The Queen v Grant [2007] NTSC 50

PARTIES:	THE QUEEN
	v
	GRANT, David Ian
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	20623974
DELIVERED:	11 October 2007
HEARING DATES:	9 & 10 October 2007
JUDGMENT OF:	OLSSON AJ

CATCHWORDS:

CRIMINAL LAW AND PROCEDURE – evidence – voir dire – admissibility of three records of interview – whether the accused was so intoxicated as to render him incapable of rationally making a free choice as to whether to speak or remain silent – whether adequate caution given as to the nature of the interview – whether removal of accused from remand centre of Alice Springs Correctional Centre into custody of police officers was unlawful - Whether failure to contact the legal representative of the accused prior to interview resulted in unfairness to the accused.

Police Administration Act 1994 (NT)
Prisons (Correctional Services) Act 1996 (NT)

Cited:

Bara (1998) 106 A Crim R 1;
Dumoo v Garner (1997) 7 NTLR 129
R v Echo (1997) 136 FLR 451;
Regina v Kirk [2000] 1 WLR 567;
Kirkman v Moore [2001] NTSC 33;
The King v Lee (1959) 82 CLR 133;
The Queen v Miller (1980) 25 SASR 170
Murielle and Others v Moore and Another [2000] NTSC 23;
The Queen v Ostojic (1978) 18 SASR 188;
Ridgeway (1995) 78 A Crim R 307;
R v Smith (1992) 58 SASR 491;
The Queen v Swaffield (1997) 192 CLR 159

REPRESENTATION:

Counsel:

Crown:	Dr N Rogers
Defence:	M O'Connell

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Defence:	Northern Territory Legal Aid Commission

Judgment category classification:	B
Judgment ID Number:	Ols
Number of pages:	33

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

The Queen v Grant [2007] NTSC 50
No 20623974

BETWEEN:

THE QUEEN
Crown

AND:

GRANT, David Ian
Defence

CORAM: OLSSON AJ

REASONS FOR JUDGMENT

(Delivered 11 October 2007)

Introduction

[1] The accused stands charged with having murdered Richard Freeman on 16 September 2006. The Crown asserts that, at about 10.00 pm on that day, the accused inflicted two stab wounds on Freeman with a knife, as a consequence of which he died.

[2] The stabbing occurred at Unit 2, 56 Bradshaw Drive, Alice Springs, where the accused lived. The evidence indicates that, as at the date of his death, the deceased had, apparently at the invitation of the accused, also resided at the unit for about two years.

[3] The two men were said to have met at the Salvos. I infer that neither of them were employed. Certainly, it seems that the accused had suffered a severe neck injury at some stage, for which he regularly took potent pain killing medication. The personal situation of the deceased does not readily emerge at this stage.

[4] Police arrived at the Unit some time after 11.00 pm., at which point the accused was observed to approach the police vehicle, holding a small bottle in a stubby holder. He was described by Sergeant Musgrave, the senior police member present, as being heavily intoxicated. His breath smelt strongly of liquor, he was talking extremely fast and was very incoherent.

[5] The Sergeant was unable to make any sense out of what the accused was saying. The accused attempted to enter the front door of the Unit, through which a large amount of blood could be seen on the floor. He was restrained from so doing. In general, the accused was considered to be impeding the police activities from that point.

[6] Accordingly, the police arrested him at about 11.24 pm for hindering police and placed him in the rear of a cage vehicle.

[7] I here pause to record that Constable Jolley, who was assisting Sergeant Musgrave, described the accused as extremely agitated and quite intoxicated. Constable Guascione described him as very agitated. Constable Hawke said that she could smell alcohol on the accused's breath,

his speech was slurred, he appeared unsteady on his feet and she could not decipher all that he was saying.

[8] The police witnesses Watkinson and Weller were assigned the task of conveying the accused to the Watch House. At 11.54 pm. they conducted a brief section 140, electronically recorded, interview with the accused. Watkinson testified that, although he was aware that a man had been taken away in an ambulance and had died, he did not know how he had died. On the other hand, he had been told that the accused had possibly been walking around with a knife and he had certainly seen a very large pool of blood inside the front door of the Unit.

[9] The observations of Watkinson and Weller at the time are difficult to reconcile with those of the arresting officers. The former, in effect, asserted that, although the accused may have been intoxicated to some extent, his faculties were not overtly impaired. His speech was not slurred and he could "*walk fine*".

[10] Furthermore, I consider that those assertions are also impossible to reconcile with the electronic recording of the interview, which was played in the *voir dire* hearing. In my opinion, the accused did occasionally slur his words and his answers to questions were often not truly responsive to what was asked of him. At times, he was quite incoherent and it seemed impossible to conduct a logical, cohesive and meaningful discussion with him. In short,

he sounded like a typical drunk, who did not seem to even appreciate his actual status at the Watch House.

[11] He obviously thought that he was being held because of his state of intoxication and would be released after four hours. (cf s 128 and s 129 of the Police Administration Act).

[12] During the section 140 interview, the accused was informed that he was under arrest for hinder police, duly cautioned and afforded an opportunity of notifying someone of his whereabouts. He declined that opportunity saying "*No, do me four hours and I'll fuck off. All right, just go home*". He was told that he was under arrest and would not be released, as anticipated by him.

[13] It is significant that the accused told the police that he had been drinking all day and that, at the time of interview, he felt a "*Bit pissy*". He also commented that he drank every day.

[14] When it became apparent that he would not be released after he had sobered up, he became quite aggressive and uncooperative -- complaining vociferously about being arrested on his own property for hindering police. The interview became quite unmanageable and was terminated at 11.58 pm.

[15] For present purposes, the importance of the interview is that the prosecution seeks to lead evidence that, in the course of the final stages of it, the accused volunteered the statement:

> *"I'm fuckin… I'm [inaudible] my own property, hindering police, this and that, my mate gets bashed in the place, you know what I mean, and I walk into that and then I've got youse just lockin me up when I walk into it…"*

That statement was not directly responsive to any question asked of him.

[16] The accused was then returned to the cells.

[17] Detective Sergeant Ordelman was the officer assigned to lead the investigation into the death of the deceased. He first went to the crime locus at a time that does not readily emerge on the material before me and, after a short view of it and a brief interchange with police members present, returned to the Watch House. At 0257 hours on 17 September 2006 (ie three hours after the Watkinson interview), he sought to conduct a further section 140 interview with the accused.

[18] In cross examination, Sergeant Ordelman conceded that, at that time, there was a very real prospect that the accused may well have been not [fully] sober, not feeling particularly well and overtired. He asserted that, at that point, the accused displayed no overt signs of significant intoxication. The Sergeant claimed that the accused seemed co-ordinated, walked unaided to the interview room and spoke without a slur.

[19] In opening the interview, Sergeant Ordelman referred to the earlier interview and asked whether the accused had had his rights explained to him. The latter acknowledged that he had. When the Sergeant said to the accused:

"Righto -- ah -- but you're aware that - ah – you're currently under arrest for assault and hinder police"

The accused responded-

"Assault. I dunno about assault"

He immediately went on to say –

"I didn't even touch the cops, they [inaudible] nothing. I just swore at him and they… they put my arms around my friggen… my back there".

[20] It is quite apparent to me that the accused was under the distinct understanding that his arrest and the then proposed interview were pitched at his earlier interaction with the police at the Unit and not at any other offence possibly related to the deceased. He was not disabused as to that by Sergeant Ordelman.

[21] What then followed was a frustrating and discursive conversation, during which it proved well nigh impossible to focus the accused on any cohesive and logical discussion.

[22] At that point he was considered a person of interest in relation to the death of the deceased. Sergeant Ordelman was aware that a witness or witnesses had seen a person of the accused's description outside of the Unit, holding a knife.

[23] It is fair to say that Sergeant Ordelman found it well nigh impossible to administer a standard caution to the accused, because of the latter's discursive and non-responsive answers to questions put to him. However,

on an overall assessment of the transcript, I conclude that the accused was made to appreciate, and did appreciate, that he was under no compulsion to answer questions, a right that he in fact eventually sought to exercise.

[24] However, it is beyond question that Sergeant Ordelman did not advise the accused, conformably with the requirements of s 140(b) of the Police Administration Act, that he had the right to notify a friend or relative of his whereabouts.

[25] A somewhat fragmented caution having been administered, due to the conduct of the accused, the following exchanges occurred between Ordelman and the accused:

> *"ORDELMAN: Okay so you understand that this can be used as evidence in court?*
>
> *GRANT: Yeah [inaudible]*
>
> *ORDELMAN: And that you are currently under arrest.*
>
> *GRANT: Yeah, for fuckin Jack Shit*
>
> *ORDELMAN: Okay?*
>
> *GRANT: Obstruction my arse. That's bullshit whatever they fuckin charge me [in audible] shit.*
>
> *ORDELMAN: And that… that's your opinion.*
>
> *GRANT: That's bullshit."*

[26] That was followed by a series of exchanges introduced in this manner:

"ORDELMAN: Yeah. Now you mentioned you were on your own property. Which property is that?

GRANT: Where I live?

ORDELMAN: Yeah, the address.

GRANT: Um -- I live in -- ah -- Bradshaw Street.

ORDELMAN: Yep, do you know what number?

GRANT: In number two. Two Bradshaw Street, 56.

ORDELMAN: And -- -- who do you… do you live there with anyone?

GRANT: Yeah. I live there with -- um -- bloke Rick. Yet he got bashed up. He's in hospital at the moment.

ORDELMAN: Do you know Rick's last name?

GRANT: No I don't actually. I heard him answerin' to Rick.

ORDELMAN: Yeah, where did you meet Rick?

GRANT: -- Um -- I met him at the Salvo's about probably two years ago.

ORDELMAN: At?

GRANT: Salvos.

ORDELMAN: Salvos.

GRANT: Yeah.

ORDELMAN: Does Rick work anywhere?

GRANT: No. No. He just [inaudible] rock and roll and I [inaudible].

ORDELMAN: Okay. Now --ah –

GRANT: Me and him you know.

ORDELMAN: Now you say Rick had been bashed up.

GRANT: Mm

ORDELMAN: And Rick was the man that the ambulance -- ah -- officers took to the hospital?

GRANT: Yep.

ORDELMAN: Okay, I'm sorry to have to -- ah -- be the bearer of bad tidings, but Rick is dead.

GRANT: -- ah – Your… -- Aw – You're fuckin kiddin. God for fuck's sake. That's tonight?

ORDELMAN: Yep. Now at this stage we're still conducting inquiries."

[27] The interview then flowed on to questions concerning the deceased's personal effects and whether he worked in the town. Ordelman thereafter indicated that witnesses had seen a person of the accused's description walk away from the Unit with a knife, and that the deceased had died. When it was put to the accused that there had been a fight between himself and the deceased, he denied having had a knife, declined to answer further questions and asked to be taken back to the cells so that he could sleep.

[28] His request was not immediately acceded to. Ordelman asked him about his medical condition and his need for medication, following which he took the conversation back to the deceased and the latter's personal background and circumstances. The accused was eventually taken back to the cells at 3.15 a.m.

[29] It will be seen that Ordelman deliberately led the conversation around to the circumstances related to the death of the deceased without ever cautioning the accused in relation to any inquiries in that regard. When cross-examined as to this at the committal proceedings, Ordelman said that he thought that the accused knew what they were talking about.

[30] He went on to say that he did not know why he had not informed the accused that he was a suspect in a homicide investigation. I think that the Crown Prosecutor is correct in asserting that there was nothing sinister about the omission. Rather, it is obvious that, due to the difficulties that Sergeant Ordelman was having in conducting a rational conversation with the accused, he became distracted. That is certainly the impression gleaned from a consideration of all of the evidentiary material and the general flow of the interview itself.

[31] Following further police inquiries, the accused was charged with the murder of the deceased. He duly appeared in the court of summary jurisdiction and was committed for trial on that charge on 26 April 2007. He was remanded in custody to initially appear for arraignment on 28 May 2007. He thereafter remained on remand in custody, pending his trial.

[32] What followed was described in evidence by Sergeant Ordelman. He deposed that, on the morning of 26 July 2007, a prison officer telephoned him from the Alice Springs Correctional Centre and said that the accused had asked to speak to the police to show them where the knife was. The

Sergeant had not then recently been in touch with the accused, nor had he intended to speak to him at about that time. He was aware that the accused had been represented by a solicitor at the committal proceedings.

[33] The Crown tendered declarations by two prison officers by consent. Prison Officer Donald stated that he was on duty at the Alice Springs Correctional Centre on 26 July 2007. He said that at about 9.30 am the accused spoke to him and said "*Boss, I want to speak to the police to tell them where the knife is*". He told the accused to leave it with him and immediately notified his area chief, Mr Macfarlane, of the request. Mr Macfarlane states that, on the day in question, he had the accused brought to his office as a consequence of what he had been told by Prison Officer Donald.

[34] Mr Macfarlane says that he wished to clarify the request made by the accused. He states that, when he requested the accused to advise him again of what his wishes were, the latter said to him "*I've been speaking to my lawyer Russell Goldflam, and I want to contact the police, and show them the location of the weapon*" or words to that effect. Mr Macfarlane recalls the accused using the word "*knife*" in the conversation and that the accused said that he stuck it in the ground in Bradshaw Drive, Alice Springs.

[35] Following that conversation Mr Macfarlane telephoned the police and spoke to a CIB member. He relayed what had been said to him by the accused. He says that, a day or so later, he again spoke with the accused and asked him

how he had gone with the police. The accused responded "*They didn't have any luck , they couldn't find it*".

[36] There is no challenge to the accuracy or admissibility of the evidence of Prison Officer Donald or Mr Macfarlane, at least at this point.

[37] Conformably with what Ordelman understood was the then standard operating procedure in circumstances in which police desired to interview a prisoner in custody, he sent a fax addressed to the Deputy Superintendent at the Alice Springs Correctional Centre requesting that the accused be released into the custody of himself and Detective Davis at 1330 hrs the same day for the purposes of an interview regarding the murder of Richard Freeman (Exhibit VD 11). He said that such a procedure had, to his memory, been in vogue for about six years.

[38] As appears from exhibit VD 12, the Deputy Superintendent approved that request, purporting to act under s 58 of the Prisons (Correctional Services) Act. The two detectives and other police members duly attended at the Correctional Centre at the nominated time. Ordelman was handed a copy of his fax with the approval of the Deputy Superintendent endorsed on it, together with an order for removal of a prisoner pursuant to s 58 of the last mentioned Act -- also duly signed by the Deputy Superintendent. This authorised the removal of the accused to the Alice Springs Police Station for such period as was required and subject to escort guidelines.

[39] Sergeant Ordelman testified that, due to the high risk status accorded to the accused by the prison authorities, he handcuffed the accused prior to leaving the prison.

[40] Exhibit VD 13 is a transcript of the audio content of a video record of what occurred at time of removal of the accused from the prison and subsequently during relevant portions of the time when he was in police custody.

[41] That transcript speaks for itself. It is a generally accurate transcription of the audio content of the video record that was screened during the *voir dire* proceedings.

[42] As appears from it, Sergeant Ordelman had a preliminary discussion with the accused immediately on exiting the prison into the prison car park. By that time the accused had had microphone equipment attached to him to capture anything that he said, whilst being simultaneously videoed.

[43] I here pause to record that, to my observation of the video record, the accused at all times appeared to be relaxed, comfortable with the police officers and spoke spontaneously and voluntarily. He willingly cooperated with the police officers.

[44] In response to a question from Sergeant Ordelman as to how the police got to be at the prison, the accused responded that he had spoken to the chief officer and told him that he wanted to see Ordelman about something, as a result of which the officer had telephoned the police. He acknowledged that

what was occurring was being videotaped and that he had a microphone on him. He was formally cautioned at the outset.

[45] Following the caution, Ordelman asked the accused "*now what basically did you want us to do with you here today or what did you wanna show us?*" The accused responded that he wanted to show Ordelman where he thought the knife was. At that point Ordelman again pointed out to the accused that his rights applied and he did not have to do anything or show the police anything in relation to what he was on remand for. The accused indicated that he understood that situation.

[46] Ordelman, having then inquired as to various aspects of the accused's well-being, asked him "*Now this area that you wanna show us, whereabouts?*". The accused responded to the effect that it was about a hundred metres from the roundabout on the Stuart Highway on Bradshaw Drive. When asked what, specifically, the accused would be showing the police whilst they were there, the accused responded "*where the knife is*". He conceded that it had been his choice to do so and that nobody had forced him to make any such disclosure.

[47] At that point Ordelman asked the accused "*have you spoken with your legal representation?*" The accused's response was that he had spoken with his lawyer Russell Goldflam the previous day. Ordelman then asked him whether Russell Goldflam was aware that the accused wished to speak with the police. The accused responded "*No, not at all*". When he said that

Ordelman then asked him "*Okay and whose choice is that?*". The accused answered "*That's mine*".

[48] In cross-examination, Ordelman conceded that he was aware that Mr Goldflam was the accused's solicitor on the record. He said that he did not inform Mr Goldflam that the accused was being delivered up into his custody for the purposes of an interview, presumably in the light of the statements made by the accused as above recited. He agreed that, with the benefit of retrospect, that would have been the appropriate course to adopt.

[49] As appears from exhibit VD 13 and the relevant video the accused was in the custody of the police members from 1425 hrs. He was returned to the Alice Springs Correctional Centre at approximately 1820 hrs on 26 July 2007. He directed the police to various locations on Bradshaw Drive and attempted, as it proved unsuccessfully, to locate a knife in the general location in which he said that he had buried it in the ground. He described how he had gone about that process following an earlier struggle with Richard Freeman.

[50] In the course of the activities at Bradshaw Drive he explained to the police members what had occurred between himself and Richard Freeman on the night on which the latter was stabbed. It is unnecessary, for present purposes, to recite what he said in detail. It will suffice to say that he described his involvement in a struggle with the deceased who, he said, had been holding the knife. As I understood his narrative, the deceased had been

stabbed whilst the accused was trying to wrest the knife from him, or at least prevent the deceased from stabbing him.

[51] Following unsuccessful attempts to locate the buried knife, the accused was temporarily taken to the Alice Springs Police Station and, at the suggestion of the accused, the police checked the areas indicated by him with a metal detector. This having failed to locate any knife, the accused was then returned to the Alice Springs Correctional Centre.

[52] The accused elected to give evidence on the voir dire.

[53] He confirmed that, whilst on remand awaiting trial, he approached prison officers stating that he desired to show the police where the knife was. He said that his sister had told him on the telephone that she had been speaking with his solicitor, Mr Goldflam. The latter had informed her that none of the knives so far located by the police were the correct knife, because they bore no fingerprints or traces of blood. In the course of his evidence, the accused said that Mr Goldflam had actually told him that direct, and that this "*was holding things up*".

[54] The accused agreed that he had seen Mr Goldflam the day prior to him seeking to see the police, although he did not tell Mr Goldflam that he proposed approaching the police.

[55] He testified that, when his sister told him that the police had not located the knife, he decided to help them find it.

[56] The accused conceded that he understood the caution given to him by Sergeant Ordelman on 26 July 2007, but had only expected to be asked about the location of the knife and not other aspects. When Sergeant Ordelman had asked him other questions concerning the possession of the knife and what had happened in relation to it, he felt intimidated by the presence of a number of police officers and pressured to speak.

[57] I am bound to say that I found this evidence unconvincing, for a number of reasons.

[58] The accused conceded that the police officers were not aggressive towards him, had actually treated him well and did not bring pressure to bear on him. As the Crown Prosecutor put to him and he was constrained to acknowledge in cross-examination, it was to be logically expected that, once he had admitted to possession of and burying the knife, the police would naturally desire to learn the circumstances under which it had come into his possession.

[59] At the conclusion of the interview Sergeant Ordelman specifically asked the accused whether he had been treated properly and whether he had been forced to answer any of the questions. The accused responded in the affirmative as to the first question and in the negative to the second.

[60] Most importantly of all, the video/audio record speaks for itself. It is quite apparent that, at all times, the accused was quite relaxed in the presence of the police and appeared to have a good relationship with them. In fact, he

was, for the most part, quite energetically taking the initiative and willingly indicating what had taken place on the night in question. His responses were spontaneous. This was against the background that he obviously well appreciated his rights and had, on other occasions, unhesitatingly declined to answer police questions. His demeanour in the video was quite inconsistent with being under any pressure. There was no reluctance in responding to questions.

[61] The accused told the Crown Prosecutor that he had said to Sergeant Ordelman that he wanted the knife tested for blood and fingerprints, particularly to see if his fingerprints or those of the accused came up. As he put it in evidence in chief, his motive in contacting the police was that he wanted to "*grab the knife for forensic evidence*".

[62] Quite frankly, I found the accused's evidence as to his mental reservations about answering questions and that he felt pressured utterly unconvincing. I gained a distinct impression that, having determined on the course of action that I have recited, he has now regretted some consequences of his actions and is seeking a means of extricating himself from the consequences of those actions by a process of rationalisation.

[63] I do not accept his evidence that he felt pressured when responding to police questions. Moreover, I also do not accept his evidence that he only expected to be asked about the location of the knife and nothing else. Had this been

the case I would have expected that he would have declined to answer questions that he considered inappropriate.

Applications on the voir dire

[64] Against the foregoing background counsel for the accused sought the exclusion of evidence relating to the following three recorded conversations had by the accused with police members:

(1) the tape recorded conversation between the accused and Constable Watkinson commencing at 11:54 p.m. on 16 September 2006;

(2) the tape recorded conversation between the accused and detective Sergeant Ordelman commencing at 0257 a.m. on 17 September 2006; and

(3) the videotaped conversations involving the accused when he was removed from the Alice Springs Correctional Centre on 26 July 2007.

The statutory context

[65] The submissions in this case, *inter alia*, fall to be considered in the context of s 137(2), s 140 and s 143 of the Police Administration Act.

[66] Section 137(2) empowers a member of the police force, for a reasonable period, to continue to hold a person taken into lawful custody to enable the person to be questioned or investigations to be carried out, to obtain evidence of or in relation to an offence that the member believes on reasonable grounds involves the person concerned, whether or not it is the offence in respect of which the person was taken into custody.

[67] Section 140 stipulates that, before any questioning or investigation under s 137(2) commences, the investigating member must inform a person in custody that the person does not have to say anything but that anything the person does say or do may be given in evidence; and that the person may communicate with or attempt to communicate with a friend or relative to inform the friend or relative of the person's whereabouts. It goes on to provide that, absent situations that are here irrelevant, an investigating police officer must defer any questioning or investigation that involves the direct participation of the person in custody for a time that is reasonable in the circumstances and afford that person reasonable facilities to enable the person to make or attempt to make the communication referred to.

[68] Section 143 provides that a court may admit evidence to which s 140 applies even if the requirements of that section have not been complied with, or if there is insufficient evidence of compliance with those requirements, if, having regard to the nature of and the reasons for non-compliance or insufficiency of evidence and any other relevant matters, the Court is satisfied that, in the circumstances of the case, admission of the evidence would not be contrary to the interests of justice.

[69] Those statutory provisions are reinforced and supplemented by more detailed administrative provisions of Police General Orders which deal with the manner in which members of the police force should go about the task of investigating offences and questioning suspects.

[70] For present purposes, General Order Q1 is that which is relevant. Paragraph 3.1 of the order stipulates the type of caution to be administered to a suspect and states, *inter alia*, that, in administering a caution, it is important that a suspect be informed of the nature of the allegations against him or her as part of the process of administration. Clearly, this is necessary to render a particular caution meaningful and is implicitly required by the statutory provisions to which I have just referred.

[71] Paragraph 4.5 of that General Order provides that no person should be interviewed unless the members concerned are satisfied that the person is sober, well, and not overtired at the time of the interview. It is stressed that, should it be shown that the suspect was interviewed whilst under the influence of intoxicating substance, was ill, injured or overtired, any answers given or actions taken by the suspect may be inadmissible in evidence. Those are, of course, counsels of practical common sense.

Issues on the voir dire

[72] It is convenient to deal with the three impugned interviews *seriatim*.

The Watkinson interview

[73] The Crown Prosecutor contends that it is apparent that the accused understood the questions put to him by Watkinson and responded appropriately to them. She urged upon me that, having regard to the evidence of Watkinson and Weller, I should conclude that, at the time of the relevant interview, the accused was not exhibiting signs of any significant

level of intoxication. It was clear from his subsequent statements to police that he had a clear memory of the events of the night in question and that the accused had volunteered the comment as to his mate getting bashed.

[74] She drew attention to what fell from Wells J in *The Queen v Ostojic* (1978) 18 SASR 188 to the effect that the mere fact that an interviewee is intoxicated to some degree does not mean that, *ipso facto*, any responses given ought to be excluded. As Wells J there pointed out, the fact that liquor may loosen a person's tongue or disinhibit that person in his or her responses, will not, of itself, lead to exclusion. In the end, what is involved is a question of fact and degree, to be considered in light of the principles discussed by the High Court in *The King v Lee* (1959) 82 CLR 133.

[75] At the end of the day, the questions to be asked are whether, in all the circumstances, any impugned statement was voluntary or whether, if voluntary, it would, in any event, be unfair to the accused to permit his statements to be used at trial.

[76] In my opinion, the essential problem with the Crown contentions is that I am unable to accept the factual premise on which they are based.

[77] As I have pointed out, there is a clear inconsistency between the evidence of two groups of Crown witnesses and the audio record itself strongly suggests that the evidence given by Constables Watkinson and Weller cannot be accepted as accurate. The observations reported by Sergeant Musgrave and Constables Jolley and Hawke clearly indicate that the accused was

exhibiting an advanced stage of intoxication only a short time before he was conveyed to the Watch House.

[78] I am compelled to the conclusion that, at the time of the impugned interview, the accused was highly intoxicated to the point at which, to employ the words of Perry J in *R v Smith* (1992) 58 SASR 491 at 500, his state of intoxication was such that it is highly likely that he was incapable of making a rational decision between speaking and remaining silent. In such a situation the answers given by him cannot be said to be voluntary.

[79] It follows that this record of interview must be excluded. In those circumstances it is unnecessary to consider the other submissions made on behalf of the accused concerning it.

The Ordelman record of interview on 17 September 2006

[80] It should be said at the outset that it is apparent that this interview proceeded in obvious contravention of the provisions of police General Order Q1.

[81] There was every reason to believe that the accused was hung over from his prior heavy state of intoxication (if not still intoxicated to some extent) and very tired. He was brought from his cell in the early hours in the morning, having been arrested late at night and already subjected to a previous record of interview.

[82] That aside, it is beyond dispute that the requirements of s 140(b) of the Police Administration Act were not complied with, nor was it made clear to the accused that the essential thrust of the interview was to be towards his possible involvement in the death of Richard Freeman. Indeed, as I have demonstrated, it is quite apparent that the accused thought that he was being questioned in relation to hindering and assaulting police. He went to some lengths to express his indignation concerning any such suggestions. That situation must have been plainly apparent to Sergeant Ordelman and it is quite inexplicable that he failed to disabuse the accused as to his misapprehension.

[83] In other words, the accused was never properly cautioned at all, as required by s 140 in relation to the subject matter of the investigation being conducted at the time by Sergeant Ordelman.

[84] As is specifically pointed out in par 3.1 of police General Order Q1, it is important that any person to whom a caution is administered is informed of the nature of any allegations made and thus of the subject matter of the investigation. This is in recognition of the fact that s 137(2) of the Police Administration Act focuses on persons retained in custody to enable investigations to be carried out to obtain evidence of, or in relation to, an offence that a police member believes on reasonable grounds involves the person concerned.

[85] Section 140 of that statute is, in express terms, linked to the s 137 provisions and, as a matter of simple logic, any caution given must in specific terms relate to the subject matter of the relevant investigation. If this is not done then it follows that the person in custody is not in a position to make an informed decision as to whether to speak or remain silent.

[86] In the instant case, the accused would be pardoned for being completely in the dark as to the real purpose of the interview until, in the midst of it, he was suddenly confronted with news of the death of Richard Freeman and, ultimately, a suggestion that someone fitting his description had been seen to walk away from the Unit with a knife. It is little wonder that he reacted as he did, at the latter point and asked to be returned to the cells.

[87] I took the Crown Prosecutor to suggest that, because the conduct of Sergeant Ordelman was essentially the result of distraction caused by his difficulties in effective dialogue with the accused and that he had no sinister intent in what he did, it was appropriate to admit evidence of the interview pursuant to s 143 of the Police Administration Act. Indeed, it was Sergeant Ordelman's impression that the accused well knew what was being talked about.

[88] It was also stressed that many of the questions put to the accused were either essentially aimed at endeavouring to resolve the question of the identity and personal background of the deceased, as to which the police had little

information at that stage, or were simply responsive to what the accused himself was saying.

[89] In my opinion the clear breaches of s 140 inevitably rendered it unfair to admit the content of the relevant interview. The statutory provisions to which I have referred are explicit and intended to constitute proper and important safeguards for persons taken into the custody of the police. Manifest breaches of those safeguards will more often than not result in a conclusion of unfairness (cf *Dumoo v Garner* (1997) 7 NTLR 129, *Bara* (1998) 106 A Crim R 1, *Regina v Kirk* [2000] 1 WLR 567). So much is trite having regard to the many published authorities on the topic.

[90] I do not consider that, in a situation such as this, it is appropriate to resort to the provisions of s 143. It simply cannot be said that the admission of the relevant evidence would not be contrary to the interests of justice. This court cannot be seen to place its imprimatur upon a failure to accord fundamental protective rights upon an accused person by failing to administer a necessary caution of the nature that was plainly required, quite apart from any consideration of any other failure to comply with the requirements of s 140.

[91] This record of interview must also be excluded from the evidence going before the jury.

The video interview on 26 July 2007

[92] Mr O'Connell, of counsel for the accused, took as his starting point a contention that the removal of the accused into the custody of the police for the purposes of an interview, whilst the accused was in custody on remand, was unlawful. As to this he drew comfort from the general bases of reasoning expressed in cases such as *R v Echo* (1997) 136 FLR 451, *The Queen v Miller* (1980) 25 SASR 170 and *Ridgeway* (1995) 78 A Crim R 307 and argued that the unlawfulness of the police conduct necessarily fatally tainted the evidence sought to be led as to the substance of the interview.

[93] He argued that, as a matter of general principle, once an accused person had been brought before the court and remanded in custody the legal authority of the police to have custody of that person was at an end (cf *The Queen v Miller* (supra) at 203), and the various protections afforded by s 140 of the Police Administration Act and other relevant statutory provisions related to police interrogations ceased to apply. It was, he said, an abuse of an order of remand in custody for police to utilise the occasion for further interrogation of an accused person (*R v Echo* (supra) at 459).

[94] Whilst Mr O'Connell was content to accept that Sergeant Ordelman genuinely believed (and was justified in believing) that the procedure adopted on 26 July 2007 was the proper and established standard operating procedure for obtaining access to a prisoner on remand for the purpose of pursuing inquiries, nevertheless, it was, he submitted, not authorised by law. He argued that s 58 of the Prisons (Correctional Services) Act, upon the

basis of which the Deputy Superintendent had purported to release the accused into the custody of Sergeant Ordelman, did not, in terms, authorise what was done. It followed that, at the relevant time, the accused was unlawfully in the custody of Sergeant Ordelman.

[95] Section 58 of the statute is expressed in these terms:

> "A prisoner shall -
>
> (a) on the order of a Judge of the Supreme Court; or
>
> (b) at the written direction of the Director,
>
> be removed from a prison or police prison to another prison or police prison or be brought before a court or taken to such other place as required".

[96] It is not disputed that, in the instant case, the Deputy Superintendent possessed delegated authority from the Director to give a written direction pursuant to s 58. The Crown Prosecutor tendered documentary evidence of that authority.

[97] As I understood his argument, Mr O'Connell contended that the section only authorised directions for removal from one prison to another. He said that that was not what had occurred in the instant case. He referred me to the few published authorities that make mention of the section.

[98] None of these are of direct assistance for present purposes.

[99] In *Murielle and Others v Moore and Another* [2000] NTSC 23 Mildren J discussed the legislative context and history of s 58 against the background

of the Habeas Corpus Act 1679 (31 Car 11 C 22) and made the point that, having regard to its provisions, the section had to be strictly complied with. In that case an appropriate written direction had not been given.

[100] In *Kirkman v Moore [*2001] NTSC 33 Riley J pointed out that the power granted by the section is expressed in very broad terms, but commented that any limits on the permissible exercise of the power conferred had not been an issue addressed in detail by the parties. He had been asked to review a decision to remove a prisoner from one prison to another on the basis that the plaintiff had been denied procedural fairness and that the decision to transfer him was unreasonable and an abuse of power. In the event, Riley J. concluded that there had been no denial of procedural fairness.

[101] I consider that, on a fair reading of the section, the power conferred is not limited in the manner asserted by Mr O'Connell. No doubt, leaving aside removals for the purpose of bringing a prisoner before the court, it would most often be employed for the purpose of transferring a prisoner from one prison to another. However, due regard must be had to the phrase "*or taken to such other place as required*" appearing at the end of the section. In my opinion this plainly confers on the Director an unfettered discretion to authorise removal of a prisoner, for such time as he may determine, to any place for a purpose that he considers proper. I entertain no doubt that, for proper reason, it is appropriate for the Director or his delegate to authorise the removal of a prisoner for a purpose such as that sanctioned on 26 July 2007.

[102] I took Mr O'Connell to submit that, because the formal "*order*" in this case directed a transfer from the Alice Springs Correctional Centre to the Alice Springs Police Station for the purpose of an interview, what occurred during the interview at Bradshaw Drive was unauthorised. I do not accept that contention.

[103] As appears from exhibit VD 12, specific approval was given not only for the transfer of the accused to the Alice Springs Police Station but also, by separate written approval attached to the order, the accused was to be released into the custody of detectives Ordelman and Davis at 1330 hrs on 26 July 2007 for the purpose of an interview regarding the murder of Richard Freeman.

[104] I consider that the combined effect of the two documents comprising exhibit VD 12 was to authorise what actually took place. The accused was released into the custody of the two detectives, they accompanied him to the scene where it was said that the knife had been buried and he was thereafter taken on to the Alice Springs Police Station. He was later returned to the Alice Springs Correctional Centre from there. As a matter of fact the stop at Bradshaw Drive was physically virtually en route from the Correctional Centre to the Alice Springs Police Station in any event.

[105] I conclude that the removal of the accused into the custody of Sergeant Ordelman on the occasion in question, in the manner in which it occurred, was lawful.

[106] Further, I do not consider that what took place was in any sense an abuse of the relevant order of remand. This was not a situation in which the police conduct was inspired by any improper motive. What transpired occurred solely at the initiative of the accused himself.

[107] Nor do I consider that, as contended by Mr O'Connell, the accused's ability to answer questions was compromised by the fact that he was in handcuffs as a security measure or by the use by Sergeant Ordelman of the word "*murder*". Any prejudice resulting from either of those aspects could, of course, quite simply be cured by an appropriate direction to the jury in due course.

[108] Having said that, there remains for consideration the fact that, at the time at which Sergeant Ordelman went to the Correctional Centre and first spoke to the accused, he was well aware that the latter was represented by Mr Goldflam and that Mr Goldflam had not been told of the desire of the accused to speak with the police. Sergeant Ordelman conceded, in the course of his evidence, that, with the benefit of hindsight, he ought to have first contacted Mr Goldflam and informed him of the request by his client. He really gave no explanation as to why he failed to do so.

[109] Mr O'Connell argues that such was the unfairness resulting from that situation that I ought, in exercise of my discretion, to exclude the evidence of what occurred at the prison and Bradshaw Drive on 26 July 2007. In addressing that submission I particularly bear in mind the fact that, in my

assessment based on observing the accused in the witness box, he does not appear to be a man of great intellect. I do not intend any discourtesy to him when I say that he projected as a slow speaking, slow thinking witness who, at times, did not readily grasp what was being asked of him. Plainly, he is a person who was sorely in need of proper legal advice and assistance in a situation such as that which developed, so that he could adequately appreciate and make informed decisions as to what he ought to say and do.

[110] I accept that the accused is charged with the most serious crime in the criminal calendar and that there is a need to carefully balance the various factors adverted to by the High Court in *The Queen v Swaffield* (1997) 192 CLR 159. The relevant evidence is plainly of very substantial probative value and potentially highly prejudicial to the accused. The evidence in question is plainly of a high order of reliability on the face of it. As against those considerations, the question arises as to whether the relevant evidence was obtained at an unacceptable price, having regard to contemporary community standards.

[111] It seems to me that such question must be answered in the affirmative in the circumstances of the present case. The accused was a prisoner on remand at the relevant time and not entitled to the full protection accorded to him by s 140 of the Police Protection Act, which had no application to his situation. The police were well aware that he had a solicitor acting for him and that his solicitor had no inkling of what was proposed. It seems to me that, particularly having regard to the apparent low level of intellect of the

accused and its possible bearing on his ability to appreciate the significance of what he was proposing to do, what occurred was really unconscionable. So far as I can determine, the main motivating factor that seems to have triggered the accused's initiative was his understanding that a failure on the part of the police to find what was considered to be the relevant knife was holding up the proceedings.

[112] Even putting to one side the intellect of this particular accused and its potential significance, I am of the view that the court should not countenance conduct of the type in question. There was an obvious responsibility on the police to alert Mr Goldflam as to what was in contemplation and not merely proceed behind his back. The potential for abuse in such circumstances is obvious. In this case the evidence *was* obtained at an unacceptable price, even given that the police did not initiate what developed. The court ought not to give its approval to such conduct.

[113] Accordingly, I also exclude the videotaped evidence of the interviews conducted by Sergeant Ordelman on 26 July 2007. I should, however, emphasise that, in so doing, I am in no sense ruling against the admissibility of the evidence of Prison Officer Donald and Mr Macfarlane as to what occurred at the prison prior to the arrival of Sergeant Ordelman.
