Tan Seng Kiah v The Queen [2001] NTCCA 1

PARTIES:	TAN SENG KIAH
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA19 of 1997 (9512894)
DELIVERED:	8 March 2001
HEARING DATES:	20 and 21 November 2000
JUDGMENT OF:	MARTIN CJ, ANGEL AND RILEY JJ

CATCHWORDS:

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST CONVICTION AND SENTENCE.

Record of interview – whether admissible or in breach of Part 1C of the *Crimes Act 1914 (Cth)* – where no application to magistrate to extend time for the investigation period – whether accused was unlawfully detained beyond four hours or whether the period of detainment was "down time".

Denial of rights – unfairness arising from denial of rights created by legislation – exercise of the discretion to exclude confessional material unlawfully obtained – whether involuntary or unreliable – public policy consideration – whether the right to seek access to a legal practitioner or a consular official exists separately from, or is subsumed by, the requirement for an interpreter.

Williams v R (1988) 161 CLR 278, referred to.
Bondareff, Usachov & McCabe (1999) 109 A Crim R 23, applied.
Pollard v The Queen (1992) 176 CLR 177, applied.
R v Su (1977) 1 VR 1, applied.
R v Swaffield (1997) 192 CLR 159, considered.

R v Pavic (1997) 192 CLR 159, considered.
Edwards v The Queen (1993) 178 CLR 193, referred to.
R v Tang, Dang & Quach (1998) 3 VR 508, referred to.
R v Crooks (1999) QCA 483, referred to.

Crimes Act 1914 (Cth), Part 1C, s 23C, s 23D, s 23G, s 23N and s 23P.

REPRESENTATION:

Counsel:

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Solicitors:

Applicant:	Dalrymple & Associates
Respondent:	Commonwealth Director of Public Prosecutions

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IN THE COURT OF CRIMINAL
APPEAL OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Tan Seng Kiah v The Queen [2001] NTCCA 1
No. CA 19 of 1997 (9512894)

BETWEEN:

TAN SENG KIAH
Applicant

AND:

THE QUEEN
Respondent

CORAM: MARTIN CJ, ANGEL AND RILEY JJ

REASONS FOR JUDGMENT

(Delivered 8 March 2001)

[1] On 5 September 1997 the applicant was convicted of being knowingly concerned in the importation into Australia of a commercial quantity of heroin between 20 May 1995 and 1 July 1995. On 21 October 1997 he was sentenced to 24 years imprisonment with a nonparole period of 16 years.

[2] The applicant sought leave to appeal against conviction and sentence. The application was made out of time and this Court ordered an extension of time on 20 November 2000. On 21 December 2000 it was ordered that the appeal be allowed, the conviction be quashed and that a new trial be had. These are the reasons for those orders.

[3] In summary form the Crown case against the applicant was that he was knowingly concerned in the importation into Australia of a large quantity of heroin which was brought to Australia on board the vessel *Teh Sun 16*. That vessel had travelled from Singapore carrying seafood and was intended to take on beef products in Darwin. The applicant had travelled to Darwin on four occasions in May and June of 1995, purporting to do so in order to facilitate the beef export part of the enterprise. The Crown alleged that the visits were in fact also related to the involvement of the applicant in the importation of the heroin.

[4] It was the Crown case that on 30 June 1995 the applicant and another man, Lim Chye Siew, travelled in a dinghy that had been purchased the day before to the *Teh Sun 16* where they obtained the heroin and transported it to Cullen Bay. There they were met by Tan Poh What. It was alleged that Lim Chye Siew and Tan Poh What placed the heroin in two bags on the rear seat of a rented Ford Falcon and drove to their hotel. The applicant took two other bags, that contained food and fishing gear, to a rented Corolla Seca which he then drove to his hotel. On the morning of 1 July 1995 police searched the Ford Falcon and the bags containing the heroin were found in the vehicle.

[5] The evidence against the applicant included evidence of association between Tan Poh What, Lim Chye Siew, the captain of the vessel, Hartoyo Rusmanto, Siang Pin Foo and himself. There was evidence of the purchase of the dinghy by the applicant and of his presence in the dinghy when the

heroin was transported from the vessel to Cullen Bay. In addition the Crown relied upon alleged lies that appear in the applicant's record of interview. It was said that those lies demonstrated a consciousness of guilt of the crime charged.

[6] It was the case for the applicant that he was a Singaporean businessman involved in a legitimate business enterprise. He had come to Darwin for the purpose of facilitating the export of beef from Australia to Singapore and that he was not involved in the heroin importation. Any contact he had with others involved in that enterprise was entirely innocent. Whilst he had been in the dinghy on one occasion it was not on the occasion that heroin was transported from the vessel to the beach.

The Record of Interview

[7] The applicant was arrested in his hotel room at 7.15am on Saturday 1 July 1995. He participated in a record of interview that commenced at 2.41pm on Monday 3 July 1995. Between those two times the applicant was held in custody in the watchhouse at the Berrimah Police Centre. He was not brought before a Magistrate and there was no application made to a Magistrate to extend time for the investigation period. The applicant says that his detention for much of that period was in breach of Part 1C of the *Crimes Act (Cth)* and, as a consequence, the record of interview ought not to have been admitted into evidence.

[8] The applicant challenged the admissibility of the record of interview and a voire dire was conducted to resolve that issue. The results of that hearing are to be found reported as *R v Tan Seng Kiah* (1997) 7 NTLR 61. In her decision to admit the record of interview her Honour observed (at p72):

> "Prima facie to hold a person in custody from 7am on 1st July to 4.55pm on the 3rd July 1995, without seeking an extension of time from a magistrate, a judicial officer or a justice of the peace, is a breach of s 23C of the *Crimes Act* 1914 (Cth) such as to result in the rejection of the record of interview."

[9] However her Honour went on to express the view that there was a satisfactory explanation for the delay in bringing the applicant before a Magistrate. She accepted the submission that had been made on behalf of the Crown that the requirements of Part 1C had not been breached. She also concluded that there was no reason for her to exclude the record of interview on the grounds of unfairness.

The Statutory Regime

[10] The provisions of Part 1C of the *Crimes Act* were enacted following the decision of the High Court in *Williams v R* (1986) 161 CLR 278. In that case the High Court held that a person arrested must be brought before a Court of competent jurisdiction as soon as practicable and that it was unlawful to detain a person for the purpose of questioning him.

[11] Section 23C of the *Crimes Act* modified the common law to permit the detention of a person who has been lawfully arrested for a Commonwealth

offence for the purpose of investigating whether the person committed the offence or another offence. The section created an investigation period commencing with the arrest and extending for a reasonable period. The section provides a time limit beyond which the detention should not continue unless extended by order of an identified judicial authority. At, or prior to, the end of the investigation period, and in the absence of an extension of time, the person must be released (whether unconditionally or on bail) or brought before a Magistrate (s23C(3)). The investigation period, for present purposes, should not extend beyond four hours after the arrest (s 23C(4)(b)) unless the period is extended under s 23D. Section 23C(7) sets out periods that are to be disregarded when determining whether the four hour period has expired. That subsection is in the following terms:

> "In ascertaining any period of time for the purposes of subsection (4) or (6), the following times are to be disregarded:
>
> (a) the time (if any) that is reasonably required to convey the person from the place at which the person is arrested to the nearest premises at which the investigating official has access to facilities for complying with this Part;
>
> (b) any time during which the questioning of the person is suspended or delayed to allow the person, or someone else on the person's behalf, to communicate with a legal practitioner, friend, relative, parent, guardian, interpreter or other person as provided by this Part;
>
> (c) any time during which the questioning of the person is suspended or delayed to allow such a legal practitioner, friend, relative, parent, guardian, interpreter or other person to arrive at the place where the questioning is to take place;
>
> (d) any time during which the questioning of the person is suspended or delayed to allow the person to receive medical attention;

(e) any time during which the questioning of the person is suspended or delayed because of the person's intoxication;

(f) any time during which the questioning of the person is suspended or delayed to allow for an identification parade to be arranged and conducted;

(g) the time (if any) that is reasonably required to make and dispose of an application under section 23D;

(h) any reasonable time during which the questioning of the person is suspended or delayed to allow the person to rest or recuperate."

[12] It was the submission of the Crown before her Honour that the explanation for the delay in this matter was the reasonable efforts made by police to obtain an interpreter. That submission was accepted by her Honour. Section 23N of the *Crimes Act* requires an investigating official, who believes on reasonable grounds that a person under arrest for a Commonwealth offence is unable, because of inadequate knowledge of the English language, to communicate with reasonable fluency in that language, to arrange for the presence of an interpreter and to defer any questioning or investigation until the interpreter is present. There was much evidence as to the efforts made by the relevant federal agents to obtain the assistance of an interpreter.

The History

[13] As has been observed the applicant was arrested at 7.15am on 1 July 1995 and his record of interview commenced over 55 hours later at 2.41pm on 3 July 1995. The learned trial Judge made findings in relation to the events

in between those two times and there is no challenge to her findings in that regard.

[14] At the time of the arrest the arresting officer knew of the need for an interpreter for the applicant and was aware that Mandarin was the language involved. Although an interpreter was required for any formal or detailed conversation with the applicant it is clear that he spoke "a little" English and was able to make himself understood, at least to some extent.

[15] On that Saturday morning there were 20 persons arrested in relation to this matter, all of whom required the assistance of interpreters. Four of the 20 persons required the assistance of an interpreter who spoke Mandarin. Her Honour accepted that for security reasons it was not considered appropriate to forewarn interpreters prior to the arrests that they may be needed. At that time the only way police sought to obtain interpreters was through telephone contact with the Translator Interpreter Service (TIS) or the Northern Territory Translation Interpreter Service. On weekends telephone calls to the Northern Territory operation were relayed through a telephone number to TIS in Melbourne. That office then made the necessary arrangements on behalf of the police.

[16] The arrest occurred at 7.15am and the police then conducted a search of the hotel room occupied by the applicant and of the motor vehicle then being used by the applicant. The search of the hotel room took place between 7.15am and 8.15am. The search of the vehicle took place between 8.15am

and 8.25am. The applicant was present throughout, as was his entitlement pursuant to s 3P of the *Crimes Act*. At 8.25am the applicant was conveyed to the Berrimah Police Centre and his details were entered into the watchhouse recording system at 9.02am.

[17] When the applicant arrived at the Berrimah Police Centre Detective Corby asked him whether he wished to "speak to anyone from the Embassy" to which he answered "no".

[18] At about this time Agent Schrapel was endeavouring to arrange for the attendance of appropriate interpreters. He had been contacted at approximately 7.25am by Detective Sergeant Taylor with the request that he arrange for interpreters to be present. Agent Schrapel said in his evidence that he thought it was around 9.30am that he made calls to TIS.

[19] The evidence of Agent Bessant, which was accepted by her Honour, was that between 9am and 11am he had numerous conversations with Detective Sergeant Taylor regarding the provision of interpreters. He was aware of the four hour rule found in s 23C of the *Crimes Act* and he understood that Agent Schrapel was undertaking enquiries to obtain interpreters. Between 9am and 11am on 1 July 1995 he prepared for an interview with the applicant. At about 11am he spoke with the applicant and informed him that they were trying to arrange for an interpreter to attend but were having difficulties obtaining a Mandarin speaking interpreter.

[20] At that time Agent Bessant told the applicant that he had been informed by Detective Corby that Detective Corby had asked the applicant if he wished to speak to somebody from the "Embassy" and that the applicant had said no. The applicant then said he had not understood the term "Embassy" but when it was put by Agent Bessant in terms of the Consulate he said he "did wish to speak to a member of the Consulate". Agent Bessant informed him that he would endeavour to get in contact with a consular officer. Apart from Agent Bessant informing Detective Sergeant Taylor of the request the evidence reveals that no further steps were taken in that regard.

[21] Between 12 noon and 12.30 pm Detective Corby was advised that there was an interpreter at the Berrimah Police Centre available for use but that person was presently tied up in other interviews. It appears that person was Koh Ping Ang who had been contacted by TIS that morning and he had arrived at the Berrimah Police Centre at about 10.45am. He took part in an interview with Mr Foo that continued through until 3.42pm. He was then asked to assist with a second interview. He left the police centre at about 6.15pm on 1 July 1995. He gave evidence that he was not available on the Sunday or the Monday.

[22] On the afternoon of Saturday 1 July 1995 another interpreter was present at the Berrimah Police Centre. Mei McGrath attended in response to a call from TIS. She was present between 2.30pm and 4.35pm and during that time she was involved in interviews with Tan Poh What and Lim Chye Siew. At about 4pm she became available to interpret for the applicant and the

applicant was taken from the cells to the interview room. Present at the interview was Detective Constable Corby, Agent Bessant and Mrs McGrath. At the commencement of that interview the applicant was asked whether he wished to contact a member of his consulate to which he responded "yes". He was also informed that he had a right to contact or attempt to contact a legal representative and he was asked whether he wished for that to occur. Again he replied "yes". The applicant then indicated that he was "very tired" and the record of interview was suspended. The applicant was returned to the police cells at 4.13pm.

[23] Neither Federal Agent Bessant nor Detective Constable Corby attempted to make contact with the consular office or with a lawyer. Agent Bessant spoke with the watchhouse supervisor and others regarding the request. Detective Corby spoke with Detective Sergeant Taylor regarding the request. It seems there was no attempt at all to contact the consular office. In relation to contacting a legal representative the watchhouse staff placed a call to Legal Aid at 4.24pm. At 4.28pm they were advised that the Australian Legal Aid mobile telephone was turned off. A call was then placed to Aboriginal Legal Aid and advice received that the field officer was not on duty. No further effort was made at any time to contact a legal practitioner.

Sunday 2 July 1995

[24] At 10am on 2 July 1995 there was a debriefing session at which Detective Martin asked about interpreters and was told none was available. Detective Taylor had been scheduled to participate in an interview with Tan Poh What but had been unable to commence it because of the unavailability of an interpreter. That interview eventually took place between 2.55pm and 8.18pm on 2 July 1995. The interview was conducted with the assistance of a Mandarin interpreter, Mrs Chin. She was invited to stay on for a further interview but was unable to do so. She advised she was unable to assist on Monday 3 July 1995.

[25] At 2.48pm on Sunday 2 July 1995 the applicant was informed that an interview would commence just so soon as an interpreter became available. He informed Detectives Martin, Scott and Taylor that he no longer sought the attendance of a lawyer or a consular representative before the interview. During the course of the day the detectives were informed that no other interpreters were available.

[26] During Sunday 2 July 1995 Detective Crocker and Agent Schrapel made approximately six attempts to contact interpreters through TIS. Agent Bessant, who was to interview the applicant, was informed that there were no interpreters available and that a solicitor had not been obtained. He was instructed to stand down and await instructions as to when an interpreter would be available.

Monday 3 July 1995

[27] On Monday 3 July 1995 Detective Martin telephoned a Mr Wong at his place of employment and Mr Wong agreed to interpret but was not available until 2pm on that day. At 2pm Mr Wong attended the Berrimah Police Centre and was taken to an interview room. At 2.17pm the applicant was removed from the cells for the purpose of interview. At 2.41pm the record of interview commenced and proceeded through to 4.55pm.

[28] In the course of the record of interview the applicant was again asked whether he wished to communicate with a legal practitioner or with a consular representative. He said he did not.

[29] The applicant was not taken before a Magistrate. At no time did any police officer seek an extension of time from a Magistrate pursuant to s23D of the *Crimes Act.*

[30] Having reviewed all of the evidence her Honour reached the following conclusions (NTLR at 72):

> "I am satisfied that police could only contact interpreters on 1 and 2 July 1995 by ringing TIS which was also the after hours number for NTTIS and TIS would arrange an interpreter. I am satisfied police had no other source to which they could turn to obtain interpreters at this time. It was an unfortunate coincidence that the arrest of the accused occurred on the very weekend a number of Mandarin speaking interpreters had been pre-booked for the Darwin Trade Expo. I am also satisfied that when TIS attempted to make contact with other interpreters, they were all either not available, could not be contacted, or were available only for limited periods between 1 and 3 July 1995. I am satisfied that all reasonable efforts were made by police to obtain the necessary interpreters and the delays in

> obtaining their services were due to circumstances beyond the control of the police.
>
> I am satisfied that Police did not deliberately delay or stall the process of obtaining an interpreter. I reject the submission on behalf of the defence that there were deliberate delaying tactics on the part of Police.
>
> I am satisfied that TIS made all reasonable efforts to contact appropriate interpreters at the request of Police.
>
> In respect of Mr Tan Seng Kiah the delay in obtaining a solicitor or a consulate representative was subsumed by the delay occasioned in obtaining an interpreter."

[31] Her Honour went on to hold that where s 23N of the *Crimes Act* imposes a statutory obligation on an investigating official to provide an interpreter there is a corresponding provision in s 23C allowing for down time. She held that "investigating officers are not penalised by the erosion of the investigation period while they make arrangements for the attendance of interpreters in accordance with their obligations under s 23N."

The Investigation Period

[32] The Court was taken through a detailed consideration of the events between the time of the arrest of the applicant and the commencement of the record of interview. It was the submission of the applicant that the four hour period was exceeded on the Sunday but that it "had well and truly expired by 2.41pm on Monday 3 July 1995 when the record of interview with the applicant commenced." It was submitted that her Honour erred when she found the period had not expired.

Saturday 1 July 1995

7.15am to 8.25am

[33] During this period the applicant was present with police whilst they searched his hotel room and his vehicle. It is not suggested that he underwent any questioning at that time. The police were not, during this period, arranging for the presence of an interpreter. Agent Schrapel had been alerted to the need for an interpreter but he did not commence his efforts to obtain an interpreter until "around 9.30am". This period does not fall within any of the so-called "down time" periods referred to in s 23C(7).

8.25am to 9.02am

[34] During this period the applicant was conveyed from the place of his arrest to the Berrimah Police Centre. This is a period of down time pursuant to s 23C(7)(a).

9.02am to 9.30am

[35] The time between the applicant arriving at the Berrimah Police Centre and Agent Schrapel commencing his efforts to locate an interpreter is not a period of down time. During that period questioning was not suspended or delayed to allow anyone to communicate with an interpreter or to allow an interpreter to arrive at Berrimah Police Centre. The evidence did not reveal why Agent Schrapel delayed his efforts to communicate with an interpreter.

9.30am to 3.52pm

[36] During this period efforts to obtain an interpreter were pursued. Two appropriately qualified interpreters were located and they attended at the Berrimah Police Centre. Mr Ang attended at 10.45am and remained until 6.15pm. He was engaged in interviews with Siang Pin Foo and Miss Soh. When that record of interview concluded there was no interpreter available.

[37] Mrs McGrath arrived at the Berrimah Police Centre at around 2.30pm and remained for a two hour period. She took part in a 10 to 15 minute interview with the applicant at which time he indicated a desire to consult with a Consular official and a legal practitioner. He also indicated that he was "very tired". The record of interview was delayed for those reasons.

[38] On Saturday evening the position that had been reached was that the last available interpreter had departed at about 6.15pm. The preliminary efforts undertaken to obtain a legal practitioner for the applicant had not thus far met with success. The applicant had indicated at around 4pm that he was "very tired". In those circumstances it was not unreasonable in the interests of the applicant to delay further investigation in relation to the matter until the following morning. Time was required to allow him to "rest or recuperate". In our opinion the period following that interview was a period of down time under s 23C(7)(h).

Sunday 2 July 1995

9.am

[39] Agent Schrapel attended at the Berrimah Police Centre at 9am and continued his efforts to obtain an interpreter through the TIS. There was a briefing at around 10am. There were no interpreters available at that time.

[40] Whilst it may have been acceptable to delay the investigation on the evening of Saturday 1 July 1995 for the purposes of contacting the consular office, obtaining the assistance of a legal practitioner and, most significantly, allowing the applicant to rest, those matters did not continue to have application into the Sunday morning. At that time there was no further effort made to contact a legal practitioner, there had been no effort at all to contact the Singaporean Consulate and there was no evidence that the applicant continued to suffer from tiredness. However the evidence accepted by her Honour was that during the course of that Sunday Agent Schrapel and Detective Sergeant Croker "attempted on about half a dozen occasions to contact interpreters through TIS". TIS was, in turn, acting as the agent of the police in attempting to obtain the assistance of interpreters.

[41] Agent Bessant, who intended to interview the applicant, arrived at the Berrimah Police Centre at about 12 noon. He was told that he would be contacted when an interpreter had become available and it was possible to conduct the interview. This contact did not occur until the following morning. The conclusion that efforts were being made during this time to

locate appropriate interpreters was supported by the fact that an interpreter, Chien Loi Chin, attended at the Berrimah Police Centre at 2pm on 2 July 1995. She was engaged in the interview with Tan Poh What and that occupied the time between 2.55pm and 8.18pm. She was not prepared to stay beyond that time. At 2.48pm the applicant was informed that there was only one interpreter available and she was assisting in another interview. It was at that time that he indicated that he no longer wished the attendance of a legal practitioner or contact with a representative of the Consulate. The efforts to obtain a further interpreter on that day were unsuccessful. It was not until the completion of the interview with Tan Poh What that Detective Martin was informed that the interpreter Chien Loi Chin was "too exhausted" to participate in a further record of interview. That was at 8.18pm. Her Honour treated this period as a period of downtime. Given the ongoing efforts to locate an interpreter and the late advice that none would become available that day that conclusion was open on the evidence.

[42] After 8.18pm there was no interpreter present at the police centre and there was no expectation that one would be available for many hours. No further attempt was made to obtain an interpreter until approximately 8am on Monday 3 July 1995. During this period it could not be said that the investigating officials had arranged for the presence of an interpreter nor had they deferred the questioning or investigation until the interpreter was present. No efforts were being made to obtain an interpreter. There was no suggestion that an interpreter would be obtained at any time before Monday

morning. No one was then seeking to contact or communicate with an interpreter and no one was waiting for an interpreter to arrive at the Berrimah Police Centre. None had been organised. Time does not cease to run because it is a Sunday night or because efforts to obtain assistance have been exhausted for the time being. In the circumstances it is our opinion that the period between 8.18pm on 2 July 1995 and 8am on 3 July 1995 was not a period of down time for the purposes of s 23C. At the latest it was during this period the investigation period expired.

[43] Whilst s 23N proscribes any interview commencing without an interpreter being present the absence of an interpreter does not automatically lead to down time. The investigation period runs unless the prosecution can satisfy one or more of the requirements of s 23C(7).

[44] In the circumstances of this matter the onus is upon the prosecution to establish that a period of time can be disregarded because the questioning of the applicant was suspended or delayed to allow the applicant or someone else to communicate with an interpreter. Alternatively the prosecution had to establish that the questioning was suspended or delayed to allow an interpreter to arrive (s23C(8)). Clearly no one was then waiting for an interpreter to arrive. During that period efforts to obtain an interpreter had been exhausted and had been abandoned for the time being. The fact that there was an intention to resume efforts to obtain the services of an interpreter on the following day (some 12 hours later) leads to a conclusion that the intervening period is not down time. If it were otherwise authorities

would be able to hold a person for periods of time when no effort was being made to obtain an interpreter even though one be required. It cannot be suggested that a person can be held against their will for an indefinite period whilst no interpreter is present if no further and timely action is contemplated to obtain an interpreter and no reasonable expectation can be had that one is likely to arrive.

Monday 3 July 1995

[45] At about 8am on 3 July 1995 Detective Martin contacted Mr C. K. Wong at his place of employment. Mr Wong informed Detective Martin that he would not be available until 2pm. It seems he was the only interpreter available on that day. He arrived at the Berrimah Police Centre at 2pm and the interview with the applicant commenced at 2.41pm. By that time the investigation period had expired. Had it not done so the period between 8am and 2pm would have been down time for the purposes of s 23C(7)(b) and (c). The time between 2pm and 2.41pm when the interview commenced would not be down time. The record of interview with the applicant continued through to 4.55pm.

[46] It follows from the above that, the investigation period ceased at the latest during the night of Sunday/Monday and many hours prior to the commencement of the record of interview on Monday 3 July 1995. In our opinion her Honour erred in finding that there had not been a breach of s 23C of the *Crimes Act*.

A Denial of Rights

[47] The applicant sought access to both a legal practitioner and a representative of the consular office of Singapore. Neither was provided.

[48] The right to communicate with or to attempt to communicate with the consular office is contained in s 23P of the *Crimes Act*. There is an obligation imposed upon the investigating official to give the person arrested reasonable facilities to communicate with the consular office. In this case nothing was done.

[49] Contacting the consular office by a detained foreign national provides an opportunity to report his or her circumstances, seek advice and assistance, provides a means of informing relatives and friends of his or her situation and all this in his or her native language. One need only contemplate the predicament of an Australian national held in custody in a foreign non-English speaking country without access to an Australian consular office to appreciate the importance of the right contained in s23P of the *Crimes Act*.

[50] Similarly with regard to the request of the applicant to contact or attempt to contact a legal practitioner. By virtue of s 23G the investigating official is required as soon as practicable, to give the person reasonable facilities to enable the person to communicate with a legal practitioner. Again this did not occur.

[51] These rights are part of the statutory scheme introduced to provide protection to people detained by police pursuant to the provisions of the *Crimes Act*. The right to consult a legal practitioner or to attempt to do so and the right to contact the consular office or to attempt to do so are rights independent of the right of access to an interpreter. They are rights available to be enjoyed "as soon as practicable". The fact that an interpreter may not be available does not mean that a person under arrest does not have the present right to seek access to a legal practitioner or a consular official. In this case the applicant was able to communicate to some extent in English and the need for an interpreter for the limited purpose of obtaining preliminary assistance and advice from a legal practitioner or a consular official was not necessary. It has not been suggested that language difficulties would have made contact worthless.

[52] The requests were made on Saturday 1 July 1995 and were withdrawn at 2.48pm on Sunday 2 July 1995. It is not known why the request was withdrawn. It may be, as the applicant's counsel contends, that the applicant thought his request was a cause of the delay in the commencement of the interview. However the applicant did not give evidence on the voire dire and that remains at most a speculative possibility. Whatever the reason may have been it is clear that for a period of almost 24 hours the police did little and the request was then withdrawn.

[53] The Crown submits that the failure of the investigating officers to fulfil their obligations under s 23G and s 23P of the Act, whilst regrettable, is of

no moment in this matter. This follows, it was submitted, from the withdrawal on Sunday 2 July 1995 of the request made and the further advice by the applicant to the authorities in the interview conducted on the following day that access to a legal practitioner and access to a consular official was no longer required. For a period of approximately 24 hours the request existed and was not acted upon. A statutory obligation was imposed upon the police and they failed to comply with that obligation. The fact that the applicant subsequently withdrew his request does not diminish the seriousness of the failure during the period the request was extant. In those circumstances there was a breach of the requirements of the *Crimes Act*.

[54] When the learned Trial Judge exercised her discretion against excluding the record of interview that exercise proceeded on the basis that the investigation period had not expired and upon the basis that the delay in obtaining a legal practitioner or a consular representative was subsumed by the delay occasioned in obtaining an interpreter. In our opinion error occurred.

The Exercise of the Discretion

[55] There is no statutory sanction for a breach of s 23C, s 23G or s 23P of the *Crimes Act*. The Act says nothing as to the impact upon the admissibility of evidence obtained in circumstances where those sections have been breached. However, it is clear that when a person is arrested and not dealt with in accordance with the law, the subsequent detention is unlawful and

statements or admissions of the arrested person may be excluded in the exercise of a discretion: *Bondareff, Usachov and McCabe* (1999) 109 A Crim R 23 at 42. As was observed by Toohey J in *Pollard v The Queen* (1992) 176 CLR 177 at 223 in dealing with s 464C(1) of the *Crimes Act (Vic)*:

> "It might be said that if inadmissibility is not the price to be paid automatically for obtaining evidence in breach of s 464C(1), Parliament has legislated to no effect. But it might equally be said that, if Parliament had intended that price to be paid automatically, it would have said so. The conclusion is inevitable that evidence obtained in breach of s 464C(1) is obtained illegally and its admissibility turns on the general considerations relating to evidence so obtained."

[56] The principles applicable to such an exercise of the discretion to exclude have been discussed by the High Court in *Pollard v The Queen* (supra). The following passages appear in the joint judgment of Brennan, Dawson and Gaudron JJ (at 196):

> "The exercise of the discretion to exclude evidence which has been improperly or illegally obtained involves a balancing of competing public policy considerations and is not so much concerned with the individual accused as with 'whether the illegal or improper conduct complained of in a particular case is of sufficient seriousness or frequency of occurrence as to warrant sacrificing the community's desire to see the guilty convicted in order to express disapproval of, and to discourage, the use of unacceptable methods in achieving that end'."

And, further (at 197):

> "In a case where it is established that a confession or admission by an accused was made voluntarily but the evidence warrants further consideration of whether it ought to be admitted, it will often be a convenient course for a trial judge to ask first whether it would be

> unfair to the accused to use the confession or admission against him before considering, if the evidence warrants it, whether it should be excluded on the ground that it was illegally or improperly obtained. If the first question is answered in the affirmative, it will be unnecessary to proceed to the second question."

[57] In *R v Su* (1997) 1 VR 1 the Court of Appeal (Winneke P, Hayne JA and Southwell AJA) considered the application of Part 1C of the *Crimes Act*. In so doing the following observation was made (at 54):

> "Section 23V of the *Crimes Act* makes a confession or admission by a suspect being interviewed by an investigating official inadmissible in evidence against the person unless the requirements of that section are met. There is no equivalent provision in Part 1C for the case in which there is a failure to give the caution required by s 23F or a failure to inform a person under arrest of the rights given by s 23G. It follows, in our view, that not every failure to comply with s 23F or s 23G will necessarily mean that any subsequent interview must be excluded. No doubt the failure to comply with some or other of those requirements will be a very important matter to consider in deciding whether a confession or admission obtained in breach of the provisions should be admitted in evidence and it may well be right to say that, 'as a general rule', or 'ordinarily' the confession or admission will be rejected if there has been a failure to comply with s 23F or s 23G. But that will be so only if the Court considering the matter concludes that, taking account of all the circumstances, the tendering of the statement would be unfair to the accused. As we say, that will depend upon all the circumstances in which the statement was made."

[58] That case had some similarities to this. It involved a foreign national who, so far as the evidence revealed, had no familiarity at all with Australian police procedures and who was being investigated for a very serious offence. There the accused was interviewed without being given a proper caution and without being informed of his rights. On appeal it was held that the evidence should have been excluded. The Court observed that it would

be ‘unfair’ to tender the statement obtained in those circumstances against the accused. In the present case the applicant was a foreign national in similar circumstances. He was interviewed after he had been informed of a right to speak with a legal practitioner and of a right to speak with a consular representative of Singapore but, when he sought the benefit of those rights, they were not pursued by the investigating officers. In addition he was detained for a lengthy period in custody at Berrimah without being brought before a judicial authority. He was kept beyond the period permitted by the *Crimes Act*.

[59] In *R v Swaffield* (1997) 192 CLR 159 the High Court dealt with a case in which a trial judge declined to exercise his discretion to exclude evidence of secretly recorded admissions made by the accused to an undercover officer. In the case of *R v Pavic*, which was heard at the same time, the Court considered a matter in which a trial Judge allowed into evidence a tape recording of admissions made by the accused in a conversation with a friend which was recorded by the friend on behalf of the police. In both cases the accused person had refused to participate in an interview with police. As the head note reveals, the majority (Toohey, Gaudron, Gummow and Kirby JJ) held that the admissibility of confessional material turns first on the question of voluntariness, next on exclusion based on considerations of reliability and finally upon the exercise of an overall discretion, taking account of all the circumstances, to determine whether the evidence was

admitted or a conviction obtained at an unacceptable price having regard to contemporary community standards.

[60] In their joint judgement Toohey, Gaudron and Gummow JJ said (at 194-195):

> "When the Court resumed after the first day's hearing, the Chief Justice asked counsel to consider whether the present rules in relation to the admissibility of confessions are satisfactory and whether it would be a better approach to think of admissibility as turning first on the question of voluntariness, next on exclusion based on considerations of reliability and finally on an overall discretion which might take account of all the circumstances of the case to determine whether the admission of the evidence or the obtaining of a conviction on the basis of the evidence is bought at a price which is unacceptable, having regard to the contemporary community standards.
>
> Putting to one side the question of voluntariness, the approach which the court invited counsel to consider with respect to the common law in Australia is reflected in the sections of the *Evidence Acts* to which reference has been made, when those sections are taken in combination. The question which arises immediately is whether the adoption of such a broad principle is an appropriate evolution of the common law or whether its adoption is more truly a matter for legislative action. Subject to one matter, an analysis of recent cases, together with an understanding of the purposes served by the fairness and policy discretions and the rationale for the inadmissibility of non-voluntary confessions, support the view that the approach suggested by the Chief Justice in argument already inheres in the common law and should now be recognised as the approach to be adopted when questions arise as to the admission or rejection of confessional material. The qualification is that the decided cases also reveal that one aspect of the unfairness discretion is to protect against forensic disadvantages which might be occasioned by the admission of confessional statements improperly obtained. "

[61] Earlier their Honours had said (at 189):

> "While unreliability may be a touchstone of unfairness, it has been said not to be the sole touchstone. It may be, for instance, that no

> confession might have been made at all, had the police investigation been properly conducted. And once considerations other than unreliability are introduced, the line between unfairness and policy may become blurred."

[62] Brennan CJ acknowledged the overlap of the fairness and public policy discretion. He said (at 181-182):

> "But now that the development of the public policy discretion allows for the balancing of the public interest in refusing to sanction unlawful or improper conduct and the public interest in placing all relevant and admissible evidence before a court, there is much to be said for remitting consideration of the conduct of law enforcement officers to the public policy discretion in all cases except where that conduct makes the reliability of the confession dubious. The fairness discretion would then focus on cases where the conduct which induces the making of a voluntary confession throws doubt on its reliability and thereby establishes the unfairness of using the confession against the confessionalist on his trial. Taking this approach, the public policy discretion would focus on the kind and degree of illegal or improper conduct that produced the confession or produced the confession in a particular form. If the focus is on the conduct of the law enforcement officers, the issue can be sharply delineated: is the confession, albeit voluntary and apparently reliable, to be admitted in the public interest or is it to be excluded in the public interest because of the conduct by which it was obtained? In answering this question, the weight to be given to the competing factors would depend on the nature of the charge and the circumstances of the case. As Deane J said in *Pollard* (1992) 176 CLR 177 at 203; 64 A Crim R 393 at 413:
>
> > 'The weight to be given to the public interest in the conviction and punishment of crime will vary according to the heinousness of the alleged crime or crimes and the reliability and unequivocalness of the alleged confessional statement. The weight to be given to the principal considerations of public policy favouring the exclusion of the evidence will vary according to other factors of which the most important will ordinarily be the nature and the seriousness of the unlawful conduct engaged in by the law enforcement officers.'"

[63] The *Crimes Act* has been amended to extend the powers of investigating authorities beyond those available at the common law. In so doing it

provided its own limitations upon the investigating authorities and established a system whereby the assessment of what is and what is not acceptable may proceed. The Court is engaged in a balancing exercise based upon the facts of the particular case. That exercise will involve the assessment of voluntariness, reliability, unfairness to the accused and public policy considerations. These are not always discrete issues, they may overlap: *R v Swaffield* (supra at 196).

[64] Turning to the circumstances of this particular record of interview, there was no suggestion that it was in any sense involuntary. Indeed in reading the document as a whole it can be seen as being at least in part self-serving and providing an exculpatory version of events. The applicant did not give evidence on the voire dire and did not claim that he entered into the record of interview other than voluntarily.

[65] The applicant submitted that the information contained in the record of interview was unreliable and that this was evidenced by the submissions of the Crown to the jury that parts of it should not be accepted. Those parts that the applicant said were unreliable were areas in which the applicant sought to exculpate himself by explaining or denying events that might otherwise have served to inculpate him in the alleged offence. They were not confessions or admissions against interest. The record of interview did not contain unreliable confessions in the sense discussed in some of the authorities. Rather the statements could be relied upon, if disbelieved, as indicating a consciousness of guilt. They may be characterised as admissions

by conduct: *Edwards v The Queen* (1993) 178 CLR 193 at 201. However, as the material contained false denials, the discretion to exclude it should be exercised by reference to similar considerations as a confession: *R v Tang, Dang & Quach* (1998) 3 VR 508 at 517; *R v Crooks* (1999) QCA 483 of 1998. In our opinion no question of unreliability arises.

[66] It is then necessary to consider the public policy discretion. The findings of the learned trial judge were to the effect that the police were not guilty of any deliberate delay or stalling. She specifically rejected a submission made that there were deliberate delaying tactics employed on the part of the police. Those findings are not challenged. Whilst, as her Honour held, there was no suggestion that the police deliberately applied any pressure to the applicant to enter into the interview and the process was not designed to subject him to improper pressure, the fact remains that he may not have agreed to be interviewed or the interview may have followed a different path had the applicant been dealt with in compliance with the provisions of the *Crimes Act.* It seems the breaches occurred unintentionally and in some instances, inadvertently. However they demonstrated a less than diligent approach to the obligations imposed by the legislation.

[67] The circumstances of the matter were such that the investigating authorities could easily have complied with the law. In relation to the contact with the Consulate nothing was done. In relation to contact with a legal practitioner only desultory efforts were made. In relation to the expiry of the investigation period it would not have been a difficult matter to make

application for an extension of time. Even without an interpreter the applicant was able to communicate in English to some extent. Had the investigating authorities undertaken any one of those steps the applicant is likely to have obtained advice and it may well have been the case that the applicant would have declined to be interviewed or the interview and the resulting record would have assumed a different form.

[68] The nature of the offence alleged against the applicant in this matter was clearly of a serious kind. The very serious nature of the matter is reflected in the maximum penalty of life imprisonment which applies. The applicant was sentenced to 16 years imprisonment.

[69] The evidence not excluded was relevant to the Crown case. It was the submission of the Crown that in the record of interview the applicant lied in a manner that demonstrated a consciousness of guilt. The Crown case was that those lies provided positive evidence of guilt. The evidence was presented to the jury on that basis. However the evidence was not of an admission to the crime charged. This was but one part of the Crown case against the applicant.

[70] As was noted by Mullighan J in *Bondareff, Usachov and McCabe* (1999) 109 A Crim R 23 at 45 the clear intention of the legislation is to protect the rights of arrested persons and to ensure they are treated fairly. In this case, as in that case, the investigatory stage of the process was complete. Further

"the keeping of an arrested person away from the judicial process must be regarded seriously even if due to a mistaken view of the law".

[71] In the circumstances of this matter the investigating authorities breached three of the provisions of Part 1C of the *Crimes Act*. Those provisions were s 23C, s 23G and s 23P. They prescribe important protections for persons arrested and detained under the provisions of that Act. Because of the approach adopted by the learned trial Judge consideration of the discretion to exclude proceeded on an erroneous basis and the applicant lost the opportunity of obtaining an exercise of the discretion in his favour.

[72] It was therefore necessary for this Court to consider whether the proper exercise of the discretion would have led to the exclusion of the evidence. We have reviewed the relevant matters discussed above. Although the participation of the applicant in the interview was voluntary and the information obtained was reliable (in the relevant sense) there was unfairness to the applicant. That unfairness arose from the effective denial to him for a significant period of the rights created by the *Crimes Act* and, importantly, the advice that was available from the sources to which he sought access. He was detained for a lengthy period in breach of the requirements of the Act and without any effort being made to bring him before a Magistrate. To use the statement obtained in those circumstances against him was unfair. The proper exercise of the discretion would lead to the exclusion of the evidence.

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