POLICE POWERS OF QUESTIONING

THE BLACKBURN LECTURE FOR 1987

(Delivered at Canberra on 11th June, 1987)

I was honoured to receive the invitation of the Law Society of the A.C.T. to deliver this, the second Blackburn Lecture, and was very pleased to accept the invitation. It is most appropriate that the Law Society should, by means of these lectures, pay tribute to Sir Richard Blackburn, whose distinguished career in the law included a decade of service on the Supreme Court of the Australian Capital Territory and who was the first Chief Justice of that Court. If I may venture to say so, Sir Richard is an exemplar of all the best judicial qualities: a deep and scholarly knowledge of the law together with the experience and ability necessary to apply that knowledge in practice, complete dedication to the duties, often onerous, of his office, patience, courtesy, dignity and absolute integrity and propriety in his public and private life. He has earned, and receives, the deepest respect of us all and I am glad to have this opportunity to express my own high regard and admiration for a judge who has given great service to this Territory and to Australia.

It is a commonplace that the principles of the
often involves the holding of a *voir dire* - a proceeding within a trial which nowadays takes longer than trials themselves formerly did, and which involves an expenditure of money and effort that can be justified only because of the weight which the evidence that has been objected to is likely to have if admitted. The law recognizes the critical importance of confessional evidence, and the reports contain a multitude of cases which discuss, with sophisticated elaboration although not always with consistency, the question when evidence of a confession should or may be excluded. Yet in spite of this, the common law, in Australia at least, affords the police very little opportunity lawfully

6.

to question a suspect in the hope of obtaining a confession.

It is true, of course, that the police are free to question anyone, not in custody, who may help them in their investigations, whether or not the person questioned is suspected of having committed the crime which the police are trying to solve. Most people would agree that a citizen who is asked proper questions by the police has a moral duty to assist them in the performance of their public duties by answering their questions. However, the police may not restrain or detain anyone simply for the purpose of questioning him or her; they cannot compel an
in questioning once an arrest is made. Although police questioning is a significant and essential part of the investigation of crime under modern conditions, the law in Australia (except in those cases where it has been varied by statutes which I shall later mention) not only denies to the police the power to restrain or detain a suspect for questioning but also renders it unlawful, once the suspect has been arrested, to engage in or continue an interrogation if to do so would delay bringing the suspect before a justice when that would otherwise be practicable, even though the suspect was quite willing to be questioned and to provide answers. Once the arrested

10.

person has been charged, the general view is that he or she should not be questioned about the offence the subject of the charge, even if that were practicable.

It may well be wondered how, in these circumstances, evidence of confessions continues to occupy so important a place in the administration of justice. The answer is that until recently the law has not been concerned to enquire too deeply into the question whether the accused was lawfully detained at the time when he or she was questioned, except for the purpose of ensuring that any confession was voluntarily made or that it would not be
in exposing fictions of this kind since evidence that a suspect had confessed while in unlawful custody was nevertheless admissible if the confession was voluntary, and it was not recognized that there was any discretion to reject it provided that its prejudicial effect did not exceed its probative value and that it was not otherwise unfair to use it against the accused. It was no credit to the law that for all practical purposes it required police officers to conduct necessary questioning only by resorting either to artifice or to illegality. However, in practice, the rules did not, until comparatively recently, unduly hamper police investigations.

More recently changes began to occur. In the first place there has been developing a change in social attitudes which I cannot describe better than in the following words (even if they are a little disparaging) of the editors of Wigmore on Evidence:\(^8\):

"The spirit of the community, whether we choose to call it by the name of anarchy (and it has certainly the evil as well as the good savour) is a spirit of fearlessness of superior social
to questions put after the time when it had become reasonably practicable to take the arrested person before a justice, since at that time the police conducting the questioning were in breach of a requirement of the law. This discretionary power enables a trial judge to reject evidence procured by unlawful or improper conduct even though it would be in no way unfair to the accused to allow the evidence to be admitted. The purpose of the rule is to enforce respect for the law, particularly in the conduct of police investigations, and to afford a more effective protection for the citizen against illegalities and wrongdoing, but it is not primarily

concerned with the question of unfairness to the accused who is being tried. The same principle has not been accepted in England\(^{(10)}\), or, it appears, New Zealand\(^{(11)}\) and Canada\(^{(12)}\), but similar principles have been applied in Scotland\(^{(13)}\), Ireland\(^{(14)}\) and the United States\(^{(15)}\). Too strict a rule of exclusion may have the result that the criminal may go free because the law enforcement officers have blundered\(^{(16)}\); that was well illustrated, in rather different circumstances, in the recent case in Ireland concerning Mr. Trimbole. Under the principles now applicable in Australia, the judge is not bound to reject evidence of statements made in
the justice was fundamentally different from what it is today. Two statutes, passed during the reign of Queen Mary, in 1554 and 1555\(^{(18)}\), required that when a person arrested for felony was brought before justices, they were to examine the prisoner and other witnesses as to the alleged offence. Those statutes, which during the reign of George IV were extended to misdemeanours\(^{(19)}\), probably did no more than recognize the existing position at common law\(^{(20)}\), but in any case they provided authority for a procedure which prevailed for nearly 300 years thereafter. Under this procedure justices of the peace did not perform a

22.

judicial function; rather, they played the part of detectives or prosecutors and closely questioned, in secret, arrested persons for the purpose of exposing their guilt before committing them for trial. Constables at the time had neither the facilities nor in many cases the personal ability to enable them efficiently to investigate crime and the investigative powers of the justices compensated for the deficiency of the constables. In these circumstances it was understandable that the rule should have developed that a constable making an arrest could not delay bringing a suspect before justices simply for the purpose of making enquiries of his own.
of the police to obtain convictions without first securing confessions; perhaps (although this seems unlikely) it was thought that the rights of a suspect would be infringed if he or she were to be examined by the police; perhaps it was thought that the police would have the power even if it were not expressly conferred. For whatever reason, the statutes were silent on the subject.

Thereafter the common law followed a wavering and uncertain course. During the last quarter of the nineteenth century the view was formed that once a person had been arrested he or she could not be questioned and that any answers given to questions put in breach of this rule were involuntary and inadmissible\(^{(23)}\). Later, it came to be accepted that persons in custody might be questioned after a caution had been administered. During the first half of this century it was well settled in Australia that the criterion for the admissibility of statements made by an arrested person was whether they were voluntary but there was a discretion to reject them if it would be unfair to use them against the accused\(^{(24)}\). The common law rule remained that once the accused person had been arrested he or she must be brought before a justice as soon as practicable. However, the English courts came to adopt the broad view
the standpoint of principle, it may be asked what is the reason, under modern conditions, for the rule that an arrested person should be brought before a justice so promptly that no time is allowed for questioning, except such time as is accidentally made available for reasons which have nothing to do with the interrogation. It is apparent that an arrested person may require protection in two ways. First, there must be a limit to the time during which the police may hold the arrested person - indefinite detention for the purpose of questioning would be a very serious infringement of the liberty of the subject. Secondly, an arrested person

must be protected, while in custody, from the possibility that pressure, or unfair means of persuasion, may be used to extort or induce a confession. It would probably be generally agreed, also, that the police should not have power to detain any person, whom there is no ground to arrest, simply for the purpose of questioning. But in principle it is difficult to agree with the proposition that when the police have formed a reasonable suspicion sufficient to justify an arrest, they should not be afforded an opportunity to question the arrested person, under proper safeguards, except in such accidental circumstances as may present them with an adventitious
a six-hour rule. The law of that State, as amended in that year\(^{(30)}\), now requires that a person taken into custody for an offence should be brought before a justice, an authorized officer (a stipendiary magistrate or a clerk of the magistrate's court who has been appointed to be an authorized officer) or a magistrate's court within six hours unless sooner released. This period may be extended for a further period not exceeding six hours, on application made to an authorized officer by the police with the consent of the arrested person. It is provided that evidence of or in relation to any voluntary statement by a person in custody, and any

enquiries or investigations carried out with the consent of a person in custody, within the period of six hours or within the extended time, shall not be inadmissible by reason only of the fact that the person was in custody. This amended law has not been found to be entirely satisfactory in practice in Victoria. A committee appointed to consider its operation has criticized it, particularly because of the disruptions caused when an investigation cannot be completed within six hours and it becomes necessary to seek an extension of time. Although six hours is long enough for the conduct of most investigations, the time available may be reduced, sometimes substantially.
evidence relating to an offence for which he or she is under arrest or to obtain such evidence by questioning him or her. Detention must normally end after 24 hours but in the case of a serious arrestable offence the period may be extended up to 36 hours by the police themselves and thereafter by a magistrate's court up to a maximum of 96 hours. The legislation attaches great importance to the role of custody officers, police officers appointed for that purpose who themselves should play no part in the investigation and who are responsible for ensuring both the necessity and the propriety of the investigation. The legislation provides a number of important safeguards for the accused person.

It can hardly be doubted that it would be very much in the public interest if the law were to define clearly (and preferably uniformly throughout Australia) the conditions under which a suspected person might be questioned before trial in an attempt to dispel or to reinforce the suspicion that he or she had committed a crime, provided that such conditions satisfied two requirements - first, that they afforded proper protection to the suspect, and secondly, that they were workable from the point of view of the police. A different approach,
questioning to persons who have been arrested because they have been reasonably suspected of having committed such a crime would afford some protection against the indiscriminate use of the power. I therefore favour the view that detention for questioning should be permissible only after arrest. Then there arises the question whether the period during which the arrested person may be kept for questioning should be fixed by the law or should simply be a reasonable time. This is probably the most difficult question that arises from a practical point of view. It is not answered by pointing to the fact that a large proportion of interrogations conclude within four or six hours.

Any fixed time has the disadvantage that in some important cases it will be too short and that in all cases it may tend to be taken as the norm. Applications to extend a fixed time entail their own inconveniences. On the other hand, to give power to detain for a reasonable time, even if that expression is clearly defined to mean the time reasonably necessary to complete the investigations, induces an element of undesirable uncertainty. The expedient of fixing a specific time, or a reasonable time, whichever is the less, seems to combine the disadvantages of both the other methods.
of a lawyer at the interrogation is that the arrested person might be advised of the right to remain silent and the interrogation might thus be frustrated. I must confess that I can see no great virtue in the present rule, misdescribed as the right to silence, under which no inference may be drawn against an accused person for his or her failure during police questioning to answer questions or to mention some fact upon which reliance is placed for the first time at the trial. It is of course not suggested that a suspected person, or anyone else, should be compellable to answer questions (except as to such matters as name and address) because the existence of a power in the police to compel answers might not only be exercised vexatiously, but would in itself pertain more to a police state than to a democracy. However, it is very difficult to see any good reason why the silence of a person who, having been reasonably suspected of having committed a crime, is being questioned by the police under conditions which afford proper safeguards, should not be proved at the trial and given its proper evidentiary value. Against the suggestion that the law should be changed to enable a court or jury to take into account the failure of an accused person to answer questions, it is sometimes
insupportable.

The English Criminal Law Revision Committee in 1972 proposed changes of the kind that I am suggesting and a committee of which Dame Roma Mitchell was the chairman made a similar proposal in 1974. Their suggestions met with vigorous opposition and were not adopted. The Australian Law Reform Commission in 1974 expressed the opposite view. Any proposal to alter a rule which is so emotively described as the right to silence is likely to provoke a sentimental reaction. To allow evidence that the accused was silent under questioning would not undermine the fundamental rule that the prosecution bears the onus of proof, for the principle that no inference adverse to an accused person can be drawn from a refusal to answer questions says nothing as to onus; it simply excludes from the consideration of the court or jury some facts that would otherwise be admissible. The adoption of the suggestion would not invade the principle that no one is obliged to incriminate himself, for it is not suggested that anyone should be obliged to speak under questioning. Lawyers, and the public generally, tend to be very conservative when reforms of the criminal law are
provided that the safeguards which I have already mentioned are made available to every arrested person. If the rule were abolished it would of course be necessary to cease to give a caution in its present form.

It is sometimes suggested that the tendency of the police to rely on confessional evidence is unhealthy, and that they ought to sharpen their methods of investigation and endeavour to obtain evidence of other kinds. That suggestion, I believe, cannot be proved to be well based. Cynics also assert that it seems contrary to human nature that alleged offenders should freely confess their crimes to the police, but the fact remains that not a few do so. There is therefore every reason why the law should properly regulate the circumstances in which confessions are obtained. Proper regulation of the kind that I have suggested should not only assist the police, but should reduce the temptation to fabricate confessions.

The object of this address has been to point to an area of the law, of practical significance, where the rules of the common law clearly seem to require to be supplemented, or supplanted, by statutory provision. Opinions may well differ as to the manner in which any change in the law
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16 cf. The People v. Defore (1926) 150 N.E. 585, at p. 588
17 Cleland v. The Queen, at pp. 9, 34-35
18 1 & 2 Phil. and Mary c. 13; 2 & 3 Phil. and Mary c.10
19 By 7 Geo. IV c. 64, ss. 2 and 3
21 11&12 Vic. c. 42
22 10 Geo. IV c. 44
24 The King v. Lee (1950) 82 C.L.R. 133; McDermott v. The King (1948) 76 C.L.R. 501
27 Williams v. The Queen
28 See Mallory v. U.S.
29 Omnibus Crime Control and Safe Streets Act of 1968 (U.S.), sec. 3501
30 Crimes Act 1958 (Vic) as amended, s. 460
31 Police Offences Act 1953 (S.S.A.) as amended, s. 78
32 Police and Criminal Evidence Act 1984 (U.K.)

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33 See Criminal Investigation, Interim Report No. 2 by Australian Law Reform Commission, pars. 148-149
34 See Wigmore on Evidence, Chadbourn Revision, vol. 2, pp. 827-833
THE LAW SOCIETY OF THE AUSTRALIAN CAPITAL TERRITORY

SIR RICHARD BLACKBURN LECTURE

delivered by

THE RIGHT HONOURABLE SIR HARRY GIBBS GCMG, AC, KBE

on

11 June 1987

THE POWERS OF THE POLICE TO QUESTION AND SEARCH