

IN THE SUPREME COURT  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA  
AT DARWIN

SCC No 163 of 1994

BETWEEN:

THE QUEEN  
Plaintiff

AND:

ERIC GUMBINYARRA  
Defendant

**CORAM: THOMAS J**

REASONS FOR RULING

(Delivered 28 September 1995)

This is an application pursuant to s26L of the *Evidence Act* to determine the admissibility or otherwise of certain confessional evidence which the Crown wishes to adduce against the accused at the accused's trial. The defence challenge the admissibility of the record of interview made by the accused on 13 May 1994, relating to offences alleged to have occurred on 11 May 1994.

Prior to commencement of the hearing on the voir dire the accused entered a plea of not guilty to the following two charges:

**"Count 1**

On 11 May 1994 at Oenpelli in the Northern Territory of Australia, did together with Eric Mardday unlawfully assault Rebecca Djayhjurrnga with intent to have carnal knowledge of her.

AND THAT the said unlawful assault involved the following circumstances of aggravation:

- (i) That Eric Mardday thereby had carnal knowledge of the said Rebecca Djayhjurrnga.

Section 192(1) and (4) and Section 12(1) of the Criminal Code.

## Count 2

On 11 May 1994 at Oenpelli in the Northern Territory of Australia, unlawfully assaulted Rebecca Djayhjurrnga with intent to have carnal knowledge of her.

AND THAT the said unlawful assault involved the following circumstance of aggravation:

- (i) That Eric Gumbinyarra thereby had carnal knowledge of the said Rebecca Djayhjurrnga.

Section 192(1) and (4) of the Criminal Code."

The Crown allegation is that on 11 May 1994, the victim in this matter, Rebecca Djayhjurrnga, was drinking at the social club in Oenpelli. She left the social club in the company of a man named Roderick. The Crown allege as Rebecca and Roderick walked home, Roderick was assaulted by the accused Eric Gumbinyarra and his co-accused, Eric Mardday. The two accused then carried Rebecca a short distance and raped her. Rebecca Djayhjurrnga screamed. A person named Willy Ilbinyina arrived on the scene and the two accused decamped the area. The victim made a recent complaint statement to a lady named Irene.

On the trial of the accused before a jury, the Crown will be calling evidence from Roderick, Rebecca, Willy, Irene and will further seek to rely on a record of interview made by the two accused.

The defence submission is that the record of interview made with Eric Gumbinyarra is not admissible at his trial before a jury because it is not voluntary. It is the defence contention that the caution was not administered adequately, police did not comply with guideline number 3 as expressed by Chief Justice Forster in *R v Anunga* 11 ALR 412, which states as follows:

"Great care should be taken in administering the caution when it is appropriate to do so. It is simply not adequate to administer it in the usual terms and say, "Do you understand that?" or "Do you understand you do not have to answer questions?" Interrogating Police Officers, having explained the caution in simple terms, should ask the Aboriginal to tell them what is meant by the caution, phrase by phrase, and should not proceed with the interrogation until it is clear the Aboriginal has apparent understanding of his right to remain silent. Most experienced police officers in the Territory already do this. The problem of the caution is a difficult

one but the presence of a "prisoner's friend" or interpreter and adequate and simple questioning about the caution should go a long way towards solving it."

Reference was also made to Police Orders Q2 5.3 which in making reference to the "Anunga guidelines" states as follows:

"Great care should be taken in administering the caution when the stage has been reached that it is appropriate to do so. The suspect should be asked to explain what is meant by the caution, phrase by phrase. Questioning should not proceed until it is apparent that the suspect understands the right to remain silent."

In addition to the caution being administered inadequately, it is the defence contention that no attempt was made by police to have the prisoner's friend explain to the accused what was going on, either in English or in his native tongue. The defendant relies on "Anunga guidelines" number 2 which states:

"When an Aboriginal is being interrogated it is desirable where practicable that a "prisoner's friend" (who may also be the interpreter) be present. The "prisoner's friend" should be someone in whom the Aboriginal has apparent confidence. He may be a mission or settlement superintendent or a member of the staff of one of these institutions who knows and is known to the Aboriginal. He may be a station owner, manager or overseer or an officer from the Department of Aboriginal Affairs. The combinations of persons and situations are variable and the categories of persons I have mentioned are not exclusive. The important thing is that the "prisoner's friend" be someone in whom the Aboriginal has confidence, by whom he will feel supported."

Police Standing Orders Q2.2 states as follows:

"The guidelines are not strict rules of law. Compliance with the guidelines will generally result in the admission of the evidence obtained thereby. Non-compliance will not necessarily result in exclusion of the evidence. However, members should endeavour to comply with the guidelines so far as is possible. When the circumstances of a particular case necessitate non-compliance with one or more of the guidelines, then evidence should exist to explain such non-compliance."

and Police General Orders Q2-7.4 which says:

"Police should explain to the "prisoner's friend" his/her role, and ensure that he or she understands that role. The explanation and the "friend's" explanation back should be recorded as part of the overall record of interview. A

prisoner's friend who does not understand his/her role is of no use. If Police cannot demonstrate such understanding, then this amounts to non-compliance, with the risk that the evidence will be excluded. This point is discussed further at paragraph 8.

7.4.1 The role of the "prisoner's friend" must also be explained to the prisoner and police are to ensure the prisoner understands what the role entails."

The defence contention is that in this case the prisoner's friend is not the choice of the defendant and neither the prisoner's friend or the police make clear to the defendant what is happening.

Alternately, the defence state the record of interview should be excluded on the ground of unfairness in that the accused has been totally disadvantaged by the non-compliance of the police with the basic requirements in the Anunga Rules.

Defence counsel made reference to the evidence that would be given that the accused had been a known petrol sniffer and alcohol abuser which had affected his brain. In addition, the accused had suffered depressive illness and head injuries. He was a person with a limited understanding of English.

On 13 May 1994 the accused participated in a record of interview conducted by Detective Mark Coffey. Prior to commencing the record of interview, Detective Coffey had very little information as to the background of the accused or his level of understanding of the English language. Eric Gumbinyarra is a full blood traditional Aboriginal man who usually lived on Goulburn Island. On his own evidence, Detective Coffey had, prior to commencing the record of interview, a brief conversation with the accused when he had spoken with the accused at his home on the morning of 13 May 1994 and then driven him to the Police Station. Detective Coffey gave the following evidence in cross-examination (transcript p26):

"Before you started this interview the, would you agree with me that you would have had, what, about five minutes of conversation with him?---Yes, probably.

That would be, what, a few minutes out at the house and we've got that section 140 tape?---Yes.

In total about five minutes?---Somewhere around there.

You weren't aware at the time that you were speaking to him that in fact he may have some intellectual difficulties?---Well, I was to a certain extent. Constable Nixon had told me that he was a known petrol sniffer.

Right, he was a known petrol sniffer?---Yes.

Did he tell you anything else?---No, not really.

What, you were just aware from your experience, particularly on other Aboriginal stations, that a petrol sniffer might suffer some kind of brain damage?---That's right.

You weren't aware that he'd had head injuries of any kind?---No.

Your assessment of his level of English was based on that five minutes of speaking to him, or however many minutes it was?---Well, initially yes, and then as the interview went on."

At the commencement of the record of interview, Detective Coffey asked the accused some questions as to the accused's age, his attendance at school and ability to read and write English. To these questions the accused answered either in one or two words in English or did not make any reply. The questions and answers given by the accused relevant to the caution are as follows:

"COFFEY: I have to ask you some questions about an assault that occurred on Wednesday night. Do you understand that?

(sic)GUNBINYARRA: Yeah.

COFFEY: Right. Before I ask you anything I have to tell you that you're not obliged to answer any of my questions if you do not wish to do so. Do you understand that?

" GUNBINYARRA: Yeah.

COFFEY: What does that mean to you?

" GUNBINYARRA: No answer.

COFFEY: What I'm saying is if you don't want to talk to me you don't have to. Do you understand that?

" GUNBINYARRA: Yes.

COFFEY: What does that mean to you?

" GUNBINYARRA: No answer.

COFFEY: Eh?

" GUNBINYARRA: I don't know.

COFFEY: Right. Well, when I ask you questions, right, you can say I don't want to answer that. Do you understand that?

" GUNBINYARRA: Yes.

COFFEY: So if I ask you something you can either answer me or you can say no I don't want to answer that. Do you understand that?

" GUNBINYARRA: Yeah.

COFFEY: What does that mean to you?

" GUNBINYARRA: Don't have to answer.

COFFEY: Right. Anything that you do say to me will be recorded on this machine here. Do you understand that.

" GUNBINYARRA: Yes.

COFFEY: And that tape might be shown in Court to that Judge. Do you understand that?

" GUNBINYARRA: Yes.

COFFEY: Do you know what a Judge is?

" GUNBINYARRA: Magistrate.

COFFEY: And what can he do to you?

" GUNBINYARRA: Go to jail. Go to jail.

COFFEY: Right. Right so you understand that you don't have to talk to me if you don't want to? Do you understand that?

" GUNBINYARRA: Yes.

COFFEY: Do you wish to speak to me about this matter?

(sic)GUNBINYARRA: Yes."

I agree with the submission of counsel for the accused that the record of interview does not disclose an explanation to the prisoner's friend of his role in the proceedings. A reading of the record of interview would indicate that Tommy, the prisoner's friend, did not have an understanding of his part in the proceedings.

I refer to the following questions and answers in the record of interview, Exhibit P2:

"COFFEY: Right. Eric do you agree that prior to commencing this interview I asked you if you wanted anyone to sit in here with you while we spoke to you?

(sic)GUNBINYARRA: Yeah.

COFFEY: And do you agree that you asked if Tommy could come along?

" GUNBINYARRA: Yes.

COFFEY: Alright. Tommy where do you live?

TOMMY: I, I just came from my outstation I'm (inaudible) together, we leaving together. And I came here (inaudible) and I've been nearly ready to drive back to my outstation you know but this young boy here he gave me a little bit Court for him so I've been stay back here for a while (inaudible) and then I be going back to my outstation.

COFFEY: Right. And Tommy, Eric wants you to sit in here with you[sic] while we have this interview. Do you understand that?

TOMMY: Yeah, but he always he always, he will be sitting with me at outstation.

COFFEY: Yep. Okay. So if Tommy has any trouble understanding me or whatever you can speak to him and help him.

TOMMY: Yeah, or.

COFFEY: You happy to do that?

TOMMY: *(Native language). Look, if you want to talk and have little bit of trouble understanding and mistake, talk to me and we'll tell him, you know.*

(sic)GUNBINYARRA: Yeah, I know."

The record of interview does not refer to any previous conversation between Tommy and Detective Coffey.

There is no reference to a conversation either with Tommy or with the accused about a prisoner's friend in any notes or statements

made by Detective Coffey. There is no reference to a prisoner's friend on the s137 chronology (Exhibit PI). I am not satisfied on the evidence that there was any other conversation between Tommy and police officers as to the role of a prisoner's friend other than that set out in the record of interview. Tommy Gagarraba himself gave evidence. He is an elderly traditional Aboriginal man. He had never previously been a prisoner's friend. His knowledge of English was limited as was his knowledge of the requirement of a prisoner's friend. In *Jimmy Butler* (No. 1) 57 A Crim R 451 Kearney J at 455 states:

"A prisoner's friend is present during an interview for the purpose emphasised in Anunga guidelines No 2, ..... Further, I respectfully agree with Brennan J that:

"A prisoner's friend is intended to enhance the suspect's ability to choose freely whether to speak or be silent" (*Collins* at 322).

The right of a suspect to remain silent is a right, not a privilege, and is to be protected as such; proof that a suspect understands that he has that right lies at the heart of the requirement that any admissions he made must have been made voluntarily before they are admissible in evidence. ...."

I respectfully agree.

Having read the record of interview and having seen and heard evidence given by Tommy Gagarraba to this Court, I do not consider he is a person who could enhance the suspects ability to choose freely whether to speak or to be silent.

The Crown called further evidence relating to prior occasions when the accused was interviewed by police. I accept that it is relevant to the issue of the accused's understanding as to his right to remain silent or to speak, that the Court receive evidence of prior occasions when the accused was interviewed by police as a suspect for an offence (*Queen v Maratabanga* Supreme Court of the Northern Territory No. 39 of 1992 decision of Mildren J).

Acting Sergeant Christopher John Milner gave evidence that he was Officer in Charge at Oenpelli Police Station from the

beginning of 1990 till October 1993. He saw Eric Gumbinyarra to say hello to on an almost daily basis. On three occasions he had reason to speak with him in an official capacity. A record of interview between Sergeant Milner and Eric Gumbinyarra dated 30 July 1990 was tendered and marked Exhibit P3. A statement taken by Sergeant Milner from Eric Gumbinyarra dated 19 November 1991 was tendered and marked Exhibit P4. In the record of interview (Exhibit P3) Sergeant Milner administered the caution. The relevant parts of the record of interview are as follows:

"Q.12 Before I ask you any more questions I got to tell you that you don't have to say anything about that break in or answer my questions if you don't want to. Only of your own free will. Do you understand that.

A.12 Yes.

Q.13 Is anyone forcing you or making you answer my questions.

A.13 No.

Q.14 Is anyone promising you money or presents to answer my questions.

A.14 No.

Q.15 Do you want to tell me about that break-in of your own free will.

A.15 Sure.

Q.16 Anything you do say will be typed down on this paper and may later be shown to that magistrate in court as evidence against you, do you understand that.

A.16 Yes.

Q.17 Do you know what going to happen to this paper later on.

A.17 Show it to that magistrate.

Q.18 What's going to happen when that magistrate reads this paper.

A.18 I'm going to get into trouble.

Q.19 Do you still want to tell me about this break in.

A.19 Yes."

Sergeant Milner also prepared a bail assessment (Exhibit P5) and a police precis (Exhibit P6). Sergeant Milner noted on the bail assessment under the heading "BACKGROUND" in respect of Eric Gumbinyarra, "Not very well educated, extreme petrol sniffing has caused brain damage."

With respect to the statement taken by Sergeant Milner (Exhibit P4), Sergeant Milner gave the following evidence under cross examination (transcript p65):

"And indeed when you had that statement there, you had Chris the prisoner's friend there?---That's correct.

And he was translating a lot of that, wasn't he?---He was; he was, yes.

And it was necessary - - -?---That I recall. That I recall, he was, yeah.

You do recall that?---Yeah.

It was necessary to have a translator to be able to get the coherent statement from him?---Well, I found that it helped a lot, yes, in most of the cases.

Well, you couldn't have got that kind of a statement without a translator there - - -?---Well, yeah.

That's true, isn't it?---That's correct, yes.

Because not only is he reticent but he's got these problems, but in fact speaking to him with an interpreter makes it a great deal easier to communicate with him, doesn't it?---On the more technical sides, yes."

Sergeant Milner agreed it was necessary to explain everything to Eric Gumbinyarra in simple language. Sergeant Milner gave the following evidence (transcript p67):

"And is it fair to say in all of your experience with traditional Aboriginal people, Eric would be harder to communicate with than a great many of them at the technical level that we've talked about; cautions and the like?---Yeah, due to the petrol, yes.

Petrol or other causes?---Yeah.

But certainly if you were to interrogate him now you'd want an interpreter there?---Well, I'd have to have one there, yeah."

Sergeant Milner also gave evidence (transcript p67) that if he were to interrogate Eric Gumbinyarra again he would have an interpreter present.

Constable Steele gave evidence he had been stationed as a police constable at Oenpelli from September 1990 until June 1992. During that period, Constable Steele had spoken to Eric Gumbinyarra on two occasions in an official capacity. The first time was in relation to a break-in at Oenpelli school. The second interview was in respect of an alleged assault by Eric Gumbinyarra on his own brother. The first interview was a hand written record of interview dated 9 May 1991 (Exhibit P9). This record of interview contains the following questions and answers:

"I.S. Do you want anyone.

H.S. Chris Mardajal, but he's out working on tractor.

I.S. Is he here in town.

H.S. No.

I.S. Is there anyone else that you want.

H.S. No.

I.S. Are you right to talk with me by yourself.

H.S. Yes.

I.S. Are you scared or anything sitting here.

H.S. No, I'm right.

I.S. You want a cup of tea or anything.

H.S. No.

I.S. If you want a drink or to use the toilet or anything let me know, OK.

H.S. OK.

I.S. Eric, you do not have to tell me about that trouble if you don't want to. Do you understand that.

H.S. Yes.

I.S. Do you want to tell me about what happened.

H.S. Yes.

I.S. I will write down everything we say and might show this paper to the magistrate in court. Do you understand that.

H.S. Yes.

I.S. What might that magistrate do after he reads these papers.

H.S. Get into trouble, fine or bond maybe.

I.S. Do you still want to tell me about that trouble knowing that.

H.S. Yes."

Eric Gumbinyarra then went on to make a full confession to an offence of break, enter and steal at the Oenpelli School.

Also tendered as Exhibit P9 is a record of interview conducted by Constable Steele and Eric Gumbinyarra on 18 July 1991. In this record of interview Eric Gumbinyarra was cautioned before being asked certain questions and the relevant questions and answers are as follows:

- "25. ERIC, BEFORE I GO ON, I MUST TELL YOU THAT YOU DON'T HAVE TO TALK WITH ME ABOUT THIS MATTER IF YOU DON'T WANT TO. DO YOU UNDERSTAND THAT.
25. YES.
26. DO YOU HAVE TO TALK WITH ME.
26. NO.
27. IS ANYONE FORCING YOU OR THREATENING YOU TO MAKE YOU TALK.
27. NO.
28. ANYTHING THAT YOU DO SAY, I WILL TYPE DOWN ON THIS PAPER AND WILL SHOW TO THE MAGISTRATE IN COURT. DO YOU UNDERSTAND THAT.
28. YES.
29. WHAT MIGHT THAT MAGISTRATE DO WHEN HE READS THESE PAPERS.
29. GET INTO TROUBLE.
30. DO YOU STILL WANT TO TALK WITH ME ABOUT THIS TROUBLE THEN, KNOWING THAT.
30. YES."

Constable Steele stated Eric Gumbinyarra was at that time a known petrol sniffer. Constable Steele stated it was hard to communicate with Eric Gumbinyarra who had great difficulty understanding anything other than very simple concepts. Constable Steele stated (transcript p95) with the benefit of hindsight and having now received training in investigative techniques he would have explained the caution more fully. However, in his opinion Eric Gumbinyarra had no trouble understanding the concept that he didn't have to speak to Constable Steele. Constable Steele agreed the records of interview (Exhibit P9) did not comply either with the Anunga guidelines or the Police General Order Q2 5.3. He stated that if there had been a prisoner's friend present at the record of interview, he would have had the prisoner's friend to assist with an explanation if there appeared to be difficulty. Constable

Steele agreed Eric Gumbinyarra was hard to communicate with. It was necessary to speak to him in very simple language. Constable Steele recalled that Eric Gumbinyarra had been the victim of a bashing in 1992.

Mr Leon Pethick, Probation and Parole Officer with the Department of Correctional Services, gave evidence he has had ten years experience supervising offenders on court orders. Mr Pethick first had contact with Eric Gumbinyarra in October 1989. Since that time Mr Pethick, in his official capacity, has spoken to Eric two or three times. Each contact would be for 15 minutes to half-an-hour. Mr Pethick gave evidence he would ask very simple questions. Mr Pethick prepared a pre-sentence report in respect of Eric Gumbinyarra dated 19 December 1991 (Exhibit P7); the following is an extract from this report at p3-4:

"When interviewing Gunbinyarra (sic) the majority of his responses were monosyllabic or yes/no gestures. The following information therefore has been obtained by very extensive questioning.

Gunbinyarra (sic) acknowledged he was aware that his actions were illegal and that, in so offending, he would also be in breach of his bond. He indicated that he understood the terms of his recognizance and by signing the bond, was giving his word he would comply with the conditions."

Included in Exhibit P7 is a report dated 3 January 1992 compiled by Peter Mals, Team Manager, Forensic Unit Mental Health Services, Tamarind Centre. Mr Mals states in his report:

"PRESENTATION

The prisoner was extremely reticent. He quite often gave no answers to my questions, instead simply staring at the table or looking around the room. At most he gave one-word answers such as "yes" or "no", or names of people, places or objects. I note that the writers listed above found him similarly uncommunicative. His reticence was particularly pronounced in relation to my enquiries about his feelings.

I note your comment that the prisoner prefers his tribal language over English, in his home environment. Discomfort with English may account for his reticence during my assessment.

The prisoner's manner and facial expression gave the general impression of listlessness, and apathy: he did not smile,

nor appear to take any interest in any aspect of his environment or the tasks at hand, during the assessment period."

In cross-examination as to Eric Gumbinyarra's level of understanding, Mr Pethick gave evidence as follows (transcript p77):

"So when you're dealing with - perhaps I can put it this way, Mr Pethick. Would it be fair to say that, on your experience of, what, two or three dozen discussions and professional meetings with Eric, that he would understand short questions expressed in simple words well?---That's correct.

But you couldn't really go beyond that?---You could make a question - you make a composite question from a lot of simple questions.

But his level of understanding - what you would feel competent about in terms of relying on his answer would be a short question that you would ask in simple plain language?---Yes.

And you'd get an answer to that and you'd be confident he understood?---No, I'd ask that question probably two or three different ways to make sure that his answers were consistent.

So long as you kept it short?---Yes.

And as long as you used simple terms?---Yes.

And as long as you were dealing with simple concepts?---Yes.

You'd have a level of understanding with him?---That'd be right.

And of course if any of that breaks down, if you have a long question with bigger words - - -?---No, that was a waste of time."

Constable Grant gave evidence that he interviewed Mr Gumbinyarra on 5 January 1988. The handwritten record of interview taken on that date was tendered and marked Exhibit P8. In this record of interview the caution was not administered in accordance with the Anunga guidelines. The two questions and answers relevant to the caution are as follows:

"I/S: Before we go any further I must tell you that you don't have to answer my questions unless you want to. Do you understand that?

H/S: Yes.

I/S: Before I told you that you don't have to answer my questions but if you do I will give them in evidence to the court. Do you understand that?

H/S: Yes."

When asked a further question, Eric Gumbinyarra made no reply and then when asked, "Do you want to answer my question?", replied, "No", and replied, "No" to two further questions. In the circumstances, I do not interpret Eric Gumbinyarra's refusal to answer the question as an understanding of his right to the exercise of a free choice whether to speak or to remain silent. Constable Grant understandably had no independent recollection of the record of interview and whether or not he had a conversation with Eric Gumbinyarra prior to the record of interview to assess Eric Gumbinyarra's competence in the English language.

Constable Brett Furnell gave evidence he is the Officer in Charge of Gumbalanya Police District (Oenpelli) and has been there since October 1992. In his early period at Oenpelli, he had regular contact with Eric Gumbinyarra. At that time, Eric Gumbinyarra was a known petrol sniffer which had the effect of making him withdrawn, limited in his response and difficult to communicate with. Constable Furnell stated that since Eric moved to an outstation some nine months ago, he has stopped petrol sniffing and is now considerably easier to converse with. On 11 June 1993, Constable Furnell was present at a record of interview with Eric Gumbinyarra and Constable Nixon. Transcript of this record of interview was tendered and marked Exhibit P10. Also present at the record of interview was a prisoner's friend, Willy Ilbinyina. The court heard a tape recording of the record of interview. On this occasion the caution was administered in the following way:

"NIXON:                    Alright. Before I ask you any questions in relation to that Willy - sorry, Eric - I will just have to caution you that anything you do tell me in this interview will be taken down on the tape recorder in front of me on the tape and may later be given in evidence in Court. Do you understand that this interview's being recorded on tape?  
GUMBINYARRA:            Yeah.

NIXON: And do you understand that it can - this tape may be given in evidence in Court? Have you been to Court before?

GUMBINYARRA: Yeah.

NIXON: And you know what giving evidence in Court is - when you talk to the Magistrate? When you go to Court and the man that sits up the front, the Magistrate, do you understand that he might hear this tape?

GUMBINYARRA: Yeah.

NIXON: Okay. So you're quite happy to talk to me?

GUMBINYARRA: Yeah."

Subsequently Eric Gumbinyarra either made no reply to questions or refused to answer. The caution did not comply with the Anunga guidelines. There was no attempt to invoke the assistance of the prisoner's friend to assist with the explanation of the caution. There were no questions asked to gauge the level of understanding or competency in English of Eric Gumbinyarra with this record of interview. I could not be satisfied that Eric Gumbinyarra sufficiently understood the caution, that he exercised a choice whether to speak or remain silent. Eric Gumbinyarra was not asked to repeat the caution in his own words. Constable Furnell stated this record of interview was taken during Eric Gumbinyarra's petrol sniffing period. Subsequently he was bailed to an outstation.

Mr Keith Brent Williams, Family Worker with the Counsel for Aboriginal Alcohol Program Services, prepared an assessment report dated 5 December 1991. This document was tendered and marked Exhibit P11. Mr Williams gave evidence that Eric Gumbinyarra's responses to his questions were sufficient to enable him to compile the report. Mr Williams gave the following evidence in cross examination (transcript p112):

"Is it fair to say this, that what you have done is, you've kept your questions quite simple?---It's a practice with most Aboriginal people to use plain English, yes.

Yes. Simple questions, simple words?---As far as possible. I can't remember the details, but I - with most Aboriginal people I would use a different standard of communication to that which I would use with you. But I would believe Eric was quite capable of understanding the level of language that I used.

Your experience in talking to Aboriginal people, traditional people?---I have been doing it for 18 years with fair regularity and consistency.

You are aware of how to pitch your message as it were so that it's understood?---I believe I'm a better communicator with most Aboriginal people than the average person, yes.

Notwithstanding that, it's still the case isn't it that Eric by nature is very quiet and taciturn?---Yes.

Indeed there are times when, for one reason or another, you mentioned his mood, but for one reason or another he just is not communicative at all back, is he?---That's true, yes."

On all the evidence to this Court, Eric Gumbinyarra is not a sophisticated or urban aboriginal person. He is an aboriginal person who has lived most of his life in an aboriginal community. His understanding and ability to express himself in the English language is limited. On all the evidence he is a person who is normally withdrawn and reticent. He is, in my opinion, representative of the aboriginal persons for whom the Anunga guidelines and the subsequent Police General Orders were designed. At the time of his interview with Constable Coffey, Eric Gumbinyarra was a known petrol sniffer. The implication being that his mental faculties were impaired. I note also that Sergeant Milner had previously written in a police precis dated November 1991 (Exhibit P6) "A Record of Interview on this deft. is impossible due to his brain damage caused by years of petrol sniffing".

The fact that a person suffers some unsoundness of mind or psychiatric order at the time a confession is allegedly obtained from him, does not necessarily make evidence of the confession inadmissible. It may be relevant to whether evidence of the confession is inadmissible on the ground that the confession was not made in the exercise of a free choice and may be relevant to whether the trial judge should, in his discretion, exclude the evidence (*R v Michael John Parker* NSW Court of Criminal Appeal (1990) 19 NSWLR 177).

At the time of the record of interview, Constable Coffey was a police officer who, on his own evidence, had very little experience

in interviewing aboriginal persons. Constable Coffey asked a very limited number of questions of Eric Gumbinyarra designed to obtain an indication of Eric Gumbinyarra's level of understanding. The only information Constable Coffey had about Eric Gumbinyarra prior to commencing the record of interview, was that Eric Gumbinyarra was a known petrol sniffer. I am not satisfied that Constable Coffey explained to Eric Gumbinyarra the role of the prisoner's friend. There is no reference to any such explanation in the chronology of events (s137 *Police Administration Act*, Exhibit P1). There is no explanation made to Eric Gumbinyarra in the record of interview (Exhibit P2) as to the role of the prisoner's friend. Neither am I able to find that an adequate explanation was made to Tommy Gagarraba as to the role of a prisoner's friend. I accept the import of Tommy Gagarraba's evidence that he was walking along the street in Oenpelli when he was asked by a police officer to go to the police station. At the police station he sat in a room with Eric Gumbinyarra and three police officers (transcript p84). Mr Gagarraba was asked the following question in cross examination (transcript p85):

"Did you know what Eric's rights were?---No.

Did you know what the right to silence means, Tommy?---No.

Do you know what a caution is?---No, I don't know.

You were there, were you, to help Eric talk to the police?---Yeah, I actually I help. I been alongside to him and that's all I know.

And when you were there in that room with Eric you remember talking to Eric in your tongue, your language?---Not - not any - any other like my language. Only once, only one time.

And that was about four cans of beer?---Mm mm.

Is that right?---That's - that's right. Only that's all I know.

So the only bit that you remember speaking to Eric about - - -?---Yeah.

- - - in your language, is about some beer that he drank?---Only beer. That's all I know, not any other."

Tommy Gagarraba gave his age as 70 years. He is an elderly traditional aboriginal man. He had not been a prisoner's friend

before this occasion. I accept his evidence that he spends all his life on an outstation. He had only visited Darwin on two occasions. He usually speaks his own aboriginal language and only speaks a little bit of English. I am not satisfied that Tommy Gagarraba understood the role of the prisoner's friend or that anyone adequately explained to him the role of the prisoner's friend.

The high point of the Crown case in respect of the record of interview, the subject of the present challenge, is that when asked the questions:

"COFFEY: So if I ask you something you can either answer me or you can say no I don't want to, answer that?

GUMBINYARRA: Yeah.

COFFEY: What does that mean to you?

GUMBINYARRA: Don't have to answer."

I have had the opportunity to hear the tape. I consider those are the words spoken by Eric Gumbinyarra. There are then further questions and answers as quoted on p6 of those Reasons for Ruling. I do not accept, in the circumstances of this particular interview having regard to the background of the accused, that there is adequate compliance with the Anunga guideline No. 3 and Police General Order Q2 5.3 that "the suspect should be asked to explain what is meant by the caution phrase by phrase".

The prosecution quite properly, in my opinion, called evidence as to previous occasions when Eric Gumbinyarra was interviewed in respect of alleged offences. I accept this can often be very illuminating to a Court to gauge the level of understanding of the accused to exercise a choice to speak or remain silent.

However, an analysis of the prior records of interview does not support a finding that Eric Gumbinyarra did have an understanding of the concept that he had the right to choose between remaining silent or speaking to police officers. There is evidence that on previous occasions he had been interviewed by police in

respect of alleged offences. I have already outlined the relevant parts of such records of interview. None of those prior records of interview comply with the Anunga guidelines. In my opinion, none of these records of interview demonstrate that Eric Gumbinyarra did have an understanding of his right to choose between remaining silent or speaking to police officers. Eric Gumbinyarra has heard the caution on a number of occasions. In these particular circumstances repetition does not necessarily mean understanding.

Whilst with some aboriginal persons I would accept the caution in the record of interview dated 13 May 1994 (Exhibit P2) was adequate, I do have a concern in light of all of the evidence as to whether Eric Gumbinyarra did understand he had a choice to speak or remain silent.

A failure to comply with the Anunga guidelines does not necessarily mean a record of interview will be rejected (*R v Gudabi* 12 A Crim R 70).

With respect to Eric Gumbinyarra there are a number of factors which I have taken into account in assessing whether or not he understood his rights. Eric Gumbinyarra is an aboriginal man who has lived all his life in relatively remote areas of the Northern Territory. He is not a sophisticated or an urban aboriginal person. He has had a limited education. At the time of participating in the record of interview, he was a known petrol sniffer and had been a petrol sniffer for some years. There was also evidence to the effect he had suffered head injuries at some earlier time. These factors had affected his mental faculties at the time the record of interview was conducted. Eric Gumbinyarra does have difficulty in communicating in English. He does speak his own aboriginal language, and reference had been made by police on earlier occasions to the necessity for an interpreter. His ability to speak the English language appears very limited. He falls into the very category of persons for whom the Anunga guidelines were designed and to whom they should have been fully applied. The prisoner's friend, Tommy Gagarraba, although obviously willing and well intentioned, was not a person able to provide much assistance and

had no knowledge or understanding himself of the role of the prisoner's friend.

In my opinion, the guidelines as expressed in *R v Anunga* (supra) and in Police General Orders relating to a prisoner's friend, were not complied with.

I have considerable sympathy for the police officers who were faced with the difficult task of explaining the caution to Eric Gumbinyarra. However, in all of the circumstances I am not satisfied on the balance of probabilities that the confession was voluntary in the sense that the accused exercised a free choice whether to speak or remain silent (*Collins* VR 31 ALR 257).

Accordingly, I rule the record of interview conducted with the accused on 13 May 1994 is not admissible on the trial of Eric Gumbinyarra.

---