

9/11/87

COX J.REG. v. DESMOND GEORGE TURNER
REG. v. LINDSAY BRUCE WILLIAMSMonday, 9 November 1987RESUMING 10.05 A.M.

FURTHER SUBMISSIONS ON VOIR DIRE

HIS HONOUR: The present voir dire raises an interesting question about the interpretation and application of s.79a of the Summary Offences Act. I have had the advantage of the adjournment to give it some thought and I am ready to make a decision on it now.

I have no doubt that Sergeant Gore "apprehended" the accused Turner, within the meaning of that expression in s.79a. Without troubling to go to the text of the transcript, it is common ground, I think, that he not only told Turner more than once to stop where he was, but there was at least one occasion when he restrained Turner physically by putting a hand on his shoulder, I think it was, or some other part of Turner's body. There was no violence about that, no great force applied, but, coupled with the words he used, it clearly amounted in my view to a restraint, an apprehension. Turner, in short, was being told to stay where he was and not to move. The effect of that apprehension was to bring into operation all of the provisions of s.79a. In particular, Sergeant Gore was thereby obliged to inform Turner of his rights under sub.s.(1) and to caution him. Now he did caution him, in my view, as soon as it was practicable to do so, so nothing can turn on par.(b) of sub.s.(3) of s.79a. A good deal, however, could properly turn upon the failure to inform Turner of his rights. Those rights included his entitlement to make a telephone call, and to have a solicitor or a relative or a friend present during any interrogation that might follow. He was not told about his right to make a telephone call - not surprisingly. It was hardly practicable to do anything about it in Elder Park - and he was, in fact, soon afterwards interrogated without the benefit that he might have had from the presence of one of the nominated categories of person.

It follows, in my view, that there was an apparent illegality, and perhaps unfairness, about the interrogation that soon afterwards took place. I might say that, as indeed I have indicated with respect to the telephone call, it was impracticable to comply, at least beyond the mere formality, with the provisions of the section then and there. I have considerable sympathy with the police sergeant. He was at first quite alone and had the difficulty of investigating a matter on the accusation of two young men. Those who were allegedly responsible had friends in their company, and it would be surprising if Gore were not apprehensive about the situation. Experience, I have no doubt, would have taught him that it could very easily get out of hand and that he could find himself possibly on the receiving end of any difficulties that might have followed.

So, as I say, one can only sympathize with him, and I am sure that he acted in good faith, doing the best he could in the circumstances. However that is not a complete answer to the problem created by s.79a. I think I am obliged to find that the fulfilment of the responsibility that was cast upon the police sergeant by the section might have made a difference. It might have led to Turner deciding not to talk to the police officer at all. I do not overlook the fact that Turner was cautioned at the outset of the formal interrogation. However, compliance with the other parts of the section might have tipped the scales against talking at all or might have limited his admissions, if indeed he made any. (I don't know that.) In short, I certainly cannot be satisfied that compliance with the Act would not have produced a different result so far as the subsequent interrogation was concerned.

When I say that it was impracticable for Sergeant Gore to comply in any real sense with the provisions of s.79a at the park, that does not mean that all further activity was stultified. If he was going to apprehend Turner and wanted to question him - and it was certainly understandable and desirable that he should do the latter - then his course was clear. He was, for practical purposes, obliged to take him back to police headquarters - to go through the formalities of the section and question him there. I must say that that implies a deal of rigidity in the statutory provisions which in many circumstances, and they probably include this one, could be quite undesirable.

It must happen quite often that a police officer is called to the scene of some alleged street offence where there are a number of people around. He has to make a quick judgement about who can help him get to the bottom of the matter and it is understandable that he should ask people to wait while he tries to sort out the matter of accusation and counter accusation, assertion and denial, for himself. That was the situation that faced Sergeant Gore here. I have held that he was obliged to take Turner off to police headquarters, and there to comply with the obligations of the section, but I make that finding with some regret. One can imagine many a case in which, notwithstanding the original complaint and identification by people in the position of Thwaites and O'Brien, the investigating officer finds after making a few more enquiries that he is not really disposed to proceed against those who have been accused. He has identified some other culprit, perhaps, or is not satisfied he can sheet home a case against any person at all. So the matter will be sorted out to a practical and proper conclusion on the spot, without any undue harrying of anyone. To import the kind of rigidity into the Act's provisions that I have held is, on a proper construction of the section, necessary, may mean that people in Turner's position have to be taken off with all statutory formality to police headquarters, and at the expense on their part of a deal of trouble and time and embarrassment; and perhaps, who knows, to no avail. It could well transpire, after the man has been taken a mile away in those circumstances, somehow there has been a mis-identification or more people should have been questioned on the spot as a result of the disclosures of the apprehended person, and a great deal of rigidity and clumsiness is imported into the situation where flexibility and speed on the spot would produce the most satisfactory solution all round.

However there are no saving provisions in s.79a - possibly, on balance, for good reason. I do not have to form a judgement about that. At any rate, there was no alternative, in my view, to the sergeant completing the formalities of the apprehension that he had, by force of the circumstances confronting him, begun at Elder Park.

That raises the question whether, despite the failure to comply with the section, the interrogation should nevertheless be admitted in evidence. There is a great deal of weight in Mr. Schapel's submissions to that end. I have no doubt that the

sergeant acted in good faith, believing that what he did was not only the best practicable course available to him in the circumstances but also that it complied with the law. He thought that s.79a applied only when there was some formal kind of apprehension leading to the typical interview with a typewriter at police headquarters. It is plain, however, that the section is not so limited. I think, too, that I am obliged to take in account that there was really nothing very exceptional in type about this situation. I have already said that I regret that it could not have been dealt with, with more flexibility, on the spot. It is not unusual for a police officer to have to investigate this sort of alleged street offence where not a great deal can be discovered from one or more of those whom he suspects to be responsible. In short, a police officer may often have to choose between arresting a man, and taking any risk that that might involve, in order to question him under the section, and simply pursuing his enquiries in some other way. Indeed, even when the provisions of the section are complied with it is not uncommon, as we all know, for some apprehended persons, particularly those with a good deal of experience, to decline to answer any questions at all. So in that respect it was not such a very uncommon situation. As I have said, the kind of field investigation that was forced upon Sergeant Gore here is itself not uncommon, and Parliament must be presumed to have been aware of that when it evidently declined to build into s.79a any special provision to take care of that situation. As I said a little while ago, I do not express any judgement for myself on that policy question. One can see that there would be more than one side to the desirability or otherwise of making some exception to deal with the sort of situation that confronted Sergeant Gore. An obvious problem would be the risk of its being exploited unfairly to secure some quick important admissions, on the spot, before the statutory formalities were pursued. However, as I say, that is not my problem this morning. My duty is to apply the section as it stands. So, despite the fact that the sergeant did his best in a difficult situation, acting throughout, I have no doubt, in good faith, despite the fact that he gave a caution at the beginning of the interview itself, I am satisfied that he was in breach of s.79a and that it may well have made a difference, to the nature and contents of the ensuing interview, had the requirements of the section been complied

with, either at the park itself or, more probably, at police headquarters. I am of the opinion that I should exercise my discretion in favour of the accused Turner and exclude the evidence of the interview that Sergeant Gore had with him. I therefore, uphold, the defence objection.