The Queen v Gaykamanu [2010] NTSC 12

PARTIES:	THE QUEEN
	v
	GAYKAMANU, Phillip Dharul
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	20620791
DELIVERED:	8 April 2010
HEARING DATES:	31 March 2010, 1 April 2010 and 6 April 2010
JUDGMENT OF:	OLSSON AJ

CATCHWORDS:

CRIMINAL LAW – EVIDENCE - ADMISSIBILITY

VOIR DIRE - Admissibility of record of interview at trial - asserted breaches of Anunga Rules - whether Crown has demonstrated that admissions made by the accused were voluntary - whether it unfair to admit any portion of record of interview - no ground of exclusion established.

Collins v R (1980) 31 ALR 257
Gudabi (1984) 12 A Crim R 70
The Queen v Robinson [2010] NTSC 09
The Queen v RR [2009] NTSC 44
R v Weetra (1993) 93 NTR 8

REPRESENTATION:

Counsel:

Crown:	E Armitage
Accused:	J Brock

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Accused:	North Australian Aboriginal Justice Agency

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

The Queen v Gaykamanu [2010] NTSC 12
No. 20620791

BETWEEN:

THE QUEEN

AND:

GAYKAMANU, Phillip Dharul

CORAM: OLSSON AJ

REASONS FOR JUDGMENT

(Delivered 8 April 2010)

Introduction

[1] The accused in this matter is an Aboriginal man who was 29 years of age as at 17 August 2006. He had been married in the Aboriginal way to Valerie Gingiyarr in 2004 and lived in the blue Council house at Milingimbi. The principal occupiers of the house were Valerie's parents. The accused and his wife had three children, who also resided at the blue house, which was known as 145 Milingimbi Community.

[2] Valerie's father was present in the general area on the day of the offence alleged against the accused and witnessed certain events relevant to these

proceedings, but unfortunately passed away prior to giving any evidence at the committal proceedings.

[3] It seems common ground that, on 11 August 2006, a dispute arose between the accused and his wife concerning the latter's alleged consumption of Kava and also the proper care of the children.

[4] The Crown case is that, following an altercation between them, Valerie removed the accused's belongings from the blue house when he was not there and took them to Beach Camp (also known as Rulku Camp), where the accused's extended family lived.

[5] The Crown asserts that, when the accused returned to the blue house to find his belongings missing, his wife said to him words to the effect "I took all your stuff to Rulku, to your family. So you can live the way you live before". She also told him that he could stay at Rulku because he was not helping with the kids.

[6] The exchanges that occurred at that time admittedly led to an aggravated physical assault by the accused on his wife. This assault gave rise to his conviction (on his plea of guilty) of such an offence in a Court of Summary Jurisdiction on 6 August 2008.

[7] The Crown alleges that, following the assault, the accused's wife ran to the yellow house at Milingimbi. At about that time she observed the accused running toward Rulku.

[8] Some one and a half hours later the blue house was observed to be on fire. The entire structure was gutted by the fire and all personal belongings within it were destroyed.

[9] It is said that the ignition of the house fire was witnessed by Valerie's father, who was sitting nearby in the grass at the time.

[10] There was a delay in reporting the fire to the nearest police, who were based some distance away on the mainland at Maningrida. A crime scene was, therefore, not immediately established.

[11] However, a police officer from Maningrida attended Milingimbi on 15 August 2006. Having spoken with Valerie and her father, he arranged for officers from the major crime unit in Darwin to attend.

[12] Two officers from that unit flew first to Maningrida and, thereafter, proceeded on to Milingimbi, arriving there at 10:25 on 17 August 2006. At 10:48 they arrested the accused and charged him with arson. An immediate tape recorded s140 caution was administered in the usual English form and the accused was informed of his rights.

[13] No independent interpreter was involved at that stage and I infer that one was probably not immediately available. However, the arresting officers were assisted by an Aboriginal Community Police Officer (ACPO), who was able to communicate with the accused in an indigenous language spoken and understood by the latter. The transcript of the s 140 exchanges indicates

that, in fact, the accused appeared to have no significant problem in generally understanding what was being said to him. His recorded responses were relevant and appropriate. There seems, probably, to have been some communication between the ACPO and the accused but the relevant transcript gives no indication of its substance.

[14] At that time, the accused was given a full caution, asked who he wished to have sit with him during any formal interview and was also asked whether he was happy with certain proposed interpreting arrangements in Maningrida. During the course of the s 140 process the accused stated that he did not desire any other persons to be advised of his arrest. It seems that his family were obviously aware that he was in custody.

[15] Having been provided with lunch, the accused was taken to Maningrida by the investigating police officers by air. He was placed in the cells whilst police located his nominated prisoner's friend and the proposed interpreter.

[16] Commencing at 14:58, police conducted a formal electronically-recorded record of interview (EROI) at the Maningrida police station. They were assisted by Mr Gordon Machbirrbirr, an interpreter who was fluent in the Gupapuyngu language, which the accused professed to speak and understand.

[17] Mr Machbirrbirr was a qualified interpreter, specifically accredited with regard to the Barrada language. He was so accredited, at the relevant time, to the highest level then possible. I noted that, in giving evidence, he

appeared to speak excellent English and had excellent English comprehension. He testified that he resided in Maningrida, but had been fluent in Gupapuyngu since an early age, having frequently been in Milingimbi. Gupapuyngu was, in fact, his father's language.

[18] A person named Michael Ali (Ali), a cousin of the accused, was also present as his nominated prisoner's friend to sit with him. Ali had been present outside the police station prior to the interview and Mr Machbirrbirr had, at that time, interpreted an explanation by a police officer to him of his role as a proposed prisoner's friend. Mr Machbirrbirr's memory is that, amongst other things, he had interpreted to Ali at that time that that he was there to support the accused, but not advise him.

[19] During the course of the interview the accused made full admissions, *inter alia*, as to his involvement in the lighting of the fire that destroyed the blue house. He also gave his version of what had occurred between his wife Valerie and himself, as part of the overall narrative. The interview ultimately concluded at 16:17.

[20] It is common ground that, due to the fact that Valerie's father passed away before giving evidence in any proceedings, the only evidence now directly implicating the accused with the relevant fire consists of the admissions made by him in the course of his EROI. Those admissions are, therefore, critical to the Crown case.

[21] It is to be noted that there has been a considerable delay in bringing these proceedings to trial. In part this has been a product of the Court system and the fact that an aggravated assault charge was first prosecuted to a conclusion in the Court of Summary Jurisdiction. In part it has also been the consequence of the accused failing to appear at several court listings.

The issues raised on the present voir dire

[22] In essence, the accused now makes an application, pursuant to s 26L of the *Evidence Act* seeking the exclusion of the whole of the EROI on the ground of involuntariness or, alternatively, in the exercise of the Court's discretion, on the ground of unfairness.

[23] The specific grounds of application relied on may be summarised in these terms:

First, that the admissions made by the accused cannot be shown to be voluntary, in the relevant legal sense, because --

(1) the police officers failed to ensure that the accused understood the caution administered to him, in that they failed to ensure that he repeated back an appropriate understanding of it;

(2) they failed to (adequately) explain to the accused the second limb of the caution, namely the use to which the record would be put; and

(3) they further failed to (adequately) explain the role of the prisoner's friend to either the accused or to Ali.

Second, that it would be unfair to admit the evidence of any admissions made by the accused, having regard to his relative youth and lack of experience with police and because, in the whole of the relevant circumstances related to what is said to have been an unsatisfactory caution process, an inadequate use of the interpreter and an inadequate briefing of the accused as to the role of the prisoner's friend, the potential reliability of the admissions made was compromised.

[24] There are no allegations of deliberate and specific improper conduct on the part of the police officers concerned. In essence, the main thrust of the grounds of the application relates to asserted inadequacies in the formal requirements. This is asserted to be due to what was described as undue police complacency or even wilful blindness related to the conduct of the EROI, having regard to the well-settled requirements related to the proper conduct of such interviews pursuant to s 142 of the *Police Administration Act* (PAA).

Relevant facts

The initial s 140 interview

[25] It must be said that, following the arrest of the accused, the police officers scrupulously observed the requirements of s 140 of the PAA. Whilst it is true that no accredited interpreter was present at that time, I entertain no doubt that the accused understood his general situation and, in particular, that, *inter alia*, he had the right to have a prisoner's friend present when

interviewed. No admissions were sought or made on that occasion. It was purely a formal process.

[26] The accused readily supplied his personal particulars when requested to do so, acknowledged an understanding of why he had been arrested, said that he understood his right to silence, nominated the prisoner's friend that he sought to have present at any EROI and discussed with the police the suitability of proposed interpreters.

[27] As already appears, an ACPO who spoke his language was present at the time, although it is not apparent what precise role, if any, was played by him. However, it can at least be said that the general "flavour" of the audio record does not suggest that the accused did not understand at least the general import of what was being said to him, even bearing in mind the need to allow for the cultural tendency of persons of Aboriginal background to readily accept propositions put to them, whether or not those propositions are correct -- the so-called "gratuitous concurrence" tendency.

The administering of the caution on the afternoon of 17 August 2006

[28] The relevant video recorded segment discloses that, during the formal EROI commencing at 14:58, the accused at times directly and spontaneously responded to matters put to or asked of him in English, whilst, at other times, there was an intervention by the interpreter and interaction between the interpreter and the accused in the Gupapuyngu language.

[29] It is my distinct impression that he well understood most of what was said to him in English, although his English replies were often in staccato, albeit usually appropriately responsive, terms. The printed transcript suggests that, on many occasions, he simply responded "Mm" to questions asked of him. It is quite clear from the original video that, on virtually every such occasion, he nodded his head and was patently intending to give an affirmative response.

[30] To the extent that the accused directly responded to questions, he obviously displayed a fair grasp of basic English.[1] Mr Machbirrbirr confirmed such a situation in the course of his evidence.[2]

[31] It is fair to say that, after some preliminary formal questions, DSC Evans (Evans), the primary interviewing officer, went to some pains to re-administer a full caution to the accused[3] and to also attempt to elicit a response from the accused as to his understanding of that caution. In this he was assisted by the interpreter.

[32] According to what I take to be the translation of the relevant segment of the interview process, the interpreter put the initial portion of the caution to the accused, in language, in the form, "If I ask questions it is up to you if you want to tell me or not. It's up to you, you can say yes or no". The accused

[1] See, for example, the EROI at pages 4 - 7 of the Transcript.
[2] Voir Dire Transcript of Proceedings at Darwin on 1 April 2010.
[3] EROI Transcript at page 11 et seq.

is recorded as replying, "Yes", when asked in Gupapuyngu whether he understood that.

[33] Those exchanges were followed by a further statement by the interpreter to the accused in language, "I'm just going to ask you -- there's two choices. You can talk if you want or you can just stay quiet". The accused again professed to understand that.

[34] It is true that some difficulty was experienced in getting the accused to articulate his understanding of the concept in his words, in the course of which the interpreter successively repeated to the accused in language statements such as, "Two choices, one you can tell your story and the other one is you don't have to say anything", and, "You can either tell the story or sit there quiet". Statements to that effect were repeated in language.

[35] Towards the end of that process, the interpreter reported, "I just said to him there are two choices, um, it's your choice you can either talk to him, that policeman, or you can sit down and not talk". An independent translation of what was actually said in language was, "The story is you've got two choices, you can either talk to that policeman, or sit quiet. That's the law". A viewing of the video strongly suggests to me that the body language of the accused when spoken to in language was consistent with him understanding what he was then being told.

[36] At the stage when the interpreter finally asked the accused, in language, if he understood, the latter replied in English, "Mm, understand, I said I'm

gonna stand up. I'm not gonna sitting here quietly ... because I'm (inaudible) tell you the story."

[37] The interpreter assured Evans at the time that, in his opinion, the accused did understand what had been said to him.

[38] With the aid of the interpreter, Evans then proceeded to explain to the accused that everything that was said was being recorded on the tape and might be used in court in evidence.

[39] When asked by the interpreter, in language, whether he understood that, if he did tell his story, where his voice would go from the tape and the TV, and who might look at and listen to it, the accused replied, "Maybe Judge". I am satisfied that, in so responding, the accused was not, as his counsel suggests, making some equivocal response. He was clearly stating his understanding that the record of any thing he said might be used in court before a judge.

[40] Following those exchanges the accused readily answered questions put to him, sometimes (as I have already recited) by direct English responses and sometimes, in language, with the assistance of the interpreter. At times, there were pauses to change audiotapes.

The role of the prisoner's friend

[41] There cannot be the slightest doubt that, on the morning of 17 August 2006 at Milingimbi, immediately before and following his arrest, Evans informed the accused that he was to be the subject of a formal interview at

Maningrida and that he was entitled to nominate someone to sit with him at that interview. It is equally clear that the accused ultimately nominated a person (who proved to be his cousin Ali) to do so.

[42] On arrival at Maningrida, the police located Ali and he, in fact, attended the EROI. Almost at the outset of the EROI and in the presence of the accused, Evans said to Ali:

> "And Michael, okay, um Phillip's asked for you to sit here today as a friend, for comfort, okay and basically what that means is any time, you can, you can talk to Philip if you want, you know, um, you, you can say something to me if you want, but what I will ask is, don't answer his questions for him, that's all, okay. So you are here, here today just to be with him, give him a bit of support".

[43] The transcript reveals that, in response to that indication, the following exchanges occurred:

> "ALI: Yeah, company.
>
> EVANS: Company, yeah, okay. So we're happy with that?
>
> ALI: Yes, I'm happy.
>
> EVANS: All right, Philip, you happy with that?
>
> GAYKAMANU: Yes".[4]

[44] At a slightly later stage Evans said to the accused that Ali was there to give him support. I accept that, although it was made clear to both Ali and the

[4] EROI Transcript at page 3.

accused that the two of them could talk with one another at any time, neither were specifically told that Ali could "advise" the accused.

[45] I here pause to record that Ali was not called as a witness on the voir dire. I was informed that two attempts were made to have him flown to Darwin for the hearing but that he failed to board the aircraft on each occasion. I was, in effect, invited by Mr Brock to infer that, had he been called, he would not have given evidence supportive of the Crown case. I am not prepared to draw such an inference. There are a variety of possible reasons why he did not board the aircraft and his failure to do so remains entirely equivocal.

The substance of the accused's narrative in the course of his EROI

[46] In the course of the EROI and in response to questions put to him by the police, the accused readily gave his detailed version of the relevant events of the day on which the fire occurred at the blue house. It will suffice for present purposes if I merely attempt a summary of the key points of what he said.

[47] The accused described how, that morning, he went to Centrelink and then met his wife at the shop. An argument broke out when she wanted him to go to the house to help with the kids and because he was angry at her for drinking too much kava. He said that he went home and he went to his family at Rulku Beach Camp for a time.

[48] The accused related how he subsequently returned home, having encountered his wife at the school en route. On arrival home he found that she had taken his belongings to the Beach Camp. Another argument developed and he hit his wife in the head with his hand, punched her in the mouth and kicked her twice in the ribs (those concessions ultimately led to his appearance in a Court of Summary Jurisdiction, when he pleaded guilty to aggravated assault).

[49] The accused stated that, after that incident, he returned to Rulku Camp. He described going to relative's boat there and removing a red 20L fuel tank from it that was about a quarter full. He then took that tank back to the blue house. No one was in the house when he arrived.

[50] He related how, on arrival, he went to the room that had been occupied by his wife and himself, unscrewed the lid of the tank, and spilled the fuel on the mattress and everywhere. He made a fuel trail out across the veranda to the steps.

[51] He indicated that having done so, he lit the fuel with a lighter that he carried with him for smoking. He, thereafter, walked back to the Beach Camp, carrying the fuel can, which he placed in a relative's house, in which he, himself, remained for two nights.

[52] When asked through the interpreter, "When you spill that petrol in that place and lit it up did you want to burn that house?", the accused replied, "Yes" …

"Because we having this problem, person problem".[5] He agreed that, when he splashed the petrol, he thought that it would burn the house down. He later agreed that it was the wrong thing to do and added, "... but also, I tell you mate, because she always give me a problem, you know".

[53] It should be noted that the exchanges between Evans and the accused that elicited such a narrative went forward without real difficulty and, at times, there was only a partial requirement for intervention by the interpreter.

[54] The accused's responses were, for the most part, spontaneous, responsive and clear as to their meaning. He described, by gestures, both his manner of striking Valerie with his hand and unscrewing the cap of the petrol container. At times he, in effect, asked for clarification of questions.[6] On occasions there were some failures to answer, but it is my distinct impression from a study of the video of the EROI that these were due to a failure on the part of the accused to fully appreciate the meaning of specific questions, rather than an unwillingness to respond. When translations were made by the interpreter, there was no apparent reluctance by the accused to answer.

[55] This is even so in relation to the non-response recorded on page 43 of the transcript. The clue as to that situation lies in the immediate suggestion of the interpreter at the time that he re-interpret the question.

[5] EROI Transcript at page 41.
[6] EROI Transcript at page 28 and at page 33

The contentions on behalf of the Accused

[56] The accused's primary contention was to the effect that, at the time of the EROI, the investigating police officers well appreciated their obligation to work within the guidelines established by the so-called Anunga Rules and Police General Orders Q1 and Q2.

[57] It was argued that they had failed to do so, in that they had not adequately satisfied themselves that the accused understood the caution administered to him and that, as a consequence, the Crown had not established on the balance of probabilities that the responses of the accused were voluntary.

[58] Alternatively, it was asserted that, due to the deficiencies in the police methodology, it would be unfair to admit the content of the EROI.

[59] Police General Order Q2 envisages that, in the case of accused persons whose first language is not English, police officers conducting a record of interview should not only administer the appropriate caution, but ought also to take steps to ensure that the caution has been understood by the recipient of it as required by the Anunga Rules. The suggested method of doing so is to ask the proposed interviewee to express, in his or her words, the effect of what has been said.

[60] There are, of course, two facets of the necessary caution. The first is an intimation that the proposed interviewee is not obliged to answer any question and has the right to remain silent. The second is that, if the

proposed interviewee does elect to respond, then what he or she says will be recorded and may later be tendered in court in evidence.

[61] It is true to say that, in the instant case, although Evans was assiduous in his efforts to explain the elements of the caution to the accused, he only succeeded in having the accused partially repeat back an understanding of the content of the full caution. The accused did, however, repeatedly indicate that he understood what had been said to him.

[62] Whilst the Crown bears the onus of establishing, on the balance of probabilities, that not only was a proper caution administered to the accused and that he understood it, nevertheless that onus does not require proof that the accused was able to and did accurately recite back to the police officers in English and understanding of the substance of the caution.

[63] Such a recitation is but a simple, advised method of confirming the requisite comprehension. At the end of the day, the question remains as to whether, on the whole of the evidence, the Crown has demonstrated, on the balance of probabilities, that the accused did comprehend what was said to him -- due allowance being made for the cultural tendency of gratuitous acquiescence, to which I have earlier referred.

[64] On reviewing the evidence in this case, I consider that the following aspects are of importance:

(1) Throughout the interview process the accused appeared to display reasonable levels of intelligence and a reasonable grasp of basic English. His responses, when given, were generally spontaneous. As I have indicated, on the occasions on which he simply did not respond, it seemed to me that the lack of response reflected the fact that he did not understand what he was being asked until it was interpreted to him;

(2) The interview was conducted in a relaxed and informal fashion. The police were at courteous at all times and not overbearing. There is no overt indication that the will of the accused was overborne or that he felt intimidated;

(3) On my count the right of silence was accurately explained to the accused in simple terms and in slightly different ways, both in English and in Gupapuyngu no less than seven times. Ultimately, as I have recited, the accused respondent in English, "Mm, understand, I said I'm gonna stand up. I'm not, sitting here quietly... because I'm (inaudible) tell you the story...".

(4) It was pointed out by Kelly J in her recent ruling in *The Queen v Robinson*[7] that, where a caution is given to a suspect in his own language, the reason for having that person explain the meaning of it in his own words is, in any event, less compelling. I respectfully agree with that comment. I find it impossible to accept that, in the

[7] [2010] NTSC 09.

circumstances of this case, the accused may not have understood what was put to him on multiple occasions in language and in simple terms with the assistance of Mr Machbirrbirr. On the contrary, I am satisfied that he did have a proper understanding of his rights.

(5) I have no hesitation in accepting the evidence of both Evans and the interpreter Gordon Machbirrbirr -- whose competence and professionalism as an interpreter I do not doubt -- to the effect that, at the time, they were in no doubt that the accused understood his right to silence and had positively and voluntarily elected to relate his version of relevant events. They were well justified in arriving at such a conclusion.

(6) In his submissions Mr Brock sought to make much of what he asserted were the inadequacies of the initial s 140 interview at Milingimbi and the impact that, it is said, this would have had on the perception of the accused as to whether or not any responses at the EROI proposed to be conducted in Maningrida were or were not to be voluntary. Even allowing for any possible lack of understanding of a caution at that initial stage due to the absence of a qualified interpreter and in the absence of Ali, I remain unconvinced that, following what was said to him on numerous occasions at Maningrida with the aid of the interpreter, it remains possible that he misconceived his situation at the EROI and was in any doubt as to his right to silence at that time.

[65] In my view, there is not the slightest doubt that the accused comprehended that anything said by him would be recorded on tape and video and that it might later be used in court as evidence. The accused gave the distinct impression that he had some familiarity with audio and video recording equipments and, when asked as to his understanding as to who might watch and listen to any recorded material, he responded, "Maybe Judge". There is nothing equivocal about that statement, in the context in which it was made.

[66] Mr Brock, of counsel for the accused, complained that the Anunga Guidelines, as explained in Police General Order Q2 had not adequately been complied with in relation to the presence and potential mode of involvement of a so-called "prisoner's friend".

[67] Whilst he accepted that a suitable prisoner's friend nominated by the accused had been present, he submitted that no proper briefing had been given by the police to either Ali or the accused concerning the role of the former in the interview process, as contemplated in *R v Weetra* (*"Weetra"*).[8]

[68] Par 3.1.2 of Police General Order Q2 makes the point that the prisoner's friend ought to be someone in whom the accused has confidence and by whom he feels supported. That General Order contemplates that, prior to the commencement of an interview, police should explain to the friend the reason for the interview, the form that it is to take, brief particulars of any alleged offence and that the friend has been chosen by the suspect to sit with

[8] (1993) 93 NTR 8 at 11 – 12.

him in a supporting role. It is further said that the friend should be made aware of his right to assist or support the suspect with help or clarification if at any time it appears necessary and to talk with the suspect at any time.

[69] The same General Order seems to contemplate that the friend and the suspect ought to be made aware of the right of the suspect to communicate with the friend at any time for advice or for any reason.

[70] It should be noted that these provisions are, relevantly, advisory only. They extend beyond the expression of the Anunga Guidelines, which speak only of the desirable presence of a prisoner's friend, where practicable -- to support him -- and appear to be based on what fell from Mildren J in *Weetra*.

[71] As already appears, Evans told Ali in the presence of the accused that the latter had asked that he sit with him as a friend for comfort -- "to give him a bit of support".[9] Importantly, as has been seen, he went on to explain that he could talk to the accused at any time or say something to Evans himself, if he wished, but that he ought not to answer questions for the accused.

[72] There can, in my opinion, be no reasonable suggestion that Ali or the accused did not understand that explanation.

[9] EROI Transcript at page 3.

[73] I note that there is no evidence as to what other explanation, if any, may have been given to Ali or the accused prior to the interview, apart from what was interpreted by Mr Machbirrbirr to Ali outside the police station.

[74] That said, the reason for the interview and the nature of the offence alleged against the accused must have rapidly become apparent to Michael Ali as the interview proceeded.

[75] Further, it must be borne in mind that, quite apart from the presence of Ali, the accused at all times had the assistance of an interpreter of the Aboriginal culture who, as I have indicated, was a resident of Maningrida.

[76] Whilst the Crown evidence falls short of establishing compliance to the letter with all aspects of par 5.2 of Police General Order Q2, I am, nevertheless, of the opinion that there was substantial compliance with both the Anunga Guidelines and the advice in that paragraph.

[77] It is, in my view, unreal to argue that Ali and the accused did not understand the key role of the prisoner's friend or that any significant prejudice flowed to the accused as a consequence of any failure to give a more expansive explanation of Ali's role than was in fact given. There is no indication that Evans deliberately flouted any aspect of the Anunga Guidelines or exhibited wilful blindness in relation to them.

[78] It should be said that, in the course of his submissions, Mr Brock sought to elevate what was said by Mildren J in *Weetra,* concerning the desirable

attributes of a prisoner's friend and the briefing that ought, desirably, to be given to both the accused and the prisoner's friend, almost to a rule of law in extension of the Anunga guidelines, a breach of which had the effect, *ipso facto*, of rendering the admissions of the accused involuntary, or at least unfair.

[79] In my view such contentions are unsustainable.

[80] What was said by His Honour was that, ideally, a prisoner's friend ought to possess certain characteristics referred to and that both the accused and the friend should be adequately briefed as to the role to be played. He recognised that it would often be the case that such a person might not be available, or even prepared to act.

[81] However, Mildren J recognised that, in the final analysis, the selection and presence of a properly qualified prisoner's friend and an adequate briefing of the accused and the friend as to the friend's role was only one factor to be considered, both as to the issues of voluntariness and the exercise of any discretion based on fairness.[10] It was necessary to reflect on the impact of the relevant circumstances considered as a totality.

[82] In *Weetra*, Mildren J concluded that, although the relevant prisoner's friend in the case before him played no effective role other than to act as a witness and thereby ensure that nothing really untoward happened during the EROI, the substantive issue to be addressed was whether, notwithstanding such a

[10] Cf also the situation that arose in *The Queen v RR* [2009] NTSC 44 at [50].

situation, the Crown had proved on the balance of probabilities that the accused had understood his right of silence and had chosen to speak in the exercise of a free choice to speak or remain silent. Moreover, absent some positive indication of unfairness in the whole of the circumstances, there was no basis for excluding admissions that were otherwise voluntarily made.

[83] In the instant case, Mr Brock sought to place great stress on the fact that neither Ali nor the accused had been told that a prisoner's friend could act in an advisory role. With the greatest respect, I am not entirely clear as to what Mildren J had in mind when he spoke of acting in an advisory role and, in my experience, most prisoner's friends would have little or no training or competence to tender meaningful advice. In this case both persons concerned were made well aware that Ali and the accused were free to speak with one another at any time and that Ali could also speak to Evans, if he desired.[11]

[84] There only remains for consideration the suggestion that, by virtue of his relatively young age and lack of experience with the police and given the overall circumstances to which I have already referred, it would be unfair to admit evidence of any admissions made by the accused.

[85] It must be said that, in the context of this case, such a proposition is novel, if not unreal.

[11] Cf *The Queen v RR* [2009] NTSC 44 at [48].

[86] The accused was a married man 29 years of age. Whilst he may have had little or no experience with the police, he did not present as a person who had any particular intellectual disability or other vulnerability. He appeared to be a man of at the least average intelligence and to have full well understood his situation.

[87] There is not a scintilla of evidence to suggest any inappropriate treatment of the accused by the police. On the contrary, they dealt with him in a sensitive, humane and decent fashion. It is a somewhat startling proposition to suggest that some unfairness arose by virtue of his age and lack of prior interaction with police, or, for that matter, any aspect of the mode of conduct of the EROI or of its content.

[88] Having regard to the level of obvious competence of the accused in the English language, I do not accept that it was essential that *all* exchanges between him and Evans ought to have been interpreted, as seems to be suggested by Mr Brock in his written submissions; and I reject the submission that mutual understanding was not achieved to the requisite extent. The accused's English and interpreted responses were spontaneous and reflected relevant understanding on his part.

[89] In the course of his submissions, Mr Brock embarked on a quite detailed analysis of the content of the expressions used in the EROI. He criticised the frequent use of expressions such as, "Do you understand?" and sought to point to examples of what he said appeared to be a lack of understanding of

certain concepts put to the accused, as well as, what he contended, were inappropriately expressed questions. Critically, I agree with Ms Armitage, for the Crown, that such an expression reproduced at page 12 of the EROI Transcript, was immediately followed by an explanation by the interpreter, in language, of the relevant concept and was responded to appropriately by the accused.

[90] I do not propose, in this ruling, to embark on a detailed analysis of all of the examples sought to be relied upon him, although I have considered them carefully.

[91] I felt that there was an air of considerable unreality in many of the examples sought to be identified by him. Quite apart from the fact that the general flow of the interview suggests that, at the end of the day, there was effective, mutual communication between Evans and him and a clear willingness on the part of the accused to tell his story, much of the criticism ignores the involvement of a very competent interpreter and his role in promoting understanding and effective communication by and with the accused.

[92] There is no basis for any suggestion that the narrative given by the accused was actually or potentially unreliable. On the contrary, it bore the clear ring of truth and was consistent with the Crown case, as sought to be presented.

[93] Indeed, the very fact that the accused impliedly conceded the general accuracy of so much of the EROI as related to the assault on Valerie by

reason of his plea of guilty in relation to that aspect, highlights the incongruity of what is now contended in relation to the arson charge. There is simply no logical basis for suggesting that, although the EROI may be reliable as to the assault, it is potentially unreliable as to the alleged arson, which was an integral element of what was essentially a single, ongoing scenario.

Summary of conclusions

[94] In the course of his recent ruling in *The Queen v RR*[12] Riley J reiterated the classic dictum of Brennan J in *Collins v R*[13] concerning the issue of voluntariness, to the following effect:

> "The ultimate question is whether the will of the person making the confession has been overborne, or whether he has confessed in the exercise of his free choice. If the will has been overborne by pressure or by inducement of the relevant kind it does not matter that the police have not consciously sought to over bear the will… So the admissibility of the confessions as a matter of law (as distinct from discretion, later to be considered) is not determined by reference to the propriety or otherwise of their conduct of the police officers in the case, but by reference to the effect of the conduct in all the circumstances upon the will of the confessionalist. The conduct of police before and during an interrogation fashions the circumstances in which confessions are made and it is necessary to refer to those circumstances in determining whether a confession is voluntary. The principle, focusing upon the will of the person confessing, must be applied according to the age, background and psychological condition of each confessionalist and the circumstances in which the confession is made."

[95] The sole basis on which it is asserted that the Crown has failed to demonstrate that the confessional statements made by the accused were

[12] [2009] NTSC 44.
[13] (1980) 31 ALR 257 at 307.

voluntary was the asserted failure of the police, having administered an appropriate caution to him, to then ensure that the accused had clearly understood it and, in particular, his right to silence and the use to which anything that he said would be put, given also the criticisms related to explanations of the role of the prisoner's friend.

[96] I have held that neither of the last mentioned assertions has been made good as a matter of fact. The evidence in this case plainly demonstrates, on the balance of probabilities, that the confessional statements made by the accused were made in exercise of a free will and after a proper caution that he comprehended had been administered to him.

[97] The issue of the alleged inadequacy of the briefing of Ali and the accused concerning the role of the prisoner's friend potentially touches on both questions of voluntariness and unfairness.

[98] As Riley J pointed out in *The Queen v RR*,[14] the status of the Anunga Guidelines as complemented by Police General Order Q2 was described by the Court in the case of *Gudabi*[15] in these terms:

> "The guidelines, which have as their object the assistance of investigating officers in conducting their enquiries in such a manner as to be fair to the person being interviewed while at the same time serving the public interest by not unduly inhibiting the investigating process, are not rules of law. It would be wrong to treat what is said in *Anunga* as laying down principles or rules the breach of which in any respect will result in confessional material being rejected as inadmissible. Equally it cannot properly be said that evidence of a

[14] [2009] NTSC 44 at [48].
[15] (1984) 12 A Crim R 70 at 81.

> confessional statement will always be admissible if it can be shown that the investigating officers did not in any respect contravene those guidelines. The legal question will always be whether the confessional statement was voluntary in the sense in which that expression is used in the relevant authorities."

[99] I have also held that, whilst the evidence does not establish literal compliance with every aspect of par five of Police General Order Q2, there was, nevertheless, substantial compliance with the Anunga Guidelines and that there was no deliberate non-observance of all aspects of that paragraph or, for that matter, any wilful blindness.

[100] In practical terms, the accused did have the benefit of relevant support from Ali and also the interpreter Gordon Machbirrbirr. Not only is there no reason to doubt the voluntary nature of the statements made by the accused in the context and environment in which he made them, but also there was no unfairness to him in the mode of conduct of the interview.

[101] There is no reason to suspect that the admissions made were other than accurate in relation to what was a serious offence. On the contrary, the accused's narrative bears the ring of truth and is consistent with the other Crown evidence proposed to be led.

[102] Public policy considerations of the need to bring to justice the perpetrator of a serious crime such as arson who has unequivocally admitted committing it constitute an important factor to be taken into account. In my opinion, it is clear that the accused was at all times ready to relate his version of events, both as to the assault on Valerie and also the lighting of the fire. The

accused pleaded guilty to the former and there is no logical basis in law or principle for excluding the latter.

[103] The final complaint sought to be made as to the age and asserted lack of experience of the accused goes solely to a potential exercise of discretion to exclude on the ground of unfairness. I have held that there was no unfairness in the circumstances in which the interview went forward.

[104] I therefore rule that the Crown is entitled to lead evidence of the record of interview save as to any specific passages that may be considered objectionable on general grounds. The application to exclude it must be dismissed.

[105] I will hear counsel as to any specific passages of the EROI that may be considered objectionable on general grounds.
