

PARTIES: THE QUEEN  
v  
EM

TITLE OF COURT: Supreme Court of the Northern Territory

JURISDICTION: Supreme Court of the Northern Territory of Australia exercising Territory jurisdiction

FILE NO: SC 6 of 1995

DELIVERED: 28 September 1995

HEARING DATES:

JUDGMENT OF: THOMAS J

**CATCHWORDS:**

Evidence - Admissibility and relevance - Criminal law  
- Confessions and admissions - Record of interview  
- Juvenile - Involuntariness

*Evidence Act s 26L*  
*Police General Orders Q2 7.4 and 7.4.1*

R v Anunga (1976) 11 ALR 412

**REPRESENTATION:**

*Counsel:*

Applicant:  
Respondent:

*Solicitors:*

Applicant:  
Respondent:

JUDGMENT CATEGORY: C  
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IN THE SUPREME COURT  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA  
AT DARWIN

SC No. 6 of 1995

BETWEEN:

THE QUEEN

AND:

EM

**CORAM: THOMAS J**

REASONS FOR RULING

(Delivered 28 September 1995)

This is an application pursuant to s26L of the *Evidence Act* for a ruling that certain confessional evidence namely two records of interview conducted with the accused dated 13 May 1994 are not admissible and should be excluded as evidence on the trial of EM.

The accused, EM, was charged that on 11 May 1994 at Oenpelli in the Northern Territory of Australia, unlawfully assaulted RD with intent to have carnal knowledge of her and that the said unlawful assault involved the following circumstances of aggravation; that EM thereby had carnal knowledge of RD. The accused was charged under s192(1) and (4) of the Criminal Code and pleaded not guilty.

EM is a juvenile aged 15 years. The evidence is he has not previously been interviewed by police.

The defendant contends that both records of interview between the police and the accused were involuntary in three senses.

1. Principally that the caution was either not properly administered or not comprehended by the accused.

2. That between the first record of interview and the second record of interview, Detective Sergeant Chapman spoke to the accused in the presence of his father, NM, and said words to the effect: "I don't care what you tell me, but I think you should tell your father the truth." The result of Detective Sergeant Chapman saying that to the accused, was that he then turned to his father and spoke in his native language to him. The defendant submits that it was shortly after those discussions that both the accused and his father approached Detective Sergeant Chapman and there was a second record of interview. The defendant submits that the second record of interview was improperly induced by Detective Sergeant Chapman's exhortation to the accused to tell his father the truth.
3. The defendant further submits that there was an absolute and complete failure to comply with the Anunga guidelines in respect of the prisoner's friend. The accused was 15 years old at the time, his father acted as his prisoner's friend. The defendant contends that the accused was never asked whom he wished to act as his prisoner's friend, that NM was simply summoned from his outstation to come into Oenpelli and perform that role. In addition to this, the role of prisoner's friend was never explained to NM nor to the accused. Finally, NM is a traditional aboriginal man who speaks very little English.

I refer to the cross examination of Detective Sergeant Chapman at transcript pp16-17:

"Now this issue of prisoner's friend, did you think it not very important for these interviews with this young man?---To be recorded?

To be recorded?---I didn't think it's important.

Now can you tell us please, did you ever explain to young EM, at any time, the role of a prisoner's friend?---No, I never.

You made no attempt, is that right?---No. The only question I asked him was who he wished to have with him.

Did you flagrantly refuse to explain to this young man the role of a prisoner's friend? Was that a deliberate decision on your part?---No, I never thought I had to explain to him about a prisoner's friend.

You are serious about that answer?---Yes.

You are quite serious about that answer?---Yes I am.

Now NM, did you ever speak to NM - you say the requested prisoner's friend - about the role of a prisoner's friend?---No, I did not.

Again that was something that you chose not to do, was it?---No, I thought my - Detective Coffey spoke to him in relation to that.

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Did you ask Detective Coffey what he'd said to Mr. M?---No.

Mr M is a person whose command of the English language probably - he probably has about 10 English words, doesn't he, all up?---That's may be your view but my view's a lot different than that. You can hold a conversation with Mr M.

Fluent in English, is he?---No, I wouldn't say that.

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Can I suggest to you that Mr NM, with great respect to him, has little or no command of the English language, will you accept that?---I couldn't agree with you. I couldn't disagree and I couldn't agree with you."

For approximately 20 minutes prior to the commencement of the record of interview, EM waited in a cell at the police station. The cell was not locked and the purpose of taking EM to the cell was to keep out of the sun. Detective Sergeant Chapman agreed no questions were asked during the record of interview to confirm if EM wanted to have his father present as a prisoner's friend. It is Detective Sergeant Chapman's evidence that EM chose his father, NM, to be with him during the record of interview. Detective Sergeant Chapman agreed he did not, during the record of interview with EM, succeed in having EM repeat the caution back to him in his own words in compliance with the Anunga Rules (*R v Anunga* 11 ALR 412). Detective Sergeant Chapman agreed that at the conclusion of the record of interview commencing 9.37 am on 13 May 1994, it

was not clear to him that EM understood the caution. He also agreed that by the end of the second record of interview conducted with EM that day, he had reason to be concerned that EM might not have understood the caution (transcript p7). Detective Sergeant Chapman stated that at the conclusion of the first record of interview, he had formed the view that EM had not told him the truth.

Outside the police station following the first record of interview, Detective Sergeant Chapman had said to EM in the presence of his father NM, words to the effect "I don't care what you tell me but I think you should tell your father the truth". EM and his father NM then spoke together in their own language. Shortly afterward, EM requested a second record of interview. I accept the evidence of Detective Sergeant Chapman that he did not expect his words to EM would result in EM seeking to make a second record of interview and making a confession to his part of the offence. I accept the evidence of Detective Sergeant Chapman that his words were not spoken as an inducement or to apply pressure. I find that the words spoken by Detective Sergeant Chapman were not with the intention of inducing a confession but rather an expression of his own concern that a young aboriginal boy was not being truthful. Detective Sergeant Chapman gave evidence that in his experience, aboriginal boys tell the truth and he found it unusual that EM should have told him a story that Detective Sergeant Chapman considered to be untruthful. I do not accept the defence submission that the words spoken by Detective Sergeant Chapman amounted to an improper exhortation and induced EM to shortly afterward participate in a confessional record of interview.

Detective Sergeant Chapman gave evidence he is aware of the Police General Orders 7.4 and 7.4.1 relating to a requirement that police explain the role of the prisoner's friend to the person who is the prisoner's friend. At the time, Detective Sergeant Chapman was under the impression Constable Coffey had done this and it was not till afterwards that he became aware such explanation had never been made to NM. In re-examination Detective Sergeant Chapman stated in his opinion EM was aware of his right to remain silent at the time he participated in the two records of interview with police.

Detective Constable Coffey gave evidence he attended the Oenpelli Police Station on 13 May 1994 in relation to a complaint of sexual assault. He spoke to EM's father NM and explained police wished to speak to EM about a complaint of sexual assault. NM appeared to understand them and responded in English. They attended upon another house, spoke to EM advising they wanted to interview him regarding a rape. EM agreed to accompany them to the police station. At the police station he had to wait a short time while police organised for his father, NM, to attend the police station as EM was a juvenile. When NM arrived, Detective Constable Coffey spoke with him and asked if he would sit with EM because EM was a juvenile and it was necessary to have a parent sit with him. The first record of interview commenced at 9.37 am and concluded 10.07 am. Detective Constable Coffey was aware that following the first record of interview, Detective Sergeant Chapman was outside the police station with EM and NM. Detective Sergeant Chapman then returned and stated they were going to conduct a second record of interview. The second record of interview commenced at 12.20 pm and concluded at 12.38 pm. Subsequently, Detective Constable Coffey became aware neither he nor Detective Sergeant Chapman had explained to NM the role of a prisoner's friend. Detective Constable Coffey did tell NM that he was required to be with EM as EM was a juvenile and NM could help EM if he had any trouble understanding the police officers.

NM gave evidence that he is the father of EM. NM sat in a room at the police station with his son EM while police asked a lot of questions about the incident with R.

NM gave evidence that when the policemen finished talking they went outside the police station. The older police officer (Detective Sergeant Chapman) spoke to them outside about EM. After the police officer spoke with them, NM and his son EM went back into the room in the police station and police asked EM further questions.

I accept NM's evidence that when he first arrived at the police station he was told to sit alongside EM because he was too young.

I find that no explanation was made by police to either Neville or EM as to the role of the prisoner's friend. NM was essentially there because police were complying with the requirements of the s25 *Juvenile Justice Act* that police shall not interview a juvenile in respect of an offence unless in the presence of a parent or other person as provided in the section. Police General Orders Q2 7.4 and 7.4.1 were not complied with in that it was not explained to NM or his son EM the role of the prisoner's friend. Mr NM is the father of EM, he is an aboriginal man who lives at Oenpelli. He has not attended school and has no formal education. His understanding and ability to communicate in English is limited.

NM has not been in trouble with police himself. He is not accustomed to giving evidence in Court. I accept he had great difficulty in understanding questions that were put to him in Court.

I do not consider he was ever told or comprehended the role of a prisoner's friend as distinct from being present as father of a juvenile being interviewed by police about an offence. There is no reason why he could not be present in both capacities but there is nevertheless a requirement for police to explain to the accused and to his father the role of a prisoner's friend. I am not satisfied police ever explained to EM the role of a prisoner's friend. Even accepting Detective Sergeant Chapman's evidence that EM nominated his father as the person to be with him, he cannot be said to be exercising a choice as to who will be his prisoner's friend if he does not know the role of the prisoner's friend. Police General Orders Q2 7.4 and 7.4.1 states as follows:

"7.4           Police should explain to the "prisoner's friend" his/her role, and ensure that he or she understands that role. The explanation and the "friend's" explanation back should be recorded as part of the overall record of interview. A prisoner's friend who does not understand his/her role is of no use. If Police cannot demonstrate such understanding, then this amounts to non-compliance, with the risk that the evidence will be excluded. This point is discussed further at paragraph 8.

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

Guideline No. 2 in *R v Anunga* 11 ALR 412 states as follows:

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

Guideline No. 3 in *R v Anunga* 11 ALR 412 states as follows:

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

Police General Orders are guidelines. A breach of the guidelines will not necessarily result in a record of interview being ruled inadmissible. Similarly, the Anunga Rules are guidelines. Failure to comply with the guidelines does not necessarily result in a record of interview being ruled as inadmissible.

However, in this particular instance, there are a number of matters that give rise to concern as to EM's understanding of his right to choose to remain silent or to speak to police. EM is a

juvenile aged 15 years. He has lived his life at Oenpelli. He is not a sophisticated or well educated aboriginal boy. He has attended school at Kormilda College. In his record of interview on 13 May 1994, EM states he reached grade 10 at college. It is not clear when he left Kormilda College. He is limited in his ability to understand or communicate in English. It appears he was no longer attending college or school at the time of this interview. His father who was with him during both records of interview, has the same limitations with respect to the English language. Having heard the whole of the tape recorded records of interview, and being assisted by the transcript of the record of interview, I am not satisfied EM understood the caution. I appreciate the difficulties for police in having an explanation of the caution repeated by the accused in his own words, however, I adopt with respect the words of Kearney J in *Jimmy Butler* No 1 57 A Crim R 455-456:

"The right of a suspect to remain silent is a right, not a privilege, and is to be protected as such; proof that a suspect understands that he has that right lies at the heart of the requirement that any admissions he made must have been made voluntarily before they are admissible in evidence. I note that in *Jungala* (unreported, Forster CJ, 21 March 1980) his Honour, in dealing with a case of non-observance of the Anunga guidelines, said:

"It is absolutely vital that persons being interrogated understand and are accorded the right to remain silent."

In *Beljajev* [1984] VR 657 at 662; (1984) 12 A Crim R 430 at 436, Stark J said:

"... the right to silence is a fundamental principle of the criminal law and is not to be overridden by any other so-called doctrine or other principle."

I respectfully agree. The right to silence is a statement about how our culture values the individual, and limits the power of the state."

EM did not repeat the caution back in his own words, neither was there any attempt to have NM assist with an explanation of the caution. There was a failure to comply with the Anunga guidelines and have EM explain the meaning of the caution in his own words and a failure to explain, either to the accused or his father, the

role of the prisoner's friend. I am not satisfied on the balance of probabilities that the accused understood the caution. In these circumstances I am not satisfied the accused exercised a choice whether to speak or remain silent.

Accordingly, the Crown have failed to satisfy me on the balance of probabilities that the records of interview conducted with EM were voluntary. I rule that the records of interview are not admissible on the trial of EM.