IN THE SUPREME COURT OF NEW ZEALAND

SC 115/2014
[2015] NZSC 124

BETWEEN	THE QUEEN Appellant
AND	SHIVNEEL SHAHIL KUMAR Respondent

Hearing: 12 and 13 February 2015

Court: Elias CJ, William Young, Glazebrook, Arnold and O'Regan JJ

Counsel: M D Downs and P D Marshall for Appellant
R M Mansfield and D A C Bullock for Respondent

Judgment: 6 August 2015

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS

WILLIAM YOUNG, GLAZEBROOK, ARNOLD AND O'REGAN JJ
(Given by Arnold J)

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Introduction

[1] This appeal concerns the admissibility of incriminating statements made by the respondent, Mr Kumar, while he was in custody following his arrest on a charge of murder. The statements were made in the course of an 80 minute conversation with two undercover police officers in a police cell following a formal video interview in which Mr Kumar had denied responsibility for the murder. In the High Court, Venning J held that the statements were admissible;[1] on appeal, the Court of Appeal disagreed.[2] This Court granted leave on the question:[3]

> … [W]hether the Court of Appeal was right to conclude that an inculpatory statement made by Mr Kumar to undercover police officers was improperly obtained and should not be admitted in evidence at his trial.

[2] As Mr Kumar's trial was due to commence on 2 March 2015, we issued a results judgment dismissing the appeal.[4] In this judgment we set out our reasons. We note that both Mr Kumar and his co-accused, Mr Permal, were found guilty at trial.

[3] Counsel were agreed that, on the authorities, the assessment to be made was whether the undercover police officers had "actively elicited" relevant information from Mr Kumar in the course of their conversation with him. In the particular circumstances of the case, if the officers did actively elicit information, they necessarily undermined Mr Kumar's rights, in particular his right to refrain from making a statement as protected by s 23(4) of the New Zealand Bill of Rights Act 1990 (NZBORA).

[4] For the Crown, Mr Downs acknowledged in oral argument that there had been active elicitation from a particular point in the conversation and accepted that, as a consequence, statements made by Mr Kumar after that point should be excluded. In respect of those statements, Mr Downs did not argue that they should be admitted under the balancing process contemplated by s 30(2)(b) of the Evidence Act 2006. For Mr Kumar, Mr Mansfield submitted that the active elicitation had been present

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1 *R v Kumar* [2013] NZHC 3487 [*Kumar* (HC)].
2 *Kumar v R* [2014] NZCA 489, (2014) 27 CRNZ 19 (Harrison, Courtney and Clifford JJ) [*Kumar* (CA)].
3 *R v Kumar* [2014] NZSC 166.
4 *R v Kumar* [2015] NZSC 14.

from the outset of the conversation with the undercover officers, so that all the statements made by Mr Kumar should be excluded.

[5] We have concluded that the transcript of the conversation between Mr Kumar and the undercover officers must be excluded in its entirety. Mr Downs was right to acknowledge that there had been active elicitation by the undercover officers during the course of the conversation. However, we consider that it began at an earlier point than that identified by Mr Downs. In effect, the undercover officers conducted an interrogation of Mr Kumar, in circumstances where his formal video interview had been brought to an end to enable him to take legal advice and he had retained a lawyer. We consider that the actions of the undercover officers undermined Mr Kumar's right to refrain from making a statement and, as a result, the statements were improperly obtained in terms of s 30(5) of the Evidence Act. We consider that none of the appellant's statements should be admitted under the s 30(2)(b) balancing process.

The police investigation

[6] A 21 year old Indian man, Shalvin Prasad, was murdered late on 30 January or early on 31 January 2013. According to the pathologist who examined his body, Mr Prasad was burnt alive after having been doused in petrol.

[7] Mr Prasad's family had reported him missing early on 31 January 2013. He had been last seen around 8.30 pm on 30 January. When he did not return home that evening, his father checked his son's bank account and noticed that $30,000 had been withdrawn earlier in the evening. The father then contacted the police. Around 6.30 am on 31 January, a badly burnt body, later identified as that of Mr Prasad, was found. Mr Kumar and another man, Mr Permal, were ultimately charged with Mr Prasad's murder.

[8] Mr Kumar, a Fiji Indian, knew Mr Prasad. Mr Kumar was 18, almost 19, at the time. Although born in Fiji, Mr Kumar has lived in New Zealand since he was two years old and English is his preferred language.

[9] Police investigations established that, at the time he withdrew the $30,000, Mr Prasad was making a phone call to Mr Kumar. He also sent Mr Kumar a text message reading "she getting money nw". The cell phone evidence indicated that Mr Prasad had arranged to meet Mr Kumar around 8.30 pm on 30 January. CCTV footage indicated that at 9.19 pm on 30 January Mr Prasad had entered Mr Kumar's vehicle outside Mr Permal's workplace. At 10.33 pm Mr Kumar and Mr Permal went to a service station where CCTV footage indicated that Mr Permal purchased two plastic petrol containers and filled them with petrol. About an hour later, Mr Permal purchased petrol for his car at another service station.

[10] Having determined that Mr Kumar and Mr Permal were suspects in the murder, the police decided to speak to them. At about 11.44 am on 14 February, Detectives Batey and Laumatia went to Mr Kumar's home. They advised Mr Kumar that they wished to speak to him about Mr Prasad's murder and advised him of his rights. Mr Kumar acknowledged that he understood his rights and agreed to accompany the detectives to a police station for an interview. On the way to the station, Mr Kumar gave Detective Batey his details. He showed the detectives where he and Mr Prasad had met on the morning of 30 January and said that they had gone to a supermarket. Mr Kumar also showed the detectives a fast-food restaurant where he and his co-accused Mr Permal had gone around 3.30 am on 31 January.

[11] After they arrived at the police station, the detectives organised some food for Mr Kumar. Having confirmed that he wished to be interviewed in English, the detectives commenced Mr Kumar's video interview at 12.49 pm, with Detective Batey acting as the lead interviewer. Mr Kumar said that he and Mr Prasad had met around 10.30 am on 30 January and that he had told Mr Prasad that he and Mr Permal intended to go to the city that evening. Mr Prasad had turned down Mr Kumar's invitation to join them. Mr Kumar said that he and Mr Permal had met up around 9 pm that evening and gone into the city around 11 pm, where they had gone to several clubs. They left the city around 3.30 am on 31 January and stopped at a fast food outlet. Mr Kumar said that he had not seen Mr Prasad since their meeting the previous morning and that he had no knowledge of the $30,000 withdrawn from Mr Prasad's bank account, although he later said that he knew of the withdrawal but had not seen the money. When confronted with the text data and

CCTV footage which showed his contact with Mr Prasad at around 9 pm on 30 January, Mr Kumar denied killing Mr Prasad.

[12] Towards the end of the interview, the detectives read from parts of the transcript of an audio recording of a conversation between Mr Kumar and Mr Permal in Mr Kumar's car a few days earlier. Mr Kumar said that he wished to listen to the full recording with his lawyer and asked for a lawyer. At that point, shortly after 4 pm, the detectives terminated the interview and arrested Mr Kumar for Mr Prasad's murder.

[13] Having selected Mr Davey from a list of duty lawyers, Mr Kumar spoke to him on three occasions between 4.41 pm and 5.43 pm. Detective Batey spoke to Mr Davey during the first of these calls and advised him of the allegation against Mr Kumar, the circumstances of the offence and what had been discussed with Mr Kumar during the video interview. He also advised Mr Davey that he was intending to make a formal request of Mr Kumar for a voluntary DNA sample and medical examination. At 5.19 pm Detective Batey telephoned Mr Davey at his request. During their conversation, Mr Davey asked if the Detective would be conducting any further interviews with Mr Kumar. Detective Batey said that the interview with Mr Kumar had concluded, but if further enquiries identified other evidence that needed to be discussed with Mr Kumar, another approach for an interview would be made. According to Detective Batey, Mr Davey did not ask that he be contacted before there was a further approach for an interview, nor did he say that no further interviews were to occur.

[14] Later, there was another telephone conversation between Detective Batey and Mr Davey. During the course of that conversation, Mr Davey said that he would have to speak to Mr Kumar in person in relation to the medical examination and the DNA sample. The Detective agreed not to make the request until this had been done. In response to the Detective's advice that he could visit Mr Kumar that evening, Mr Davey said that he would leave the meeting until the following morning, before Mr Kumar's court appearance.

The police undercover operation

[15] The undercover officers, who were from outside the Auckland district, went under the names Ben and Ronnie. Venning J, who had the advantage of viewing a DVD of the interaction between Mr Kumar and the undercover officers as well as reading the transcript, described Ben as "a solidly built male of Maori or Pacific Island descent" who looked "about 40"; he described Ronnie as "a tall Indian male of average build" who looked "about 25".[5]

[16] Venning J noted that the planning and preparation for the undercover operation had begun on 11 February 2013.[6] The undercover officers had been given access to a subject profile on Mr Kumar, which contained personal information about Mr Kumar, his criminal history, associated persons and vehicles and details of his interests, social activities and such like. This profile had been prepared sometime in advance and had been made available to the undercover officers by, at the latest, the morning of 14 February.

[17] The officers' task was described in the infiltration plan set out in the Operation Orders as:

> During their time in the cells with the target/s, the Agents will use their arrest cover story and history of criminality to develop rapport with the target. … The rapport will be developed to a stage where the target/s will feel comfortable talking about his own criminality with the Agents.

[18] Detective Batey knew that the undercover officers were available to be deployed, but was apparently not aware of the details. He had been told earlier in the day that an undercover operation was a possibility, but did not receive confirmation until he was updating a superior, Detective Sergeant Williamson, on the video interview with Mr Kumar. Detective Sergeant Williamson asked Detective Batey whether Mr Kumar had said or done anything which indicated that he did not want to make any further comment and whether Mr Davey had indicated that or said that no further interviews were to occur. Detective Batey told Detective Sergeant Williamson that none of these things had happened.

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5 *Kumar* (HC), above n 1, at [54].
6 At [18].

[19] Detective Jones, the Undercover Controller, was responsible for supervising the deployment of the undercover officers. He met with Ben and Ronnie at 5.50 am on 14 February at the operation base. They were provided with recording devices and were briefed about the operation. Ben and Ronnie went to the police station where Mr Kumar was being held around 4 pm and were placed, at different times, in the same dayroom cell. About 15 minutes after the second agent had been deployed, Mr Kumar was placed in the dayroom cell with them (around 6.38 pm). He had been in another cell, but was told (falsely) by police that the toilet was broken, so that he had to be transferred to the other cell where Ben and Ronnie were.

[20] The cell had two tables on one wall with bench seats on either side, with room for two people on each bench. When he entered the cell, Mr Kumar walked over to an empty table. Ben told him to avoid it as someone had urinated over that part of the cell (this was untrue – the officers had simply poured some water about). Ben and Ronnie then struck up a conversation with Mr Kumar. Initially, Mr Kumar was leaning up against a wall, but sometime later in the conversation, he sat down on a bench beside Ben.

[21] Venning J gave the following summary of what then occurred:[7]

> During the conversation that followed, Mr Kumar told Ben and Ronnie that he was charged with the murder of Mr Prasad. He told them the police had bugged his car. He said he had gone to a brothel with Mr Permal to create an alibi and talked about trying to leave New Zealand to avoid the charges. He said Mr Prasad owed him $74,000 for drugs. As the conversation went on he said that he had punched Mr Prasad to his nose. He said he had killed him with the one punch and had then burnt the body in an attempt to destroy evidence. He told them what he had done with the money Mr Prasad had given him.

We set out what occurred during the conversation in greater detail later in this judgment.

The rights at issue

[22] Following his arrest, Mr Kumar had the right to obtain legal advice and the right to refrain from making a statement. Section 23 of NZBORA provides in part:

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7 *Kumar* (HC), above n 1, at [23].

23 Rights of persons arrested or detained

(1) Everyone who is arrested or who is detained under any enactment—

…

(b) shall have the right to consult and instruct a lawyer without delay and to be informed of that right; and

…

…

(4) Everyone who is—

(a) arrested; or

(b) detained under any enactment—

for any offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right.

[23] The right to refrain from making a statement and the right to obtain legal advice are closely connected. This point was emphasised by Hardie Boys J in *R v Barlow*,[8] a case which we will discuss further below. Hardie Boys J adopted the following observations of McLachlin J in *R v Hebert*:[9]

> The most important function of legal advice upon detention is to ensure that the accused understands his rights, chief among which is his right to silence. The detained suspect, potentially at a disadvantage in relation to the informed and sophisticated powers at the disposal of the state, is entitled to rectify the disadvantage by speaking to legal counsel at the outset, so that he is aware of his right not to speak to the police and obtains appropriate advice with respect to the choice he faces. Read together, ss. 7 and 10(b) [of the Canadian Charter of Rights and Freedoms] confirm the right to silence in s. 7 and shed light on its nature.
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> The guarantee of the right to consult counsel confirms that the essence of the right is the accused's freedom to choose whether to make a statement or not. The state is not obliged to protect the suspect against making a statement; indeed it is open to the state to use legitimate means of persuasion to encourage the suspect to do so. The state is, however, obliged to allow the

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8 *R v Barlow* (1995) 14 CRNZ 9 (CA).

9 *R v Hebert* [1990] 2 SCR 151 at 176–177, as cited in *R v Barlow*, above n 8, at 43. The Canadian Charter of Rights and Freedoms contains a right to counsel (s 10(b)) but does not contain an explicit right to silence – that is read in as part of the right to a fair trial in s 7. Accordingly, an important part of counsel's role is to advise a suspect of the right to silence. The statutory setting in New Zealand is different, in the sense that a detained person has an explicit right to refrain from making a statement, to have access to counsel and to be informed of those two rights.

> suspect to make an informed choice about whether or not he will speak to the authorities. To assist in that choice, the suspect is given the right to counsel.

[24] Sections 28 and 30 of the Evidence Act are also relevant. Section 28 requires judges to exclude statements unless they find, on the balance of probabilities, that they are reliable and identifies a range of non-exclusive considerations which judges must take into account when making this assessment. Under s 30(2), a judge who finds that evidence has been improperly obtained must consider whether its exclusion is proportionate to the impropriety. Under s 30(5), evidence is improperly obtained for the purposes of s 30 if (among other things) it is obtained by the police in breach of any enactment or rule of law or unfairly. Section 30(6) provides that in deciding whether a statement obtained by the police has been obtained unfairly, the court must take into account any guidelines set out in practice notes issued by the Chief Justice.

[25] The Practice Note on Police Questioning issued by the Chief Justice on 16 July 2007 relevantly provides:[10]

> 1. A member of the police investigating an offence may ask questions of any person from whom it is thought that useful information may be obtained, whether or not that person is a suspect, but must not suggest that it is compulsory for the person questioned to answer.
>
> 2. Whenever a member of the police has sufficient evidence to charge a person with an offence, or whenever a member of the police seeks to question a person in custody, the person must be cautioned before being invited to make a statement or answer questions. The caution to be given is:
>
> (a) that the person has the right to refrain from making any statement and to remain silent;
>
> (b) that the person has the right to consult and instruct a lawyer without delay and in private before deciding whether to answer questions and that such right may be exercised without charge under the Police Detention Legal Assistance Scheme;
>
> (c) that anything said by the person will be recorded and may be given in evidence.

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[10] *Practice Note – Police Questioning (s 30(6) of the Evidence Act 2006)* [2007] 3 NZLR 297.

3. Questions of a person in custody or in respect of whom there is sufficient evidence to lay a charge must not amount to cross-examination.

4. Whenever a person is questioned about statements made by others or about other evidence, the substance of the statements or the nature of the evidence must be fairly explained.

5. Any statement made by a person in custody or in respect of whom there is sufficient evidence to charge should preferably be recorded by video recording, unless that is impractical or unless the person declines to be recorded by video. Where the statement is not recorded by video, it must be recorded permanently on audio tape or in writing. The person making the statement must be given an opportunity to review the tape or written statement or to have the written statement read over, and must be given an opportunity to correct any errors or add anything further. Where the statement is recorded in writing, the person must be asked if he or she wishes to confirm the written record as correct by signing it.

[26] The fundamental question is how what occurred in this case impacts on Mr Kumar's protected rights. We begin our discussion with the right to refrain from making a statement.

The right to refrain from making a statement and police undercover cellmates

[27] The placing of undercover police officers in cells with suspects who have been arrested and detained has obvious implications for protected rights. Without appropriate constraints, such rights could be substantially undermined. Yet the courts in New Zealand and elsewhere have been reluctant to prohibit such police activities absolutely. As we now explain, the courts have used the concept of "active elicitation" as the mediating principle, which we accept is the correct approach.[11]

[28] The New Zealand courts in cases such as *R v Barlow*,[12] *R v Hartley*[13] and the present case have derived considerable assistance from decisions of the Supreme Court of Canada. In a series of cases involving admissions by suspects to undercover police officers or others acting as state agents – *R v Hebert*,[14] *R v*

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11 As the parties agreed: see above at [3].
12 *R v Barlow*, above n 8.
13 *R v Hartley* CA6/02, 9 May 2002.
14 *R v Hebert*, above n 9.

Broyles[15] and *R v Liew*[16] – the Canadian Supreme Court has developed a set of guiding principles that inform the active elicitation test.

[29] We will discuss the principles as drawn together in the last of these cases, *R v Liew*. Our focus is on admissions made to undercover police officers – we will not discuss the additional issues that arise where an admission is made to a private citizen acting at the behest of, or in conjunction with, the police.

[30] Mr Liew was arrested in connection with a drug deal. The police also pretended to arrest an undercover police officer who was involved in the transaction. The two were taken together in a police car to a police station, where they were placed together in an interview room. Over a relatively short period of time, Mr Liew made various inculpatory statements to the undercover officer. The question was whether the statements were admissible.

[31] Delivering a judgment agreed to by all but one member of the Court,[17] Major J said that the appeal concerned "the scope of the right to silence of a person who has been detained by the state" and identified the single issue as being whether the undercover officer had "actively elicited" Mr Liew's statements.[18] Major J's judgment makes a number of important points.

[32] First, the Court rejected the view that an atmosphere of oppression was necessary to justify a finding that a detainee's right to refrain from making a statement had been violated. The Court described the "oppression" it had in mind as "typically but not exclusively thought of as persistent questioning, a harsh tone of voice, or explicit psychological pressure on the part of the state agent".[19]

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15 *R v Broyles* [1991] 3 SCR 595.

16 *R v Liew* [1999] 3 SCR 227.

17 Lamer CJ agreed with Major J's summary of the principles arising from *Hebert* and *Broyles*, but disagreed as to their application to the facts of the case.

18 At [35]–[36].

19 At [37].

[33] Second, the Court applied the distinction drawn by McLachlin J in *R v Hebert* between the use of undercover police officers to *observe* a suspect and their use to *actively elicit information* from a suspect. Major J said:[20]

> *Hebert* does not rule out the use of undercover police officers. Its concern is not with subterfuge *per se*, but with subterfuge that, in actively eliciting information, violates the accused's right to silence by depriving her of her choice whether to speak to the police. Precisely because the detainee retains her freedom in that respect, not all of her speech can be immediately deemed involuntary merely by virtue of her being detained. *Hebert* expressly allows for situations where, though speaking to an undercover officer, the detainee's speech is voluntary, in the sense that she must be taken to have freely accepted the risk of her own actions. No other view is consistent with the enshrinement of her right to choose whether to speak or to remain silent.

Accordingly, a detainee's right to refrain from making a statement is not an absolute right capable of being discharged only by express waiver.[21]

[34] Third, as will be apparent from the last point, the Court did not reject police use of undercover techniques. Major J said:[22]

> It is of no consequence that the police officer was engaged in a subterfuge, permitted himself to be misidentified, or lied, so long as the responses by the appellant were not actively elicited or the result of interrogation. In a more perfect world, police officers may not have to resort to subterfuge, but equally, in that more perfect world, there would be no crime. For the moment, in this space and time, the police can, within the limits imposed by law, engage in limited acts of subterfuge.

[35] Fourth, the Court said that determining whether there has been "active elicitation" requires answering the question whether there is what it referred to as "a causal link" between the conduct of the undercover officer and the suspect's making of the statement, which in turn requires consideration of the circumstances of the exchange between the suspect and the undercover officer.[23] The Court quoted the following extracts from the judgment of Iacobucci J in *Broyles* in relation to the factors to be considered:[24]

> The first set of factors concerns *the nature of the exchange between the accused and the state agent*. Did the state agent actively seek out

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20 At [41].
21 At [39].
22 At [45].
23 At [42].
24 *R v Broyles*, above n 15, at 611, cited in *R v Liew*, above n 16, at [42] (emphasis added).

> information such that the exchange could be characterized as akin to an interrogation, or did he or she conduct his or her part of the conversation as someone in the role the accused believed the informer to be playing would ordinarily have done? The focus should not be on the form of the conversation, but rather on whether the relevant parts of the conversation were the functional equivalent of an interrogation.
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> The second set of factors concerns *the nature of the relationship between the state agent and the accused*. Did the state agent exploit any special characteristics of the relationship to extract the statement? Was there a relationship of trust between the state agent and the accused? Was the accused obligated or vulnerable to the state agent? Did the state agent manipulate the accused to bring about a mental state in which the accused was more likely to talk?

[36] Finally, the Court rejected the Crown's submission that these principles were only relevant where a suspect has made it explicit that he or she does not want to speak to the police. The Court did not accept that "an assertion of the right to silence on the part of the accused is a condition precedent to the application of the *Hebert* doctrine".[25]

[37] On the facts, the majority held that there was no active elicitation on the part of the undercover officer, so that the appellant's statements were admissible. Major J said:[26]

> In accordance with *Broyles*, the undercover officer conducted his part of the conversation as someone in the role the appellant believed the officer to be playing would ordinarily have done. In the circumstances of this case the conduct of the officer was not the functional equivalent of an interrogation. *The point is not that role-appropriateness by itself sanitizes the exchange, but that the undercover officer did not direct the conversation in any manner that prompted, coaxed or cajoled the appellant to respond.* The appellant's response was not "caused" by the officer's statement in the sense that the officer's statement deprived the appellant of his choice whether to speak. In responding to the officer's statement, the appellant exercised his freedom to do so.

The part to be played by "role appropriateness" in the evaluation raises an important question, to which we will return.

[38] Turning to the New Zealand cases, in *R v Barlow*[27] Mr Barlow was arrested and charged with two murders four months after the murders had occurred. During

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25 *R v Liew*, above n 16, at [44].
26 At [51] (emphasis added).
27 *R v Barlow*, above n 8.

those four months, Mr Barlow, who had been identified as a suspect by police from an early stage, kept in close contact with a friend, B, and discussed various issues in relation to his position with him. After Mr Barlow had been arrested and charged, B had a discussion with the police, in which he said that he was willing to act as a police informer. The police provided him with equipment to record his telephone and other conversations with Mr Barlow, but told him not to press Mr Barlow for admissions or to ask any questions about Mr Barlow's defence strategy.

[39] In the two months following Mr Barlow's arrest, while he was on bail, B recorded many telephone and other conversations with Mr Barlow. Mr Barlow did not confess to the killings in the conversations but made various statements that strengthened the prosecution case, which was circumstantial in nature. When questioned by the police at an earlier stage in their investigation, Mr Barlow had advised that he wished to exercise his right not to make a statement.

[40] A majority of the Full Court of the Court of Appeal held that the statements made by Mr Barlow to B in the two month period were admissible at trial, with one exception.[28] The majority judgments take rather different approaches at points, most importantly to the period during which the right to refrain from making a statement in s 23(4) attaches, namely, whether it is confined to the period of arrest and/or detention,[29] or whether it carries over after the suspect is formally charged and released on bail.[30] That is not something that we need to express any view about as the statements at issue in the present case were obtained while Mr Kumar was in detention immediately following his arrest and before his first court appearance. On any view, s 23(4) was engaged.

[41] For present purposes the importance of *Barlow* is that all members of the Court adopted the active elicitation test as it emerged from *Hebert* and *Broyles*,

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[28] The exception was a conversation where B had asked questions relating to how Mr Barlow intended to conduct his defence, which the Crown accepted should be excluded. The majority comprised Cooke P, Richardson, Hardie Boys and Gault JJ, with McKay J in the minority. For a fuller discussion of what the authors describe as a curious case, see Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: a Commentary* (LexisNexis, Wellington, 2005) at [20.11.25] and following.

[29] As held by Richardson and Gault JJ: *Barlow*, above n 8, at 29 per Richardson J and at 51 per Gault J.

[30] As held by Cooke P, Hardie Boys and McKay JJ: at 22 per Cooke P, at 42 per Hardie Boys J and at 62 per McKay J.

albeit in the cases of Richardson J and Gault J, in different contexts from that of the remaining Judges:

(a) Cooke P, Hardie Boys J and McKay J each adopted the test in the context of the right not to make a statement protected by s 23(4).[31] As Hardie Boys J put it:[32]

> Just as the police must respect the right to silence in direct questioning of a suspect following arrest, so must they refrain from subverting it by deception or trick effectively resulting in interrogation of a kind that could not be undertaken overtly.

However, assuming no active elicitation, a suspect who volunteered incriminating information to an undercover police officer or other state agent could not invoke the right to silence protected by s 23(4).[33]

(b) Richardson J discussed the test when considering whether B's conduct violated Mr Barlow's right to consult and instruct a lawyer under s 24(c) of NZBORA.[34] The Judge found that Mr Barlow's right had not been violated.[35]

(c) Gault J applied the test when considering whether the statements should be excluded in exercise of the common law unfairness jurisdiction.[36]

[42] Subsequent decisions of the Court of Appeal have adopted the active elicitation approach, for example, *R v Hartley*,[37] *R v Szeto*[38] and *R v Ross*.[39] The

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31 At 22–23 per Cooke P, at 43–44 per Hardie Boys J and at 60–61 per McKay J.
32 At 43.
33 At 44 per Hardie Boys J.
34 At 35–38.
35 At 39.
36 At 52–54. Gault J also referred to the right to a fair trial protected by s 25(a) of NZBORA.
37 *R v Hartley*, above n 13.
38 *R v Szeto* CA240/98, 30 September 1998.
39 *R v Ross* [2007] 2 NZLR 467 (CA).

active elicitation approach has also been applied in Australia[40] and by the European Court of Human Rights in respect of a claim against the United Kingdom.[41]

[43] Three points of particular relevance to the present case emerge from this brief review of the authorities:

(a) First, the fact that the police use subterfuge or deception when dealing with a person who is arrested or detained does not necessarily mean that any resulting admission or similar statement was obtained in breach of the right protected by s 23(4) or unfairly.

(b) Second, there can be no complaint where an undercover police officer's role is entirely passive, as occurred, for example, in a case where a German-speaking undercover police officer was placed in a cell in Italy with two German suspects who proceeded to discuss their offending in German thinking their cellmate did not understand.[42] Nor will the fact that there was some interaction between the undercover officer and the detainee before an inculpatory statement is made necessarily be fatal to the statement's admissibility. That will depend on the particular circumstances and nature of the interaction.

(c) Third, the critical enquiry is whether the undercover officer actively elicited information from the suspect about the offending. In making this assessment, the court must consider both the nature of the exchange between the suspect and the undercover officer and the nature of the relationship between them.[43] If an undercover police officer acting as a cellmate did no more than respond to what the suspect was saying in the same way that a true cellmate would have

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40 See *R v Swaffield, Pavic v R* (1998) 192 CLR 159 at [91] and [97]–[98] per Toohey, Gaudron and Gummow JJ and at [153]–[155] per Kirby J. See also *Tofilau v R* [2007] HCA 39, (2007) 231 CLR 396 at [198]–[203] per Kirby J.

41 See *Allan v United Kingdom* (2003) 36 EHHR 12 (ECHR) at [30]–[33] and [50]–[52], applied in *Allan v R* [2004] EWCA Crim 2236.

42 *App No 12127/86 v Germany* (1989) 11 EHRR 84 (EComHR). For a New Zealand example of an undercover officer acting as a "listening post", see *R v Ngamu* (1992) 9 CRNZ 295 (HC).

43 See the extract from Iacobucci J's judgment in *Broyles* cited by Major J on behalf of the majority in *Liew*: above at [35].

> responded, it is unlikely that the suspect's right to refrain from making a statement will have been breached. The right is the suspect's; if the suspect speaks voluntarily to a cellmate about the offending, he or she must be taken to have accepted the risks inherent in that. But it must be remembered that while role appropriateness is relevant to the evaluation that must be made, it is not the key consideration: the key consideration is whether the undercover officer directed the conversation in a way that "prompted, coaxed or cajoled" the suspect to make the statements. If the officer did direct the conversation in that way, he or she will have conducted the functional equivalent of an interrogation. The focus is on function, not form. An exchange between a suspect and an undercover officer leading to a statement may not take the form or have the style of an interrogation, but it may still perform the function of an interrogation if the undercover officer has actively sought relevant information from the suspect by directing the conversation to matters of interest.

[44] To explain the third point further, while the "active elicitation" test is easy enough to articulate, it may be difficult to apply in particular cases. This feature was emphasised in two recent High Court decisions, *R v Cummings*[44] and *R v Harrison*.[45] *Cummings* concerned the admissibility of incriminating statements made by suspects who had been arrested and detained to two cellmates who were in fact undercover police officers. Having reviewed the authorities, Panckhurst J referred to the two sets of factors identified by the Supreme Court of Canada as relevant to determining whether there has been active elicitation.[46] The Judge said that the second of the two sets of factors – the nature of the relationship between the state agent and the accused – was problematic in the case before him:

> [92] … The second inquiry seems to have two elements; whether the incriminating statements were elicited and whether the flavour of the exchanges between the agent and the defendant were the functional equivalent of an interrogation. The concept of elicitation is clear enough, but to my mind determining whether a lengthy discussion in particular amounts to the functional equivalent of an interrogation can be very difficult.

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44 *R v Cummings* [2014] NZHC 1025.
45 *R v Harrison* [2014] NZHC 2246.
46 *R v Cummings*, above n 44, at [74]. See the extract from *Broyles* quoted above at [35].

> [93] There are, I think, such marked differences between a formal police interview on the one hand, and a supposed cellmate discussion on the other as to render the functional equivalence inquiry unrealistic. In the former the status of the participants, and the purpose of the occasion, are manifestly obvious. But a staged cellmate discussion is quite the opposite on account of the deception in relation to the identity of one of the parties and the concealment of the true purpose of the discussion. Given the element of subterfuge, it is only natural that the agent will not conduct the conversation in the manner of an interrogation.
>
> [94] I question whether the Canadian approach is more workable if confined to the concepts of freedom of choice, elicitation and causation. In other words, was the defendant's right to choose whether to speak respected, or was there eliciting conduct such that the agent caused the defendant to speak as he did? So viewed, the inquiry still poses a significant challenge to decision makers.

[45] Panckhurst J also emphasised that it was important to place the analysis in the context of the Evidence Act.[47] Having set out the relevant provisions and further discussed the authorities, the Judge concluded that the evidence had been unfairly obtained:

> [116] In my view the cases of both [suspects] fall into a subset defined by a number of characteristics. Both men were interviewed, arrested and charged with murder; had therefore been advised of their right to refrain from making a statement (and in [one] case had asserted that right); were then held in custody, and finally were spoken to by undercover police officers for the purpose of obtaining more evidence in support of the murder charges. I consider that the deployment of undercover police officers in the police cells in these circumstances is conduct designed to circumvent the right to silence. I appreciate that this conclusion, if correct, would likely preclude the use of undercover officers once defendants have been arrested and are detained. This is contrary to the position in Canada, but is in my view the required approach in the New Zealand context.

[46] Panckhurst J also considered whether the statements had been actively elicited. He prefaced his discussion by saying that he did not find this a straightforward inquiry given the reservations he had earlier expressed.[48] Nevertheless, the Judge found that there was active elicitation: having engaged each of the suspects, the undercover officers guided the conversation to areas of interest to them, thereby obtaining the suspects' versions of events; there were direct questions on key topics and, at least in respect of one suspect, a degree of persistence.[49]

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47 At [98] and following.
48 At [125].
49 At [125]–[131] and [137]–[138].

[47] If the Judge meant in [116] of his judgment[50] that deployment of an undercover officer in a cell with an arrested and detained suspect to obtain more evidence necessarily breaches the detained person's rights, we do not agree. Where the officer is, for example, simply a passive observer as in the example given at [43](b) above, there is no breach of the person's rights. Nor is there any breach where the interactions of the undercover officer with the detainee are straightforward, normal interactions which do not direct the conversation in a way which prompts, coaxes or cajoles the detainee into making a statement.[51] As the Supreme Court of Canada has accepted, a suspect who chooses to make incriminating statements to a cellmate must be taken to have accepted the risk that the cellmate will report the statements to the police. We do not consider that the fact that the cellmate is an undercover officer changes this analysis. The undercover officer's purpose in adopting the subterfuge does not mean that any interactions he or she has with the suspect must necessarily be treated as causative of any incriminating statements the suspect makes. We see no reason to depart from the Canadian Supreme Court's articulation of the active elicitation test.

[48] That said, the features of the interview in *Cummings* which Panckhurst J identified when applying the active elicitation test to the facts in that case meant that the statements were rightly excluded. Those features justified the conclusion that the undercover officers had conducted the functional equivalent of an interrogation.

[49] In *Harrison*, Mallon J expressed agreement with Panckhurst J's view that the active elicitation test is difficult to apply where an undercover officer poses as a fellow prisoner of a suspect. This was because, even if there were no direct or leading questions and the relevant statements emerged in the natural course of conversation, "the police may have caused statements to be made which would not have been made without their involvement".[52] Mallon J posed the essential question as being whether "police conduct caused an accused to make statements to them that would not otherwise have been made".[53] The Judge went on to say the elicitation test may assist with answering that question.

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50 See above at [45].
51 See the extract from Major J's judgment in *Liew* quoted above at [37].
52 *R v Harrison*, above n 45, at [29].
53 At [30].

[50] The effect of Mallon J's approach is largely to preclude the possibility of any involvement by an undercover officer with a suspect in custody other than as a passive listener as almost any action by an undercover officer that is responsive to what a suspect says can be characterised as "causative" of a later statement. That is further than the Canadian authorities go, and, as will already be apparent, we do not agree that there are particular features of the New Zealand setting which require a more restrictive approach than is adopted in Canada.

The statements at issue

[51] As we have said,[54] Mr Kumar accompanied the police to the police station and agreed to undergo a video interview. Although properly informed of his rights, he did not immediately seek legal assistance. During the video interview, he denied that he was responsible for Mr Prasad's death. At the point that the police wished to play an audiotape of intercepted conversations in his car, Mr Kumar said that he wished to listen to the tape in full with a lawyer. Accordingly, the video interview was brought to an end and Mr Kumar was arrested and provided with access to a lawyer, Mr Davey, from whom he took advice. In response to Mr Davey's enquiry about further interviewing that evening, the police advised that there would be no further interview unless new material arose. In response to the offer from the police to make Mr Kumar available that evening so that he could discuss the bodily sample/DNA request, Mr Davey said he would meet Mr Kumar before his court appearance the following morning.

[52] It was after this that Mr Kumar was placed in the dayroom cell where the two undercover officers had earlier been placed. Having stopped him from sitting at the spare table by saying (falsely) that someone had urinated in that part of the cell, one of the officers, Ronnie, asked Mr Kumar what was going on. Mr Kumar then told Ben and Ronnie that he was being held in relation to the murder of Mr Prasad, who had been burnt to death. For their part, the officers told Mr Kumar that they were being held for dealing in methamphetamine.

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[54] See above at [10]–[12].

[53] Mr Kumar was undoubtedly talkative and reasonably forthcoming. Although he denied killing Mr Prasad, he did acknowledge that Mr Prasad had been in his car with him on the evening of 30 January. He talked about the fact that Mr Prasad had withdrawn some money from the bank, that he (Mr Kumar) had been subject to surveillance, and said several times that the police could not prove he committed the murder. He also raised the possibility of being released on bail.

[54] Mr Kumar referred to the fact that Mr Prasad's mother had phoned his father and accused Mr Kumar of Mr Prasad's murder. Then the following exchange occurred:[55]

B Why are they doing your mate?

SK Because apparently he's accompanied, it's not accompanied like we both did it.

R Is he sweet?

SK Huh?

R Is your mate sweet like?

SK Oh nah my mate's all good he was with me the whole night.

R Yeah.

B Oh okay.

SK Yeah, we were both fucking get laid. This dude got laid by someone else, and we're getting fucked now.

R Yeah.

B Fuck, hey that shits real.

SK Yeah bro, fucked up shit aye.

B I hope you've got a good lawyer.

SK Me too bro, cos this ain't like normal low jack shit aye it's fucking murder.

R But for them to fucken go to the and do all the shit they did.

B Yeah.

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[55] There are two versions of the transcript, one taken from Ben's recording device and one from Ronnie's. The extracts in this judgment are taken from the transcript from Ronnie's recording device.

R They must be think they're pretty close to the mark you know.

SK Yeah yeah yeah, but they've fucked up.

R They must be on the money you know so.

[55] There was then some further discussion before the following exchange occurred:

R So why were you, why were you hooking up with [Mr Prasad] that night?

SK Why was I hooking up with him?

R Yeah.

SK Dealing and shit.

B Yeah yeah like okay, white, green?

SK X.

B Oh yeah ah, must run in the, bro, you're talking pills mate you're talking to the right person here.

R Fuck bro.

B That's what he … shit.

SK Yeah fuck, that's the reason the money was owed to.

B Aye?

SK That was the reason the money was owed as well.

B Oh from the X?

SK Yeah yeah yeah but the thing is they can't link me with it.

B Did he owe you?

SK Yeah yeah.

R How much.

B Oh yeah.

SK That's where the whole thing came from, but the only fucking problem is they can't link me with it.

R Yeah.

B Oh that's good.

[56] After a short break while food was delivered, the conversation resumed:

B Fuck. So how much did he owe you?

SK Bro he owed me, he still owes.

B Oh.

R Bullshit, how much was he into you for?

SK Seventy four.

B Yeah?

SK Yeah, it was quite a lot, I did that and I did pseudo.

…

R So you miss seventy four gees?

SK Yeah.

R Not seventy four hundred?

SK No seventy four gees.

[57] Later the following exchange took place:[56]

B How much does your mate know?

SK Everything.

B Oh fuck he was there?

SK Yeah yeah yeah.

R Oh …

B Oh … but he …

SK But he doesn't know about the drugs and shit but he knows about the fucking rest of the deeds.

B The what, the rest of?

SK Yeah the rest of deeds and fucking meeting him and drugs and shit but he doesn't know me dealing with the spot. He doesn't know about the money laundering, but he knows about the money, he doesn't know what it's for but if he slips.

B What about …

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[56] Emphasis added.

SK … it's gonna build up.

B What about fucking who did it, fucking blame him.

SK Blame him?

B Your mate and go.

SK What (Unclear)

B Fuck.

SK I'm not a guy that drops on my mate fucking I can't do that.

B Oh well then you'll both have to go then.

SK Fuck, but that's something you can't do bro aye, you can't let your fucking mate down.

R You know what bro.

SK Mm?

R Don't don't take me wrong bro I'm not a rat or shit like that but …

B Mate if he's in there now …

R I can tell you're worried about him doing it to you, I can see it bro straight out, you're worried, true or not true? I can see it in you as soon as your fucking as soon as old mate said it to ya bro, but hey.

B It's about the rest of your life, fuck.

SK And the thing is bro if I get screwed from that cunt, I can't leave the country as well.

B Aye?

SK I can't leave the country, even my father (Unclear)

R It's hard to leave the country when [you're] in these four walls man.

SK You know what the most shittiest thing is, and this is what's getting me, I'm not an old guy you know I'm young, my partner's young and I've got a son whose six months old. If I let them slip now and I go in for ten years, after ten years what's the guarantee I'm still going to have her and that.

R He'll be calling someone else Dad mate.

SK That's the thing, I don't want to fucking do.

R That's fucked up.

SK And um I've been in the fucking (Unclear) bro and I'm busting, I can't sleep, I can't stop shaking I just want to fucking get the fuck out of here.

B If you can't get out of here, is there any way they can fucking prove it was you though?

SK There's no way, the only way they can prove it's me is by linking me to the spot.

B Aye?

SK The only, boss outside. The only way they can do it is by linking me to burning him but the thing is there is no proof with me or my car, or him or his car …

B Fuck.

SK … that went there. They've got proof of us going to a fuel station though but that doesn't mean we killed him. It's like ah there's a MacDonalds case that happening just because they found, they found his footprints in the murder thing.

R Yeah.

SK … but they said just because his footprint was there doesn't mean he murdered the guy.

…

B What fucking for a, don't be rude but *why fucking burn him man?* Why not just fucking (makes sound).

SK You know why, I'll be dead honest to you, when this shit happens bro my ran, my mind ran around the world bro, ran a million miles per second, the only thing I could think of was the only way I could leave no evidence was burning.

B Burning.

SK Fire gets rid of the fingerprints, everything.

B Yeah.

SK So it just clicked with me cos if I murdered my fingerprints and everything would be gone.

[58] As the conversation went on Mr Kumar told Ben and Ronnie that he had punched Mr Prasad hard in the nose and thought he had killed him and disposed of the body by burning it. Later, once Ben had been removed from the cell leaving only Mr Kumar and Ronnie, the following exchange occurred:

SK Have you ever killed someone?

R No bro.

SK I have done it.

R Yeah.

SK But (Unclear) it's fucking hectic shit bro.

R Shit happens.

SK Ay bro it was hard to sleep with aye for like, fuck until now.

R Yeah.

SK Because the thing is it's I've never done it before and I and I'm more naturally inclined can just go kill someone.

R What do you see?

SK Huh like when I sleep or sometimes to be honest I don't give a fuck about him.

R Yeah.

SK I'm worried about cops like everyday I just see the cops, I don't think it's me not being able to sleep because of it, it's because of the cops.

R Yeah.

SK If you kill someone and you know you got away with it, you'll feel sorry for a week.

R Yeah.

SK Like natural human, will be just like you'll forget after a while.

R As the time goes on.

SK But with the cops.

R Yeah.

SK In your head twenty-four seven.

R Yeah.

SK That's that's that's the fucked up thing man.

R Oh well hopefully....

SK 30th, 30th January he died, 31st I could have got a flight out, no not on the 31st, on the 1st of Feb I could have got a flight out. On the 4th of Feb they started tracing me.

Evaluation

[59] In assessing the admissibility of Mr Kumar's inculpatory statements we will proceed on the basis that they are reliable. Although reliability was challenged in the High Court, Venning J found that the statements were reliable[57] and that finding was not challenged in the Court of Appeal.[58] There are some indicia of possible unreliability, for example, the fact that the evidence of the pathologist does not support Mr Kumar's assertion that he knocked Mr Prasad down with a heavy punch to his nose. However, there is much about the statements which suggests they are reliable, for example, the fact that both Mr Kumar and Mr Permal had substantial amounts of cash immediately after the $30,000 withdrawal made by Mr Prasad. Our focus, then, will not be on reliability but on whether the statements were improperly obtained.

[60] As we have said, Mr Downs accepted that there had been active elicitation by the undercover officers at least from the point of the italicised question in the extract quoted at [57] above ("why fucking burn him man?"), so that from that point at least, Mr Kumar's inculpatory statements were improperly obtained in terms of s 30 of the Evidence Act. Mr Downs did not attempt to argue that the statements from that point on should nevertheless be admitted under the balancing process contemplated by s 30(2)(b). He also accepted that, if the Court considered the active elicitation had begun at an earlier point in the conversation, statements from that point on would be prima facie inadmissible, but argued that they should nevertheless be admitted under the s 30(2)(b) balancing assessment.

[61] We consider that Mr Downs was correct to make the concessions that he did. There is no doubt that Mr Kumar was a talkative young man and that he spoke freely throughout the conversation, as Venning J found.[59] We accept Venning J's observation that Mr Kumar appeared relaxed throughout and eager to talk. However, it is equally clear that the undercover officers both guided the conversation and were direct and/or persistent in their questioning on key points. An example from an early stage in the conversation is the questioning recorded above at [55] and [56] about

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57 *Kumar* (HC), above n 1, at [91]–[93].
58 *Kumar* (CA), above n 2, at [16].
59 *Kumar* (HC), above n 1, at [58].

how much Mr Prasad owed Mr Kumar. That question was asked three times before Mr Kumar indicated the amount. Even then, Ronnie sought clarification as to whether the amount was $7,400 or $74,000.

[62] Venning J considered that the undercover officers had conducted their part of the conversations just as other detainees (as Mr Kumar believed them to be) would have done.[60] He said:[61]

> If Mr Kumar had been put in a cell with other, genuine, prisoners, I am satisfied that he would have talked to them just as he did to Ben and Ronnie.

We do not agree with this analysis. While role appropriateness is relevant to the evaluation that must be made, it is not the critical point. The critical point is whether the undercover officer directed the conversation in a manner that "prompted, coaxed or cajoled" Mr Kumar to respond.[62] An undercover officer is entitled to engage a detainee in conversation. But he or she may not conduct the functional equivalent of an interrogation. Whether the officer has done so is to be assessed in terms of what the officer actually did – the sequence and nature of the questions asked, their relevance to the police investigation, how persistent the officer was and so on. The court should not speculate on what might have happened if the officer had been a genuine inmate or had taken a low-key role. The danger of such an approach is that it could allow what is the functional equivalent of an interrogation on the basis of the court's assessment that the detainee is a naturally talkative and outgoing person who would have engaged with fellow detainees in any event. Adopting such an analysis would undermine the protected rights at issue.

[63] We accept that some of the topics raised by the undercover officers with Mr Kumar may also have been raised by fellow prisoners. But the officers' questions were both systematic and comprehensive. The officers steered the conversation to matters that interested them in terms of the police investigation in a way that other detainees would have had no particular interest in doing, and they were persistent. In these circumstances, we have no doubt that the officers "prompted" Mr Kumar to respond and conducted the functional equivalent of an

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60 At [64].
61 At [69].
62 See the extract from *Liew* cited above at [37].

interrogation. Thus, consideration of the first set of factors identified by Iacobucci J in *Broyles*[63] – the nature of the exchange between the undercover officers and Mr Kumar – indicates that there has been active elicitation.

[64] Consideration of the second set of factors – the nature of the relationship between the undercover officers and Mr Kumar – supports this conclusion. Throughout their time with Mr Kumar in the cell, the undercover officers actively sought to gain his trust, by, for example, telling him to be quiet whenever a police officer was close by, offering to obtain a lawyer for him, offering to assist him in leaving the country if he was released on bail and offering to organise lucrative work for him.

[65] Moreover, it is important to emphasise, as the Court of Appeal did, the prelude to the conversation between the undercover officers and Mr Kumar, which casts some light on the objective of the police. Preparation for the undercover operation began several days before Mr Kumar's formal video interview. Prior to being placed in the dayroom cell, the undercover officers were briefed about the circumstances of Mr Kumar's alleged offending and his personal characteristics. This information was presumably intended to assist the officer in building a rapport with Mr Kumar and engaging him in conversation, as well as steering the discussion in the desired directions. On its own, such a briefing would not be objectionable; indeed, some amount of briefing is necessary to any effective undercover operation, even one where the officers take a reasonably passive role. Rapport building without more is unobjectionable. But here the preparatory steps went further and facilitated what the Crown now accepts was active elicitation. As we have previously noted, building rapport to the point that Mr Kumar would feel "comfortable talking about his own criminality" was part of the infiltration plan set out in the Operation Orders.[64]

[66] The confined setting in which Mr Kumar was placed with the officers, their successful attempt to stop Mr Kumar sitting at a table by himself by fabricating the urine story and the fact that one of the officers was a young Indian man were steps

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63 See above at [35].
64 See above at [17].

which must have been designed to enable the officers to build a rapport or relationship with Mr Kumar by making him feel comfortable, thus enabling them to engage him in conversation more easily and facilitating his giving of information. We accept that there were no special features of the relationship between the undercover officers and Mr Kumar which the undercover officers sought to exploit. But Mr Kumar was a young man in what was undoubtedly a stressful situation. As the extracts above show, the undercover officers raised issues about the strength of the police case, about the quality of Mr Kumar's legal representation (and offered to help in that respect) and about the reliability of Mr Kumar's co-accused, Mr Permal. These matters must have been raised to increase the pressures on Mr Kumar.

[67] The result of all this was that the undercover officers did actively elicit information about the alleged offending from Mr Kumar – they conducted what was effectively an interrogation, albeit that it was carried out with some subtlety. We do not consider that this is a case where the undercover officers adopted a passive role but, over time, became more active in their questioning. Rather, we consider that from very early in the conversation, the undercover officers attempted to build a rapport with Mr Kumar and to direct the conversation so as to ascertain details of importance to police. In those circumstances, we consider that Mr Kumar's right to decide whether or not to make a statement was breached from the outset of the conversation and that the statements made to Ben and Ronnie are inadmissible.

[68] As we have said, the Crown did not seek to have the statements following the question "why fucking burn him man?" admitted under the s 30(2)(b) balancing process. It did, however, seek to have the earlier statements admitted under that balancing process, on the basis that the undercover officer's questions before "why fucking burn him man?" were part of a natural exchange that could have occurred between genuine cellmates, so that any active elicitation was minor in nature. The Crown submitted that other factors identified in s 30(3) also favoured admissibility.

[69] We do not propose to discuss this aspect in any detail. We acknowledge that Mr Kumar did volunteer a good deal of information at the outset of his conversation with the undercover officers. We also accept that it may be appropriate to allow evidence to be given of part of a conversation between a detainee and an undercover

officer in some circumstances, for example, where the officer takes a generally passive approach and oversteps the mark only towards the end of the conversation or at particular points. But that is not what occurred in this case. Here, the undercover officers actively pursued their objective of obtaining information from Mr Kumar about the alleged offending with questioning that was both specifically directed and persistent and the steps they took from the outset were designed to facilitate that. We do not accept that the officer's questions before "why fucking burn him man?" were simply part of an exchange that might have occurred between genuine cellmates: the same elements of directed and persistent questioning as came to the fore later in the conversation were present from the outset.

[70] Considering the factors identified in s 30(3), the offence was serious and Mr Kumar's statements appear to be reliable; but the right to refrain from making a statement is of fundamental importance and the police intrusion on it was serious. The evidence is important but by no means critical to the prosecution. Overall, we do not consider that the exclusion of the evidence is disproportionate, taking account of the need for an effective and credible justice system. Accordingly, we see no legitimate basis to allow the earlier part of the transcript to go in.

[71] As we have found that Mr Kumar's statements were obtained in breach of his s 23(4) rights, we need not address the application of the Chief Justice's Practice Note.

The right to counsel

[72] In light of the conclusion that we have reached in relation to the breach of Mr Kumar's right to silence, we do not need to discuss whether there was a breach of Mr Kumar's right to counsel and, if so, what the impact of that was, although we acknowledge that the right to counsel and the right to refrain from making a statement are closely linked.

[73] We do agree, however, with the concern expressed by the Court of Appeal about the way the police dealt with Mr Kumar's counsel, Mr Davey. In response to Mr Davey's enquiry, the police advised that they did not intend to speak further with Mr Kumar after his formal interview had ended and they would only seek to conduct

a further interview if new material arose. On the basis of that, Mr Davey said that he would met Mr Kumar before court the following morning to discuss with him the requests by the police for a DNA sample and a medical examination. Whether or not the individual officer knew it, the advice the police gave to Mr Davey was misleading, as the undercover officers had been briefed and were waiting and ready to be deployed.

Decision

[74] The appeal is dismissed.

ELIAS CJ

[75] The issue on the appeal is whether incriminating statements made by Mr Kumar while he was in police custody after being charged with murder were improperly obtained by police undercover agents posing as prisoners. The Court of Appeal held, reversing the decision of Venning J in the High Court,[65] that the statements had been improperly obtained in breach of s 23 of the New Zealand Bill of Rights Act 1990 and should not be admitted at trial.[66] The Crown appealed with leave against the determination that the statements had been improperly obtained.[67] At the conclusion of the hearing of the appeal in this Court, all Judges were of the view that the statements had been improperly obtained and ought to be excluded. Because the trial was imminent, we delivered judgment excluding the statements, with reasons to follow.[68] These are the reasons why I concur with the judgment dismissing the appeal from the Court of Appeal decision to exclude the statements.

Background and summary

[76] The background is traversed in the judgment of Arnold J and does not need to be repeated by me. I, too, conclude in the reasons that follow that the statements were obtained in breach of the appellant's rights under s 23(4) of the New Zealand

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65 *R v Kumar* [2013] NZHC 3487.
66 *Kumar v R* [2014] NZCA 489, (2014) 27 CRNZ 19 (Harrison, Courtney and Clifford JJ).
67 *R v Kumar* [2014] NZSC 166.
68 *R v Kumar* [2015] NZSC 14.

Bill of Rights Act to refrain from making any statement and to be informed of that right.

[77] I write separately to record reservations about the elaboration in the reasons of the other members of the Court of the test of "active elicitation" which the parties agreed to be appropriate when deciding whether statements have been improperly obtained by police agents in breach of s 23(4). "Active elicitation" is explained in the reasons of the other members of the Court as turning on both "the nature of the exchange" between the undercover police agent and the person in custody and "the nature of the relationship between them". In such inquiry the "key consideration" identified in the reasons of the majority is that the undercover police agent "directed the conversation in a way that 'prompted, coaxed or cajoled' the suspect to make the statements".[69]

[78] The formula preferred by other members of the Court is drawn from similar elaboration of the causal link of "elicitation" in decisions of the Supreme Court of Canada dealing with exchanges between agents of the police with existing association with the accused, rather than agents previously unknown to them acting as prisoners.[70] For the reasons given in what follows, I consider that a more direct causal inquiry as to whether the actions of the police agents elicited the statements is sufficient in cases where a police agent is placed in the cell of a person detained in order to obtain admissions.

[79] That approach is, I think, compelled by the terms of s 23(4) and s 3 of the New Zealand Bill of Rights Act which impose obligations on the police to observe the right of those detained to refrain from making statements and to be advised of that right. The right to refrain from making a statement is breached if agents of the police obtain a statement they would not have been able to obtain if the rights of the person detained to refrain from making a statement and to be advised of the right had been observed. Where an undercover agent is placed by the police in the cell of a person detained, I consider that any statement obtained is obtained in breach of s 23(4) if obtained by means other than passive observation or listening unless the

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69 At [43](c).

70 *R v Broyles* [1991] 3 SCR 595; *R v Liew* [1999] 3 SCR 227 per Major J for the majority (with whose discussion of the principles Lamer CJ agreed, while dissenting on their application).

person has first been advised of his right to refrain from making a statement and chooses nevertheless to speak.

[80] The use of a standard of "active elicitation", in the sense in which it is explained in the opinion delivered by Arnold J, causes no harm in the present case because I agree with the other members of the Court that the undercover police officers did in fact actively elicit the statements in the sense described, by directing the conversation they held with Mr Kumar to matters of interest to the police and by direct questioning. In another case, however, a requirement that police officers whose identity is concealed must "actively elicit" statements, by means of "direction" which entails "prompting, coaxing or cajoling" before there is breach of s 23(4), could permit evasion of the right.

[81] As is further explained in what follows, I would also find that the circumstances constituted breach of the accused's rights to consult and instruct a lawyer and to be informed of that right under s 23(1)(b) of the New Zealand Bill of Rights Act. The rights under s 23(1)(b) are "intertwined"[71] with the right to refrain from making a statement because, as McLachlin J pointed out for the Supreme Court of Canada when considering comparable rights under the Canadian Charter of Rights and Freedoms, the right to consult counsel exists "to ensure that the accused understands his rights, chief among which is his right to silence".[72] Despite the connection, breach of s 23(1)(b) is breach of a standalone right, which is a fundamental protection in our system of criminal justice and should itself be directly addressed.

[82] For the reasons explained at [134] to [141], I am of the view that s 23(1)(b) was breached by the actions of the undercover investigation, even though the Court of Appeal was in error in thinking that Mr Kumar's counsel had been told that police would not conduct a further interview before he had an opportunity to provide advice. The impression reasonably to be taken in the circumstances was that no further police interview would be undertaken before Mr Kumar had the opportunity to see his lawyer. The deployment of the undercover officers effectively subverted

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71 *R v Hebert* [1990] 2 SCR 151 at 162 per McLachlin J.

72 At 176. This statement was cited with approval in *R v Barlow* (1995) 14 CRNZ 9 (CA) per Hardie Boys J at 43.

the right to counsel and the right to be advised of the right to counsel. I would hold the statements to have been improperly obtained on this basis also.

[83] In addition, I consider that the Court of Appeal may well have been right in the tentative view it expressed at [85] of its judgment that the statements were obtained in breach of the standards of fairness identified by the Practice Note on Police Questioning,[73] which is the successor to the Judges' Rules.[74] If so, on that basis too they could have been held to be improperly obtained.

[84] The Crown did not seek to argue in written or oral submissions that, if improperly obtained, all the statements should nevertheless be admitted under the discretion conferred by s 30(2)(b) of the Evidence Act 2006. Counsel for the Crown accepted that, from a point approximately one-third into the 80 minutes of recorded interaction between the undercover officers and Mr Kumar,[75] the statements were improperly obtained and should not be admitted in evidence. Counsel argued however that statements up to that point, even if improperly obtained, entailed "minor" impropriety only. In those circumstances they argued that, if the Court found breach of s 23(4) in relation to the earlier statements (contrary to the submissions made), it would be necessary to consider whether the earlier statements should be admitted under s 30(2)(b).

[85] In agreement with the other members of the Court, I consider that all the statements were improperly obtained in breach of the right to refrain from making a statement under s 23(4) of the New Zealand Bill of Rights Act. The matter of admission was not greatly pressed in written or oral argument. I join in the reasons of the other members of the Court for the conclusion that all statements (including those made before the most significant breaches), were also properly excluded.

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73 *Practice Note – Police Questioning (s 30(6) of the Evidence Act 2006)* [2007] 3 NZLR 297.

74 For discussion of the history of the Judges' Rules see *Adams on Criminal Law – Evidence* (edited by Bruce Robertson, looseleaf ed, Brookers) at [ED5].

75 The point occurs 32 pages into the 84 page transcript of the 80 minute recording.

Improperly obtained evidence

[86] Under s 30(5) of the Evidence Act, evidence is improperly obtained and may be excluded (if exclusion is proportionate to the impropriety)[76] if obtained "in consequence of a breach of any enactment or rule of law by a person to whom section 3 of the New Zealand Bill of Rights Act 1990 applies" or if obtained "unfairly". In deciding whether a statement obtained by a member of the Police has been obtained unfairly, s 30(6) requires the judge to "take into account guidelines set out in practice notes on that subject issued by the Chief Justice".

[87] The current Practice Note referred to was issued in 2007, following the coming into effect of the Evidence Act. The guidelines in the Practice Note, in their own terms (which are set out in the reasons delivered by Arnold J at [25]), "do not affect the rights and obligations under the New Zealand Bill of Rights Act".[77]

[88] Although I do not think the ground of unfairness in the light of the Practice Note should be overlooked (and think there is force in the view expressed by Panckhurst J in *R v Cummings* that breach of s 23(4) is equally a breach of rule 2 of the guidelines),[78] the principal grounds for exclusion put forward by the respondent were based on breach of the New Zealand Bill of Rights Act.

[89] Section 23 of the New Zealand Bill of Rights Act deals with the "rights of persons arrested or detained". As is relevant, it provides:

> **23 Rights of persons arrested or detained**
>
> (1) Everyone who is arrested or who is detained under any enactment–
>
> …
>
> (b) shall have the right to consult and instruct a lawyer without delay and to be informed of that right; and
>
> …
>
> **…**

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[76] Evidence Act 2006, s 30(2)(b).

[77] *Practice Note – Police Questioning (s 30(6) of the Evidence Act 2006)* [2007] 3 NZLR 297.

[78] *R v Cummings* [2014] NZHC 1025 at [118]. A similar view was expressed by Hardie Boys J in relation to equivalence between s 23(4) and with the ground of unfairness regulated then by the Judges' Rules in *R v Barlow* (1995) 14 CRNZ 9 (CA) at 46.

(4) Everyone who is–

(a) arrested; or

(b) detained under any enactment–

for any offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right.

...

[90] More generally, everyone charged with an offence has "the right to consult and instruct a lawyer" under s 24(c). And everyone charged is entitled to the "minimum standards of criminal procedure" recognised by s 25, including the rights "to be presumed innocent until proved guilty according to law" and "the right not to be compelled to be a witness or to confess guilt".

[91] Section 3 of the New Zealand Bill of Rights Act establishes the application of the Act:

This Bill of Rights applies only to acts done–

(a) by the legislative, executive, or judicial branches of the Government of New Zealand; or

(b) by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

Undercover police agents and the s 23(4) right

[92] A person charged or detained who discusses information of interest to the police with a private person cannot complain about breach of his right to refrain from making a statement if the person provides the information to the police.[79] That is a risk the person making the statement has assumed.

[93] There is relatively little authority in New Zealand on the application of s 23(4) where undercover police agents obtain statements from those arrested or detained. *R v Barlow*,[80] the principal New Zealand authority, was an early case in the history of the New Zealand Bill of Rights Act and was produced under

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79 *R v Barlow* (1995) 14 CRNZ 9 (CA) at 22 per Cooke P; and *R v Hebert* [1990] 2 SCR 151 at 184 per McLachlin J.

80 *R v Barlow* (1995) 14 CRNZ 9 (CA).

circumstances of urgency, with five different opinions. Significantly, it was not a case where the accused was in custody although, with the exception of Richardson and Gault JJ, the other Judges were prepared to accept that s 23(4) continued to apply after arrest, including to an accused on bail.

[94] *Barlow* did not involve a police officer acting undercover, although whether the informer friend in that case was rightly treated as a police agent was in issue. There were differences too among the members of the Court about the grounds on which the evidence of the informer could be challenged.[81] Despite the differences between them, the separate opinions delivered by the Court of Appeal in *Barlow* cite as helpful the decisions of the Supreme Court of Canada in *R v Hebert*[82] and *R v Broyles*[83] and their adoption of a test of "elicitation" or "active elicitation" when determining whether evidence has been improperly obtained by police undercover agents or informers, although the differences between the legislation protecting rights in New Zealand and Canada is also acknowledged in the opinions.

Obligation of police agents to observe s 23(4)

[95] The precise role played by a private informer in dealing with an accused may be important in cases where the court has to decide whether the informer is in fact acting as an agent of the police, as was in issue in *Barlow*. In the present case, however, police agency was not in issue. The informers in the cells were police officers, obliged by s 3 to observe the rights contained in the New Zealand Bill of Rights Act. The obligation necessarily extends to those acting undercover. The judgments in *Barlow* are clear in the view that someone who is a police agent cannot subvert rights by "masquerading" as a private person.[84] As Sopinka J said of the right to silence under the Canadian Charter "police officers cannot prevent its availability against them by disguising themselves, any more than they can

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81 Whether for breach of the right to silence, breach of the right to counsel or for reasons of fairness.

82 *R v Hebert* [1990] 2 SCR 151.

83 *R v Broyles* [1991] 3 SCR 595.

84 *R v Barlow* (1995) 14 CRNZ 9 (CA) at 37 per Richardson J. See also at 22 per Cooke P; at 43 per Hardie Boys J; at 53 per Gault J (who considered the case on the basis of the right to counsel); and at 63 per McKay J.

constitutionalize an unreasonable search or an arbitrary detention by disguising themselves".[85]

[96] In circumstances where the informers were police officers, I consider that Venning J was in error in thinking that it was relevant to breach of s 23(4) that they stayed within the role they were playing as prisoners and that their part of the conversations had been conducted in a manner that might have been expected of the prisoners they were pretending to be.[86] Whatever role the officers were playing, if their actions allowed the police "indirectly and by deception to elicit statements that they cannot obtain directly",[87] the statements are obtained in breach of s 23(4).

[97] In cases where it is necessary to establish whether an informer was acting as an agent of the police when obtaining statements, it is understandable that close review of the interaction and relationship between the informer and the person detained or arrested will have to be undertaken. That is I think an explanation for the elaboration of "elicitation" undertaken in the Canadian cases of *Broyles* and *R v Liew*[88] and the reason *Broyles* was helpful in the comparable case of the informer friend in *Barlow*. In cases such as the present case, however, where an acknowledged police agent, under an obligation to observe s 23(4), is put in the cell of someone detained for the purpose of obtaining statements of use to the police, emphasis on the nature of the relationship and dealings between the informer and the person detained or arrested is unnecessary and distracts from the causal inquiry whether the statement was obtained by agency of the state. It also overlooks the right under the New Zealand Bill of Rights Act to be informed of the right to refrain from making a statement, as is discussed below at [128]–[131].

Use of undercover police agents to obtain statements from those in custody

[98] Where undercover police agents posing as prisoners are placed in police cells with an arrested person in order to obtain information of use to police investigations, there is a high risk that the rights to refrain from making a statement and to be

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85 *R v Hebert* [1990] 2 SCR 151 at 201.
86 *R v Kumar* [2013] NZHC 3487 at [64] and [69].
87 *R v Barlow* (1995) 14 CRNZ 9 (CA) at 53 per Gault J.
88 *R v Liew* [1999] 3 SCR 227.

informed of that right will be subverted. In all jurisdictions, particular concern has been expressed about the position of those in custody.

[99] So, in *Hebert*, the potential disadvantage of a person detained "in relation to the informed and sophisticated powers at the disposal of the state", which the rights to silence and to counsel attempt to redress, was cited by McLachlin J.[89] Sopinka J cited as "instructive"[90] (despite the different constitutional provisions) the recognition of vulnerability of those in custody referred to by Burger CJ for the majority of the Supreme Court of the United States in *United States v Henry*:[91]

> … the mere fact of custody imposes pressures on the accused; confinement may bring into place subtle influences that will make him particularly susceptible to the ploys of undercover Government agents.

[100] In New Zealand, the vulnerability of those in custody was emphasised in particular in connection with the rights in issue in *Barlow* by Richardson J[92] and Gault J.[93]

[101] In addition to the inherent pressures of custody on the accused, the powers of the state, when deployed in a "scenario" operation such as was used here, include the ability to place the undercover agent in proximity with the accused and the profiling of the accused which assists in developing the scenario that is most likely to be effective. Unlike the accused in *Barlow* (who was on bail) or the prisoner visited by an informer friend in *Broyles* (who could have declined the visit), those detained have no control over who will be placed in their cells.

[102] In the Canadian case of *Hebert*, the agreed facts were that the undercover police officer placed in the accused's cell "engaged the accused in conversation".[94] Sopinka J, with whose concurrence Wilson J agreed, said of this, "[i]f there is any set of circumstances in which the right [to silence] attaches, this is it".[95] And, if the right attaches, he thought "any communication between an accused and an agent of

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89 *R v Hebert* [1990] 2 SCR 151 at 176.
90 At 200.
91 *United States v Henry* 447 US 264 (1980) at 274.
92 *R v Barlow* (1995) 14 CRNZ 9 (CA) at 29 per Richardson J.
93 At 51 per Gault J. See also See *R v Harrison* [2014] NZHC 2246 at [28]–[29].
94 *R v Hebert* [1990] 2 SCR 151 at 159.
95 At 202.

the state (including a suborned informer) is subject to the right and may proceed only if the accused waives the right".[96] No such waiver could arise where an undisclosed undercover informant was acting for the state.

Elaboration of "active elicitation" by the Supreme Court of Canada

[103] In *Barlow*, the members of the Court of Appeal found help in the approach taken by the Supreme Court of Canada in *Hebert* and *Broyles* to the right to silence recognised to be part of the "principles of fundamental justice" protected by s 7 of the Canadian Charter. The approach in *Hebert* and *Broyles*, more recently confirmed by the Canadian Supreme Court in *Liew*, has continued to be treated as helpful in the relatively few New Zealand cases to date.[97]

[104] The Canadian approach suggested first in *Hebert* turns on whether the statements were "elicited" or "actively elicited" by the behaviour of the police agents, thereby obtaining information which the police were "unable to obtain by respecting the suspect's constitutional right to silence".[98]

[105] In *Liew*, the Supreme Court of Canada approved the following passage from *Hebert*, adding emphasis by its own underlining:[99]

> [A] distinction must be made between the use of undercover agents to observe the suspect, and the use of undercover agents to actively elicit information in violation of the suspect's choice to remain silent. When the police use subterfuge to interrogate an accused after he has advised them that he does not wish to speak to them, they are improperly eliciting information that they were unable to obtain by respecting the suspect's constitutional right to silence: the suspect's rights are breached because he has been deprived of his choice. However, in the absence of eliciting behaviour on the part of the police, there is no violation of the accused's right to choose whether or not to speak to the police. If the suspect speaks, it is by his or her own choice, and he or she must be taken to have accepted the risk that the recipient may inform the police.

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96 At 201.

97 Relatively few New Zealand cases to date analyse what elicitation entails. Court of Appeal decisions are *R v Barlow* (1995) 14 CRNZ 9 (CA); *R v Hartley* CA6/02, 9 May 2002; *R v Ross* [2007] 2 NZLR 467 (CA); *R v Petricevich* [2007] NZCA 325; *K (CA106/13) v R* [2013] NZCA 430; and *M v R* [2014] NZCA 339, [2015] 2 NZLR 137.

98 *R v Hebert* [1990] 2 SCR 151 at 185 per McLachlin J.

99 *R v Liew* [1999] 3 SCR 227 at [40] per Major J; citing *R v Hebert* [1990] 2 SCR 151 at 184–185 per McLachlin J.

As the Court's highlighting of the words "observe" and "actively elicit" from the *Hebert* passage indicate, the Supreme Court in *Liew* continued to contrast "elicitation" or "active elicitation" with "observation".

[106] In both *Liew* and in *Broyles* further elaboration of the factors bearing on the necessary causal link required for breach was undertaken because of the particular circumstances in those cases. In each, the informer or agent was an existing associate of the person in custody (even if in *Liew* the association was as a result of an undercover operation). They are cases with some comparable features to those encountered in *Barlow*, which is no doubt why *Broyles* was treated as of help in *Barlow*.

[107] *Broyles* was a case where the informer was a friend of the accused who visited him in custody and recorded their conversations for the police. In *Liew* the informer was an undercover officer who had negotiated the drugs deal for which the accused was arrested and who had also been "arrested" at the same time and placed in the same cell as Mr Liew, where discussions about the offending occurred as between co-offenders.

[108] It was in that context that Iacobucci J for the Court in *Broyles* explained "active elicitation" by reference to considerations grouped into two categories: "the nature of the exchange between the accused and the state agent"; and "the nature of the relationship between the state agent and the accused".[100]

[109] With respect to the first category, the nature of the exchanges, Iacobucci J thought the factors that were relevant were:[101]

> Did the state agent actively seek out information such that the exchange could be characterized as akin to an interrogation, or did he or she conduct his or her part of the conversation as someone in the role the accused believed the informer to be playing would ordinarily have done? The focus should not be on the form of the conversation, but rather on whether the relevant parts of the conversation were the functional equivalent of an interrogation.

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100 *R v Broyles* [1991] 3 SCR 595 at 611.
101 At 611.

[110] With respect to the second category, the relationship between the state agent and the person in custody, Iacobucci J considered the relevant factors to be:[102]

> Did the state agent exploit any special characteristics of the relationship to extract the statement? Was there a relationship of trust between the state agent and the accused? Was the accused obligated or vulnerable to the state agent? Did the state agent manipulate the accused to bring about a mental state in which the accused was more likely to talk?

[111] Applying this approach and excluding the evidence, the Supreme Court concluded that the conversation between the agent and the accused did not "flow naturally" but had been directed by the agent to the areas where the police needed information and at least in part was "functionally the equivalent of an interrogation".[103]

[112] In *Liew*, Major J, who wrote for all members of the Court on the approach to be taken,[104] cited with approval the elaboration of relevant factors identified in *Broyles.*[105] It was held by the majority in *Liew* that the test of "active elicitation" was not met because the undercover officer (who, it will be recalled, was not introduced into the cell of the accused as a stranger but had been "arrested" with him) did not direct the conversation in any manner that "prompted, coaxed or cajoled" the appellant to respond.[106] Mr Liew had simply exercised his freedom to speak and the officer had not caused him to make the admissions. It is not necessary to consider whether the result in *Liew* would be reached in New Zealand under the different terms of the New Zealand Bill of Rights Act. For present purposes it is sufficient to note the context.

[113] The elaboration of the approach taken in *Hebert*, *Broyles* and *Liew* responded to the circumstances of prior association in which it was to be expected that confidences could be volunteered, without being elicited through actions properly attributable to the state. They do not in my view suggest a general approach applicable to cases like the present, where an undercover police officer with no previous relationship with the person in custody is brought into contact with him by

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102 At 611.
103 At 613.
104 Lamer CJ dissented as to the result, not the approach.
105 *R v Broyles* [1991] 3 SCR 595 at 611, as cited by *R v Liew* [1999] 3 SCR 227 at [42].
106 *R v Liew* [1999] 3 SCR 227 at [51].

the police precisely in order to elicit admissions of interest to the police investigation. Nor do I think they justify elevating as a general approach the intrusiveness of the "eliciting" behaviour required by circumstances such as whether the elicitation has been as a result of coaxing or cajoling by the agent. They should not be relied on to replace in New Zealand the simple causal connection I think is indicated in *Barlow* where there is direct police intervention (discussed below at [116]–[123]) and as adopted in the context of undercover police posing as prisoners by Sopinka J in *Hebert* (as described at [127]). I consider any more elevated causal link fails to give effect to the right to be informed of the right to refrain from making a statement (as indicated further at [124]–[131]) and is unwarranted.

Cause and effect

[114] Some causal connection between the actions of the police agent and the statements made is necessary. As indicated, in *Hebert* "active elicitation" was used interchangeably with "eliciting behaviour" and in contradistinction to "observation". On this basis, a police agent who observes or listens or records statements volunteered in his presence without any causative intervention on his part receives the information "passively" and does not obtain it in breach of rights. Such cases are illustrated by *App No 12127/86 v Germany*, where a German-speaking undercover agent overheard the conversation between two German accomplices.[107]

[115] The effect of suggestions that there must be a "functional equivalent of interrogation" or direction by the police agent of conversation in a manner that "prompts, coaxes or cajoles" the statement is to elevate the causal connection required beyond that suggested by the contrast with "merely passive" listening or observing. Even when it is stressed, as it was in *Liew*, that no overlay of oppression is entailed in the use of the word "interrogation",[108] it raises the standard of breach more than is indicated by the approaches taken in *Barlow* or is consistent with the terms of the New Zealand legislation.

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[107] *App No 12127/86 v Germany* (1989) 11 EHRR 84 (EComHR).
[108] *R v Liew* [1999] 3 SCR 227 at [37].

(i) **Barlow** ***and cause***

[116] In *Barlow*, Richardson, Hardie Boys and Gault JJ all pointed to differences between the provisions of the New Zealand Bill of Rights Act and the Canadian Charter on the rights in issue. Nevertheless, all members of the Court were of the view that consideration of the decisions of the Canadian Supreme Court in *Hebert* and *Broyles* was helpful. But in the approach applied, the cause and effect looked to was a direct factual inquiry.

[117] So, in *Barlow*, Cooke P, treating the question of causal link as one of "fact and degree"[109] referred simply to "elicitation", which he treated, by reference to *Hebert*, as to be contrasted with "cases where the undercover officer had remained merely passive".[110] If, at any time after arrest, by the agency of the police, the state "were to seek to elicit statements from the person by an undercover officer or other informer" Cooke P considered that the right under s 23(4) would be violated. Otherwise, he said, "there would be something fraudulent about s 23(4)".[111] It should be noted that Cooke P's reference to the judgment of Iacobucci J in *Broyles* is in connection with whether the informer was an agent of the police. In that connection, the test applied by Cooke P was the "simple" one posed by Iacobucci J: "would the exchange between the accused and the informer have taken place, in the form and manner in which it did take place, but for the intervention of the state or its agents?"[112]

[118] Richardson J, who dealt with the case on the basis of breach of the right to consult a lawyer, also cited the judgment of Iacobucci J (referring to when a private person acts as an agent of the state) as helpful in considering whether an informer was an agent of the state. It is clear that he was not applying it in the context of "a Government agent … masquerading as a private individual".[113] And the reference in Richardson J's judgment to the Canadian authorities is explicitly said to be concerned with "confessions involving informant deception", rather than police

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109 *R v Barlow* (1995) 14 CRNZ 9 (CA) at 23.
110 At 23.
111 At 22.
112 At 23, citing *R v Broyles* [1991] 3 SCR 595 at 608 per Iacobucci J.
113 At 37.

deception.[114] Richardson J adopted the same test approved by Cooke P as to whether the statement would have been made but for the intervention of the state or its agents.[115] In that connection, in relation to the right to consult a lawyer Richardson J thought that the "obvious questions" bearing on that inquiry were: "did governmental action affect the accused's access to his or her lawyer; did it deprive the accused of making an effective choice of whether or not to speak on that occasion; and did the manner in which the conversation took place subvert the accused's right to a lawyer?"[116] Richardson J adopted the two step inquiry suggested in the context of informer elicitation: was the informer an agent of the state and, if so, was there "a causal relationship between any unacceptable police conduct and the supply of evidence by the accused".[117] Richardson J referred to the passage in *Broyles* concerning "the functional equivalent of an interrogation".[118] He could see no basis "for an inference that the conversations were tainted by the indirect police involvement or that information of the kind conveyed to [the informer] would not otherwise have been given to him".[119]

[119] Hardie Boys J adopted the two-stage approach suggested in *Broyles* in considering first whether the informer was a police agent and secondly whether he had "elicited" the information. That test was, he considered, appropriate under the New Zealand Bill of Rights Act:[120]

> It confines attention to the role of the police in relation to the obtaining of further evidence, thus allowing for the individual who for reasons that may or may not be commendable, makes inquiries of his or her own initiative. And it withholds protection from the offender who volunteers information without being induced to do so by the agent.

[120] Hardie Boys J found that the informer had been acting as a police agent from an early stage. He found however, on the facts and without reference to the "functional equivalent of interrogation" test suggested in *Broyles*, that the "issue in relation to elicitation", was "whether there is a causal link between the conduct of

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114 At 36.
115 At 37, citing *R v Broyles* [1991] 3 SCR 595 at 608 per Iacobucci J.
116 At 38.
117 At 37.
118 At 38, referring to *R v Broyles* [1991] 3 SCR 595 at 611 per Iacobucci J.
119 At 39.
120 At 44.

the agent and the making of the statement by the accused".[121] He concluded that, overall, this was a "two-way conversation of a kind which had become quite normal between the two men prior to the respondent's arrest".[122] Accordingly, there was "no eliciting of information and so no subverting of the respondent's right to silence".[123]

[121] Gault J, who dealt with the matter on the basis of fairness, considered that s 23 applied only to those arrested or in custody and did not apply to those released on bail. He emphasised that if a person was in custody, it would be of "real significance as the Judges' Rules recognise".[124] Where a person was at large after being charged, however, he considered that, so long as he had been informed of his rights, it was for the accused himself to determine whether to exercise them or risk discussing the offence with those he believes he might trust.[125] In considering fairness, Gault J pointed to the distinction made in Canada and the United States between "passive reception" and elicitation and thought that, in the end, "it must be a matter of whether the particular statement has been deliberately elicited by the police in derogation of, or disregard for, the suspect's rights or otherwise by means that, on a reasonable assessment, is to be categorised as unfair".[126] "Plainly there must be limits upon what authorities may do":[127]

> It would be entirely unacceptable for the police to be able indirectly and by deception to elicit statements that they cannot obtain directly. If a person indicates on arrest that he does not wish to discuss the allegations with the police that is a right which must be respected. On the other hand if a suspect knowing his rights chooses to take the risk of discussing his predicament, the police may take advantage of that.

[122] McKay J, who dissented in the result and would have excluded all the evidence apart from one conversation in which it was clear that the statements were volunteered without any elicitation, thought that the question was whether the police, through the informer, had "elicited statements which would not otherwise have been

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121 At 45, referring to *R v Broyles* [1991] 3 SCR 595 at 611 per Iacobucci J.
122 At 46.
123 At 46.
124 At 53.
125 At 53.
126 At 54.
127 At 53.

made".[128] In that connection, he too referred to the suggestion in *Broyles* as to whether the exchange "was akin to an interrogation".[129]

[123] *Barlow* was concerned with marking off the conduct properly attributable to police action in the elicitation of statements by an informer who was not a member of the police. Although some of the Judges considered factors suggested in *Broyles* such as whether the police agent had conducted the "functional equivalent of an interrogation", they did so in relation to the need to consider whether the state was responsible for eliciting the statement through the informer's interaction with the accused. The judgments delivered in *Barlow* are not concerned with the application of the tests to direct police elicitation. Nor are there indications consistent with the suggestions developed in *Broyles* and later in *Liew* in the context of the undercover participant in the offending that it is useful to consider whether the agent directed the conversation by "prompting, coaxing or cajoling". I do not consider that the judgments in *Barlow* support the view that such factors are necessary considerations or helpful as an approach of general application. Indeed, the tenor of the judgments is consistent with the view indicated below at [125] that the terms of s 23(4) and s 3 of the New Zealand Bill of Rights Act provide no justification for such latitude for statements elicited by police deception which could not be obtained directly.

[124] Assessment of the nature of questioning or the relationship between the agent and the person in custody may be relevant when considering whether someone is acting as an agent of the police as was a principal focus in *Barlow.* In addition, matters of relationship and close consideration of the exchanges between the agent and the person in custody may be important when considering admissibility of evidence in the application of s 30 of the Evidence Act. But I agree with Wilson J, in her concurring opinion in the Supreme Court of Canada in *Hebert*, in thinking that questions bearing on admissibility do not determine the scope or content of the right.[130]

[125] It is not, I think, desirable or necessary for New Zealand courts to be drawn into close analysis in all cases of the sequence and content of conversations, whether

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128 At 62.
129 At 61.
130 *R v Hebert* [1990] 2 SCR 151 at 190–191.

opening gambits have been directional or non-directional, or whether conversations have been allowed to flow naturally in the context as it was assumed to be by the person in custody. Such nice distinctions do not seem to me to answer when the effect of deception practiced by those undoubtedly subject to s 3 of the New Zealand Bill of Rights Act is to obtain statements from someone detained which could not have been obtained by direct means. Unless police officers planted in cells to obtain admissions from those in custody have been passive observers, their actions are rightly treated as eliciting statements which would not have been obtained but for their intervention.

[126] As Panckhurst J pointed out in *R v Cummings*, the differences between "a staged cellmate discussion" and a police interview stretch any "functional equivalence" inquiry.[131] Panckhurst J's reservations about such understanding of "active elicitation"[132] were echoed by Mallon J in *R v Harrison*.[133] I agree with their preference for a lower causative link.

[127] The better view I think is that any prompt (by conduct or words) by an undercover police officer which leads to an incriminating statement is in breach of s 23(4). Such prompt includes engaging the person detained in conversation with the intention of obtaining information of interest to the police, as Sopinka J in *Hebert* in my view was right to recognise. That is not passive observation. In the case of use of undercover officers placed in police cells, I consider that the statements are improperly obtained if made in conversation between the officers and the prisoner brought about by the police with the purpose of obtaining admissions of use to the police investigation.

(ii) The right under the legislation to be informed of the right to refrain from making a statement

[128] The New Zealand Bill of Rights Act explicitly confirms not only the rights to refrain from making a statement and to consult and instruct counsel on arrest or detention but the rights to be informed of those rights. The inclusion in s 23(1)(b)

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131 *R v Cummings* [2014] NZHC 1025 at [93].
132 At [93]–[94] and [125].
133 *R v Harrison* [2014] NZHC 2246 at [29].

and (4) of these additional stand-alone rights to be advised of the rights to refrain from making a statement and the right to obtain legal advice mean that these obligations of advice are themselves imposed under s 3 of the New Zealand Bill of Rights Act on police officers.

[129] The explicit statements of rights under the New Zealand Bill of Rights Act differ from the position in other jurisdictions. In Canada, for example, (where the right to silence is treated as implicit in observance of the "principles of fundamental justice" under s 7 of the Canadian Charter), there is no distinct reference to a right to be advised of the right to refrain from making a statement. Nor has Canada ever adopted guidance through anything equivalent to the Judges' Rules.

[130] In New Zealand, a right to be cautioned has long been part of the Judges' Rules, which provided guidance as to when evidence is to be rejected as unfairly obtained. A police officer may not obtain a statement from someone who is arrested or detained under any enactment unless the accused is first advised that he is not obliged to speak. Reminders of the right, despite earlier caution, may need to be given where interviews are interrupted and later resumed or where a further interview is undertaken.[134] If an acknowledged police officer had wanted to question Mr Kumar again after the interview with him had been stopped so that he could obtain legal advice and after he had been placed in the cells, I consider it would have been necessary for him to be reminded that he was not obliged to speak to the officer. If so, it was equally necessary for Mr Kumar to be reminded of his rights to refrain from making a statement and to obtain legal advice under s 23 of the New Zealand Bill of Rights Act before further interview was undertaken by police officers acting under cover. Otherwise, such masquerade would permit rights to be easily evaded, contrary to the views expressed in *Barlow* and *Hebert* cited above at [95].

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134 *Adams on Criminal Law – Rights and Powers* (edited by Bruce Robertson, looseleaf ed, Brookers) at [BC11.09] and [BC12.05(5)]; Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) at [20.11.11]; see also *R v Barlow* (1995) 14 CRNZ 9 (CA) at 42 per Hardie Boys J. See also the requirements in the United Kingdom at [10.8] of the Home Office *Revised Code of Practice for the Detention, Treatment and Questioning of Person by Police Officers: Police and Criminal Evidence Act 1984 (PACE) – Code C* (May 2014).

[131] If that means that undercover police agents cannot be used to obtain information by engaging with those in custody in order to obtain admissions, the result seems to me to be compelled by s 23(4) and s 3 of the New Zealand Bill of Rights Act.[135] If that were not the case, "there would be something fraudulent about s 23(4)", as Cooke P said in *Barlow*.[136] This view is similar to that arrived at by Panckhurst J in *R v Cummings* as the "required approach in the New Zealand context", even though contrary to the position reached in Canada.[137]

The statements were improperly obtained in breach of s 23(4)

[132] As has already been indicated, the use of a test of "active elicitation" does not cause difficulty in the present case. Despite the different view taken in the High Court, it is clear that the undercover officers placed in the cells with the appellant directed the conversation with him and asked questions designed to obtain incriminating statements from the outset. It is unnecessary for me to repeat the analysis undertaken by Arnold J at paragraphs [59] to [70], with which I am in complete agreement.

[133] Although Venning J thought that asking questions, if consistent with the role assumed by the agents, was not "active elicitation", I consider that the disguise adopted by the officers did not absolve them of their obligations to observe the rights contained in s 23(4). Just as in *Liew* the statements obtained were information the police "were unable to obtain by respecting the suspect's constitutional right to silence",[138] here the statements were information the police were unable to obtain by respecting Mr Kumar's rights under the New Zealand Bill of Rights Act to refrain from making a statement and to be told of that right.

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135 Section 3 requires the rights contained in the New Zealand Bill of Rights Act 1990 to be observed by all exercising public powers.

136 *R v Barlow* (1995) 14 CRNZ 9 (CA) at 22.

137 *R v Cummings* [2014] NZHC 1025 at [116].

138 *R v Liew* [1999] 3 SCR 227 at 243 per Major J, citing *R v Hebert* [1990] 2 SCR 151 at 184–185 per McLachlin J.

Breach of s 23(1)(b) – the right to consult and instruct a lawyer without delay and to be informed of that right

[134] In addition to the breach of s 23(4), I consider that the deployment of the undercover officers in the appellant's cell breached his right to consult and instruct a lawyer. Although in the Court of Appeal and this Court the argument relied on the more general right contained in s 24(c) of the New Zealand Bill of Rights Act,[139] I consider that the right infringed here is more appropriately considered under s 23(1)(b) since Mr Kumar was in custody.

[135] The Court of Appeal was in error in thinking that Detective Batey had told Mr Davey, the lawyer consulted by Mr Kumar, that no further interview would be conducted without notice to him. But I do not consider that factual error was necessary for a proper conclusion that the police conduct in substance deprived Mr Kumar of his right to obtain legal advice under s 23(1)(b).

[136] The initial interview with Mr Kumar on 14 February 2013 had been properly ended at 4:04 pm after Mr Kumar asked to see a lawyer and he was then arrested for Mr Prasad's murder. Mr Kumar had made contact by telephone with Mr Davey immediately and, in three short telephone conversations between 4:41 pm and 5:43 pm, arrangements had been made for the two to meet before court the following morning. At this stage, Mr Kumar had not had proper opportunity to consult a lawyer except in a very preliminary way. In subsequent discussion with Detective Batey, the lead interviewer, Mr Davey was told that no further attempt would be made to interview Mr Kumar unless further information came to hand which it was necessary to put to Mr Kumar. Mr Davey indicated that he would see Mr Kumar before his court appearance the following morning and would then get his instructions on the police request to obtain a sample from him for DNA analysis and a request that he undergo a medical examination.

[137] Detective Batey expressed himself carefully when he told Mr Davey on the telephone at about 5:19 pm that he had concluded the interview with Mr Kumar that evening unless further inquiries made it necessary to discuss additional information

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[139] Section 24(c) provides that everyone who is charged with an offence "shall have the right to consult and instruct a lawyer".

with him, in which case "another approach for an interview would be made". When later questioned on the point by a senior officer before deployment of the undercover officers, Detective Batey reported that Mr Davey had not asked that he be contacted before any such approach was made. Detective Batey said in his evidential statement:

> Detective Sergeant Williamson asked me if the Accused had made comments or behaviours indicating he did not want to make further comment.
>
> He also asked me if the Accused's lawyer had indicated the Accused did not wish to make further comment, or asked that no further interviews occur.
>
> To that point none of these had occurred and I advised Detective Sergeant Williamson of this.

[138] In fact, arrangements had been in hand for use of undercover agents in connection with the case from 11 February. They entailed bringing in an officer of Indian ethnicity. The undercover operation, which was not under the control of Detective Batey, was ready for deployment on the afternoon of 14 February with the briefing of the undercover agents and their placement in the cell to which Mr Kumar was removed at approximately 6.30 pm. Detective Batey knew that the use of undercover officers was possible. That it was going ahead was confirmed to him by a senior officer, Detective Sergeant Williamson, before the officers were placed in the cell with Mr Kumar. Detective Batey knew that the meeting between Mr Davey and Mr Kumar would not take place until the following morning, before Mr Kumar's first appearance in court.

[139] It is a matter of some concern that the police appear to have been astute to look for an assertion of the right to seek the assistance of counsel and to regard themselves as able to elicit further information from Mr Kumar in the absence of explicit requirements by counsel or the accused that he was not to be approached without notice to his counsel or opportunity to obtain legal advice. I am not persuaded that it was necessary for Mr Kumar or his counsel to assert the right in this way. The Crown relied on decisions of the Court of Appeal[140] which are not directly in point (because they do not entail use of undercover agents) and which may simply be examples of cases were the rights were treated as waived with full

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[140] Including *R v Ormsby* CA493/04, 8 April 2005; *R v Wallace* [2007] NZCA 265; *Te Moananui v R* [2010] NZCA 515; and *Lisiate v R* [2011] NZCA 170.

knowledge. Here, no question of waiver of the right arises. The better view seems to me to be that the right to counsel (or to refrain from making a statement), which the police are bound to observe under s 3 of the New Zealand Bill of Rights Act, does not turn on assertion. Whether the right to consult and instruct a lawyer without delay and to be informed of that right is breached requires substantive assessment.

[140] I consider that the circumstances in which Mr Kumar terminated the interview in order to obtain legal advice and the conversations between Detective Batey and Mr Davey would reasonably have left the impression that no further interviews would occur before Mr Davey had had an opportunity to see Mr Kumar unless there was notice to him. More importantly, Mr Kumar, for his part, had clearly indicated that he wanted to take legal advice and the interview was terminated for that purpose, not yet fulfilled. At the very least, he should have been reminded of his right to consult a lawyer before any further attempt to elicit a statement from him occurred. If that means that undercover police agents cannot be used to interview those in custody, such result seems compelled by ss 23(1)(b) and 3 of the New Zealand Bill of Rights Act.

[141] After exercising his right to confer with counsel and termination of the interview with the police for that purpose, the appellant was tricked into providing a statement without the benefit of the legal advice he had requested. There was effective circumvention by the police of the right to consult a lawyer when the undercover officers were used to seek admissions from Mr Kumar. McLachlin J said in respect of such subterfuge in Canada, "this cannot be in accordance with the purpose of the *Charter*".[141] Equally it cannot be in accordance with the purpose of the New Zealand Bill of Rights Act.

Breach of the Practice Note

[142] The Practice Note of 16 July 2007 provides additional detail for the advice that must be provided to those in custody. It sets standards of fairness which s 30(6) of the Evidence Act requires to be taken into account in considering whether evidence has been improperly obtained. The finding that the evidence was obtained

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[141] *R v Hebert* [1990] 2 SCR 151 at 181.

in breach of the New Zealand Bill of Rights Act makes it unnecessary to rely on the Practice Note here. It comes into play, however, "whenever a member of the police seeks to question a person in custody".[142] At that stage the person in custody must be advised about his rights to refrain from making a statement and to consult a lawyer without delay and in private.[143] It is necessary too to advise the person being questioned that anything said "will be recorded and may be given in evidence", and that the recording should preferably be by video recording.[144] The person making the statement must then be given an opportunity to review the tape or written statement to correct any errors or add anything further and to be provided with an opportunity to confirm it as correct.[145]

[143] The Practice Note applies to questions by "a member of the police". It seems well-arguable that, consistently with the views I have expressed on the application of ss 3 and 23 of the New Zealand Bill of Rights Act, the reference includes members of the police acting undercover. If so, the use of the undercover agents would equally have been a breach of the Practice Note and the statements would have been improperly obtained on that basis also.

The improperly obtained evidence was rightly excluded

[144] For the reasons given, I consider that the Court of Appeal was right to allow the appeal from the decision of Venning J that the statements were not improperly obtained. They were obtained in breach of the rights to refrain from making a statement and to receive legal advice and the rights to be advised of such rights under s 23 of the New Zealand Bill of Rights Act. I incline to the view that they were also unfairly obtained, contrary to the guidelines in the Practice Note.

[145] As already indicated, if improperly obtained, the Crown did not seek to have the statements admitted from the point when the undercover officer, "Ben", asked Mr Kumar "why fucking burn him man?" The proper concession that the discussion from that point on was not one the Crown felt able to argue should be admitted in

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142 *Practice Note – Police Questioning (s 30(6) of the Evidence Act 2006)* [2007] 3 NZLR 297 at [2].
143 At [2](a) and (b).
144 At [2](c) and [5].
145 At [5].

exercise of the discretion under s 30 of the Evidence Act was based on the argument that the test for admissibility should turn on whether the conversation was "the functional equivalent of interrogation" and assumes that the earlier conversation was not of that character.

[146] As already indicated, I consider that impropriety in avoiding the rights under s 23 turns on a lower causative link and that, from the outset, the conversation was steered to obtain statements of interest to the police investigation. It was irrelevant whether the conversation was one it might be thought genuine prisoners would instigate and carry on. It was a deliberate ploy to obtain by subterfuge information the police had been unable to obtain in the acknowledged interview. I am unable therefore to accept the submission that the breaches of rights were "minor".

[147] In any event, the statements made by the accused before the question about burning were themselves elicited by skilful prompting. They included information about the extent to which the deceased was in debt to the accused (where the detail was obtained with some persistence), information about "alibis" and purchase of fuel, information about defence issues and flight plans consistent with guilt, and information generally damaging about the character and background of the accused. The posed circumstances in which a young accused was placed with older men portraying themselves as experienced criminals, may themselves have allowed exploitation of the character and insecurities of the accused (especially in relation to his legal representation and the dependability of his co-offender), and contributed to the picture of the accused's apparent boastfulness and callousness which were highly damaging in themselves.

[148] For the reasons given by Arnold J, and in circumstances where breach of rights fundamental to the criminal justice system were deliberately undertaken and had the effect of evading the requirements of s 23 of the New Zealand Bill of Rights Act, I consider that partial admission of the statements, excluding only those most damaging, would not serve the interests of an effective and credible system of

justice. No reasons of urgency or protection of the police, such as are indicated may be relevant by s 30(3), arise here. Exclusion of all statements was a proportionate response to the serious impropriety entailed.

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