

PARTIES: THE QUEEN
v
JIMMY MARRMOWA

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: Supreme Court of the Northern Territory
Exercising Territory Jurisdiction

FILE NO: 199/95

DELIVERED: 20 November 1996

HEARING DATE: 2/9/96

JUDGMENT OF: Thomas J

CATCHWORDS:

Criminal law and procedure - evidence - admissibility of record of ainterview - application of Anunga Rules - role of prisoner's friend - voluntariness of record of interview

Evidence Act 1994 (NT) s26L

Police Administration Act 1994 (NT) s140

R v Anunga (1976) 11 ALR 412 applied

R v Collins (1980) 31 ALR 257 applied

REPRESENTATION:

Counsel:

Crown: R.P. Noble
Defence: C.D. Howse

Solicitors:

Appellant: NAALAS
Respondent: DPP

Judgment category classification: C
Judgment ID Number: tho96012
Number of pages: 7

(tho96012)

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

No. SCC No. 199 of 1995

BETWEEN:

THE QUEEN
Appellant

AND:

JIMMY MARRMOWA
Respondent

CORAM: THOMAS J

REASONS FOR RULING

(Delivered 20 November 1996)

The accused was granted leave to bring an application pursuant to s26L of the *Evidence Act* challenging the admissibility of a record of interview made by the accused on 19 August 1994.

On 3 September 1996, I ruled that the record of interview of the accused was not admissible on his trial and that I would publish reasons at a later time. The reasons for the ruling are as follows:

The two challenges to the admissibility of the record of interview are:

1) The administration of the caution is in breach of guideline number 3 of the Anunga Rules and it is not demonstrated in the record of interview that the accused understood either that he had a right to remain silent or that the tape could be used as evidence against him. Accordingly, the record of interview was not made voluntarily.

2) The person selected by the accused to be his prisoner's friend was a witness in the case and accordingly not an independent person as required under the Anunga Rules. In addition, the role of prisoner's friend was inadequately explained to the person selected. For these reasons the confession subsequently obtained was not voluntary.

The record of interview was video taped and audio taped. However, there was a malfunction and the video tape cannot be played. The audio tape of the record of conversation was played to the Court (Exhibit 1) and a transcript of the audio tape made available to the Court for use as an aide memoire.

The record of interview was conducted by Constable Potts with Constable Gilmour present. Constable Potts agreed that the accused was a bush aboriginal who had difficulty with English. Constable Potts also agreed the accused is a prime candidate for the application of the Anunga Rules.

The accused was 22 years old at the date of the alleged offence. In the record of interview he states he had been to school for three years. He was not asked what level of schooling he reached or his age when he left school. At

the time of the record of interview he was unemployed. When asked who he wanted as a prisoner's friend he nominated Tony Djandjul. Constable Potts arranged for Tony Djandjul to be present as the prisoner's friend. In the course of the record of interview Constable Potts explained the role of the prisoner's friend as follows:

“POTTS: Can you tell me why you're here in the interview room though. Do you know why you are here? Okay just to let you know you've been um asked by Jimmy to be here and be and be (sic) his friend to um, um make him feel comfortable when we speak to him here today. Do you understand that?

DJANDJUL: Yeah.

POTTS: If ah Jimmy has anything that he doesn't understand you are perfectly entitled to um talk between the two of you if you're not quite a hundred percent sure what I'm asking. Okay, do you understand what?

DJANDJUL: Yeah.”

In the record of interview the caution was administered as follows:

“POTTS: Now before I ask you any questions about these matters I have to caution you that you don't have to talk to me if you don't wish to, but if you do say anything to me everything that we say is going to be recorded here and it may later go to court in front of a magistrate or a judge, do you understand that?

MARRMOWA: Yeah.

POTTS: Now can you tell me in your own words what you understand by what I've told you?

MARRMOWA: (No reply)

POTTS: Okay Jimmy, if I ask you a question and you don't wish to answer it, what are you going to say to me?

MARRMOWA: I don't know.

POTTS: Hum um. Okay I'll explain the caution to you again, right, the law says that when you speak to police you don't have to answer any of their questions that they ask. Okay, do you understand that?

MARRMOWA: Yeah.

POTTS: Right now if you do ask, or answer any of my questions, right, everything will be recorded on the machine here, and it may later go to the court. Do you understand that?

MARRMOWA: Yeah.

POTTS: Okay now can you just tell me in our own words what I just told you?

MARRMOWA: You just told me that if you ask me any questions that I (sic).

POTTS: Okay Jimmy, do you have to talk to me?

MARRMOWA: Yeah.

POTTS: I want you to understand you don't have to talk to me, right, if I, if I say something, if I ask you a question, you don't have to give me an answer. Do you understand that?

MARRMOWA: Yeah, yeah.

POTTS: Okay and if you want to not answer a question all you have to do is say to me "I don't wish to answer that". Do you understand that?

MARRMOWA: Yeah.

POTTS: Okay now what I want to know from you is if I ask you something, and you don't want to answer, what are you going to say to me?

MARRMOWA: I wish to not answer.

POTTS: Okay do you know where everything is going to be recorded here today?

MARRMOWA: Yeah.

POTTS: Can you point to the to the (sic) machine that's going to record our conversation?

MARRMOWA: Yes.

POTTS: Okay and you know where all those tapes are going to go after today?

MARRMOWA: Yeah.

POTTS: Where?
MARRMOWA: Court.

POTTS: Okay. Okay now it's also going to be um recorded on something else that's in this room. Can you point to that machine?
MARRMOWA: Camera.”

Constable Potts gave evidence that prior to commencing the record of interview he had a conversation with Mr Marmowa about the prisoner's friend. He also had a conversation with Mr Djandjul about the role of the prisoner's friend. Neither of these conversations were recorded. Constable Potts agreed that Police Standing Orders stipulated that such conversation be recorded. Constable Potts also agreed that under the provisions of Police Standing Orders Q29 police are to proceed in the following manner:

Prior to commencing an interview in the presence of the prisoner's friend, police are to explain to the chosen friend in simple terms (1) the reason for the interview; (2) the form the interview will take; (3) brief particulars of the alleged offence; (4) that the friend has been chosen by the suspect to sit with the suspect in a supporting role; (5) the right of the friend to assist or support the suspect with help or clarification at any time, if it appears necessary; (6) the right of the friend to talk to or otherwise communicate with the suspect at any time; and (7) the right of the suspect to communicate with a friend at any time for advice for any reason.

Constable Gilmour gave evidence that he was present when Constable Potts spoke to Tony Djandjul prior to the record of interview with the accused.

Constable Potts had told Tony Djandjul the reason for the interview was in relation to the accident. Constable Gilmour could not recall the exact conversation. Constable Potts was also unable to recall the details of the conversation he had with Tony Djandjul as to the role of the prisoner's friend. Tony Djandjul gave evidence that police had asked him to sit with Jimmy. He could not remember what the police said to him. He said he did not know what he was doing sitting beside Jimmy. He gave further evidence that the policemen were fair to Jimmy and treated him well.

I am not satisfied that when Tony Djandjul sat in with the accused as the prisoner's friend that Tony Djandjul knew or understood the role of the prisoner's friend.

With respect to the administering of the caution the relevant provision s140 of the *Police Administration Act* provides as follows:

“140. PERSON TO BE WARNED AND GIVEN OPPORTUNITY TO INFORM FRIEND OR RELATIVE OF PERSON'S WHEREABOUTS

Before any questioning or investigation under section 137(2) commences, the investigating member must inform the person in custody that the person -

- (a) does not have to say anything but that anything the person does say or do may be give in evidence; and

.....”

I am satisfied that Constable Potts used the right words in administering the caution and that he was not required to say words to the accused that the

evidence could be used **against** him in Court. However, I am not satisfied the accused understood he had a choice either to speak or remain silent. He is a bush aboriginal with a limited understanding of English. I am not satisfied on the balance of probabilities the accused understood the caution. I am not satisfied either he or the prisoner's friend, Tony Djandjul, knew the role and purpose of the prisoner's friend. In these circumstances the prisoner's friend was virtually ineffective and of little assistance to him. For these reasons the Crown have not satisfied me on the balance of probabilities that the admissions made were voluntary in the sense that the accused understood he had a right to decline to answer the police officer's questions. The onus is upon the Crown to prove on the balance of probabilities that admissions made in a record of interview are voluntary (*R v Collins* 31 (1980) ALR 257 Brennan J at 318).

Accordingly, I ruled the record of interview was inadmissible on the trial of the accused.