

## SYLLABUS

(This syllabus is not part of the opinion of the Court. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Supreme Court. Please note that, in the interests of brevity, portions of any opinion may not have been summarized).

### State of New Jersey v. Rame Pepshi (A-78-98)

**Argued October 25, 1999 -- Decided December 16, 1999**

**O’HERN, J., writing for a unanimous Court.**

In this appeal, the Court considers the significance of the defendant’s silence when arrested after a high-risk stop.

Defendant, Rame Pepshi, was among a group of eastern European emigres stopped by the police after a bungled attempt to break into a nearby supermarket. A tripped burglar alarm brought police to the scene. After seeing a vehicle leaving the scene, the responding officers alerted other patrol units. One of those patrol units spotted a vehicle approaching from the opposite direction. The officer put his patrol car in the path of the oncoming car and forced it to stop. He ordered the occupants out of the car and arrested them. Subsequent investigation produced strong evidence of the defendants’ guilt. In short, the case against them was almost airtight.

At trial, over counsel’s objection, the officer described the motorists’ reaction when arrested. According to the officer, “they had no real reaction.” The defendants objected to the testimony on the basis that they were in police custody and had a constitutional right to remain silent that was infringed on by the comment.

In an unreported opinion, the Appellate Division affirmed Pepshi’s conviction and the admission of the officer’s statement. In its opinion, it noted that Pepshi’s “silence and nonreaction was not evidence of a refusal to speak or an assertion of a right to remain silent, but evidence of an indifference to his arrest and an acceptance of draconian conduct,” which conduct was “intrinsically indicative of a consciousness of guilt.”

The Supreme Court granted Pepshi’s petition for certification.

**HELD:** Because of the overwhelming evidence of defendant’s guilt and the innocuous nature of the testimony regarding his silence at the time of his arrest, the mischaracterization of defendant’s conduct as indicative of guilt was harmless.

1. In most circumstances, silence is so ambiguous that it is of little probative force. (pp. 4-5)
2. Although it cannot be said as a general proposition that indifference to arrest or acceptance of draconian conduct is indicative of a consciousness of guilt, the generalizations made in this case engendered no fundamental violation of fair trial rights in light of the overwhelming evidence of guilt and the innocuous nature of the testimony. (pp. 5-6)

Judgment of the Appellate Division is **AFFIRMED**.

**CHIEF JUSTICE PORITZ and JUSTICES GARIBALDI, STEIN, COLEMAN, LONG, and VERNIERO join in JUSTICE O'HERN's opinion.**

JERSEY  
1998

SUPREME COURT OF NEW  
A-78 September Term

STATE OF NEW JERSEY,  
Plaintiff-Respondent,

v.

RAME PEPSHI,  
Defendant-Appellant.

Argued October 25, 1999-- Decided  
December 16, 1999

On certification to the Superior  
Court, Appellate Division.

Kevin G. Byrnes, Designated Counsel,  
argued the cause for appellant  
(Ivelisse Torres, Public Defender,  
attorney).

Joseph Connor, Jr., Assistant  
Prosecutor, argued the cause for  
respondent (John B. Dangler, Morris  
County Prosecutor, attorney).

Melaney S. Payne, Deputy Attorney  
General, argued the cause for amicus

curiae, Attorney General of New Jersey (John J. Farmer, Jr., Attorney General, attorney).

The opinion of the Court was delivered by  
O'HERN, J.

This appeal concerns the meaning of silence. In some circumstances it is said that "silence speaks louder than words." In re Young, 91 F.3d 1367, 1375 (10<sup>th</sup> Cir. 1996). The silence here concerns the passive reaction by a group of motorists to a high-risk stop of their vehicle by the police. The motorists were in fact a somewhat inept, but no less dangerous, ethnic gang. They had bungled an attempt to break into a nearby supermarket. A tripped burglar alarm brought police to the scene. The police saw a vehicle leaving and alerted patrol units to be on the lookout for the escaping vehicle. A patrol unit spotted a vehicle coming in the opposite direction. Because of the lateness of the hour, no other vehicles were on the road. The

officer put his patrol car in the path of the oncoming car and forced it to stop. He ordered the motorists out of the car and arrested the occupants, one of whom was the defendant.

At the station house, one of the suspects said that they were coming from Chicago and had left the highway in order to get gas. Investigative records disclosed that the car had been stopped and searched in New York just the day before. They could not have been in Chicago. New York police had found sledgehammers, crowbars, saws, chisels, and other suspicious tools in the car. A vehicle owned by one of the suspects was found the next day at a nearby supermarket. That car contained similar tools. When the beeper seized in the getaway car was activated, it led the police to another member of the gang whose footprints fit the footprints found at the scene of the crime. The case against the suspects was almost airtight.

At trial, over defendant's objection, the arresting officer described the motorists' reaction when arrested. According to the officer, "they had no real reaction. There was no questions being asked . . . ." The defendants had objected on the basis that they were in police custody and had a constitutional right to remain silent that was infringed upon by the comment.

In an unreported opinion, the Appellate Division affirmed the defendant's conviction and the admission of the officer's statement. In its opinion, it wrote:

Defendant's silence was admitted as proof that he had a guilty mind at the time of the stop because he did not inquire as to the reason for the stop or express any shock or surprise. Moreover, defendant's silence was not in response to custodial questioning which would have triggered defendant's Fifth Amendment Rights. "[E]vidence of pre-arrest silence, particularly in the absence of official interrogation, does not violate any right of the defendant involving self-incrimination."

State v. Brown, 118 N.J. 595, 613 (1990).

Defendant's silence and nonreaction was not evidence of a refusal to speak or an assertion of a right to remain silent, but evidence of an indifference to his arrest and an acceptance of draconian conduct. This behavior bespeaks knowledge of why it was happening. His conduct was "intrinsically indicative of a consciousness of guilt." State v. Phillips, 166 N.J. Super. 153, 160 (App. Div. 1979), certif. denied, 85 N.J. 193 (1980) Defendant's right to remain silent was not implicated in the admission of this evidence.

The inference suggested is that law-abiding people would if innocent, naturally protest the police treatment. We are not so certain that emigres from eastern Europe (as were the members of this group) would have been so naturally inclined as would a suburban couple returning from the theater. Their life experiences might have made them less spontaneous in encounters with security forces.

The cases cited by the Appellate Division do not sustain its thesis. "In most circumstances silence

is so ambiguous that it is of little probative force. . .” United States v. Hale, 422 U.S. 171, 176, 95 S. Ct. 2133, 2136, 45 L. Ed.2d 99, 104 (1975).<sup>1</sup>

Brown, supra, held that “once a defendant chooses to take the stand in his or her own defense pre-arrest silence has a bearing on the credibility of the defendant.” 118 N.J. 595 (1990). In that case we stated that

[i]f it can be inferred by the fact-finder that a reasonable person situated as the defendant, prior to arrest, would naturally have come forward and mentioned his or her involvement in the criminal episode, particularly when this is assessed against the defendant’s apparent exculpatory testimony, then the failure to have done so has sufficient probative worth bearing on

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<sup>1</sup>It is true that “[s]ilence gains more probative weight where it persists in the face of accusation, since it is assumed in such circumstances that the accused would be more likely than not to dispute an untrue accusation,” Hale, supra, 422 U.S. at 176, 95 S. Ct. at 2136, 45 L. Ed.2d at 104, but no accusations had been made when the reaction took place.



defendant's credibility for purposes of impeachment.

[Id. at 613.]

State v. Phillips, supra, emphasized that its :

rule applies only to such conduct as is intrinsically indicative of a consciousness of guilt, such as unexplained flight, or an unusual exhibition of remorse for the victim of the crime, or the switching of clothes while [sic] a cellmate before a lineup. It does not apply to conduct which, as here, is frequently engaged in by substantial numbers of people and which can be interpreted as self-inculpatory only by permitting the jury to speculate, unaided by any evidential base, as to defendant's motive in so conducting himself.

[166 N.J. Super. at 160 (citations omitted).]

Although, then, we disagree with the generalizations that indifference to arrest or acceptance of draconian conduct are indicative of a consciousness of guilt, we are satisfied that those mischaracterizations engendered no fundamental violation of fair trial rights here, especially in

light of the overwhelming evidence of guilt and the innocuous nature of the testimony. There was only the single reference to the suspect's reaction to arrest. No further inference of guilt was suggested by court or counsel. The question and answer were harmless. The Appellate Division found no merit in the remaining issues raised and those issues do not require comment.

The judgment of the Appellate Division is affirmed.

CHIEF JUSTICE PORITZ and JUSTICES GARIBALDI, STEIN, COLEMAN, LONG, and VERNIERO join in JUSTICE O'HERN's opinion.

# SUPREME COURT OF NEW JERSEY

NO. A-78 SEPTEMBER TERM 1998

ON APPEAL FROM \_\_\_\_\_

ON CERTIFICATION TO Appellate Division, Superior Court

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RAME PEPSHI,

Defendant-Appellant.

DECIDED December 16, 1999

\_\_\_\_\_  
Chief Justice Poritz

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PRESIDING

OPINION BY Justice O'Hern

—  
CONCURRING OPINION BY \_\_\_\_\_

DISSENTING OPINION BY \_\_\_\_\_

CHECKLIST	AFFIRM		
CHIEF JUSTICE PORITZ	X		
JUSTICE O'HERN	X		
JUSTICE GARIBALDI	X		
JUSTICE STEIN	X		
JUSTICE COLEMAN	X		
JUSTICE LONG	X		
JUSTICE VERNIERO	X		

TOTALS	7		
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