R v ANDERSON

In the Supreme Court of the Northern Territory of Australia

Martin J.

15, 16 & 21 October 1991 in Alice Springs

CRIMINAL LAW - evidence - confessions and admissions - Aboriginal - whether admission voluntary - neglect of Anunga rules with regard to caution and prisoner's friend - reliance on caution given a month before on different matter - absence of friend

CRIMINAL LAW - evidence - confessions and admissions - obtained by misrepresentation - "interrogatory lie" - whether question of voluntariness or a factor in exercise of discretion - misrepresentation may deprive confession of voluntary nature - onus on Crown to prove voluntarily made

CRIMINAL - evidence - confessions and admissions - obtained by misrepresentation - exercise of discretion - need for exceptional circumstances before exclude illegally obtained confession - "interrogatory lie" of sufficient seriousness - public policy

Cases referred to:

Cleland v R (1982) 151 CLR 1
Collins v R (1980) 31 ALR 257
Duke v R (1989) 63 ALJR 139
McDermott v R (1948) 76 CLR 501
R v Anunga (1976) 11 ALR 412
R v Ireland (1970) 126 CLR 321
R v Kwabena Poku (1978) Crim LR 488
R v Lee (1950) 82 CLR 133
R v Sharpe (1983) 33 SASR 366
Van der Meer v R (1988) 62 ALJR 656
Wendo v R (1963) 109 CLR 559
Williams v R (1986) 161 CLR 278

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 54 of 1990

BETWEEN:

THE QUEEN

AND:

BRIAN PETER ANDERSON

CORAM: MARTIN J.

REASONS FOR RULING ON VOIR DIRE

(Delivered 21 October 1991)

On Wednesday 16 October I ruled that certain confessional material relied upon by the Crown in this matter be excluded from evidence upon trial. I said I would deliver reasons later. That I now do.

The accused pleaded not guilty to two counts, the first being that on 26 March 1990 at Tennant Creek he unlawfully entered a building at 119 Ambrose Street, Tennant Creek with intent to commit an offence, the unlawful entry involving circumstances of aggravation, namely that the offence intended to be committed was a crime, unlawful carnal knowledge; the building was a dwelling house; the dwelling house was occupied at the time of the unlawful

entry and the unlawful entry occurred at night time. The second count was that at the same date and place he unlawfully assaulted a female person named in the indictment with intent to have carnal knowledge of her.

The application for the voir dire which related to statements made by the accused to investigating police and recorded on a micro cassette and later material contained in a typewritten record of interview was made by senior counsel for the accused upon the basis that when the confessions were recorded on the tape recorder it was done in the absence of any prisoner's friend and without the precautionary requirements of the Anunga Rules being complied with (see R v Anunga (1976) 11 ALR 412). As to the typewritten record, the objection was based upon defects in the caution and other aspects of the Anunga Rules not being complied with, but principally upon the basis that it was infected by the circumstances in which the first confession was obtained.

Sergeant Smith who was, at the time of the offence, a Detective Senior Constable stationed at Tennant Creek told of how he had had occasion to speak to the accused in relation to another matter, and upon completion of that he asked the accused whether he was responsible for the assaults alleged in this case. The accused replied that he was not. That conversation took place about a month prior to the date upon which the confessional material in

question here was obtained. I do not detail what was said by the Sergeant and the accused on that former occasion suffice it to say that upon the face of it the manner in which the caution was then administered and the accused's responses when questioned as to his understanding of the caution give every indication that the accused was aware of his right to remain silent. The caution accorded pretty well with the requirements of the Anunga Rules and it was given in the presence of a friend, again in accordance with those Rules.

On that occasion a blood sample was also obtained from the accused and the Sergeant was informed by a forensic biologist that blood on a sheet at the scene of the crime could have come from the accused. Armed with that information the Sergeant sought out the accused again, and after conveying him to the police station at Tennant Creek he immediately opened the subject of the blood evidence. The conversation took place in the presence of a Constable Bahnert and the first portion was not recorded in any way. According to the Sergeant the following conversation took place between him and the accused: "Brian do you remember that I asked you about an attack in Ambrose Street?", to which the accused replied "Yes" and he then said "Well we've carried out a blood test, and the blood test indicates that it was you, did you do it?" and the accused replied "Yes". The Sergeant then said: "Why didn't you tell us before, were you frightened?" and the accused answered "No". At that

time the tape recorder was turned on. The tape recorder was what is commonly called a micro cassette and was placed on a table between the accused and Sergeant Smith while the conversation proceeded. The tape recording itself is quite unsatisfactory in that although what was said by Sergeant Smith is fairly clear, little if any of the accused's responses are able to be heard. According to Sergeant Smith, that was because he was speaking clearly and the accused was speaking softly. He, however, was able to obtain a transcription of what he said was on the tape recorder by wearing earphones, and it was provided. According to that transcript and the Sergeant's evidence verifying it, the accused made a number of confessions as to being at the subject premises on the day in question, of his movements through the house and his assault upon the complainant. The woman resisted his assault and a child came into the room whereupon the accused apparently desisted and left. At the conclusion of that part of the record the Sergeant said "Are you going to show us the house, do you know where the house is?". The accused replied "Yes". The Sergeant told him he did not have to show him; "You know that don't you?" and the accused is said to have nodded, whereupon the Sergeant said to him "You understand you remember like before when we spoke, you don't have to talk to me unless you want to hey? Are you happy to me hey?". The accused is again recorded as having nodded, the Sergeant saying: "You want to talk to me" and the accused replying "OK", the Sergeant going on: "You don't have to hey" and the

accused replying "Yes". The Sergeant then said "That's right. But you want to talk to me, are you happy to be with me now?" and the accused again said "Yes". They then departed the police station and travelled in a motor car in which other attempts were made to record what was said between the Sergeant and the accused, but the evidence shows that the Sergeant was directed to the house where the attack had occurred.

Upon returning to the police station arrangements were made to have a person nominated by the accused to be his friend and sit with him. The statement by that person, Mr Stokes, and a transcript of a tape recording in which Sergeant Smith explained to Mr Stokes, in the presence of the accused, the role which he was to play, show he was a suitable person and appeared to understand the function he was to fulfil. The typed record of the interview in question and answer form has been signed on all pages by the accused and his friend, Mr Stokes, and Constable Bahnert. After a number of preliminary questions going to the presence of Mr Stokes, establishing matters personal to the accused and that he spoke the English language, Sergeant Smith then administered a caution and asked the accused as to his understanding of it in the following way:

> "27. Before I proceed any further I am advising you that you do not have to answer any of my questions unless you wish to but if you do answer any of my questions I will type your answer down on this typewriter and your answer, together with my question, may later be given before a Court as

evidence. Do you understand this caution.

A. Yes.

28. Do you have to answer my questions.

A. No.

29. What will I do if you answer my questions.

A. You will type it down.

30. Having typed it down onto this paper using this typewriter what may later happen with what has been typed.

A. Court.

31. What may happen at the Court.

A. The Judge will read it out.

32. What might he do after he read it out.

A. He find me guilty."

The questioning proceeded and again the accused made a number of admissions going to the offences.

The Sergeant's evidence was that throughout the morning of 28 May when he was speaking to the accused the accused's demeanour was calm though slightly apprehensive and he was bright, alert and fully awake. There was no difficulty in conversing in the English language, although it appears from what the accused told the Sergeant that he had had only a modest formal education to year 8. His degree of academic success is not disclosed.

At the conclusion of the formal record of interview the accused was charged and later taken before a

Court.

When cross-examined Sergeant Smith acknowledged that he wished to speak to the accused again about this matter because of the results which had been obtained from the blood found on the sheet and the blood taken from the accused. He said in answers to direct questions in cross-examination that he was anxious not to mislead the accused, to be quite fair with him and not to tell him any lies, and that at the time he spoke to the accused on that occasion his information was that the blood on the sheet could have come from the accused. The accused's blood and the blood found on the sheet were of the same type, but that does not necessarily mean that the blood on the sheet in fact had come from the accused. The cross-examination continued:

> "Were you accurate with him? ... Yes, Your Honour.
>
> Did you say to him: "The results that we have show that the blood on the sheet could have come from you"? ... I think I may have even said: "That was your blood". I may have been more specific.
>
> If you'd said that, it was a lie wasn't it, to your knowledge?
>
> That was a lie wasn't it? ... Certainly it was not deliberately meant to be, Your Honour.
>
> No, all right. It was an accidental lie was it, not deliberate? ... I believed what I said, Your Honour.
>
> Yes, you believed it was his. You believed it was his blood. Is that right? ... I should phrase this correctly. It was an interrogatory lie, Your Honour.
>
> I'm sorry? ... I'm misleading the court. I didn't mean to intentionally do it. It was an - if that

> is a lie, it was a lie. I said to him it was his blood and I certainly - what Joy Kuhl had said to me is "it could be his blood", and I was aware of that, Your Honour. (Joy Kuhl was the biologist).
>
> It was an attitude, or a decision, that you as an interrogator made because you thought you might that way derive from him an account of what took place? ... Yes, Your Honour.
>
> ...
>
> ... All I'm asking you about is every now and again, when you think it's necessary, is the interrogatory lie a proper way of questioning, as far as you are concerned? ... I would use it if I thought it would work, Your Honour.
>
> Yes, that is that you would get a confession. That right? ... Well the truth, not necessarily a confession, Your Honour. It could be the other way.
>
> ...
>
> You didn't believe what you said was true? ... That is correct."

Leaving aside for the moment the "interrogatory lie", I am not satisfied that the accused's admissions made to Sergeant Smith immediately upon going to the police station, the bulk of which was recorded on the tape recorder, were made voluntarily by the accused in the legal sense. Although the accused may have been somewhat more sophisticated than many full blood Aboriginal people it was not appropriate for the Sergeant to purport to rely upon the caution given a month before in relation to another matter as being an adequate caution for the purposes of this matter. There was no attempt made to secure the accused's understanding of the caution and that he was free to choose whether he would speak with Sergeant Smith about this matter

or not. Further, in the exercise of discretion, I would rule the confessions then made inadmissible because of the failure of the police to have a friend of the accused present during that interrogation. It was not as if they had simply stumbled across him during the course of or immediately after the commission of a crime and he had blurted out his involvement prior to any opportunity to obtain the attendance of such a person. This meeting between the police and the accused had been set up some day or two beforehand, and according to Sergeant Smith, the accused was expecting them to go and collect him from the camp where he was then living and bring him back to the police station at Tennant Creek. Armed with the information he then had regarding the matching of the blood from the accused with that on the sheet, and given he intended to interrogate the accused further about the matter, the Sergeant should have taken the clearly available course of complying with the guidelines regarding attendance of a prisoner's friend.

The formal typed record of interview in question and answer form, however, falls into a different category. It is not challenged by the accused in any fashion other than by his counsel saying that it was tainted by what had gone before, and that once the accused had locked himself into a position during the earlier conversation he necessarily continued to show his cooperation and make further inculpatory statements. I am not satisfied that

that is the case. He had with him at the time that interview was conducted a person who on all the evidence he trusted and he understood that person's function. He was given a formal caution, and although the Anunga Rules may not have been strictly complied with in relation to the Sergeant satisfying himself that the accused understood his rights, in all of the circumstances I consider that that statement was made voluntarily and there is no good reason to reject it on any discretionary basis.

However, the "interrogatory lie" cannot be left out of account. The accused was confronted with an assertion made by the Sergeant of police to the effect that it was the accused's blood that had been found on the sheet at the scene of the crime, a factor which could well have caused the accused to consider that his best interests may well lie in assisting the police further with their enquiries, which he promptly did. Nothing occurred between the time he originally denied having been involved in this particular matter until the time he commenced making admissions, other than the lapse of time and the false statement made by the Sergeant. Such a situation gives rise to the question of whether an admission in those circumstances gives rise to a voluntariness issue, where the Crown bears the onus or whether it is something which may be taken into account in the exercise of the Judge's discretion to exclude evidence on other grounds, the burden of which falls upon the accused. In The King v Lee (1950) 82 CLR 133

the Court at p. 144 said that any one of a variety of elements will suffice to deprive a statement of its voluntary character. Those elements are not restricted to things such as duress, intimidation, sustained or undue insistence or pressure or inducements such as a threat or promise held out by a person in authority. At p. 149 their Honours referred to what was said by Dixon J. in McDermott (1948) 76 CLR at p. 512 "... that to be admissible a confession must be voluntary, a principle the application of which is flexible and is not limited by any category of inducements that may prevail over a man's will". A not dissimilar situation arose in R v Kwabena Poku (1978) Crim LR at 488. The defendant was charged with sexual assault and save for the evidence of opportunity the only evidence against him consisted of verbal admission and a written statement under caution amounting to a full confession. He had originally denied the offences, but the confession immediately followed suggestions by a police officer that clothing of the victim was stained with semen and a forensic examination would undoubtedly show the semen to be that of the defendant. There was no forensic evidence. It was clear that in making the suggestion of the likelihood of such incriminating material the police officer had, albeit unintentionally, misled the defendant. His Honour Mr Justice Melford Stevenson held that, accepting that the police officer had made such suggestions to the defendant in good faith, the defendant had nevertheless made the admissions when under a material misapprehension as to the

true fact. Admissions made in such circumstances cannot be said to be voluntary and are not admissible, he ruled. In Cleland v The Queen (1982) 151 CLR 1 at p. 15 Justice Murphy said that the voluntariness of a confession is suspect if it is obtained in a variety of circumstances including "if anything suggests inducement by threats, promises, false representations or other trickery" and at p. 18 Justice Deane included improper conduct on the part of law enforcement officers as a circumstance of relevance on the question of whether a confession was voluntary. Three cases are referred to in an article of the Criminal Law Journal (1979) at p. 156 involving the common feature that the main evidence for the prosecution was a confession that was made by the accused as a result of a false representation on the part of the police. Reference is made to the fact that in two of those cases, Toiamia, in the Papua New Guinea National Court of Justice, Wilson J., and B v Linnane, in the Supreme Court of South Australia, Zelling J., it is suggested that an untrue representation may render the confession involuntary and thus inadmissible.

A false misrepresentation as to an important fact linking an accused to the commission of a crime, not recognised by the accused as being false, may well be an element depriving a confession of its necessary voluntary nature. The onus is upon the Crown to prove on the balance of probabilities that the confessional statements made by the accused after being confronted with the false

representation were voluntary in the legal sense. I am not satisfied that they were. It is as likely as not that the accused's response and continuing admissions were made in the light of false representation because he considered that things might go better for him if he were to cooperate rather than that he decided to make his confession without regard to the purportedly strong police case. Taking the traditional elements which tend to rob confessions of voluntariness, a false representation on a critical matter such as this would amount to undue pressure upon the accused and thus his confession be excluded.

As to the exercise of the discretion, this is not a case where the question is whether it would be unfair to the accused to use his statement against him (per Wilson, Dawson and Toohey JJ. in Van der Meer v The Queen (1988) 62 ALJR 656 at 666) "Unfairness in this sense is concerned with the accused's right to a fair trial, a right which may be jeopardised if a statement is obtained in circumstances which affect the reliability of the statement". It is rather a question as to whether for reasons of public policy the evidence should be rejected, although there is a concomitant unfairness to the accused should the material be admitted. This is not a case in which a clear distinction could be made between these two elements. Even if there were a finding of voluntariness, that would not exclude the exercise of the discretion to exclude evidence by reason of unfairness or public interest (per Toohey J. in Duke v The

Queen (1989) 63 ALJR 139 at 147). This is not a case in which the circumstances in which the confession was made render it unreliable and thus unfair for it to be given in evidence upon the accused's trial. To the contrary, the false representation made by Sergeant Smith as to the accused's connection with the crime put him in a position where he may well have considered that it would be in his best interests to tell the truth. In Williams v The Queen (1986) 161 CLR 278 at 286 Gibbs CJ. said that the majority of the High Court made it clear in Cleland v The Queen (1982) 151 ClR 1 that: "It will only be in the most exceptional case that a voluntary confession, which would not be unfair to admit against the accused, will be rejected on the grounds that it was illegally obtained". No doubt the same principle applies where the confession has been obtained by improper means (per Dixon CJ. in Wendo v R (1963) 109 CLR 559 at 562). In Collins v R (1980) 31 ALR 257 at 317 Brennan J. expressed the same view. The improper conduct here was not technical or slight nor was it an isolated incident. What Sergeant Smith said to the accused about the blood was deliberate, to his knowledge untrue and in relation to a matter of substantial significance. He admitted that he had used the technique on other occasions. This is a case in which the improper conduct complained of is of sufficient seriousness and frequency as to warrant "sacrificing the community's desire to see the guilty convicted in order to express disapproval of, and to discourage, the use of unacceptable methods in achieving

that end" (Dawson J. in Cleland at p. 34). The circumstances are exceptional and called for the exclusion of the confessional material. In another case involving positive misinformation by police to an accused person Cox J. in The Queen v Sharpe (1983) 33 SASR 366 at 367 said that the cases in which it can be defended will be rare. I agree, although there may be questions of degree.

It is well to be reminded at all times of the comments of the then Chief Justice in R v Ireland (1970) 126 CLR 321 at 335, where, after referring to the discretion said: "In the exercise of it, the competing public requirements must be considered and weighed against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price".