

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

NO. 113 of 1993

BETWEEN:

THE QUEEN

Plaintiff

AND

LOUIE RILEY

Defendant

CORAM: MILDREN J

**REASONS FOR DECISION**

(Delivered 23 June 1994)

This is an application to rule on the admissibility of a confessional statement recorded on video tape and made to the police on 13 March 1993. After hearing evidence and submissions, and viewing the video tape of the interview, I held that the statement was not voluntary and thus inadmissible, and that I would publish my reasons at a later time. I do so now.

The accused, of Aboriginal descent, was charged with unlawfully assaulting Ruth Benson with intent to have carnal knowledge of her, contrary to s.192(1) of the Criminal Code. The charge included one circumstance of aggravation in that the accused thereby had carnal knowledge of Ruth Benson (s.192(4)).

The facts which the Crown intended to prove involved an incident on the evening of 12 March 1993 which occurred a short distance from the Borroloola Hotel. Ruth Benson had been drinking at the Middle Bar of the hotel. At about 10.30 p.m. Ruth left the grounds of the hotel. She was very intoxicated. About 30 metres from the hotel Ruth was assaulted and allegedly raped. On 28 February 1994, Jacob Riley pleaded guilty to the same charge and circumstance of aggravation with which the accused was charged. The accused, Louie Riley, was alleged to have assaulted Ruth Benson either prior to or following or both before and after his non consensual act of intercourse with her. Jacob Riley was alleged to have had non consensual intercourse with Ruth Benson following the assault and the act of sexual intercourse by Louie Riley. After performing the sexual act upon Ruth Benson, Jacob Riley escorted Ruth Benson back to Yanyula Camp, otherwise known as Splinter Woody's camp, where Ruth resided. Shortly after arriving back at camp, Ruth claimed she had been raped and punched and kicked by Louie and Jacob Riley. As a result of the claims by Ruth the police were notified.

The accused underwent four separate interviews. The first occurred at 1.41 p.m. on 13 March 1993 when he was briefly interviewed, then arrested and taken into custody. At 7.40 that same day he was again interviewed briefly when it was

ascertained that the accused wanted a friend, Roy Hammer, to be present when he was to be further interviewed. The third interview was conducted at 9.37pm on 13 March 1993. A fourth interview occurred at 8.54 a.m. on 15 March 1993. It is the third interview which was challenged.

Mr Algy, for the accused, submitted that the record of interview was inadmissible because it was not given voluntarily by the accused. Because of the circumstances generally, and the manner in which the interview was conducted producing the answers given, he also submitted that it would be unfair to the accused to admit it into evidence and that I should exercise my discretion to exclude it.

As I found the interview was not given voluntarily, there is no necessity to discuss the question of my discretion.

Mr Algy submitted that in relation to the voluntariness of the statement, the customary caution was never properly administered to the accused, resulting in the accused demonstrating that he at no stage understood his right to remain silent. Mr Algy further submitted that even if I found that in effect the accused did understand the caution, then the presence and the involvement in the questioning of Roy Hammer destroyed the effect of the caution. Mr Algy submitted that Mr Hammer's involvement and presence constituted a positive inducement upon the accused to answer the questions put to him.

Mr Algy submitted that by employing the assistance of Mr Hammer, the police

were in effect employing Mr Hammer as their agent and that he was not present for the benefit of the accused. The effect was that Mr Hammer instructed the accused to tell the police what happened rather than act in the true role of a prisoner's friend. Mr Algy submitted that Mr Hammer, a person tribally in authority over the accused, was a person in authority to the accused and from this position he induced the accused to answer the police questions.

The interview was conducted mainly by Senior Constable James Brown. The accompanying police officer was Detective Senior Constable Charles Farmer, who during the latter stage of the interview also questioned the accused.

The interview commenced with the police officers identifying themselves and requesting Mr Hammer to identify himself. Neither Constable Brown nor Constable Farmer suggested at this stage that Mr Hammer was there in the capacity of a prisoner's friend. There was no evidence as to how the police invited Roy Hammer to attend the interview.

Mr Hammer stated at the outset of the interview that he was the President of the Borroloola Community Council and was the accused's grandfather.

The interview then proceeded as follows:

BROWN: Grandfather. Could you state your full name, Louie?

RILEY: (no answer.)

BROWN: Tell me your full name, please.

RILEY: (no answer - long pause.)

BROWN: What - what - what do people call you? What's your name?

RILEY: Louie.

BROWN: Louie - what's your other name, Louie? What's your family name?

RILEY: (no answer - long pause.)

ROY HAMMER: Louie Riley he talk.

At this stage Mr Hammer leaned across from his chair and physically nudged the accused in the shoulder area.

The interview continued:

BROWN: Is that right, Louie - Louie Riley?

RILEY: Mmm.

HAMMER: Speak up.

BROWN: You've got to speak up hey.

RILEY: Mmm.

Constable Brown then proceeded to ask the accused his age, date of birth and place of birth, which elicited monosyllabic answers.

The interview continued:

BROWN: Where do - where do you normally live? Where do you live?

RILEY: (A long pause, followed by an inaudible answer.)

HAMMER: Roper.

RILEY: At Roper.

BROWN: At Roper, hey?

RILEY: Yeah.

BROWN: At Roper - at Ngukurr itself?

HAMMER: Ngukurr, yeah.

RILEY: (A long pause, followed by) "Mmm".

Constable Brown continued to question the accused, asking if he worked, what he did, what school he attended, and what grade he reached. These questions were answered by the accused monosyllabically.

The interview continued:

BROWN: Can you - can you read and write?

RILEY: Nah.

BROWN: Can you - can you read? Can't read English at all?

RILEY: Nah.

BROWN: Little bit or not?

RILEY: No.

BROWN: Can't read.

RILEY: No.

BROWN: Can you write English? Can you write with a pen?

RILEY: Nah.

BROWN: Can you understand me when I speak to you?

RILEY: Yeah.

BROWN: Is that yes?

RILEY: Yes.

BROWN: You have to speak up - it's on the tape.

HAMMER: (Raised voice) You're gonna have to speak up, Brian - ah - Louie.

BROWN: So you - you can understand me okay when I speak to you, Louie?

RILEY: Yeah.

BROWN: You understand what I'm saying?

RILEY: Yeah.

BROWN: Alright. If you have any trouble understanding me you can ask Roy here to give you some help. Alright.

RILEY: Yeah.

BROWN: He's your grandfather.

RILEY: Yeah.

BROWN: And 'cause you're only sixteen.

RILEY: Mmm.

BROWN: He's here to help you. Do you understand that?

RILEY: Yeah.

BROWN: Anytime while I'm speaking to you, or Rob Farmer here speaking to you, and you can't understand us, you ask Roy - alright?

RILEY: Yeah.

BROWN: He's here to help you. Do you understand that? Roy, as you can tell, Louie's a bit shy, mate.

HAMMER: Yeah.

BROWN: If you feel he doesn't understand something.

HAMMER: Mmm.

BROWN: From either of us you feel free to ---

HAMMER: Yeah - alright.

BROWN: --step in.

HAMMER: Righto.

BROWN: You happy to have Roy sitting here - sit here while I speak to you --

RILEY: Yeah.

BROWN: --- about this?

RILEY: Yeah.

The accused was then questioned regarding his health that evening and whether he had any tiredness or ill health that would prevent the interview from continuing.

The interview continued thus:

BROWN: How - how do you feel now, Louie?

RILEY: Good.

BROWN: Good.

RILEY: Mmm.

BROWN: You feel alright to talk to us or?

RILEY: Yeah.

BROWN: You don't wanna - you're not tired or sick or anything?

RILEY: Mmm-mmm

BROWN: No.

RILEY: Nothin'.

BROWN: Nothing. Before I started asking you - before I started asking you these questions did you see me take these tapes out of these packets?

RILEY: Yeah.

BROWN: They brand new tapes ---

RILEY: Yeah.

BROWN: --- is that right? And I put these tapes in this machine here.  
Did you see me do that?

RILEY: Yeah.

BROWN: Did I turn that machine on?

RILEY: Yeah.

BROWN: Alright. And I explained to you before that this machine is -  
um - taping what we say on that cassette hey. Do you  
understand that? Did you understand?

RILEY: Yeah.

BROWN: You're gonna have to speak up, mate.

HAMMER: You have to speak up when him ask you question.

BROWN: You see that video camera - I told you about that video  
camera too, did I?

RILEY: Yeah.

BROWN: And what's that do?

RILEY: Take the pi - picture.

BROWN: That's right. So you understand that the cassettes are going?

RILEY: Yeah.

BROWN: They're gonna record your voice or whatever you say.

RILEY: Yeah.

BROWN: And that video camera up there's gonna record your picture -

right.

RILEY: Yeah.

BROWN: When you talk to us. Do you understand that?

RILEY: Yeah.

BROWN: Right. You understand that you're under arrest at the moment?

RILEY: Yeah.

BROWN: You're not - you're not free to go.

RILEY: Yeah.

BROWN: You understand that?

RILEY: Yeah.

BROWN: So you're in Police Custody at the moment.

RILEY: Yeah.

BROWN: You understand?

RILEY: Yeah.

At this stage of the questioning there was no attempt to assure the accused that whilst he was not free to leave, being in police custody, he was nevertheless not compelled to answer questions.

The interview continued thus:

BROWN: Right. I want to ask you some questions, Louie, about this complaint we got from this Ruth Benson last night. She said that she was assaulted and raped by you and one other person.

RILEY: Mmm.

BROWN: Do you understand what I want to speak to you about?

RILEY: Yeah.

BROWN: What do I want to speak to you about? You tell me.

RILEY: The rape.

(This answer tended to indicate the accused understood what the questioning involved.)

BROWN: When was that?

RILEY: Last night.

BROWN: Alright. Before I ask you - before I ask you some of those questions, I'm gonna first tell you that you don't have to answer any of my questions if you don't want to. Do you understand that?

RILEY: Yeah.

BROWN: What did I just say?

RILEY: Not to answer everthin' you hear.

BROWN: Yeah - you don't have to answer it if you don't want to.

RILEY: Yeah.

BROWN: You understand?

RILEY: Yeah.

BROWN: You tell me what I mean by that?

RILEY: (no answer - long pause.)

BROWN: I - I'm not gonna force you to answer any questions - alright. You only answer those questions of your own free will. You don't have to answer them if you don't want to. Do you

understand?

RILEY: Yeah.

BROWN: Do you have to answer these questions?

RILEY: No.

BROWN: No?

RILEY: (No answer.)

BROWN: It's up to you, alright?

RILEY: Yeah.

The words used by the accused in reply to the question "What did I just say?", indicate that probably the accused understood his right of silence. When Constable Brown again asked "You tell me what I mean by that", the accused either could not or would not answer the question. However, Constable Brown wanted to make sure, and the interview continued:

BROWN: Do you um - Roy, do you think he understands that, mate?  
Can you just have a - explain to him, please.

HAMMER: Louie, him asking you if - ah - if that Constable ask you if  
any word you want to talk like - you willing to talk like, hey?  
Louie, come on, don't be frightened. You gonna talk?

Mr Hammer's tone of voice during this was cajoling, and persuasive.

RILEY: What about?

HAMMER: Well, that question him gonna ask you about that lady.

BROWN: Yeah, you don't - you don't have to - don't have to answer me  
if you don't want to, Louie. It's up to you - alright - if -  
whether you talk to me or not. Alright. I'm not gonna force

you or threaten you or anything like that. It's up to you. You answer - you only have to answer of your own free will. Do you understand?

RILEY: Yeah.

BROWN: You sure?

RILEY: (No answer - long pause.)

BROWN: Alright. If I asked you a question and you don't want to answer it, you don't have to. It doesn't worry me. Alright?

RILEY: Yeah.

BROWN: So, if - if you want to tell me that's fair enough - that's up to you. But if you don't want to tell me, that's up to you also. It's not - doesn't worry me. You got - it's your own free will whether you talk to me about this trouble or not. You understand?

RILEY: Yeah.

BROWN: Do you have to answer my questions?

RILEY: (No answer - long pause.)

BROWN: Do - do you understand what I'm saying, Roy, about?

HAMMER: Yeah. If him ask you a question you - you reckon you tellin' him straight. Hey?

RILEY: 'Bout that thing?

HAMMER: 'Bout that thing last night. Him ask you any questions, you tell him truth or what?

RILEY: Mmm. Yeah, tell him straight out?

HAMMER: Yeah.

During the above discussion with Mr Hammer, the accused was clearly puzzled and the questions he asked were in an incredulous tone. The accused then looked at the camera, still with a puzzled expression on his face.

The interview continued:

BROWN: You don't - you don't have to tell me about it if you don't want to - alright. You - you understand what I'm saying, Louie? No one's forcing you to answer these questions, alright? You understand?

RILEY: Yeah.

BROWN: Do you understand?

RILEY: (No answer - long pause.)

At this stage of the interview the questioning was taken over by Constable Farmer. In cross-examination, Constable Farmer conceded that he thought that Mr Hammer had been unable to get the message across to the accused that he was not obliged to answer questions and that his (Constable Farmer's) questioning was a further attempt to explain to Riley the effect of the caution.

FARMER: Speaking is - um - Senior Constable Farmer. I just - so we're clear on this Louie, I want you to understand that this is a choice you have - alright? You have a choice here today. You can - if you want to, you can talk about it. Alright? Do you understand that?

RILEY: Yeah.

FARMER: But if - if you don't want to talk about it, you don't have to

talk about it. No one is going to force you. Okay? It's up to you. You decide what you want to do.

RILEY: (long pause). I down the pub - ah - when the pub been closed.

FARMER: Yeah - yeah.

RILEY: Yeah.

FARMER: Just - just hang on a moment, Louie. We're just - we just have to make sure that you understand what your rights are here today - okay?

RILEY: Yeah.

FARMER: We want - want you to - to - we want to be sure and we want to be fair to you. We want to make sure you understand what - what rights you have here - okay? We want to be - we want to be sure that you know that if you - if you don't wanna say anything you don't have to say anything. Okay? You can - you can just be quiet if you want to. You don't have to say anything. Okay?

RILEY: Yeah.

FARMER: Or you can say to us "I don't want to say anything to you" and we'll - we'll stop this. Alright? It's up to you. So you - you - you make the choice of what you want to do.

RILEY: (No answer.)

It was obvious to both Constables Brown and Farmer that despite their gallant attempts, they did not know if the accused understood his rights and having reached

this stage it might have been more prudent for them to have attempted to have the caution translated into the accused's language by Mr Hammer. However, this did not occur and Constable Brown continued the interview thus:

BROWN: You understand that, Louie, what that Senior Constable saying? You understand?

RILEY: Yeah.

BROWN: Alright. We'll - we'll go on. If you don't think he understands at all, Roy, just stop us, mate, we'll ---

HAMMER: Yeah.

BROWN: --- we'll have a bit of a yarn about it. Right. Anything that - anything that we say is going to be recorded on these cassettes - right?

RILEY: Yeah.

BROWN: Now these cassettes may be - may be given to that Magistrate in court.

RILEY: Yeah.

BROWN: And he can listen to 'em.

RILEY: Yeah.

BROWN: You understand that? Do you know - do you know what happens in court?

RILEY: (No answer.)

BROWN: Do you know - know what the - do you know what a court is?

RILEY: Mmm-mmm - nothin'.

BROWN: Um - do you know what a Magistrate is?

RILEY: (No answer - long pause.)

BROWN: When - when people get in trouble for things, where do they go when they get in trouble by the Police? Where do they go?

RILEY: Cell.

BROWN: Who sends them to jail do you think?

RILEY: Police.

BROWN: Ah - Police don't send them to jail. Police put 'em to the court. Do you know what that court is? Have you ever heard anyone talking about the court house? Other boys going to court or anything like that?

RILEY: (No answer - long pause.)

BROWN: Do - they have court here, don't they, Roy?

HAMMER: Yeah - we have court.

BROWN: Where - which building's it in, mate?

HAMMER: School.

BROWN: How often's that - once a month, is it?

HAMMER: Once a month - yeah.

BROWN: Do you know what happens at that school once a month that Roy's talking about?

RILEY: Mmm.

BROWN: What - what - what - what's happens there?

RILEY: Court.

The interview continued in this vein, in an attempt to explain to the accused what a

court was and what functions a court performed. The accused's monosyllabic answers, together with his denial that he had ever been to court before, gave me little confidence in the value of his answers on this topic. After this topic had concluded the interview then proceeded thus:

BROWN: Did you - um - speak to that other Policeman in the - in the overalls at all today and the Police Aide?

RILEY: Yeah.

BROWN: Where did you speak to them?

RILEY: (No answer - long pause.)

BROWN: Whereabouts? Did they come and see you at your house or they?

RILEY: Yeah.

BROWN: And what - what did they say there? What did they tell you?

RILEY: 'Bout rapin' last night.

BROWN: Oh - right. So they're the ones that brought you back to the police station - is that right?

RILEY: Yeah.

BROWN: And they put you in the cells?

RILEY: Yeah.

BROWN: Is that right?

RILEY: Yeah.

BROWN: What - what can you tell me about last night, Louie? What happened, mate?

RILEY: We went over there in the pub and that pub been closed. And

then took a walk over to see that girl there at the tree. Drag 'er in and I have sex with her.

BROWN: You had sex with her?

RILEY: Yeah.

BROWN: You're gonna - you're gonna have to speak up. Speak really clear so the tape can hear you. Do you understand?

HAMMER: You gotta talk loud.

BROWN: Talk loud like Roy talks, hey. I can't hear you and the tape won't hear, mate - that's all. So you said you were at the pub - is that right?

RILEY: Yeah.

BROWN: Were you drinking at all?

RILEY: Yeah.

BROWN: What time did you start drinking, yesterday?

RILEY: (No answer - long pause.)

At this point Mr Hammer became impatient and asked the accused in a very demanding tone:

HAMMER: What time you been drinking yesterday? Lunch time or what?

RILEY: Mmm.

HAMMER: Hey?

RILEY: Lunch time.

BROWN: Lunch time, hey?

RILEY: Yeah.

BROWN: What - what sort of grog are you drinking? What sort?

RILEY: Green can.

BROWN: VB - green cans, hey?

RILEY: Yeah.

BROWN: And you - you started drinking at lunch time?

RILEY: Yeah.

BROWN: Did you drink all day - right through - or did you have a break?

RILEY: Yeah, just break.

BROWN: Sorry?

RILEY: Break I had.

BROWN: You had a break from drinking?

RILEY: Yeah - yeah.

BROWN: Then what happen then? Did you go to the pub, did yah?

RILEY: Yeah.

BROWN: What - what time did you go to that pub?

RILEY: (No answer - long pause.)

BROWN: Was it after the sun went down - night time, or still day time when you went ... (pause)

RILEY: Night time.

BROWN: Night time?

RILEY; Yeah.

BROWN: Did you go up by yourself or were you with other people?

RILEY: Other people.

BROWN: Who - who was with you? Who'd - who'd you go to the pub

with?

RILEY: (no answer - long pause.)

Again Mr Hammer demanded:

HAMMER: How long you been gone?

RILEY: (Inaudible).

HAMMER: Riley?

RILEY: Mmm.

BROWN: Other Riley?

HAMMER: Jacob Riley

RILEY: Mmm.

BROWN: You went to the pub with Jacob Riley, hey?

RILEY: Mmm, yeah.

BROWN: What - what relation is Jacob Riley to you? What relation is Jacob?

RILEY: My father.

BROWN: Your real father, or step?

RILEY: Step.

BROWN: Stepfather?

RILEY: Yeah.

BROWN: He's not - is - is he your uncle, or your stepfather?

RILEY: Stepfather.

BROWN: Stepfather.

RILEY: Mmm.

BROWN: How many - and what were - what were you drinking at the

pub? What - what sort of drink were you drinking there?

RILEY: (No answer.)

BROWN: You said before that you were drinking those green cans.  
What - what were you drinking at the pub - green cans, too?

RILEY: Yeah.

BROWN: How many - how many green cans you think you had  
yesterday?

RILEY: Four.

BROWN: Four?

RILEY: Yeah.

BROWN: Is that four all day, or just four at the pub?

RILEY: Pub.

BROWN: And how many - how many did you have before you went to  
the pub, do you reckon?

Again at this stage of the interview Mr Hammer stated unequivocally:

HAMMER: You had a lot of beer at the pub.

In reply, Riley stated: Only four.

Hammer then questioned somewhat disbelievingly: Only four?

The interview continued:

RILEY: Mmm.

HAMMER: And you all day had four?

RILEY: (Inaudible).

HAMMER: Who shout you?

RILEY: Ian.

BROWN: So you had more than four, hey?

RILEY: Yeah, more then four. They was shouting.

Constable Brown then established that the accused was "full drunk" and stayed at the hotel until it closed. Following this, the questioning moved to when the accused first saw the victim, the victim's state of sobriety in the opinion of the accused, and how the accused first approached the victim with his subsequent suggestion to have consensual sexual intercourse:

BROWN: And what did she say to that?

RILEY: She say no.

BROWN: She said no?

RILEY: Mmm. (Nods)

BROWN: Then - then what did you do?

RILEY: Have to rapin' 'er.

BROWN: Sorry, you'll have to speak up, Louie.

HAMMER: (Inaudible)

RILEY: Have to rape 'em.

BROWN: You have to rape 'em?

RILEY: Yeah.

BROWN: What did - what did you actually - what did you do when she said no? Did you walk away from her or did you talk to her again, or what?

RILEY: Talk to 'er again.

BROWN: What - what did you say to her then?

RILEY: Tell her to get up an' walk.

BROWN: What do you mean, get up? Was she sitting down or lying down or something, was she?

RILEY: No, sittin' down.

BROWN: On grass or chair?

RILEY: Grass.

BROWN: And what she do - what did she do to that when you said that to her?

RILEY: (No answer - long pause.)

BROWN: Do you remember what she did, Louie, when you ask her to stand up or get up? Can you remember what she did? What did she do?

RILEY: She just tell me to wait there.

BROWN: She told you what, sorry?

RILEY: She tell me to wait there.

BROWN: To wait there?

RILEY: Yeah.

BROWN: Why - why was that?

RILEY: (No answer.)

BROWN: Why - why did she tell you to wait there?

RILEY: (No answer - long pause.)

BROWN: When you said - when you said that you raped her - is that right?

RILEY: Yeah.

BROWN: Where - whereabouts did you rape her? Where - where did

that take place?

RILEY: (No answer - long pause.)

BROWN: Can you remember - can you remember where - where you had that sex with that girl?

RILEY: (No answer - long pause.)

BROWN: Was it in the pub, Louie?

RILEY: (No answer.)

BROWN: Did you have sex with that girl in the pub - in the hotel?

RILEY: Nah.

BROWN: Well, do you know where you had sex with her?

RILEY: (No answer - long pause.)

BROWN: Was - was it near the pub or long way away from the pub, or?

RILEY: Long way.

BROWN: How long is long way? How far?

RILEY: (No answer - long pause.)

BROWN: Was it at somebody's house or was it out in the bush somewhere?

RILEY: Bush.

BROWN: Out in the bush, hey?

RILEY: Yeah.

BROWN: Where - whereabouts in the bush? Where - where were you - can you remember?

RILEY: (No answer - long pause.)

At this point in the questioning Mr Hammer clearly lost his patience and stated:

HAMMER: Come on, Louie, we haven't got wait all day, you gotta talk.

After a very long pause indeed, Riley replied: This side of the white man bar.

BROWN: This side of the what, sorry?

RILEY: White man bar.

BROWN: What's that - sorry, Louie.

HAMMER: Just on this side of the bar.

BROWN: On this side of the bar. So ...

FARMER: I think he said this side of white man bar.

HAMMER: Yeah.

BROWN: White man bar?

HAMMER: Yeah.

RILEY: Yeah.

BROWN: So right near the hotel, hey?

RILEY: Yeah.

BROWN: In that bush there?

RILEY: Yeah.

The questioning continued regarding how the victim got to a tree, that the accused was accompanied by another, the accused's assault upon the victim, the injuries sustained by the victim and the act of sexual intercourse between the accused and the victim. The accused answered some of the questions but did not answer many of the questions put to him concerning his alleged rape of the victim. Attempts by the police to get him to explain what he meant by the word "rape" were not answered. The accused, in answer to a direct question as to whether he had "sex"

with the victim answered "yeah". It is not clear that he understood the meaning of the word "rape". Mr Hammer remained silent until the accused was asked by Constable Brown in three different questions what the victim was wearing. The accused did not answer these questions and Mr Hammer interceded thus:

HAMMER: He just ask you what - what kind of clothes she was wearing.

It was clear from his demeanour that Mr Hammer was impatient and anxious for the interview to conclude as quickly as possible.

Questioning about the clothes worn by both the victim and accused continued with the accused answering some questions until he was again asked about the actual act of sexual intercourse:

BROWN: And you took your own clothes off. What happened then?

RILEY: (No answer - long pause.)

BROWN: You - you said before that you had sex with her - is that right?

RILEY: Yeah.

BROWN: How - how did you have sex? Just - just explain to me if - if you want - how - how you have sex with a girl. Could you explain to me how you do that?

RILEY: (No answer - long pause.)

BROWN: Can you just ask him, say - I think he might be a bit shy because he's not gonna tell me.

HAMMER: (Native language) that girl.

RILEY: Me laid on him and hold him.

HAMMER: (in an instructing fashion) Well you want to tell him that story now. Don't be shame boy.

RILEY: I be makin' 'er lay down an' have sex with 'im.

BROWN: Make her lay down?

RILEY: Yeah.

BROWN: Was she - was she laying down on her front or her back, or what? How was she laying down?

HAMMER: Belly down.

RILEY: Belly up.

BROWN: Belly up, hey. So she's laying on her back.

RILEY: Mmm.

BROWN: And when you have sex, what does - what does - what do you mean by that?

RILEY: (No answer - pause.)

BROWN: Like, what's a - what's a - what's a man do when he has sex? What's he do with a lady?

RILEY: (No answer.)

BROWN: Can you explain?

RILEY: (No answer.)

BROWN: You - you know what I - you know what I'm talking about, Louie, when you have sex with a girl?

RILEY: Yeah.

BROWN: Alright. The way I have sex with a girl I put my dick in that girl, hey?

RILEY: Yeah.

BROWN: How do - how do you have sex with a girl?

RILEY: (No answer.)

BROWN: Same way or different way?

RILEY: Same way.

BROWN: Is that what you did to that girl last night?

RILEY: Yeah.

BROWN: What, you put your dick in her?

RILEY: Yeah.

BROWN: What do you call that thing you put your dick in - long pause - what's that called?

RILEY: (No answer.)

BROWN: What do you call it?

At this stage Mr Hammer clearly felt his intervention was necessary to get Louie to stop wasting time.

HAMMER: What do you call - c'mon Louie, what you say?

BROWN: What - what - what other boys call that thing on the girl out at Roper? What do they call it? They must have name for it, hey?

RILEY: Cunt.

BROWN: Cunt. And that's - where's that on the girl? Is that between her legs, hey?

RILEY: Yeah.

BROWN: So you put your dick in her cunt - is that right?

RILEY: Yeah.

BROWN: How long did you do that for, do you think - last night?

RILEY: (No answer - very long pause.)

HAMMER: (Inaudible) long time?

RILEY: No, just little bit.

HAMMER: Hey?

RILEY: Little bit.

HAMMER: How long did it take you?

RILEY: (No reply - pause.)

BROWN: How many - how many minutes? You reckon it was minutes or long time, or?

RILEY: Yeah.

BROWN: What?

RILEY: Yeah.

HAMMER: How long would it taken you?

BROWN: How - how long?

HAMMER: Him ask you.

RILEY: (No reply - long pause.)

The questioning continued as regards the sexual act and then moved to the assault upon the victim; there again Mr Hammer interceded:

BROWN: Pub - yeah - but in that middle bar - you know on that lawn there. You know that grass out the front of that middle bar. What do you call that, Roy - the middle bar - that grass there, mate - what's that?

HAMMER: You know that lawn there where we sit down drinking beer,  
that girl bin there, eh?

RILEY: Yeah.

HAMMER: And you remember hitting that girl there?

RILEY: Yeah I never hit her in there.

HAMMER: And where you hit 'im, that girl?

RILEY: That thing, I don't know.

Following a brief but unsuccessful questioning period by Det. Snr Constable Farmer, which tended to elicit no answers the following occurred:

FARMER: So why you take her to the tree, then?

RILEY: (no answer - long pause.)

FARMER: What - what reason did you take her to the tree, Louie?

RILEY: (no answer - long pause.)

FARMER: Is - is there some reason why you're not answering my  
questions?

RILEY: (no answer.)

FARMER: Louie, why is it you're - that you're not answering those  
questions?

RILEY: (no answer - long pause.)

FARMER: I've got nothing ...

BROWN: Nothing further? Louie - I'm gonna ask you some more  
questions, alright? Is there anything else you want to tell me  
about that trouble last night?

RILEY: (no answer - long pause.)

HAMMER: You wanna tell him anything?

RILEY: That's all now.

HAMMER: Hey?

RILEY: That's all now.

BROWN: What did he say, Roy?

HAMMER: That's all.

BROWN: That's all?

FARMER: That's all now.

BROWN: That's all, hey? You don't want to say anything more about it?

RILEY: Mmm.

The accused was clearly indicating that the questioning was to cease and at this stage the police officers should have discontinued. However, the following occurred:

BROWN: Do you think you did the right thing or the wrong thing last night?

RILEY: Wrong.

BROWN: Wrong, hey?

RILEY: Yeah.

BROWN: You - why - why's that the wrong thing?

RILEY: (no answer - very long pause.)

BROWN: Alright. We'll finish up here, then, hey? Nothing else you

want to say?

RILEY: Yeah.

BROWN: Nothing.

RILEY: Yeah.

BROWN: Finished, hey? Alright. Do you wish to make a - um - a written statement about this trouble last night, or have you said enough, do you think?

RILEY: Had enough.

BROWN: You've had enough, have you?

RILEY: Yeah.

BROWN: Do you want me to play the - one of these tapes back to you so you can hear what you said?

RILEY: Yeah.

BROWN: You do?

RILEY: Yeah.

BROWN: What, tonight or - what I'm saying is I can take - I can take these tapes that we've listen - we've done tonight and I can go get a cassette player and we can go put them in a cassette player and we can listen to them again if you want to. If you don't want to it's alright. It's up to you.

RILEY: (no answer.)

BROWN: Can you just explain what that means, Roy? He's just...

HAMMER: Louie - if you want him he can play that tape later. But if you don't want him he can't play.

RILEY: (Inaudible)

HAMMER: Hey?

RILEY: (Inaudible)

HAMMER: (Inaudible). You don't wanna listen to the tape, hey?

BROWN: I'm gonna give you these tapes to take - take home with you. You can listen to them at home if you want, or give them to that Legal Aid, hey?

RILEY: Yeah.

BROWN: Is that alright by you?

RILEY: Yeah.

BROWN: Alright. Did I - did I threaten you at all to make you answer any of my questions?

RILEY: (no answer.)

BROWN: Did I threaten or hit you at all to make you answer any of our questions?

RILEY: (no answer.)

HAMMER: Louie, him ask you if the Constable want to kill you or threaten you. Nothing, hey?

RILEY: Nothin'.

The interview concluded shortly thereafter.

I shall deal with each submission individually.

1. Did the accused confess voluntarily in the sense that he understood he had

the right to remain silent?

In *R v Lee and Others* (1950-51) 82 CLR 133 at 149 the High Court said, in a joint judgment:

"The word 'voluntary' in the relevant connection does not mean 'volunteered'. It means 'made in the exercise of a free choice to speak or to be silent'.

It is clear that the Police Constables made considerable efforts to explain to the accused that he had a choice to remain silent or speak to them, and they also explained to him on at least one occasion that he was not free to go. The police also made an attempt to satisfy the guidelines as set down in *R v Anunga and Others; R v. Wheeler and Another* (1976) 11 ALR 412 at 414-5, in that Mr Hammer who was apparently the accused's choice as prisoner's friend, and who could have acted if necessary as interpreter, was present during the interview, and some effort was made to get the accused to repeat the essential elements of the caution. However, guideline 3 in *Anunga* clearly requires great care to be taken when administering the caution, as it is not adequate to administer it in the usual terms and then ask "Do you understand that?" or, "Do you understand that you do not have to answer questions?". As Forster CJ stated

"... 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."

It appears to me that in a case such as the present, when the accused has little understanding of English, unless the prisoner's friend interprets the caution to the accused in his own language and the prisoner's understanding of the caution, the crown is faced with considerable difficulty in establishing on the balance of probabilities that the prisoner was acting voluntarily in the relevant sense.

Whilst Mr Adams, for the prosecution, conceded that at no stage did the accused explain back the terms of the caution, he submitted that nonetheless, the proof of the accused's understanding of the choice was evidenced by the fact that the accused exercised his choice at the latter stages of the interview (see pages 31 and 32 herein) when the accused decided that the interview was at an end and refused to answer any further questions by saying "That's all now". This, coupled with the accused's earlier statement "Not to answer everything you hear" demonstrated fully that the accused had exercised a free choice to answer such of the questions as he answered. I was far from satisfied that this must be so, but if it be so, it equally follows that the probable explanation for the accused's silence in not answering many of the questions put to him was that he was attempting to exercise his right of silence; but notwithstanding that, the police persisted in questioning him to the extent that his will was overborne: see McDermott v. The King (1947-1948) 76 CLR 501 at 511-12 per Dixon J.

2. "Person in authority".

Mr Algie submitted that because of the structure of aboriginal society in which certain people are "elders" and others in "positions above this" there are people in a position of tribal authority over other members of the tribal community. Because Mr Hammer was president of the Borroloola Community Council, an elder in the community and the accused's grandfather, Mr Algie submitted he was a person in tribal authority over the accused. Further he submitted that as a result of that tribal authority, Mr Hammer had the power to order or tell the accused what to do, and that he virtually instructed the accused, who was reluctant to speak to the police, to answer their questions.

In my opinion, Mr Hammer was not a person in authority. In Ibrahim v The King [1914] AC 599 it was held that a "person in authority" includes officers of the police and others concerned in preferring the charge, including the prosecutor: see

also the discussion in R v Dixon; R v Smith (1992) 28 NSWLR 215 at 227 to 230 per Wood J.

In Patrick Joseph Cleary (1964) 48 Cr.App Rep 116 Finnemore J speaking for the Court of Criminal Appeal held that the appellant's father was not a person in authority but that his statement to his son, "Put your cards on the table. Tell them the lot....if you did not hit him, they cannot hang you," was made in the presence of persons in authority, namely two senior police officers. The position was the same as if they, the police officers, had made the statement themselves, unless they took steps to dissent from it.

Similarly a statement from the father of a sixteen year old appellant in Kevin Neil Moore (1972) 56 Cr.App Rep. 373, to the effect of "My boy, you had better tell the truth and then we can go home" was held to have been capable of being an inducement by a person not in a position of authority himself, but offered by the father in the presence of the police who were in a position of authority.

Although Mr Hammer is not a person in authority to the accused, I find that statements made by Mr Hammer (see below) in the presence of persons in authority, Senior Constable James Brown and Detective Senior Constable Charles Farmer were such as to overbear the will of the accused and thus have the same effect, as neither police officer sought to distance themselves from these statements. These statements specifically are:

1. At page 1 of the first section of transcript when the accused appeared to be exercising his right to remain silent and not provide the police with his name, Mr Hammer lent across to the accused and physically nudged the accused, instructing him "Louie Riley he talk". Constable Brown did not tell the accused immediately following this that he did not have to talk if that was his choice and thereby distance himself from the instruction.

2. At page 5 in the first transcript the tone of voice used by Mr Hammer when he told the accused "... to speak up when him ask you questions" was loud and intimidating, the inference being that the accused must answer the question.
3. At page 11 of the first transcript the accused remained silent in response to a question. Mr Hammer after waiting some time demanded "What time did you start drinking yesterday?" The tone of voice used was such that the accused appeared to answer with great reluctance.
4. The same thing occurred again at page 12 of the first transcript when Mr Hammer demanded "How long you been gone?" The accused's response was reluctant and at first inaudible.
5. Mr Hammer became very impatient with the accused when the accused at page 15 of the first transcript, was not answering questions put to him. Mr Hammer demanded: "Come on Louie, we haven't got wait all day, you gotta talk". Mr Hammer's demeanour at this stage of the interview was most intimidating.
6. At page 7 in the second transcript Mr Hammer suggested the accused might be ashamed by saying "Will you want to tell him that story now? Don't be shame boy." I consider this suggestion was also an inducement.
7. The accused exercised his right of silence at page 8 of the second transcript but Mr Hammer attempted to coax an answer out of him: "What you care - C'mon Louie what you say?" The accused by his manner and mumbled reply to the questioning was clearly reluctant to reply.

Accordingly, I was not satisfied that the admissions made were proven to be voluntary on the balance of probabilities, and for this reason I held that the record of interview was inadmissible.