is a nonsense. It bears no relationship to what occurs. Too often the resources of such bodies are wasted in covering ground which a rational system would identify as not in dispute. In those few cases where an accused person is seriously saying that the authorities have arrested the wrong person, so there must have been a mistake in the scientific process, financial resources should be made available to permit investigation. If pleadings were required the true scenario would emerge.

The present system, which is a hotch potch of accretions developed at different times, in different circumstances, to deal with different conditions, is far from the best which could now be devised. Regrettably slogans and recourse to theoretical rights blurs a vision of what actually occurs and impedes sensible reform.

Although defence lawyers become agitated when anyone, let alone a judge who before sitting on the bench undertook legal aid work, mentions it, legal aid must be looked at. Many areas of government spending would benefit from rigorous scrutiny. Criminal legal aid has not been the

20 Crimes Act 1961, s 367A introduced in 1973.
21 Crimes Act 1961, s 368 and see *R* v *Lee* [1976] 2 NZLR 171.
22 See for example *Atkins* supra n 6.
23 For a recent discussion of the issues and the forensic potential see Eastel, McLeod & Reed: *DNZ Profiling* (Harmod Academic Publishers 1991).

most expensive component of legal aid. Nevertheless, there is money spent on criminal legal aid which could be saved, or better used by properly paying those involved in productive and necessary work. Present structures, percepts and principles arose at a time when an accused person paid for their own defence. When a person is not paying directly for a benefit, they are likely to use more of the resource than when they have to pay themselves. I am not alone in that general view of life in 1992![24] Legal representation must be provided for those who cannot afford to pay, but they must not be put into an advantaged position. The new regime of legal services[25] should help but a structural change in criminal procedure could save millions. Particularly it would avoid the scandalous waste of time and resources as scores of law enforcement officers daily haunt court corridors waiting to give evidence which would not be needed if the system in crime was parallel to that in all other areas of the law.

Any constructive reform of the criminal process inevitably involves the so called right to silence.[26] I consider the issue in both manifestations – talking to law enforcement officers and giving evidence in court.

The in court right has been specifically removed by statute in some places.[27] The out of court right has even more frequently been removed as in New Zealand with customs and revenue matters,[28] and more recently the serious fraud legislation.[29] The legislature has determined priority between public weal and individual right. Because it has happened in some areas does not necessarily mean it must occur elsewhere. A judgment must be made. The detection, conviction and punishment of persons who kill, maim and inflict serious violence in either physical or psychological terms, I suggest is more important than how we respond to the misappropriation of property.[30]

The right to silence has its genesis in a system which denied accused

24 A similar philosophy underlies the changes in the provision of medical services introduced this year.

25 Legal Services Act 1991. For an example of problems which arise, although in another jurisdiction and in a civil case, see *Almond* v *Miles* judgment, 20 December 1991 of Vineloft J reported in *The Times,* 2 February 1992.

26 For a comprehensive and compelling analysis see Mr Justice Thomas, "The So-Called Right to Silence" (1991) 14 NZULR 299.

27 In 1976 the Singapore Parliament introduced legislation to that effect, modelled on the English Criminal Law Revision Committee, Eleventh Report on Evidence (General) 1972 Cmnd 4991. The right has also been curtailed by the Criminal Evidence (NI) Order 1988 which deals with the specific problem of terrorist suspects in Northern Ireland.

28 Customs Act 1966, ss 212, 218 and Inland Revenue Department Act 1974, ss 17, 18.

29 Serious Fraud Act 1990, ss 27, 28.

30 Companies and insolvency legislation in most countries include specific abrogations of the right to silence. *Re London United Investments plc* (English Court of Appeal, reported in *The Times,* 1 January 1992) is an example of a removal of the right being upheld. It should be compared with the ability of persons to refuse to answer questions where they are in peril of criminal charges although the activities complained of are not different, eg the position of Kevin and Ian Maxwell when a parliamentary committee sought information from them about the collapse of businesses controlled by their late father.

people the ability to give evidence.[31] It arose when uneducated and vulnerable people needed protection from exploitation.[32]

It has been said that when officialdom singles out a person as a candidate for penal consequences, an acute antagonism develops and that if the right to silence were interfered with, that would necessarily alter the onus of proof.[33] That does not bear analysis.

Take the much publicised and over-exposed trials of Mr Walker and Ms Chignell following the death of Mr Peter Plumley-Walker.[34] Out of court statements to the police were at trial patently not the whole truth and that was accepted. In the second and third trials it was not argued but that Mr Peter Plumley-Walker turned up alive at the accused's residence. While in their company (and I put it no higher) he lost his life. At none of the trials did the accused give evidence. The jury were left (and I might say at least in one trial)[35] actively encouraged to speculate and postulate about all sorts of possibilities.[36] There were difficulties because of the way the Crown ran the case, but that aside, no justice or unfairness could have occurred had the accused been expected to provide explanations. As to where, how, and to whom I will return.

What is the right to silence and how does it operate? Theoretically no citizen is required to provide any explanation to a police officer. You must provide name and address,[37] but thereafter the police can only pursue enquiries with co-operation. Unless arrested a person cannot be forced to go to a police station. They are under no obligation to answer questions. When a person ceases to be merely a witness assisting the police and is a suspect, they must be cautioned[38] and, probably under the Bill of Rights Act, advised of the right to counsel.[39]

On the rationale that what a person says voluntarily against interest is likely to be true, there is a long established exception to the hearsay rule which enables courts to receive in evidence the out of court comments of an accused. Notwithstanding the reasoning, in determining whether to admit such material, courts generally ignore whether the statement is true and restrict enquiry as to whether it was voluntary and not unfair. Even the gloss of s 20 of the Evidence Act 1908 is directed not to the truth of

31 The ability of an accused to give evidence arose in the Criminal Evidence Act 1898, s 1 (UK).

32 For a general review of the historical data see L W Levy, *Origins of the Fifth Amendment* (OUP New York 1968).

33 *Atkin* supra n 6.

34 Auckland High Court, T 149/89.

35 Second trial, February 1991. For a more general consideration of the issue see Glanville Williams, "The 'Right to Silence' and the Mental Element" [1988] Crim LR 97.

36 The ethics of speculating before a jury without an evidential base is highly questionable.

37 For an overview of this area see Tim McBride, *New Zealand Civil Rights Handbook* (1980) 16 et seq. Note the comparison between legal and social duty discussed by Richardson J in *Moulton* v *Police* [1980] 1 NZLR 443.

38 *R* v *Convery* [1968] NZLR 426 is a comprehensive enunciation of how the principles operate in our courts.

39 In *R* v *Kirifi* [1992] 2 NZLR 8, the Court of Appeal held that formal arrest was not a pre-requisite.

the statement but to whether "the means by which the confession was obtained were not in fact likely to cause an untrue admission of guilt to be made". There have been occasional judicial references to the confirmatory assistance to be gained from knowing that only a person who committed an alleged offence could have had the information he or she was supplying to the police, but that is the non-mainstream approach.[40]

The general thrust is consistent with and appropriate to the existing framework. There may be a shift in emphasis as the Court of Appeal in the context of Bill of Rights advice has considered whether the failure actually made a difference.[41] That may redress some imbalance. I make no criticism of the decisions. The issue I raise is more fundamental. Is this system the best in 1992?

An accused person is never required to give evidence in court. There is a specific statutory prohibition on the prosecution commenting on that failure.[42] Section 366 of the Crimes Act 1961 permits judges to comment. Recently the Court of Appeal reminded trial judges that they are not to be discouraged from exercising the right to comment.[43] The same sentiment has been repeated when the President of the Court of Appeal said that commenting:[44] "May well be desirable . . . to prevent the right to silence from being over exploited."

If the right to silence is of fundamental importance — and its enshrinement in the New Zealand Bill of Rights Act 1990 would suggest it is — I would have thought its use was to be facilitated and encouraged. To speak of the right being "over exploited" — with its pejorative overtones — could be inconsistent with that.

The traditional appreciation of the right to silence was eloquently expressed by Mr Justice Brennan in the high Court of Australia:[45]

> It is sufficient for present purposes to appreciate that it is a principle deep-rooted in our law and history that the Crown may not subject an accused person to compulsory process to obtain his answers upon the issue of his guilt of an offence with which he has been charged. Some reference to the development of the principle may be found in *Stephen's History of the Criminal Law* vol 1, ch XI and *Glanville Williams: The Proof of Guilt* 3rd ed, ch 3. Its importance is eloquently described by Brown J in delivering the opinion of the Supreme Court of the United States in *Brown* v *Walker* (1896) 161 US 591 at 596-7: "The maxim *nemo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interogating accused persons, which has long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England . . . . [The abuses of interrogation which were] so painfully evident in many of the earlier state trials, notably in those of Sir

40 For example, see Speight J in *R* v *Tapava* unreported, High Court, Auckland, 8 July 1991, T252/90. The traditional approach is typified by cases like *R* v *Wilson* [1981] 1 NZLR 316.

41 Examples are *R* v *Kirifi* supra n 39, and *R* v *Grant* unreported, Court of Appeal, 19 March 1992, CA 443/91.

42 S 336(1).

43 *R* v *Butcher* [1992] 2 NZLR 257, 268.

44 *R* v *McCarthy* unreported, Court of Appeal, 27 February 1992, CA 263/91.

45 *Hammond* v *Commonwealth of Australia* (1982) 42 ALR 327, 337.

> Nicolas Throckmorton, and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American jurisprudence."

The comments were made while recognising that Parliament might in specific cases remove the right. However, the circumstances that eminent judge was describing are so different from those pertaining today[46] that a general alteration or modification could be an equally appropriate response to needs and expectations in our current environment.

An assessment of the effects of any change must begin with a consideration of how those lofty sentiments are implemented. When the New Zealand Court of Appeal was considering the admissibility of confessional statements and the inter-related question of fairness the President noted:[47]

> A non-lawyer might think that to describe Admore's confession as voluntary is in the circumstances a strange use of language. It seems a distortion of reality to suppose that a suspect would voluntarily go to the police station in the early hours of the morning, voluntarily submit himself to interrogation for some hours, and ultimately voluntarily confess. But in this branch of law "voluntary" has come to have a rather restricted meaning . . . .

In that case, notwithstanding the fact that the trial judge found that the accused had been effectively in custody, and cross-examined (although not unfairly nor oppressively and there had been no element of bullying or oppression) he had concluded that "it would be unjust for the confession not to be produced to the jury". That finding was not interfered with by the Court of Appeal. The President expressed some disquiet and raised the possibility of additional police powers being:[48]

> given frankly and expressly by legislation, which would obviously need to include safeguards. Otherwise there might be room for a suggestion that the police are stretching the limits of the law and the courts are acquiescing.

It was in *Admore* that the sustained call for the video recording of interviews was made by each judge. This was repeated in *R* v *Webster*[49] where Bisson J said:

> Even without statutory or constitutional recognition of a right of access to a solicitor when sought by a person in police custody, it is to be recognised as a fundamental right, though not an absolute right, which accords with the right to silence and the privilege against self-incrimination . . .
>
> However, while the courts have a supervisory function over law enforcement officers, it is not a disciplinary body. The ends of justice must be the paramount consideration. Fairness to the person being interviewed is not to be assessed in a vacuum but

46 Hearings are in public with the constant vigilance of the media ensuring that every action and inaction is known to the public. Even if at times facts are not permitted to get in the way of a good story, the process is always under public scrutiny.

47 *R* v *Admore* [1989] 2 NZLR 210, 212.

48 Ibid, 214.

49 [1989] 2 NZLR 129, 140.

> in the light of all the circumstances of the particular case and having regard, too, to the public interest in the proper investigation of crime, prosecution of offenders and the protection of the public.

I note the tension expressed between the absolute "right to silence" and the "ends of justice" including various public interests. The tensions are clearly demonstrated in the two recent judgments of the Court of Appeal in *Andrews.*[50]

In *R* v *Alexander,*[51] the court having reaffirmed a judge's ability to dismiss cases as an abuse of process or reject evidence illegally obtained, noted:

> However, the power must be exercised after weighing the private and the public interests involved. There can be no doubt that the illegality involved arises from a breach of a fundamental and important right of the accused Chiswell. On the other hand, we consider that there is no unfairness to her in allowing her voluntary confession to be tendered in evidence . . . . It follows that to exclude the voluntary confession to punish the police would result in the prosecution of Chiswell being heard without a cogent piece of evidence being tendered.

Another means of maintaining balance is to hold there has been waiver of a right.[52] That approach can be contrasted with evidence presented to the UK Commission on Criminal Procedure in 1982 on the mismatch between "legal" and "psychological" voluntariness and the contention that any interrogation at a police station is inherently coercive.[53] What is to be labelled voluntary and when an accused is to be said to have decided not to exercise rights are in practice full of difficulty. Pragmatism has been important to date in the exercise.

The courts have acknowledged first, the importance of weighing the competing public and private interests, and secondly, the cogency of confessional material. I make no criticism of either. It is a principled and pragmatic response.[54] The ability to weigh the competing public and private interests is seriously impaired by the so called right to silence. The possibility of weighing is lessened by the New Zealand Bill of Rights Act 1990 and the Court of Appeal's interpretation thereof. Accused appear to be in a more favourable position than that which exists under the Canadian Charter of Rights.[55]

In *R* v *Butcher & Burgess*[56] the first trial judge adopted the traditional approach which had been applied with respect to a breach of the Judges' Rules, assessing all the circumstances, then considering whether in fair-

50 *R* v *Andrews* unreported, Court of Appeal, 15 April 1992, CA 336/91.

51 [1989] 3 NZLR 395, 403.

52 *R* v *Biddle* unreported, Court of Appeal, 18 February 1992, CA 432/91.

53 Evidence provided to the Royal Commission on Criminal Procedure Report (Cmnd 902) suggests an uneven contest always exists. See also A A S Zuckerman, "Trial by Unfair Means" [1989] Crim LR 855.

54 For a recent consideration of the issues see *R* v *Tihi* [1990] 1 NZLR 540.

55 The basic test in Canada is whether admission of the evidence would bring the administration of justice into disrepute — fundamentally a balancing process. Our courts appear to have adopted a test which is presumptively more advantageous to accused.

56 Supra n 43.

ness the evidence should be admitted notwithstanding a breach. On appeal the President noted that the Judges' Rules in their literal form are largely "obsolete in New Zealand for practical purposes" and held the Bill of Rights provisions were not to be treated in a similar way. He said:[57]

> "Its genesis is not judicial discretion but the increasing international recognition of basic human rights. It must be a prime duty of the Courts to give effect to the Act in the absence of legislation to the contrary effect, and, while applying it with due caution, to be studious to avoid any temptation to write it down because it is unfamiliar."

and earlier:[58]

> "The New Zealand Bill of Rights Act has to be applied in our society in a realistic way. Prima facie, however, a violation of rights should result in the ruling out of evidence obtained thereby. The prosecution should bear the onus of satisfying the court that there is good reason for admitting the evidence despite the violation.

In the same case Mr Justice Gault said:[59]

> "However, automatic exclusion would be a departure from the long established approach to evidence illegally obtained or evidence obtained in contravention of the Judges' Rules where exclusion is determined in the exercise of judicial discretion. Such a departure might be justified by the elevation of the rights by their inclusion of the Act, although there is a logical difficulty in imposing, without clear direction from the Legislature, different remedies for the same breaches of the same rights as have long been protected by our law and are merely 'affirmed'. It is to be noted that express provision in the Canadian Charter directs exclusion if it is established that having regard to all the circumstances the admission of the evidence would bring the administration of justice into disrepute. Subject to interpretation that is considerably less than automatic exclusion."

Mr Justice Holland who concurred in the result, said he had:[60]

> . . . grave concerns as to the possible implications of the provisions in the New Zealand Bill of Rights Act 1990 without the introduction of other measures to ensure some balance between the rights of the individual and the need to bring law breakers to justice.

And later:

> Where, as here, the two accused have voluntarily admitted their guilt of a serious crime a Court must give very anxious consideration to the issues involved before ruling such admissions to be inadmissible at their trial with the consequence of their possible acquittal of charges for which they are clearly guilty.

Having then drawn attention to the fact that a substantial proportion of persons convicted of crimes either at trial or after a plea of guilty are convicted because of what they said to the police on interview, Mr Justice

57 Ibid, 267.
58 Ibid, 266.
59 Ibid, 272-273.
60 Ibid, 273-274.

Holland questioned whether the right to silence should be qualified and whether there should be a limited power to detain for enquiries.[61]

In *McCarthy*[62] the learned President, while encouraging judges to use the s 366 provision to comment, nonetheless adopted the stance that silence does not give rise to an inference of guilt. I confess to a degree of cynicism about that in a trial court. Where there is prima facie evidence pointing to involvement of a person in criminal offending, and no explanation is proffered either to a law enforcement officer nor in the court, all the admonitions from a judge that no adverse inference is to be drawn from that silence fall on deaf ears (certainly with juries, and I suspect with many professional finders of fact). It is a proposition which is so contrary to every day experience that its empirical application must be open to question. I prefer the approach of Lord Diplock in the advice of the Privy Council in *Haw* v *Public Prosecutor*[63] when he said:

> "English law has always recognised the right of the deciders of fact in a criminal trial to draw inferences from the failure of a defendant to exercise his right to give evidence and thereby submit himself to cross-examination. It would in any event be hopeless to expect jurors or judges, as reasonable men, to refrain from doing so."

But where is the fairness then when the person has been solemnly told that they do not have to speak or give evidence?

Why do we persevere with either phrase of the right? When there is evidence that a 5 year old child who has been only with her parents has been sexually abused, why should the parents not be called to explain what they know? If the bloodied and battered body of an elderly woman is found in her home, why should the man whose fingerprints are found on the windowsill of the bedroom and who was seen leaving the house not be required to tell what he can and explain his position? Such comment or explanation will, if it is admissible, undoubtedly be a "cogent" piece of evidence. The problem is that we have a structure which intrinsically contains the potential to deny the determiner of fact such cogent and compelling evidence. Our present system works because courts have responded pragmatically in the definition of voluntary and by not excluding all evidence obtained improperly. That has been necessary to ensure the proper detection and conviction of offenders.

I endorse the notion that if any right is granted the courts should ensure that in reality it is available. I have difficulty with providing in 1992 a solemn right to say nothing when the circumstances cry out for an explanation. Our criminal justice system hangs on the thin thread of suspects speaking to the police even although they do not have to. If "voluntary statements" required informed consent (as in other areas of the law)

61 Upon retrial before Eichelbaum CJ in the High Court at Auckland between 10-12 April 1992, without the wrongly obtained confession, Mr Butcher pleaded guilty at the conclusion of the Crown case. Mr Burgess was acquitted by the jury which did not know of his previous plea of guilty to the charge.

62 Supra n 44.

63 [1981] 3 All ER 14, 20.

the system would shudder to a halt. It is rare to have a suspect who actually wants to talk to the authorities. The person who arrives at the police station with a pre-prepared voluntary statement, fashioned with legal advice, will not find it warmly received.[64] Detection or conviction being largely dependent upon the non-exercise of declared legal rights is a strange system. Logic, integrity and consistency each demand something more predictble, responsible and sensible.

An argument against requiring an accused to speak is that there can be many good and compelling reasons for them not wanting to do so. It may involve betraying another or exposing someone to risk, it may caused distress or emotional hurt. These are all laudable human concerns. Giving them priority is evidence of an over emphasis on the needs, rights and sensitivities of accused people, and an insufficient concern for victims. A family which has lost a member has a legitimate interest in ensuring those responsible are brought to justice. The present ability of an individual to maintain silence so as to avoid having to implicate another who is in truth responsible is less worthy of emphasis than society's interest in apprehending those who commit offences on or against others.

Parliament is presently considering the possibility of amending the Children and Young Persons and Their Families Act 1989. The statute includes a check-list of rights.[65] In light of the outcry there has been about them, it is instructive to see what is involved. A young person must be advised he is not obliged to accompany an enforcement officer to any place for the purpose of being questioned. Under the normal law, nor is any adult.

64 Non reception could be justified on the basis that such material would seldom be incriminatory although the prerequisite of it being "against interest", which lay at the heart of the common law exception, has been obscured in recent years.

65 S 215 provides:

215. Child or young person to be informed of rights before questioned by enforcement officer – (1) Subject to sections 233 and 244 of this Act, every enforcement officer shall, before questioning any child or young person in relation to the commission or possible commission of an offence by that child or young person, explain to that child or young person –

(a) Subject to subsection (2) of this section, if the circumstances are such that the enforcement officer would have power to arrest the child or young person without warrant, that the child or young person may be arrested if, by refusing to give his or her name and address to the enforcement officer, the child or young person cannot be served with a summons; and

(b) Subject to subsection (2) of this section, that the child or young person is not obliged to accompany the enforcement officer to any place for the purpose of being questioned, and that if the child or young person consents to do so, that he or she may withdraw that consent at any time; and

(c) That the child or young person is under no obligation to make or give any statement; and

(d) That if the child or young person consents to make or give a statement, the child or young person may withdraw that consent at any time; and

(e) That any statement made or given may be used in evidence in any proceedings; and

(f) That the child or young person is entitled to consult with, and make or give any statement in the presence of, a barrister or solicitor and any person nominated by the child or young person in accordance with section 222 of this Act.

(2) Nothing in paragraph (a) or paragraph (b) of subsection (1) of this section applies where the child or young person is under arrest.

A young person must be told there is no ability for police officers to require any person to accompany them to a police station. Our system operates on the basis that persons voluntarily accompany police officers and remain with them answering questions. If a citizen knows their rights and is strong enough to exercise them the police cannot compel attendance without arrest.

A young person must be told a consent to accompany may be withdrawn at any time. That is the position under the general law as well although the possibility is seldom raised. A person who is being questioned always has the ability to leave if they have the wit or will to do so unless arrested.

A young person must be told there is no obligation to make or give a statement. That is what the caution administered to every suspect says. The difference is that the CYP Act puts flesh on the bone to avoid merely the arid recitation of a litany and provides a genuine opportunity to exercise a choice.

Youngsters must be told they can withdraw a consent, that a statement may be given or used in evidence and that they are entitled to consult with and make or give any statement in the presence of a lawyer. The presence of a parent or guardian is an added right for a youngster. From the point of principle any person who is "voluntarily" speaking with a police officer should be able to have any friend or assistant with them. It does not require much imagination to contemplate how an interviewing police officer would react to the possibility.

The rights under the CYP Act are theoretically no different from those of a suspect at common law. The difference is the mode with which they are provided. It is practice not theory which diverges. That is said to be justified on the basis of immaturity and vulnerability of young people. An empirical survey of the disabilities, lack of educational attainments and absence of social skills of most adults being interviewed would hardly justify the distinction.

Rights given under the Bill of Rights Act to persons who are "arrested or detained under an enactment" are available without formal arrest when there is detention against will.[66] Last year[67] the Court of Appeal upheld a trial judge's exercise of discretion to admit a statement where noncompliance with the Children, Young Persons and Their Families Act had been of a technical nature and nothing substantially unfair or seriously contrary to the purposes of the Act had taken place. However in the *Irwin* situation where the breaches were "individually significantly and cumulatively overwhelming"[68] and the learned trial judge, not surprisingly, concluded that unless the Act was to be ignored altogether the statement had to be excluded. If the common law protections and rights were accorded their theoretical potential the same fate would befall the evidence arising from the many police interviews.

66 Supra n 41.
67 Unreported, Court of Appeal, 19 September 1991, CA 311/91.
68 Supra n 10.

As the system stands many people who are factually guilty are not convicted. Frequent public responses suggest a desire for a system rather more concerned with the rights of law abiding citizens and victims within the community. A requirement for those demonstrably involved in criminal activity to explain their position would achieve that. The old adage about 9 guilty men going free to protect one innocent is laudable. If no innocent people could be convicted in a revised system which let only 5 guilty go free, that would be preferable.

If the law moved from the present system of providing rights but not encouraging their enjoyment, to the more principled position of requiring explanation, when and how is that to occur? The obvious starting point is the present system whereby suspects are interviewed by police officers. It is not too many years since police officers went to court and related the gist of what had been said. That practice has now disappeared.[69] Courts expect contemporaneous notes which the suspect has had an opportunity to read and endorse. In more and more cases, video recordings are available of the actual interchange.[70]

Whether after access to lawyers accused will necessarily be silent is problematical[71] but it will often happen. Pragmatically today the issue is avoided because after a caution is given, even when an accused says that he wishes to say nothing, police officers routinely ask further questions. One can hardly blame the police officers who have a job to do in investigating, detecting and prosecuting persons involved in criminal activities. Notwithstanding, Sir Robin Cooke's concern that the right to silence should not be "over-exploited", I would have thought that if integrity in the system is to be maintained, once a person says they wish to enjoy the right to silence, bearing in mind the uneven position of police and suspect, no further questioning should occur. That taken in isolation would be impractical.

The need for a properly protected system was recognised in the United Kingdom in terms of the Police and Criminal Evidence Act 1984 and the protocols thereunder which placed more "teeth" in the rights given to suspects. Decisions since that time have still involved balancing. The fact that there is now a further Royal Commission as a result of notorious cases like the Guilford Four, and the Birmingham Six, leaves little confidence in the present system. It is riddled with the potential for disaster.

One of the great problems in the criminal justice area is out of court statements. Granting accused people rights but not demanding rigorous adherence (as to ensure there will be statements to introduce) is unsatisfactory.

69 Rule 9 of the Judges Rules applies. See particularly *R* v *Mason* [1988] 2 NZLR 61 and comments of Eichelbaum CJ in *R* v *Dally* [1990] 2 NZLR 184.

70 The pilot projects in the video recording of interviews with suspects have been considered successful and availability of resources is the only impediment to its universal application.

71 The extent to which persons who have full knowledge and understanding of their rights will still talk is not clear. See David Dixon, "Commonsense, Legal Advice and the Right to Silence" [1991] Public Law 233, cf A Sanders and L Bridges, "Access to Legal Advice and Public Malpractice" [1990] Crim LR 494.

Such statements are admitted under the rubric that they are against interest but in many cases they are (or include) self serving and exculpatory material. That is not tested by cross-examination and demeanour is not available for assessment. They are introduced in the interests of fairness. Frequently it deflects enquiry away from truly probative evidence. The problems inherent in witnesses relaying what was said out of court are well recognised.[72] If there is an alternative way of having relevant material before the court, it should be explored.[73]

Out of court statements are not infrequently relayed by lay members of the community and too often from persons who are incarcerated in prisons along with accused. The potential for distortion, misrepresentation and fabrication is enormous.[74]

The question must be asked, why do we resort to this sort of evidence if there is an alternative way of having that same information before the court? The reasons are seldom articulated – it is the way we have done it for decades. Part of the eagerness of prosecutors to have such material introduced is because it is the comment of the person made before a legal advisor has intervened and without time for post hoc justification or rationalisation. I have doubts that such manipulation is in reality a problem.

Again the parallel with civil cases is helpful. More often than not evidence is by affidavit or prepared brief but judges have no difficulty getting to the truth.

Competent cross-examining can always expose a carefully crafted recitation. If I am wrong in believing that trial techniques will expose the truth and out of court comment is essential, why is its availability at the whim of an accused? Logic would then require that suspects had to co-operate with the police and not retreat into silence.

On balance I am persuaded there is a better use of time and resource not to place the emphasis on out of court material (except perhaps in rebuttal) but whenever there is prima facie evidence of involvement in criminal activity, require an accused to go into the witness box. The first and most immediate advantage would be to cut down the time that it takes to hear criminal trials. An extraordinary time is spent in hearing evidence from police officers and others about the out of court statements by accused people. Time is taken first in the all too frequent voir dire. That procedure has a potential for injustice. The police have a confession which they believe was fairly and properly obtained. In the course of the trial a court rules otherwise. On the basis that they had the confession the prosecution did not seek, or certainly have immediately available, other evidence. The system allows a person to walk away. If an accused had to give evidence

72 The general issue is discussed by the Court of Appeal in *R* v *McCarthy* supra n 44 in the context of medical experts giving the factual background to their opinion when there is no proper evidence of that background material.

73 Australian courts have respsonded by requiring a corroboration warning, see *McKinney* v *R* (1991) 65 ALJR 241.

74 This was an issue in the appeal of *Tamihere:* see *R* v *Tamihere* unreported, Court of Appeal, 21 May 1992, CA 428/90.

that injustice would not arise. Where the voir dire is unsuccessful, time is consumed again in the main trial in racking over the process of obtaining the statement rather than the pivotal issue of whether it is true.

Under the alternative police officers would be free to get into the community preventing and detecting crime, rather than spending so much time compiling reports, preparing briefs, and appearing in court to relay what an accused said out of court. It has been suggested that we need 900 more police officers to deal with the crime wave in New Zealand. I necessarily refrain from any comment on the validity of that contention. I note, however, that if police officers were not so heavily involved in taking statements and then reporting those statements in court, from within the existing force, more person hours for front-line police prevention and detection work would be available than if 900 new members are introduced while we continue to operate as at present.

Criminal trials today are dominated by process. The fairness of the process becomes more critical than whether the accused committed a crime. If explanations arose in court the actual probative material would be immediately available for scrutiny and assessment. The issue of fairness would be intermingled with and part of the determination.

What are the serious objections to expecting accused to give evidence?

One is that some people are better at telling their story than others – some people by their nature and personality do not make good witnesses. If a person is unattractive, disagreeable, short fused, or otherwise less than perfectly presentable, they may not give a good account of themselves in the witness box. That cannot be under-estimated. It is life. But, as the system presently works, accused are pictorially exposed to the jury. Video taping of police interviews is becoming more common. It is a good thing. As resources become available it will become the norm. As a result an accused person with all their warts and disabilities is portrayed on a television screen in court as they are spoken to by the police. In my judgment an accused will there give a much less reasonable account. That police interview will frequently occur late at night, often after the suspect has been drining alcohol or consuming drugs, sometimes while the person is stressed by trauma, feeling uncomfortable because it is the police's patch and the environment is perceived as antagonistic. Usually no aid will be available. It is no answer to say that under the Bill of Rights Act he or she can have a lawyer. My experience suggests that if the lawyer turns up the accused will then say nothing. If the lawyer is not there, more often than not that is because the accused has not understood that he or she could have been assertive of the right to have the lawyer there and remain silent.

In a nutshell, I suggest a system which recognises that the community has interests; that those who suffer at the hands of wrong doers have interests. I am persuaded that at the moment they are given insufficient weight.

Can we create a framework in which those interests are acknowledged and given validity along with the rights of accused people?

I believe the answer is yes. I advocate change so criminal trials became

first and foremost an enquiry into what happened in the alleged criminal incident. Under the court's supervision, everyone who knows something about the matter would be expected to give evidence.[75] It would avoid the present arrangement of articulating rights, but hoping they are not exercised. It would free up law enforcement officers for frontline policing instead of having them closeted in courts or preparing for courts.

Some people may simply refuse to give evidence. I am not suggesting a return to physical compulsion. We do not have physical compulsion in the civil field yet almost all parties give evidence. The difference is the absence of an inbuilt avoidance mechanism for parties in civil litigation. They are not told they have the right not to explain what happened. Further (whether the trial is before a judge or a judge and jury) an inevitable and sensible inference will be drawn from a refusal to testify and that possibility should be acknowledged and encouraged.

How will courts deal with the out of court statements on the question of credibility? Introducing prior inconsistent statements is one of the least helpful and most fruitless exercises in courts. They are a prime example of the shift of focus in the process. Again, instead of a useful, productive and positive enquiry into what occurred, attention is diverted from the real issues. I would do no more than permit judges to admit out of court statements in rebuttal, in the infrequent cases where such material had real probative value.

In the final analysis there are two questions to be asked. First, is there a system which is more likely than the present to ensure that a person who has not committed any wrongdoing is not convicted?[76] Any survey of injustices alleged to have occurred both here and overseas indicates that a person's alleged out of court statements have been of pivotal importance in the obtaining of convictions which are subsequently found to be unjustified. General exclusion would lessen the possibility of injustice arising. Such material is essential under the present system but that would be averted if explanation was required in court with the potential for distortion removed.

Secondly, would it create a system in which those who have transgressed are more likely to have to face the consequences of their wrongdoing? If accused people knew that they would have to explain that would avoid many pleas of not guilty because there would be no system to play.[77] As importantly, when persons actually face their judges of fact (be they

75 I acknowledge that the response to a change can be varied, see Meng Heong Yeo; "Diminishing the Right to Silence: The Singapore Experience" [1983] Crim LR 89. I am satisfied that within the New Zealand context the alteration of the structure would have manifold benefits and avoid the gamesmanship inherent in the status quo.

76 I make no criticism of the jury system in my plea for reform. In my experience at the bar and on the bench, the integral involvement of representatives of the community in the process of adjudication is highly desirable. It is the system we work under which has unnecessary potential for both inappropriate convictions and acquittals.

77 I do not overlook the fact that in the overwhelming majority of cases pleas of guilty are entered. That is no reason for not having a rational system for dealing with those cases which are defended.

professional or lay) to explain themselves, the chances of inappropriately avoiding responsibility would be lessened.

It is for the community to decide what is important. The system could be changed, if it does not properly reflect the community's current needs and priorities. It ought to be changed if a fairer, juster and more equitable system could be constructed.