

The Queen v Spencer [2000] NTSC 44

PARTIES: THE QUEEN
v
BRYCE JABALTJARI SPENCER

TITLE OF COURT: SUPREME COURT OF THE NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction

FILE NO: 9818617

DELIVERED: 21 June 2000

HEARING DATES: 6 June 2000

JUDGMENT OF: THOMAS J

CATCHWORDS:

CRIMINAL LAW -- EVIDENCE -- ADMISSIBILITY

Application seeking record of interview not admissible – interview between police officers and the defendant – guidelines to police officers interviewing aboriginal persons – Police Standing Orders – role of a prisoner’s friend – caution – understanding of the English language – statements to police were voluntary – weather unfairness to defendant – no impropriety in behaviour of police – voluntary admission not rendered unreliable – no unfairness to defendant – interview is admissible.

Evidence Act 1939 (NT), s 26L; *Police Administration Act 1978* (NT), s 137.

R v Anunga (1976) 11 ALR 412; *Collins v The Queen* (1980) 31 ALR 25; *R v Lee* (1950) 82 CLR 133; *R v Weetra* (1993) 93 NTR 8; *R v Swaffield*; *Pavic v The Queen* (1998) 192 CLR 159; *Van der Meer v The Queen* (1998) 62 ALJR 656, cited.
Dumoo v Garner (1997) 7 NTLR 129, referred to.

REPRESENTATION:

Counsel:

Applicant: R Van de Wiel QC and Mr G Georgio
Respondent: R Noble

Solicitors:

Applicant: Northern Territory Legal Aid Commission
Respondent: Office of the Director of Public Prosecutions

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

The Queen v Spencer [2000] NTSC 44
No. 9818617

BETWEEN:

THE QUEEN

AND:

BRYCE JABALTJARI SPENCER

CORAM: THOMAS J

REASONS FOR RULING

(Delivered 21 June 2000)

- [1] This is an application pursuant to s 26L of the *Evidence Act 1939* (NT) made on behalf of the defendant seeking a ruling that a record of interview between police officers and the defendant on 4 September 1998 is not admissible on the defendant's trial.
- [2] Bryce Jabaltjari Spencer has entered a plea of not guilty to a charge that on 3 September 1998 at Alice Springs in the Northern Territory of Australia, murdered Rachael Riley.
- [3] The basis of the objection to the admissibility of the record of interview are:
- 1) That there is no demonstrated understanding by the defendant of the caution administered by police at the commencement of the record of

interview. That the police officers should have taken the matter a step further and established that the defendant did have an understanding of the caution.

2) That the police officers interviewing the defendant did not properly explain to the defendant that he had a right to a prisoner's friend or what the role of the prisoner's friend is. The police made no effort to obtain a prisoner's friend to sit with the defendant during the record of interview.

[4] The deceased, Rachel Riley, died on the night of 3 September 1998 from stab wounds to her body at a camp near Burke Street in Alice Springs.

[5] On the night of 3 September 1998, Senior Sergeant Geoffrey Sullivan who had received a call to go to Burke Street, arrested the defendant for murder.

[6] Guidelines to police officers interviewing aboriginal and other persons of a non-English speaking background suspected of an offence are well established; particularly with respect to administering the caution and of the rights of the person being interviewed to have present a prisoner's friend (*R v Anunga* (1976) 11 ALR 412).

[7] These matters are also addressed in the Police Standing Orders. Copy of the relevant standing orders were provided to the Court by counsel for the defendant, Mr Van de Wiel QC. Extracted from that document are the standing orders in respect of "The Role of a Prisoners Friend":

- “8 The ‘prisoner’s friend’ must understand his/her role – the following procedures will ensure that this point is not overlooked.
- 9 Prior to commencing an interview in the presence of a ‘prisoner’s friend’, Police are to explain to the chosen ‘friend’ in simple terms:
 - 9.1 the reason for the interview;
 - 9.2 the form the interview will take;
 - 9.3 brief particulars of the alleged offence;
 - 9.4 that the ‘friend’ has been chosen by the suspect to sit with the suspect in a supporting role;
 - 9.5 the right of the ‘friend’ to assist or support the suspect with help or clarification if at anytime it appears necessary;
 - 9.6 the right of the ‘friend’ to talk to, or otherwise communicate with the suspect at any time that he/she is acting as a ‘friend’; and
 - 9.7 the right of the suspect to communicate with the ‘friend’ at any time for advice or for any reason.”
- 10 The above points, and any other conversation with the ‘prisoner’s friend’, are to be recorded, generally by the same means as the interview with the suspect.
- 11 If practicable, a statement should be taken from the ‘prisoner’s friend’ at the conclusion of the interview with the suspect, to clarify that the ‘friend’ understood his/her role and was satisfied that Police conducted the interview in a fair and proper manner. If the ‘prisoner’s friend’ is unable to read, the statement should be read to him/her and suitable wording incorporated in the statement to describe the relevant circumstances.
- 12 Should a ‘prisoner’s friend’ speak or communicate with a suspect or vice versa during a record of interview, the words or fact of communication should be accurately recorded in the record of interview. In addition to any questions put by the interrogating member direct to the ‘prisoner’s friend’ and the replies received must also be accurately recorded in the record of interview.
- 13 A ‘prisoner’s friend’ should be invited to sign, as witness, all records of interview at which he/she is present.
- 14 It should be clearly understood that the qualities that should be met by a person acting as a ‘prisoner’s friend’ are:

- 14.1 The person should be ‘someone in whom the suspect has apparent confidence . . . by whom the suspect will feel supported’.
- 14.2 The person should be a person ‘who knows and is known to the suspect’.”

- [8] The Crown called evidence on the voir dire from Senior Sergeant Geoffrey Sullivan, Detective Sergeant Vincent Kelly and Detective Senior Sergeant Don Fry. Counsel for the defendant, Mr Van de Wiel QC, very fairly conceded from the outset that the defence were not suggesting any impropriety on the part of the police in their dealings with Mr Spencer. The complaint was that they did not adequately comply with the requirements under the Anunga Guidelines and the Police Standing Orders.
- [9] Senior Sergeant Sullivan spoke to ambulance officers when he arrived at the Burke Street Camp shortly after 10.20 pm on 3 September 1998. He accompanied ambulance officers some 100 metres into nearby scrub where he had been informed the body of an aboriginal woman had been located. On the way there the defendant approached Senior Sergeant Sullivan and said “Hello Sergeant. My name is Bryce Spencer I have a brother in the Police.” Senior Sergeant Sullivan asked him to wait there and he proceeded on to locate the body. Sergeant Johnson described the body as that of an aboriginal lady laying on her back with her right leg folded under her left leg. Senior Sergeant Sullivan observed a large amount of blood both on the body and round the area. Other officers then placed a guard on the crime scene. The defendant again approached Senior Sergeant Sullivan who noted

that the defendant appeared to have a rather large blood stain on his left trouser leg. The defendant said to Senior Sergeant Sullivan “That woman is my girlfriend. She walked here from Hidden Valley tonight. Someone must have stabbed her and she threw herself into the fire.” Senior Sergeant Sullivan asked “Did you stab her?” Mr Spencer replied “No. I only had an argument with her.” Mr Spencer stated that he knew the system, he had just been released from gaol for seven years for manslaughter. Senior Sergeant Sullivan at this point obtained a tape recorder and recorded a conversation with the defendant. The audio tape of this conversation was played to the Court and the tape, together with a transcript, were marked Exhibit P1. Senior Sergeant Sullivan advised Mr Spencer that he was arresting him for the murder of the woman who was dead in the bush nearby. The following conversation then took place (record of conversation 3 September 1998 at 22.35 hours pp 2 – 3):

“Sullivan: Now anything you do say will be recorded here on this tape and may be later used as evidence. Do you understand that?”

Spencer: I appreciate that and I will talk in front of the (inaudible) judge.

Sullivan: All right. All right now I have to tell you, is there anyone that you want contacted or informed that you’ve been arrested on a charge of murder. Do you want me to tell anyone that you’ve been arrested?”

Spencer: I never been murdered. I know who she is. She was, she’s my girlfriend.

Sullivan: All right.

Spencer: Can’t contact any legal aid, I can’t hey, contact any interpreters. I can speak with my own weight.

Sullivan: So you don’t want legal aid contacted?”

Spencer: No thankyou.
Sullivan: And you don't want any interpreters?
Spencer: I will not contact any interpreters.
Sullivan: Is there anyone else, a family members that you want informed?
Spencer: Ah I got a brother who working as a for the police over at Kintore.
Sullivan: Who?
Spencer: His name is Andrew Spencer and I want to contact him.
Sullivan: Andrew Spencer.
Spencer: I will talk with my own rights.
Sullivan: Out at Kintore?
Spencer: Mm.
Sullivan: You want him informed?
Spencer: Mm.
Sullivan: All right no worries.
Spencer: I don't want.
Sullivan: We'll do that.
Spencer: I don't want to contact him.
Sullivan: Okay.”

[10] Senior Sergeant Sullivan stated he could smell alcohol on the defendant but he seemed to be pretty sober and didn't appear seriously intoxicated. Senior Sergeant Sullivan agreed that Mr Spencer had been amiable. A document titled “Query Offender Journal: was tendered and marked Exhibit P2. This journal has a number of entries relating to Mr Spencer from the time he was placed in to police cells at 23.17 hours on 3 September 1998 to the final entry which is at 10.21 hours on 5 September 1998. The journal notes that at 6.52 on 4 September 1998, Andrew Spencer had arrived at the Watchhouse and was speaking to Bryce Spencer. There is an entry

recording that Andrew Spencer had left the Watchhouse at 7.01 on 4 September 1998. At 15.59 on 4 September 1998, the journal records that Senior Sergeant Sullivan “advised legal aid contacted re Bail Application”. In his evidence Senior Sergeant Sullivan stated he contacted the Legal Aid Office of his volition and not at the request of Bryce Spencer. This was done because Senior Sergeant Sullivan intended to remand Mr Spencer in custody and if Mr Spencer wished to apply for bail before the magistrate he may need legal representation.

- [11] Listening to the audio tape of the conversation (Exhibit P1) there is no indication that Mr Spencer was seriously intoxicated. He appears to have a very good grasp of the English language and to be speaking clearly and coherently.
- [12] Detective Sergeant Kelly gave evidence that he was called on duty at about 11.00 pm on 3 September 1998 with respect to a death in the bushland near Burke Street, Alice Springs. Detective Sergeant Kelly viewed the body of the deceased and made observations of the area. Detective Sergeant Kelly resumed duty the following morning and commencing at 8.09 am on 4 September he had a recorded conversation with Mr Spencer. The audio cassette of this conversation and a transcript were tendered and marked Exhibit P3. In this recorded conversation, Mr Spencer stated he understood that he had been arrested by Senior Sergeant Sullivan on an offence of murder. He agreed that earlier that morning he had spoke to his brother, Andrew Spencer, who is an aboriginal community police officer. He said he

understood he was being held in custody under s 137 of the *Police Administration Act 1978* (NT) while police conducted an investigation into the death of Rachael Riley. The interview then continued as follows (record of conversation 4 September 1998 at 8.09 am, pp 2 – 4):

- “Kelly: Okay and, and we have reason to believe that you were involved in the death of that lady. Do you understand that?
- Spencer: Yep.
- Kelly: Okay. Now before you make any other comment I have to advise you again as you were advised last night that you do not have to say anything about any of this trouble unless you wish to do so. Do you understand that?
- Spencer: I do understand.
- Kelly: So you understand that you have a right to be silent and you don't have to answer questions from police?
- Spencer: Yeah.
- Kelly: Okay. Anything you do say from now, from now on will be recorded on this tape or another tape and that may later be used in evidence in court. Do you understand that?
- Spencer: Yeah.
- Kelly: Do you know what happens in court?
- Spencer: Yeah I know. They, the tape has to be shown to the judge.
- Kelly: Yep.
- Spencer: And be recorded.
- Kelly: And it could get you in trouble if you say something.
- Spencer: Yeah.
- Kelly: Yep. Okay now um Brice you said last night, you made it fairly clear to Sergeant Sullivan on the tapes you spoke to him on, that you don't want to speak to legal aid. Do you still not want to speak to legal aid?
- Spencer: I can speak for my rights.
- Kelly: You can speak for your rights?
- Spencer: Mm.

Kelly: All right later on this morning when we finish um conducting or when we finish speaking to a couple of other witnesses and doing a few other things we want to talk to you on video and audio tape. Do you understand that?

Spencer: Yep.

Kelly: Now during that interview are you happy to sit in that interview on your own or do you want someone to sit with you?

Spencer: Ah I'd rather sit on myself.

Kelly: Okay so you happy to, happy to be on your own?

Spencer: I don't want interpreters. I don't want any legal aid.

Kelly: All right so.

Spencer: I've done it before.

Kelly: Okay you've done it before. So um Brice is it fair to say that you're reasonably well educated?

Spencer: I'm not educated.

Kelly: You're not?

Spencer: I never been to school.

Kelly: But, but you understand this, the system, the way the police work?

Spencer: Yeah.

Kelly: And you're happy to do this interview on your own?

Spencer: I'd like to do it myself.

Kelly: Okay.

Spencer: I've done it before.

Kelly: All right. Well it's going to be probably at least 3 or 4 hours before we get that interview so you're probably going to have to stay in the cells here."

[13] Reference was then made in the tape recorded interview to the fact that Mr Spencer had been provided with new clothes and had breakfast. He was advised he would have to wait in the cells for three to four hours before the

full record of interview was conducted. He was asked how he was feeling and Mr Spencer replied that he was “sober now”.

[14] At 1.40 pm on 4 September 1998, Detective Sergeant Kelly commenced a record of interview with Mr Spencer. The video tape of this record of interview was played to the Court and subsequently tendered to the Court together with a transcript as Exhibit P4. Mr Spencer was asked a number of questions about his own history which he answered appropriately. There was a discussion about the tapes during which Mr Spencer indicated he knew he was to give a copy to his lawyer. He indicated again that he could speak for himself and that he did not want anyone to be with him. He gave certain answers with respect to prior employment he had and stated he could understand and speak English but did not know much about writing. He was then cautioned by Detective Sergeant Kelly in the following manner (record of conversation 4 September 1998 at 1.40 pm pp 6 – 7):

“Kelly: Okay. Before I ask you any questions about that matter I have to tell you that you don’t have to answer any of my questions or any of the questions that Detective Doidge may ask you, unless you wish to do so. Do you understand that?”

Spencer: I wish to, to be answer.

Kelly: Okay.

Spencer: Mm huh.

Kelly: Can you just explain in your own, do you understand that you don’t have to answer my questions?

Spencer: (inaudible) answer it.

Kelly: Right ho.

Spencer: (inaudible) I can answer.

Kelly: Okay, so but you understand if you.

Spencer: It's my ability to.

Kelly: Yep. So if you don't want to answer you don't have you know that?

Spencer: No I don't have to answer.

Kelly: Okay. If you choose to answer any questions they will be recorded obviously on these tapes and those tapes may be used as evidence in, against you in court. Do you understand that?

Spencer: I do understand clearly yeah.

Kelly: Okay and can you just tell me what happens in court?

Spencer: Ah (inaudible) for my lawyer then they go up to face the prosecutor and the judge.

Kelly: Mm huh.

Spencer: Juries (inaudible). I been in courthouse before.

Kelly: Okay. So you know that if you answer questions these tapes may get you in trouble with the judge?

Spencer: Yes I do understand."

[15] The only other reference relevant to the issue of a prisoner's friend was the following exchange which took place prior to the caution being administered when the following interchange occurred (record of conversation 4 September 1998 at 1.40 pm pp 2 – 3):

"Kelly: Okay. All right Brice um do you agree that um this, earlier today myself and um this detective here spoke to you down in the watchhouse?

Spencer: Yes.

Kelly: And um did we offer you the opportunity to um have someone sit with you during this interview?

Spencer: No I, I disagree because I can speak for my rights.

Kelly: All right so but we, we did ask you if you wanted someone and you said no?

Spencer: No I said no."

[16] Following the administering of the caution, Mr Spencer gave a detailed description in response to questions asked by Detective Sergeant Kelly. He volunteered to draw a map of the area and proceeded to draw a map. His version of the events was at first exculpatory and as they moved through the interview Mr Spencer made certain admission as to his part in the offence. From watching the video of the record of interview (Exhibit P4) it appeared that Mr Spencer was not at all overawed by his situation. He does at some points repeat what has been said to him and he does not state in his own words what he understands the caution to mean. However, overall he exhibited a high level of confidence, was quite fulsome in his explanations, demonstrated a very good grasp of the English language and a quite wide vocabulary. Mr Spencer's answers were responsive to the questions, he appeared to understand everything that was said to him and to be very willing to tell his story. The record of interview concluded at 2.30 pm.

[17] At 3.08 pm on Friday 4 September 1998, Detective Sergeant Kelly again interviewed Mr Spencer and asked for his consent to the taking of a blood sample for forensic testing. Mr Spencer indicated his consent to this procedure and that he did not require a doctor of his choice to be present. The audio tape and transcript of this interview were tendered and marked Exhibit P5.

[18] The Crown tendered a record of the defendant's prior convictions (Exhibit P6). It is not necessary to detail these prior matters other than to note the defendant has had frequent contact with the police since 1976. Between

1976 and 1995 he has 37 convictions for offences committed by him in that period. This record supports his own statements to police on 3 and 4 September 1998 that he knows the process and his rights when he is charged with an offence.

[19] Under cross examination Detective Sergeant Kelly gave evidence that he did not believe Mr Spencer needed a prisoner's friend. Detective Sergeant Kelly considered Mr Spencer had a good understanding of English. Mr Spencer was adamant that he did not want legal assistance. Detective Sergeant Kelly gave Mr Spencer an opportunity to have someone with him in the interview but did not believe that person could assist Mr Spencer in any way. From the answers he gave in cross examination Detective Sergeant Kelly demonstrated a good understanding of the role of the prisoner's friend.

[20] Donald Leslie Fry also gave evidence he is a Detective Senior Sergeant and currently the officer in charge of the Criminal Investigation Bureau at Alice Springs. Detective Senior Sergeant Fry had interviewed Mr Spencer on 12 April 1991. The audio tape and the transcript of that record of interview were tendered and marked Exhibit P6.

[21] In the first interview which commenced at 15.48 on 12 April 1991 and was suspended at 1600, the following exchange took place between Detective Senior Sergeant Fry and Mr Spencer (p 3):

“Fry: She’s your wife, alright, before we get into talking about that story, is there anyone you want to have sit with you as your friend while we talk?
Spencer: I don’t need anybody.
Fry: You don’t need anybody.
Spencer: No.
Fry: Alright.
Spencer: I don’t need them interpreters no.
Fry: Right, so you feel your able to talk to us without anybody sitting with you?
Spencer: No.
Fry: Yes, we’re obliged that law tells us that we’ve got to ask you whether you want somebody to sit with you or not so we’re happy to have anybody that you want sitting with you while you, we talk to you, do you understand that?
Spencer: No, I don’t need anybody.
Fry: You don’t need anybody, now do you have any problems understand me when I talk to you?
Spencer: I do understand you.”

[22] This record of interview was suspended because Detective Senior Sergeant Fry said it became apparent during this record of interview that Mr Spencer was affected to a degree by alcohol and he thought it prudent to suspend the interview and allow Mr Spencer time to rest and to sober up.

[23] When the interview resumed at 2014 hours on 12 April 1991, the following conversation took place (p 2):

“Fry: Alright, now how do you feel at present? Are you effected at all by what you had to drink today?
Spencer: No, I’m feeling fine yeah. Sober up now.
Fry: Alright, during the break did you sleep at all?
Spencer: Yeah, I slept and I got fed, I eatin and drink.

Fry: Alright, now while we're talking to you, you told us before that umm in the early interview you didn't wish to have anybody sit with you, and now again I'm going to ask you do you want a friend, a relative or some person to sit with you while we talk to you?

Spencer: No, I will talk myself.

Fry: Because if, it's no problem to us if you want someone to sit with you.

Spencer: No, there's no problem."

[24] I will deal firstly with the objection to the admissibility of the record of interview with Mr Spencer on 4 September 1998 on the basis that it has not been demonstrated he understood the caution.

[25] There is no objection taken to the way the caution itself was worded.

[26] I have had an opportunity to view the video tape of the record of interview with Mr Spencer on 4 September 1998 and to listen to the audio tape of his earlier interviews. In each of the interviews Mr Spencer demonstrates a very good understanding of the English language and an ability to express himself in that language. I am satisfied that he understood the caution that was administered and exercised a free choice to speak to the police (*Collins v The Queen* (1980) 31 ALR 257, *R v Lee* (1950) 82 CLR 133).

[27] The second objection was that the record of interview on 4 September 1998 should be ruled as inadmissible because the police officers did not adequately explain the role of the prisoner's friend or make sufficient efforts to obtain a prisoner's friend.

[28] I accept the submission made by Mr Van de Wiel QC, counsel for the accused, that the role of the prisoner's friend was not adequately explained to Mr Spencer (*R v Weetra* (1993) 93 NTR 8). The interview with police officers on 12 April 1991 (Exhibit P7) does not assist because the role of the prisoner's friend was not explained adequately on that occasion either.

[29] However, having viewed the record of interview and listened to the earlier conversations with police, Mr Spencer makes it very clear that he wants to speak on his own, that he does not want any assistance or any person to be with him. Mr Spencer was most adamant and insistent on this point. I do not consider that the failure to adequately explain the role of a prisoner's friend affects the fact that Mr Spencer exercised a free choice to speak to police and in this sense his statements to police were voluntary. Mr Spencer made it very clear to police that he did not wish to have anyone sit with him through the interview. He was given every opportunity to have the assistance of a lawyer, friend or interpreter and he refused such offers of assistance.

[30] The Crown have discharged the onus of proof upon them to satisfy the Court that the record of interview on 4 September 1998 was voluntary.

[31] This then takes me to a consideration of whether the record of interview should be ruled inadmissible in the exercise of my discretion on the grounds of unfairness to the defendant.

[32] Mr Van de Wiel QC referred me to the decision of Justice Kearney in *Dumoo v Garner* (1997) 7 NTLR 129. That matter was an appeal from convictions imposed in the Court of Summary Jurisdiction, Darwin. Kearney J was considering the exercise of a discretion to exclude a record of interview in respect of an aboriginal person who had pleaded not guilty to two charges under the *Liquor Act 1978* (NT):

“In all the circumstances, bearing in mind the nature of the charges involved, I consider that the public interest that the *Anunga* guidelines and the matters in Police General Order Q2 be observed in the investigation of crime (an essential safeguard for the protection of Aboriginal persons) in this case outweighs the goal of bringing this particular wrongdoer to conviction and punishment. To adopt what was said in *R v Ireland* (supra) at 335, these convictions, obtained by police conduct which was unlawful and improper when measured by s 140 and the guidelines, were obtained at too high a price. In terms of *R v Swaffield* (supra), the convictions were bought at an unacceptable price, ‘having regard to contemporary community standards’ as indicated by the *Anunga* guidelines and the Police General Orders. The admissions should have been excluded in the exercise of what was the ‘public policy’ discretion, and is now the ‘overall discretion’ referred to in *R v Swaffield* (supra)”.

[33] In the matter before this Court, the defendant has entered a plea of not guilty to a charge of murder. The defence do not suggest any impropriety in the behaviour of the police. Neither is there any evidence of any impropriety. I am not persuaded that the admission of the record of interview is “bought at a price which is unacceptable, having regard to contemporary community standards” (*R v Swaffield; Pavic v The Queen* (1998) 192 CLR 159 Toohey, Gaudron and Gummow JJ at 194 par 69.

[34] The failure to adequately explain the role of the prisoner's friend or to have the defendant repeat back in his own words the meaning of the caution, does not, in my opinion, render his voluntary admissions unreliable. There is no unfairness to the defendant because there is a risk that his right to a fair trial may be jeopardised because the statement was obtained in circumstances which affect the reliability of the statement (*Van der Meer v The Queen* (1988) 62 ALJR 656 at 666, *R v Swaffield* (supra)).

[35] Reception into evidence of the admissions does not involve a risk of the defendant being improperly convicted (*Dumoo v Garner* (supra)).

[36] Accordingly, I ruled on 7 June 2000 that the record of interview conducted with the accused on 4 September 1998 was admissible on his trial for murder.
