R v Miler [2015] NTSC 70

PARTIES:	The Queen
	v
	MILER, Peter Simon
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	21455041
DELIVERED:	15 OCTOBER 2015
HEARING DATES:	5 OCTOBER 2015
JUDGMENT OF:	KELLY J

CATCHWORDS:

EVIDENCE – Admissibility – *Police Administration Act* s 142 – Failure by police to electronically record alleged confession – Accused was "suspected of having committed a relevant offence" at the time of questioning – Evidence *prima facie* inadmissible

EVIDENCE – Admissibility – *Police Administration Act* s 143 – Whether it would not be contrary to the interests of justice to admit evidence of alleged confession – s 143 should not be used to overcome deficiencies in police investigation in the circumstances – Evidence not admitted

Evidence (National Uniform Legislation) Act s 138
Police Administration Act ss 142(1), 142(2), 143

R v Grimley (1994) 121 FLR 236; *R v Scotty* [2007] NTSC 43; *R v Jako & Ors* [1999] NTSC 46; *The Queen v Mellors* [2000] NTSC 41, referred to

REPRESENTATION:

Counsel:

Plaintiff:	R Murphy
Defendant:	M Aust

Solicitors:

Plaintiff:	Director of Public Prosecutions
Defendant:	North Australian Aboriginal Justice Agency

Judgment category classification:	B
Judgment ID Number:	KEL15017
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

R v Miler [2015] NTSC 70
No. 21455041

BETWEEN:

THE QUEEN
Plaintiff

AND:

PETER SIMON MILER
Defendant

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 15 October 2015)

The charge

[1] The accused is charged with aggravated assault. On 29 November 2014, Mr Raymond Dargie was assaulted at or near Coles, Palmerston. Mr Kang, a security guard who was working there attended to him and called police and an ambulance. In response to that call, Constable Palmer and Senior Constable Richards went to Coles.

The evidence objected to and grounds of objection

[2] The Crown wants to call evidence from Constable Palmer that during a conversation in the Coles carpark, the accused said to him, "*I went up to Raymond Dargie and asked him for a cigarette and when he said no I*

punched him in the head to the eyebrow,[1] *right side*," or words to substantially that effect. The defence objects to that evidence being given for two reasons:

(a) It was not electronically recorded, or confirmed in an electronic recording, and so is *prima facie* inadmissible by reason of s 142(1)(b) of the *Police Administration Act* ("PAA").

(b) Alternatively, the evidence ought not be admitted pursuant to s 138 of the *Evidence (National Uniform Legislation) Act* ("UEA") which provides (essentially) that evidence obtained improperly or in contravention of an Australian law is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in that way.

The evidence of the security guard

[3] The evidence of the security guard, Mr Kang, is to the effect that the injured man, Mr Dargie, had pointed out the accused (who was outside with some other men) as the man who had hit him. He said that, when police came, he went outside with the police officers. The accused was sitting on the ground and two other Aboriginal men were standing near him. Mr Kang pointed to the man sitting on the ground and said words to the effect of, "That's the man the victim said hit him."

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[1] Although this appears in Constable Palmer's statement as a quotation in direct speech, the words in his notebook are: "Raymond Dargy would not give me a cigg punched him in the head, eyebrow right side. Raymond is my uncle."

Original statements of the police witnesses

[4] Constable Palmer made a statement in the form of a statutory declaration on the same day the incident occurred. In it he gave a version of what happened which is essentially the same as that given by Mr Kang. He said:

> At about 8.48am we attended Palmerston Shopping centre where we located a security guard. The guard identified a male to me as the person who assaulted the victim.

[5] Several months later (in February 2015) Senior Constable Richards made a statement, also in the form of a statutory declaration, which likewise accords with Mr Kang's evidence. In it he said:

> Constable Palmer spoke to the complainant [ie Mr Kang] and received information on an assault that had just happened, the complainant he [sic] also pointed out a male that was sitting outside that had assaulted another male that was sitting on the other side of the shopping centre.

[6] To this point, all three witnesses agree that Mr Kang pointed out a man as the one who had assaulted the victim. Both Mr Kang and Senior Constable Richards add that the man pointed out by Mr Kang was sitting down.

[7] Constable Palmer's statement continued:

> I asked the male for his name and address, he said, Peter MILER DOB 24 August 1972, Emu Point Outstation.
>
> I gave Miler a direction to sit down while RICHARDS located the victim in this matter.
>
> I said "What happened here today"?

> MILER said "I went up to Raymond DARGEY and asked him for a cigarette and when he said no I punched him in the head to the eyebrow, right side."
>
> RICHARDS returned and I conducted a name search on MILER and found he had three outstanding warrants for his arrest.

[8] Senior Constable Richards statement continues:

> I walked out to the rear entrance of the shopping centre and I located a male I know to be Raymond Dargie DOB 07/02/1958. Raymond had a laceration around his left eyebrow it was 2-3 centimetres long. I told Raymond to stay where he was and that I would be back shortly.
>
> I went back and located my partner who was now speaking to an Aboriginal male who I now know to be Peter Miller [sic] DOB 24/08/1972. Constable Palmer informed me that Miller [sic] had told him that he punched Raymond Dargie in the head as he refused to give him a cigarette. …

Evidence of the police witnesses on the *voir dire*

[9] Both Constable Palmer and Senior Constable Richards gave evidence on the *voir dire*. In each case, their evidence of what occurred has changed. It no longer accords with the evidence of Mr Kang.

[10] In evidence on the *voir dire*, Constable Palmer said that Mr Kang did not identify a male to him as the person who assaulted the victim as he had stated in paragraph [4] of his statement. He said this was "a mistake". He said what actually happened was that Mr Kang pointed to a group of three Aboriginal men and told him that one of them had been pointed out to him as the man who had hit the victim. He said Mr Kang did not specify which one.

[11] In cross-examination it was put to Constable Palmer that in his statement, he had said that he asked the male (ie the one pointed out by the security guard) for his name and address, gave the man a direction to sit down and then said, "What happened here today?" Constable Palmer said that the order of events set out in his statement was wrong. He had asked, "What happened here today?" first and then asked Mr Miler for his name and address. In Constable Palmer's notes, this information appears in the reverse order – ie as set out in his original statement. Constable Palmer gave no explanation for the "mistake" in his original statement. Nor did he offer an explanation as to why he took the name of the accused and did not ask for the names and addresses of the other two men present. [This would not call so strongly for an explanation if the events had occurred in the order set out in Constable Palmer's original statement.]

[12] Senior Constable Richards likewise gave evidence that his earlier statement was wrong and that Mr Kang had pointed to a group of Aboriginal men and told the two police officers that one of them had assaulted the victim, without specifying who. He did not give any explanation for the error he says he made in his original statement.

[13] In examination in chief, Mr Kang said that the accused and the other two men were a long way off when he pointed them out to police. He estimated

about 200 metres (which seems unlikely).[2] Constable Palmer estimated they were about 30 metres away at the time.

Issues and contentions

[14] Mr Murphy for the Crown submitted that I should accept the evidence of Constable Palmer and Senior Constable Richards given on the *voir dire* that Mr Kang pointed at the group and said one of them was the perpetrator, and that in their minds at the time, they did not know which one was being accused.

[15] The defence submits that the evidence of Constable Palmer of what he says the accused said to him is inadmissible as a part of the prosecution case as it was not electronically recorded, or confirmed in an electronic recording, in accordance with PAA s 142(1)(b). Alternatively, defence submits, the evidence should be excluded pursuant to s 138 of the UEA.

[16] PAA s 142(1) provides:

> (1) Subject to section 143, evidence of a confession or admission made to a member of the Police Force by a person suspected of having committed a relevant offence is not admissible as part of the prosecution case in proceedings for a relevant offence unless:
>
> (a) where the confession or admission was made before the commencement of questioning, the substance of the confession or admission was confirmed by the person and the confirmation was electronically recorded; or

[2] This is in no way intended as a criticism of Mr Kang. Not many people can estimate distances with any degree of accuracy.

(b) where the confession or admission was made during questioning, the questioning and anything said by the person was electronically recorded,

and the electronic recording is available to be tendered in evidence.

[17] The Crown accepts that PAA s 142 applies regardless of whether the accused was in police custody at the time of making the admission, and that the question (which the Crown submits was posed to the group) constitutes 'questioning' of the accused as a member of that group within the meaning of s 142(1)(a).

[18] The Crown submits, however, that s 142 has no application as the accused was not, at the time, "*a person suspected of having committed a relevant offence*" because at the time of asking the question all Constable Palmer believed, at its highest, was:

(a) that the victim had been assaulted by an Aboriginal male, and

(b) that the offender was one of three Aboriginal males in the group pointed out by the security guard.

[19] The Crown contends that while Constable Palmer had reason to believe that one of the three men might possibly have committed the assault, he could only speculate as to which one of the three it was. Speculation, the Crown submits, is not enough to amount to a suspicion that the accused had

committed the offence. The Crown relied on *R v Jako & Ors*[3] in which Mildren J said:[4]

> In *R v Grimley* (1994) 121 FLR 236 at 258 – 259, Kearney J discussed the notion of what is a suspect, and concluded that it is a state of mind arising from a consideration of known facts, less than that required for a belief,
>
> … resulting in an apprehension that the person might possibly have committed the offence. It requires a degree of conviction which is beyond mere speculation, and based upon some factual foundation.

[20] The Crown contended that given the limited information he had at that point, Constable Palmer was entitled to gather information – including giving possible suspects the opportunity to clear themselves – without administering a caution[5] and without recording the questioning.[6]

[21] This submission by the Crown depends upon my accepting the evidence given by Constable Palmer and Senior Constable Richards on the *voir dire*. I do not accept that evidence. The statements made by Constable Palmer on the day of the incident and by Senior Constable Richards in February this year both accord with the evidence of Mr Kang. Both officers accepted (as

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3 [1999] NTSC 46

4 *Ibid*, p 18

5 The question of whether a caution ought to have been given is not directly relevant to the issue arising under PAA s 142. This Crown submission was directed only to the issue of whether the evidence should be excluded under UEA s 138.

6 *R v Jako & Ors* [1999] NTSC 46, p 16. The Crown also relies on *R v Scotty* [2007] NTSC 43 and *The Queen v Mellors* [2000] NTSC 41, in both of which the police had reason to believe that the people they had questioned had information that might assist them with their investigation; the person questioned was later found to be the offender; and the Court found that at the time the police had questioned the offender, there was insufficient information for the police to have concluded that the offender was "*a person suspected of having committed a relevant offence*": as a consequence, s 142 of the PAA was not applicable.

they were bound to do) that their memories of the events of the day were clearer at the time they made the original statements than when giving evidence on the *voir dire*. Constable Palmer in particular could not recall many surrounding details when giving evidence – for example whether the accused was sitting or standing when Mr Kang pointed out the group of men. Neither officer gave any explanation for how it is that they came to make a mistake in making their original statements – noting that each officer says he made the same mistake. The version of events in Constable Palmer's statement is more consistent with the notes he took at the time than with his later evidence – in particular the fact that he wrote the accused's details followed by the alleged admission, and that he did not take the names of the other two men present.

[22] The Crown properly conceded that, if I did not accept the version of events given in evidence by the officers on the *voir dire*, I would inevitably conclude that, at the time he asked the accused what had happened, the accused was "a person suspected of having committed a relevant offence". It is common ground that the statement said to have been made by the accused was not electronically recorded and it is therefore inadmissible by reason of PAA s 142, unless the provisions of s 143 apply.

[23] PAA s 143 provides that a court may admit evidence even if the requirements of s 142 have not been complied with, if, having regard to the nature of the non-compliance (and the reasons for it) and any other relevant

matters, the court is satisfied that, in the circumstances of the case, it would not be contrary to the interests of justice to admit the evidence.

[24] The defence having established that s 142 was not complied with, the onus is on the Crown to establish that it would not be contrary to the interests of justice to admit the evidence.

[25] Crown counsel did not explicitly submit that the evidence should be admitted under PAA s 143. However, in addressing the question of whether the evidence ought to be excluded pursuant to UEA s 138, the Crown submitted that it would not be contrary to the interests of justice to admit the evidence as:

(a) the accused is charged with a relatively serious offence - aggravated assault which carries a maximum penalty of imprisonment for five years; and

(b) the accused's admission is the only available evidence capable of proving that he, rather than anybody else, had assaulted the victim. (The two men the accused was with at the time of the admission have not been identified and cannot therefore be called to corroborate the admission, and the victim can only identify his assailant as being an Aboriginal male).[7]

[7] This is difficult to reconcile with Constable Palmer's note which records the accused as saying that the victim, Raymond Dargie is his uncle and that he asked him for a cigarette before assaulting him. That introduces another anomaly but it is not for me to speculate about that.

[26] I do not think that these matters warrant the admission of the evidence notwithstanding its *prima facie* inadmissibility pursuant to s 142. I find it highly probable that the question was directed to the accused as stated in Constable Palmer's original statement – and not at the group generally – for the reasons I have already outlined. I understand that hand held recorders are available for police officers to carry. Constable Palmer said he did not have one with him but that was his choice. Likewise, the fact that the two men with the accused have not been identified is entirely due to the failure of Constable Palmer (and perhaps Senior Constable Richards) to take their names and contact details and to ask them if they saw the assault. I do not think s 143 should be used, in the circumstances of the present case, to allow the introduction of evidence which is *prima facie* inadmissible under s 142 to make up for deficiencies in the police investigation.

Conclusion

[27] As the evidence is inadmissible under PAA s 142 and I do not think it should be admitted under s 143, there is no need for me to consider the alternative basis for exclusion of the evidence contended for by the defence under UEA s 138.