Nabegeyo v Bentham [1999] NTSC 53

PARTIES:	NABEGEYO, Charles
	v
	BENTHAM, Christopher
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUMMARY COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 62 of 1998
DELIVERED:	17 May 1999
HEARING DATES:	15 March 1999
JUDGMENT OF:	MARTIN CJ

REPRESENTATION:

Counsel:

Appellant:	Mr M Jones
Respondent:	Ms A Fraser

Solicitors:

Appellant:	NAALAS
Respondent:	DPP

Judgment category classification:	C
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

Nabegeyo v Bentham [1999] NTSC 53
No. JA62 of 1998

BETWEEN:

CHARLES NABEGEYO
Appellant

AND:

CHRISTOPHER BENTHAM
Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 17 May 1999)

[1] Appeal against conviction upon the grounds that the learned Chief Magistrate erred in admitting into evidence a record of an interview conducted between Constable Lindsay and the accused, in the course of which the accused made admissions and confessions.

[2] As developed upon the hearing of the appeal, the appellant complained that when interviewed:

- an interpreter should have been present to assist;

- the person who was present in the role of "prisoner's friend" had been nominated by the appellant, but not after he had been fully informed as to the role of such a person;

- the administration of the caution was not in accordance with the requirements of the Anunga Rules, and

- the questioning through the course of the interview contained much that was in the nature of cross-examination.

[3] In short, his Worship should have held that the prosecutor had failed to demonstrate on the balance of probabilities that the confusion was not voluntary.

[4] The appellant was charged that on 28 December 1997 he trespassed unlawfully on enclosed premises, namely, the Oenpelli police station, and secondly, that he then did steal a twenty litre red plastic boat fuel tank valued at $40, the property of the Oenpelli Police Station.

[5] The transcript of the proceedings at Jabiru on 10 June 1998 shows that on the previous day an indication had been given to his Worship that there was to be a voir dire on the admissibility of the confessional evidence. There was no indication that any application had been made to his Worship in that regard, and in fact, at the commencement of the proceedings his Worship enquired as to what the issues were. It is not up to the parties in a criminal prosecution to simply inform a court that there is to be a voir dire. Those

representing the accused must make an application, identifying the material sought to be excluded and the grounds upon which the application is made. The prosecutor and the court are entitled to know that ambit of the enquiry and the grounds upon which the application is made. That may determine where the onus lies, which of the parties is to begin, and avoid a "fishing expedition".

[6] In any event the matter proceeded before his Worship, and after a little while he was informed that there was an issue of voluntariness and some "technical point in relation to the Territory rules in relation to the interview of aborigines". Just what the technical point was, was never particularised.

[7] The evidence of the interview comprised an audio tape recording. A transcript was made available. The interview took place on 5 February 1998 at the Oenpelli police station. There was present, as well as Constable Lindsay, who identified himself as the son of the appellant. He was asked by Constable Lindsay, in the presence of the appellant, as to whether he understood that he was there as the appellant's "prisoner's friend, if he has any problems with my questions he can ask you for help and you can talk in your own language". He professed to understand that. The Constable went on: "You're here to make Charles feel more comfortable and help him out, Okay". To which he answered "Yes". As to the appellant, he indicated he was happy for Mambo Nabegeyo to sit with him. He was invited by Constable Lindsay to ask him for help in his own language if he had any

problems with any of the questions. It is apparent that Constable Lindsay knew that each of the appellant and the friend spoke a common aboriginal language.

[8] The interview then proceeded in the usual way with a number of questions going to the appellant's antecedents during which he identified himself, his birth date, where he was born and where he lived. He told the Constable that he went to school at Kormilda College, achieving year 11, could read and write English and understood the Constable when he spoke to him. He was then informed of the matter about which investigations were being made, and, after having established that he was sober and not tired, the Constable went on:

> "LINDSAY: Okay. Now Charles I'll advise you that you don't have to talk to me if you don't want to, do you understand that?
> NABEGEYO: Yeah.
>
> LINDSAY: And what does that mean?
> NABEGEYO: I don't answer your question if you say something.
>
> LINDSAY: Yep. So it's your choice if you talk to me or not?
> NABEGEYO: Right.
>
> LINDSAY: Okay. Now anything that you do say Charles will be recorded on these tape machines and may later be used as evidence in court, do you understand that?
> NABEGEYO: Yes.
>
> LINDSAY: So who might listen to these tapes in court?
> NABEGEYO: Legal Aid.

LINDSAY: Yeah and who else?
NABEGEYO: A Magistrate.

LINDSAY: Yep. Now when the Magistrate listens to these tapes and he hears what you say, what can he do to you if he thinks your guilty?
NABEGEYO: Send me out, lock you up.

LINDSAY: Yep what other things?
NABEGEYO: Fine.

LINDSAY: And what else?
NABEGEYO: Community Service.

LINDSAY: Yep. Bond?
NABEGEYO: Yeah.

LINDSAY: Okay. Now Charles you understand that your not under arrest, your free to go, leave this room at any time you like?
NABEGEYO: Yes.

[9] It was established that the appellant had come to the police station of his own free will. He was then invited to say what had happened on the night of the 28 December, and in response to what were, in the main, non leading questions, told the Constable how he and another person went to the police compound and stole some fuel from a boat tank at night time. He identified the colour of the tank and said that he remained just inside the gate whilst the other person went to the back. When asked what he was doing when he was waiting, he answered: "Just look around". He said he was looking out for the police and if he saw the police he would run away. It was then put to him: "So you were there to look out", and he replied: "Yeah". (This was said to be cross-examination). The questioning continued, and it emerged

that the other person had obtained bottles of fuel from the tank and given some to the appellant which was then used with others for the purpose of sniffing. No charge related to the stealing of fuel.

[10] In his sworn evidence, the appellant said that he remembered being asked if he wanted somebody to sit with him, and, in cross-examination, acknowledged in answer to leading questions that Mambo Nabegeyo was there to sit with him for comfort and to make him feel comfortable. He denied that he was nervous when he was at the police station. When the terms of the customary caution were put to him in examination-in-chief and he was asked what it meant, he replied: "Youse talk, I don't answer your question", and again, "When you talk, I don't answer your question". When asked what he thought would happen if he did not answer the policeman's questions he replied: "Just keep asking me" and when asked what would happen if the policeman kept asking questions, he replied: "I didn't answer the question". But later, "If that policeman kept asking you questions what would you do?" "Answer it" he replied. He also said he had to do as he was told by the policemen at Oenpelli and that he thought the policeman was telling him to answer for the stealing when he asked the questions. When the disputed piece of tape was played over in the course of cross-examination and the appellant was asked what he meant by it, he replied: "I don't have to answer his questions…. I don't answer his question when he say something. The police want to say something, I don't answer the question". Under further cross-examination, he said that he could do one of

two things, he could either say something or not answer. Later he acknowledged that he had a very good understanding of talking to policeman as he had done it many times. In re-examination he was asked what was meant by the word "choice" and acknowledged that he did not know.

[11] The submissions mad on behalf of the appellant at the close of the voir dire were based upon what was said to be three breaches of the Anunga guidelines, but it does not seem that that based upon alleged cross-examination was pressed. An attack was made upon the adequacy of the efforts made by the investigating policeman as to the appellant's understanding of the caution, an in particular, the failure to explain the caution phrase by phrase and seek the appellant's understanding. It was put that the appellant's responses to questions in that regard could not lead his Worship to find that the confessions was made by the appellant in full appreciation of this right to remain silent.

[12] The arguments advanced were based, of course, upon *R v Anunga* (1976) 11 ALR 412 and what was said regarding that in *Collin v R* (1980) 31 ALR 257. I think it bears repeating that in the latter case, Muirhead J., at 281, adhered to recent remarks made by him in the unreported decision, *Stevens v Lewis* (NT Action No 872 of 1979 - 31/10/79):

> "The primary questions it seems to me, for the court in considering admissibility of admissions allegedly made by aborigines or, indeed by any other person in our community are three - relevance, voluntariness and the question of fairness. Each case must be assessed in the circumstances with regard to the individuals involved. The court, in considering the issues, should take into account the

> guidelines. The case goes no further than that. The guidelines do not alter or constitute a departure from the general law relating to the admissibility of confessions or the matters to be taken into account in the exercise of the court's discretion. Slavish or unnecessary adherence to the guidelines, technical adherence for the sake of form or apparent compliance, was never, in my opinion, intended by the Chief Justice. Indeed he said so quite clearly…"

[13] The appellant relied on what fell from Brennan J. at p322 in holding, in dissent, that in the circumstances voluntariness had not been proved, there not being demonstrated a clear appreciation and belief on the part of the particular appellant, proved by acceptable evidence, that he was not under any obligation to speak. Anticipating that the prosecutor would rely upon the case, counsel for the appellant at trial also referred to *Gudabi v R* (1983) 52 ALR 133, and particularly at p145, where the Anunga Rules were commented upon with particular reference to changes in social climate between 1976 and 1983. "The legal question of law must be whether the confessional statement was voluntary in the sense in which an expression is used in the relevant authorities".

[14] As to the "prisoner's friend", counsel before his Worship relied upon what fell from Mildren J., obiter, in *R v Weetra* (1993) 93 NTR 8. At p11 his Honour sets out a number of requirements which, in his opinion, should be met when assisting an accused, prisoner or not, to consider the identity of the person who might fulfil that role. The evidence in regard to the efforts made by the police in that regard is set out above.

[15] The submission of the police prosecutor reviewed the evidence before his Worship, and mentioned, in particular, the fact that his Worship had had the benefit of seeing and hearing the appellant give evidence before him, and the impression to be gained by listening to the manner in which the appellant had spoken in the course of the interview with police. He reminded his Worship that in *R v Weetra*, Mildren J. at p16 said that notwithstanding that the prisoner's friend in that case played no effective role other than perhaps to act as a witness to the proceedings, his Honour was satisfied, on the whole of the evidence, that the accused did understand his right to silence and that he chose to speak in the exercise of a free choice to speak or remain silent. The prosecutor submitted that his Worship should look at the matter on the basis of the whole of the evidence, and not by taking pieces of it in isolation.

[16] An issue arose as to what the appellant had said when he was asked if he understood what the caution meant. The answer as transcribed was: "I don't answer your question if you say something". There was an issue as to whether the word "if" was "or". Listening to the evidence did not clarify the issue, but his Worship expressed himself satisfied on the basis of what he heard when listening to the tape, and in the light of the other evidence, including that of the appellant, that the words conveyed the meaning that the appellant had an appreciation that he did not have to answer questions.

[17] His Worship delivered his decision ex tempore, acknowledging that if time was available and spent on the preparation of the reasons they might be

"more perfect". No attack is made upon the test which his Worship proposed as that which must be satisfied by the prosecution before it could be found that the confessional material was voluntary. He grounded his decision upon a number of bases. The first was that the appellant had had previous experience with "the law", undoubtedly meaning with police investigations. "He's not a person who is facing an interview for the first time in his life: he understands the legal process; he has an overall understanding not only of the interview, but also of the legal process". His Worship noted that many difficulties arise by looking at precise words use in the interview and the fact that the appellant did not use "perfect grammar", and noted similar occurrences during the course of his evidence before the Court. He found that the disputed answer however regarded, seemed to him to be an appreciation, when taken in conjunction with the other evidence, that he did not have to answer questions. Again, his Worship partly relied upon the evidence he had heard from the appellant. His Worship noted the appellant's answer in re-examination to the effect that he did not understand the word "choice", but was not prepared to take that in isolation from all the evidence.

[18] As to the attendance of the "prisoner's friend", his Worship held upon the basis of the evidence before him, that the appellant was not nervous at the interview, nothing untoward happened there, he was comfortable with Mambo Nabegeyo, a person whom he had chosen, being present. Although not expressed, it is sufficiently implied from the whole of what his Worship

had to say, and his ruling, that in the circumstances of the case he did not consider that it was necessary for the police to carry out all the steps suggested by Mildren J. in *Weetra*. (The evidence regarding the "prisoner's friend" in this case seems to fall fairly well within the concepts expressed by the Full Court of the Federal Court of Australia in *Gudabi v R* (1984) 52 ALR 133 at p146).

[19] The essence of the appellant's case before this Court was that on the whole of the evidence his Worship could not be satisfied to the required degree that the appellant's will was not overborne.

[20] When his Worship ruled the confessional material admissible, the proceedings went forward in a rather irregular way. Counsel then appearing for the appellant said that he understood that would be the "close of the Crown case", but that he and the prosecutor sought the opportunity to discuss a matter, and a brief adjournment was granted. After the adjournment, the prosecutor informed the court that as a result of discussions and further listening to the audio tape, counsel for the appellant had conceded an element of the offence of stealing, and that being so, "I close the prosecution case". The concession was repeated by counsel for the appellant: "I don't seek to make any submission that Nabegeyo is not guilty" of stealing the petrol tank on the basis that he was aiding and abetting the other offender in the theft, both of the petrol and of the petrol can. At no stage was there a formal tender in the prosecution case of the record of interview which his Worship had only decided to admit into

evidence at the conclusion of the voir dire. However, the parties elected to deal with that evidence as if it had been tendered. After the concession, counsel for the appellant said it was not intended to call any evidence, and he had no submissions to make. His Worship then proceeded to consider the material which had been treated as being before him, and in discussion with counsel for the appellant, it was again conceded that it was a matter of fact and law the appellant was guilty of stealing the tank, and his Worship proceeded to find him guilty of that and the trespass charge.

[21] In *Kyriakou, D'agosto v Lombardo* (1987) 29 A Crim R 50, the Court of Criminal Appeal of New South Wales, an appeal against conviction, some of the grounds related to the admission of a record of interview by the learned trial Judge. It was put on appeal, in varying ways, that the statements were not voluntarily made, and even if voluntary, they were prejudicial and unfair and should have been excluded on discretionary grounds. The question of public policy was also raised. It is not necessary to go into all those matters here. At p57 Yeldham J said:

> "His Honour held that the confusion was voluntary. That was a finding of fact which it was open to him to make, and I am quite unable to conclude that he erred in that conclusion. This Court does not sit in judgment from factual findings made by trial Judges on the voir dire. If there is no evidence to support a finding, or if a Judge has applied wrong principles, or if the evidence is all one way, then this Court, in order to prevent injustice, will intervene, but I am far from satisfied that the present situation is a case of this nature."

[22] His Honour also reviewed the authorities in relation to interfering with the exercise of a discretion. Carruthers and Grove JJ agreed. As to finding of

fact, reference might also be made to *Altham* (1992) 62 A Crim R 126 at 131-132 which was not an appeal against the admission of confessional material after a voir dire, and *Simmons* (1995) 79 A Crim R 31, at p35, which was, and *Gudabi* at p146.

[23] It will be noted that in this case his Worship relied not only on the confessional material as recorded on the tape to which he listened and the evidence of Constable Lindsay, but, in addition, his benefit of seeing and hearing the appellant in the witness box. He relied partly upon that. I have listened to the tape and note the appellant's mainly quick responses to questions, his apparent lack of any difficulty in understanding the questions that were put, that on occasion he volunteered information, and throughout give the impression of being confident and comfortable. His Worship, as I say, had the added advantage.

[24] It was correctly put on behalf of the appellant on appeal that Constable Lindsay had acknowledged, in the course of his evidence in cross-examination before his Worship, that the appellant spoke English less well than an average person of European descent. However, that does not mean, in my opinion, that strict adherence to the guidelines set out in Anunga is required. As said in that case at p415:

> "These guidelines are not absolute rules, departure from which will necessarily lead to statements being excluded, but (police officers) who depart from them without reason may find statements are excluded."

[25] Similarly, although all of the judicial statements in respect to "prisoner's friend" may not have been fully adhered to does not mean that confessional statements must be excluded. Although raised on appeal, it was never submitted before his Worship that an interpreter might have assisted that police in the investigation and the interview process.

[26] Only one example was pointed to by way of objection on the grounds that there were answers elicited by way of cross-examination, an in my view, that has not been made out. The Constable was doing no more than rephrasing a question arising from an admission already made by the appellant. It took the confession no further.

[27] What the appellant seeks to have this Court do is review the material before his Worship and come to different findings of fact. That is not a course which is open unless the appellant can first point to an error made in the fact finding task undertaken by the learned Chief Magistrate. No such error is pointed to.

[28] As to an appeal under s 163 of the *Justices Act* 1928 (NT), being an appeal in the strict sense, see the remarks made by Kearney J. in *JK v Waldron* (1988) 93 FLR 451 at 455 and 456, repeated in *Salmon v Shute* (1993) 94 NTR 1 at p11 and 12.

[29] The appeal is dismissed.

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