R v Weston & Williams [2005] NTSC 49

PARTIES:	THE QUEEN v CLINTON WESTON and ADRIAN WILLIAMS
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	20413375, 20413376
DELIVERED:	7 September 2005
HEARING DATES:	16 – 20, 23 – 25 May 2005
JUDGMENT OF:	THOMAS J

CATCHWORDS:
EVIDENCE – CONFESSIONS AND ADMISSION – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – ARREST AND INTERVIEW – JUVENILE SUSPECTS

REPRESENTATION:

Counsel:

Appellant:	K Ratcliffe
1st Respondent:	K Kilvington
2nd Respondent:	R Goldflam

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
1st Respondent:	Central Australian Aboriginal Legal Aid Service
2nd Respondent:	Northern Territory Legal Aid Commission

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

R v Weston & Williams [2005] NTSC 49
20413375, 20413376

BETWEEN:

THE QUEEN

AND:

CLINTON JOHN WESTON

and

ADRIAN WILLIAMS

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 7 September 2005)

[1] Clinton Weston and Adrian Williams have each pleaded not guilty to two counts on indictment that:

> "Count 1
>
> On 18 March 2003 at Tennant Creek in the Northern Territory of Australia, had sexual intercourse with [SH] without her consent
>
> Section 192(3) of the Criminal Code.
>
> AND FURTHER
>
> Count 2
>
> At a time subsequent to Count 1, on 18 March 2003 at Tennant Creek in the Northern Territory of Australia, had sexual intercourse with [SH] without her consent
>
> Section 192(3) of the Criminal Code."

[2] This is an application on behalf of Clinton Weston and Adrian Williams pursuant to s 26L of the Evidence Act for a ruling as to the admissibility of records of interview conducted with each of the defendants. Adrian Williams also challenges the admissibility of forensic evidence obtained from his clothing and from a buccal swab.

[3] The background to the charges is as follows:

[4] On the night of 18 March 2003, police at Tennant Creek Police Station received a complaint from SH. Constable Peter Dash interviewed SH at the hospital prior to midnight on 18 March 2003 (Exhibit D2). On 19 March 2003, Constable Dash obtained a statement from SH (Exhibit D3). SH stated that on the night of 18 March 2003, she had been drinking with a group of friends at Tennant Creek. She decided to return to her home at Village Camp. She was walking down the laneway at the back of the garage which is opposite the chicken shop on the main street of Tennant Creek. In her statement, she says that two boys walked up to her and started asking her for sex. She described them as being aboriginal and described what each of the boys were wearing. In her interview with Constable Dash, she described them as being young, like 20 years old. She states that they asked her for sex and when she said no, one of the two men, whom she described as wearing a black t-shirt, white riding boots and a blue cap, grabbed her with both hands on her shoulders. The other man who was wearing an orange t-shirt, black tracksuit pants and black boots, punched her once to the left side of her cheek and then took off. She stated the man in the black t-shirt took

her t-shirt off. He then punched her to the ground by her shoulders. SH stated she kicked him in the leg. This man then punched her twice on the jaw and once to her mouth and then ran off toward the Sporties Oval. SH stated after this man ran off, she met her niece O, her cousin J and her sister-in-law K. She told them what the men had done to her. They started to look for the men. They could not find the men so decided to tell the night patrol. SH told the night patrol who were also walking around Sporties Oval. SH said in her statement to police on 19 March 2003 (Exhibit D3) "The men didn't touch me on the tits or my other private parts. They tried to touch my tits but I blocked them". She further stated she did not know the two men and did not think she would recognise them again if she saw them. She stated she thought the men wanted to rape her. She stated "I know what rape is, they asked me for sex and I said 'No'".

[5] Later on the night of 18 March 2003 a juvenile named Adrian Williams, who is aboriginal, was taken into custody. On his attendance at the Tennant Creek Police Station, police removed the jeans worn by Adrian Williams. The jeans appeared to have blood on them and were required for forensic analysis. Constable Muir and Constable Dash commenced a record of interview with Adrian Williams at 2.06 am on 19 March. He was interviewed again at 2.59 am. Transcripts of these conversations are Exhibit P6. Police assessed that Adrian Williams was at that time affected by alcohol and it would not be appropriate to continue the interview.

[6] Adrian Williams did not have a parent, guardian or prisoner's friend with him. He was released to return home. Copy of the police investigation diary is Exhibit D7. Adrian Williams was informed that police wanted to speak with him because a lady had complained that someone tried to rape her and had punched her. He was also informed that police were keeping his jeans because there was blood on the jeans and police wanted to check if it matched the girl's blood. Later on in the morning of 19 March 2003, police obtained authorisation to take a buccal swab from Adrian Williams and to take photographs of him. Police attended at House 21 Mulga Camp and took a buccal swab from Adrian Williams and photographs. The photographs are Exhibit P4. The consent of Adrian Williams and his aunt, Hannah Williams, was obtained with respect to both these procedures (Exhibit P1). On the same date a buccal swab was obtained from SH. The clothing of Adrian Williams that had been seized and the two buccal swabs were forwarded to Darwin forensic laboratories for testing.

[7] Constable Muir left the Tennant Creek Police Station in July 2004 to take up duties elsewhere. Constable Dash ceased duties at the Tennant Creek Police Station in August 2003. At the time they ceased duties at Tennant Creek Police Station, neither of these officers had been made aware of the results of the forensic tests carried out in Darwin.

[8] In September 2003, Acting Sergeant Carmen Butcher commenced duties at Tennant Creek Police Station. At the time of giving evidence in May 2005 she was attached to the CIB in Tennant Creek.

[9] In about June 2004, Acting Sgt Butcher was asked to check the Promis ID on the computer system about a female, SH, who had just been brought into the Watch-house in protective custody. When Acting Sgt Butcher checked the computer system, she found that SH had an alert on her name to say that if she was located CIB needed to contact her. Acting Sgt Butcher obtained the Promis job from the filing cabinet and amongst other things there was a DNA report from Carmen Eckhoff confirming that blood on the jeans of Adrian Williams was that of SH. Acting Sgt Butcher then made inquiries through the Promis system and found that there was an outstanding warrant in respect of Adrian Williams for failing to appear in court with respect to a property offence.

[10] Adrian Williams was arrested on this warrant on 7 June 2004 and conveyed to the Tennant Creek Police Station. He was accompanied by his aunt, Hannah Williams. In the police car on the way to the police station, Senior Constable Christopher Board informed Adrian Williams that after the warrant has been dealt with, police wanted to interview him about an assault upon a female in the laneway in Tennant Creek the previous year. Adrian Williams had responded with the words "That wasn't me, that was Clinton Weston".

[11] A magistrate was contacted with respect to the warrant of arrest. Adrian Williams was remanded in custody on the warrant until the following day, when court was to sit in Tennant Creek. He was then placed under arrest and informed that he was under arrest for an assault matter.

[12] At 10.43 am on Monday 7 June 2004, Acting Sgt Butcher and Snr Constable Board commenced a record of interview with Adrian Williams in the presence of his aunt, Hannah Williams. At the date of this record of interview, Adrian Williams was 17 years of age. His date of birth being 26 January 1987. He was informed that police wanted to interview him about an attack upon a girl in the laneway at the back of the garage near the chicken shop on the main street of Tennant Creek in March of the year before.

[13] During the course of this record of interview, Adrian Williams made certain admissions and referred to being with Clinton Weston. He stated that he was walking behind Clinton Weston who asked him for help. He said Clinton Weston was "hugging" this girl and they were holding hands. He stated Clinton asked this girl for sex. Adrian Williams stated he did not know what the girl said in reply. He, Adrian Williams, walked away. Adrian Williams made admissions to slapping the girl, that this made her nose bleed. He again said he walked away. Later in the interview he stated Clinton had asked him to hold the girl so Clinton could have sex with her. He stated the girl and Clinton Weston went away but came back again. He did not see them for a while. He stated he punched the girl and walked away. Adrian Williams made no admissions that he had sex with the girl. Transcript of the record of interview is Exhibit P8. The amended transcript is also marked Exhibit P8.

[14] Acting Sgt Butcher gave evidence that when Adrian Williams was brought into the police station, she asked Aboriginal Community Police Officer (ACPO) Jarrod Williams if, when he and ACPO Lex James Holt were out on patrol, they would keep an eye out for Clinton Weston, as CIB would probably want to speak with him later that day. Acting Sgt Butcher gave evidence that at this time she believed Clinton Weston was a suspect in the matter and police had power to arrest him. ACPO Holt gave evidence that on 7 June 2004 he, with ACPO Williams, were tasked by CIB members to locate Clinton Weston with regard to an assault that had occurred in 2003 against SH. They subsequently located Clinton Weston. ACPO Holt gave evidence he told Clinton Weston he was under arrest for assault and conveyed Clinton Weston back to the police station. ACPO Holt gave evidence that he had told CIB, Clinton Weston should have a male person sit with him as a prisoner's friend and nominated Neil Hayes who subsequently was brought to the Tennant Creek Police Station.

[15] CIB members Snr Constable Board and Acting Sgt Butcher, conducted an interview with Clinton Weston in the presence of Neil Hayes commencing at 1.33 pm on Monday 7 June. As at the date of this record of interview, Clinton Weston was 16 years old. His date of birth is 26 August 1987. In this record of interview Clinton Weston made admissions to the effect that he and Adrian Williams had both had sexual intercourse with a girl in March 2003 without her consent. Transcript of this record of interview is

Exhibit P9. An amended transcript of this record of interview was also tendered.

[16] On the same day, 7 June 2004, Acting Sgt Butcher obtained a further statement from SH. SH made a statement describing how, on 18 March 2003, two aboriginal boys had sexual intercourse with her without her consent. She described the clothing they wore. She stated she had been too ashamed and embarrassed to tell the full story before this date. This statement is Exhibit P18. Snr Constable Board and Acting Sgt Butcher both conducted a further record of interview with Adrian Williams in the presence of his aunt, Hannah Williams, commencing 5.20 pm on 7 June 2004. Transcript of this record of interview together with an amended transcript is Exhibit P10.

[17] In this record of interview, CIB members put to Adrian Williams that they had spoken to the girl again, being the victim of the assault, and she told police that both Clinton Weston and Adrian Williams had sex with her. Police also put to Adrian Williams the admissions made by Clinton Weston in his record of interview. Subsequently, during the course of the record of interview, Adrian Williams made certain admissions.

[18] Clinton Weston and Adrian Williams were both subsequently charged with two counts that on 18 March 2003 at Tennant Creek in the Northern Territory of Australia had sexual intercourse with SH without her consent.

[19] A summary of the context in which the hearing pursuant to s 26L of the Evidence Act was conducted, is as follows:

[20] On 18 March 2003, SH complained to police that she had been assaulted by two aboriginal men whom she could not identify. She described what each of the men were wearing. She made no allegation of rape at that time.

[21] Adrian Williams was arrested and spoken to by police on 18/19 March 2003. At that time Adrian Williams was a juvenile aged 16 years. His clothing was seized for forensic testing. He was released to go home. Later in that same morning, police attended the home of Adrian Williams, took photographs of him and obtained a buccal swab from him.

[22] Adrian Williams heard nothing further about the matter, until some 15 months later, when he was arrested on a warrant of apprehension, on 7 June 2004 in respect of other offences. He was remanded in custody on the warrant. He was then arrested and interviewed at 10.43 am on Monday 7 June 2004 concerning an allegation of assault upon SH on 18 March 2003. Adrian Williams nominated Clinton Weston as being the person who assaulted SH.

[23] On 7 June 2004, Clinton Weston was arrested for an assault upon SH that had occurred on 18 March 2003. At the time of the alleged offence Clinton Weston was a juvenile aged 15 years. He was 16 years of age at the time he made the record of interview which was at 1.30 pm on Monday 7 June 2004. Clinton Weston made admissions involving himself and Adrian Williams in

an offence of unlawful sexual intercourse with SH the previous year. After Clinton Weston made these admissions, police again interviewed SH.

[24] On 7 June 2004, police obtained a further statement from SH in which she alleged that with respect to the incident she had reported on 18 March 2003, the two aboriginal boys had sexual intercourse with her without her consent. She stated she had not told police officers about the rape when she made a statement on 19 March 2003 because one was a male police officer and she felt ashamed and embarrassed. She also stated she was scared about the boy's families hurting her, if police found out who had done this to her.

[25] At 5.20 pm on 7 June 2004, Adrian Williams was again interviewed. This time the further allegations made by SH were put to him as well as the admissions made by Clinton Weston. Adrian Williams made admissions involving himself and Clinton Weston in this record of interview.

[26] The defendants were separately represented at the hearing. They had different reasons for challenging the admissibility of their respective records of interview, and the forensic evidence obtained from the clothing of Adrian Williams. For this reasons I will deal with their applications separately.

Clinton Weston

[27] Mr Kilvington, on behalf of Clinton Weston, challenges the admissibility of the record of interview on the trial of Clinton Weston. There are a number

of grounds for this challenge. The application was heard on the voir dire pursuant to s 26L of the Evidence Act.

Voluntariness

[28] The Crown bears the onus of satisfying the Court on the balance of probabilities that the admissions made by Clinton Weston were voluntary (*McDermott v The King* (1948) 76 CLR 501 at 511-512; *R v Lee* (1950) 82 CLR 133 at 144).

[29] Mr Kilvington pointed to a number of matters which he submits are relevant to the issue of voluntariness.

The Arrest

[30] Mr Holt is an Aboriginal Community Police Officer (ACPO) stationed at Tennant Creek. Mr Holt gave evidence that on 7 June 2004 he was informed by ACPO Williams that CIB had tasked them to locate Clinton Weston regarding an assault on SH that happened in 2003. ACPO Holt stated that they located Clinton Weston on the morning of 7 June 2004 outside the newsagency on Hudson Street in Tennant Creek. Under cross examination ACPO Holt gave evidence he told Clinton Weston he was under arrest for an incident in the year 2003. He agreed in cross examination that Clinton Weston is his cousin/brother and in aboriginal law has to respect ACPO Holt. Mr Holt told Clinton Weston that the CIB wanted to talk to him back at the police station. ACPO Holt gave evidence that ACPO Williams had

told him that Adrian Williams had nominated Clinton Weston as a second offender in the assault. Under cross examination, ACPO Holt gave evidence that he arrested Clinton Weston because Clinton Weston was a suspect. ACPO Holt gave evidence it was his belief that he could arrest a person if they were a suspect and take them back to the police station for questioning by the CIB. He further stated in cross examination that he had been told by the CIB, including Snr Constable Board and Acting Sgt Butcher, that he could arrest a person for the purpose of taking them back to the CIB, at the police station, for questioning.

[31] ACPO Williams gave evidence that at about 10.00 am on 7 June 2004, he was told by Acting Sgt Butcher to arrest Clinton Weston and to bring him back to CIB for questioning. He and ACPO Holt went on patrol. ACPO Williams said he told ACPO Holt they were to arrest Clinton Weston. ACPO Holt effected an arrest of Clinton Weston outside the newsagency. At the time the arrest was effected, ACPO Williams was inside the newsagency. Together ACPOs Holt and Williams conveyed Clinton Weston back to the Watch-house. ACPO Williams states they told the Watch-house keeper that they were holding Clinton Weston under s 137 of the Police Administration Act for investigation by the CIB. ACPO Williams stated he believed he had power to arrest Clinton Weston because Clinton Weston was a suspected co-offender with Adrian Williams. He gave evidence he also believed he had the power to hold Clinton Weston for investigation pursuant to s 137 of the Police Administration Act until the investigation is complete.

[32] ACPO Williams agreed in cross examination that he could have been mistaken about Acting Sgt Butcher directing him to find Clinton Weston and arrest him. He agreed that Acting Sgt Butcher may have told him she wanted them to keep an eye out for Clinton Weston. He stated when cross examined by Mr Kilvington that he agreed that he and ACPO Holt arrested Clinton Weston so that he could be held under s 137 of the Police Administration Act for investigation. He agreed with Mr Kilvington that at the time the arrest was effected he had no grounds for believing Clinton Weston had committed an offence. He only had grounds for suspecting Clinton Weston might have committed an offence.

[33] It is the evidence of Acting Sgt Butcher, that on the morning of 7 June 2004, ACPO Williams was at the Tennant Creek Police Station at the time Adrian Williams was brought into the police station. Acting Sgt Butcher gave evidence she had asked ACPO Williams to keep an eye out for Clinton Weston as they would probably want to talk to him later that day. Acting Sgt Butcher stated at this time she had evidence in the form of a spontaneous admission by Adrian Williams that Clinton Weston was a co-offender. She also had a statement from the complainant saying that there were two aboriginal male offenders. The second offender had not been identified. Acting Sgt Butcher stated she believed Clinton Weston was a suspect in the matter. She stated that at the time she believed she had the power to arrest Clinton Weston. Under cross examination by Mr Kilvington, Acting Sgt Butcher agreed that in the first statement made by SH on

19 March 2003, she said nothing suggestive of rape the previous night. Neither did she say anything in that statement that implicated Clinton Weston. Acting Sgt Butcher gave evidence that following the arrest of Adrian Williams on the morning of 7 June 2004 on a warrant of apprehension, he had travelled to the police station in a vehicle with Snr Constable Board and Acting Sgt Butcher. It is Acting Sgt Butcher's evidence that Snr Constable Board had said to Adrian Williams that after they had dealt with the warrant of apprehension, police wanted to question Adrian Williams about an attack on a girl in the laneway behind the garage, a year earlier. Acting Sgt Butcher says that Adrian Williams immediately blurted out that it wasn't him, it was Clinton Weston. Acting Sgt Butcher agreed that up until that moment there was not a "skerrick" of evidence against Clinton Weston. It is Acting Sgt Butcher's evidence under cross examination that she did not direct ACPO Williams or ACPO Holt to arrest Clinton Weston. Her evidence is that she asked the Aboriginal Community Police Officers to keep an eye out for Clinton Weston as CIB may want to talk with him at a later date. She agreed that police may have wanted to question Clinton Weston if he was willing to be questioned. Also under cross examination by Mr Kilvington, Acting Sgt Butcher said she became aware at about 10.20 – 10.30 am on 7 June 2004, that Clinton Weston had been arrested. She further stated under cross examination that she believed there were reasonable grounds to arrest Clinton Weston. Acting Sgt Butcher stated that she agreed in the committal hearing she had said, when asked

about the second offender, that she believed Clinton Weston was a suspect in the matter.

[34] Senior Constable Board also gave evidence on the voir dire hearing. Senior Constable Board gave evidence he attended with Acting Sgt Butcher at Mulga Camp for the purpose of arresting Adrian Williams. This occurred shortly after 8.00 am on 7 June 2004. As they were driving back to the police station, Snr Constable Board said he turned to Adrian Williams and his prisoner's friend, Hannah Williams. He gave evidence he told them that police would be dealing with the outstanding warrant in the first instance and then would be speaking to Adrian Williams in relation to an alleged assault on a female, which had occurred in the previous year, in a laneway behind a garage. Adrian Williams had responded "that wasn't me that was Clinton Weston". Senior Constable Board stated that on hearing this response and based on the victim's statement which he had read earlier, his belief would have been that Clinton Weston could have been arrested. I note that the only victim statement Snr Constable Board could have read at that time, was the statement made by SH on 19 March 2003. This statement (Exhibit P6) does not implicate Clinton Weston. The statement does state that there were two aboriginal men involved in the assault. Between 19 March 2003 and the morning of 7 June 2004, there had been no evidence obtained which implicated Clinton Weston.

[35] Senior Constable Board gave evidence that prior to commencing a record of interview with Adrian Williams at 10.43 am on 7 June 2004, he was advised by Acting Sgt Butcher that Clinton Weston had been arrested. Acting Sgt Butcher asked him to have a conversation with Clinton Weston pursuant to s 140 of the Police Administration Act. Transcript of this conversation is Exhibit P22. This transcript indicates Snr Constable Board spoke to Clinton Weston at 10.35 am on 7 June 2004. He advised Clinton Weston that he was under arrest for the attempted sexual assault of a girl in March 2003 in Tennant Creek. He then advised Clinton Weston they would be conducting a record of interview with him and asked further questions with a view to arranging a person to sit with him through the record of interview.

[36] The power to arrest without warrant is set out in s 123(1) Police Administration Act which provides as follows:

> "(1) A member of the Police Force may, without warrant, arrest and take into custody any person where he believes on reasonable grounds that the person has committed, is committing or is about to commit an offence."

[37] Section 123 of the Police Administration Act was considered by Kearney J in *R v Grimley* (1994) 121 FLR 236 at 252:

> "Police in the Territory may lawfully arrest a person without warrant, and take him into custody, only where they believe on reasonable grounds that he has committed, is committing, or is about to commit an offence: see s 123 of the Act. At common law Police could arrest a person without warrant if they reasonably suspected he had committed a felony; but that power is necessarily superseded by the heavier requirement of 'reasonable belief', in s 123. Edwards clearly

> could not lawfully have arrested the accused until he made admissions about 8 pm; suspicion is less than reasonable belief, there is no power to arrest on suspicion, and Edwards had no reasonable grounds to form a belief that the accused had committed the offences, until about 8 pm. It is also clear, for the purposes of the voir dire proceedings, that a person is regarded in law as being under arrest and held in custody when police by their words or conduct would have given a reasonable person grounds to believe, and in fact have caused the person in question to believe, that he would not be allowed to leave should he try to do so. …"

These provisions were the subject of similar comment by the Court of Criminal Appeal in *Grimley v The Queen* (1995) 121 FLR 282 at 294:

> "The power of police to arrest without warrant is circumscribed by a need for the member of the police force to believe on reasonable grounds that the person has committed an offence. It was not established that any of the police involved in this matter had such a belief to the time of the arrest at about 8 pm, shortly after the appellant had started to make his confession. The consequences of a wrongful arrest can be quite serious, hence the oft-offered invitation to a person to go to the police station. …"

[38] In the matter before this Court, the arresting officer ACPO Holt, could have had no more than a suspicion Clinton Weston was involved in the offence of an assault upon SH on 18 March 2003.

[39] Similarly, Acting Sgt Butcher and Snr Constable Board could not have had a belief based on reasonable grounds at the time of his arrest, that Clinton Weston was involved in the offence of an assault upon SH on 18 March 2003.

[40] The information available to police officers at the time of Clinton Weston's arrest was that SH had stated on 19 March 2003, she had been assaulted on 18 March 2003 by two aboriginal men whom she was not able to identify.

She had described the clothing they wore. After police arrested Adrian Williams early on the morning of 7 June 2004, Snr Constable Board had explained they would be questioning him about an attempted sexual assault on a girl in a laneway at Tennant Creek in March of the year before. Adrian Williams had said "that was not me it was Clinton Weston". The statement made by Adrian Williams was not an admission, it was an accusation. This may have given rise to a suspicion on behalf of police officers that Clinton Weston may have been involved. It could not form the basis of a reasonable belief Clinton Weston had committed an offence.

[41] Indeed Acting Sgt Butcher does not appear to have formed such a belief because on her evidence she says she asked ACPO Holt and ACPO Williams to keep an eye out for Clinton Weston as CIB may want to speak with him later that day. Acting Sgt Butcher denies that she gave a direction to ACPO Holt and ACPO Williams to arrest Clinton Weston.

[42] Clinton Weston arrived at the Tennant Creek Police Station at approximately 10.30 am on 7 June 2004. Police officers, Snr Constable Board and Acting Sgt Butcher, did not have any further information relating to Clinton Weston, as the record of interview with Adrian Williams did not commence until 10.43 am. At 10.40 am Snr Constable Board, under instruction from Acting Sgt Butcher, conducted a conversation, pursuant to s 140 of the Police Administration Act, with Clinton Weston informing Clinton Weston he was under arrest.

[43] There could, at this time, have been no belief based on reasonable grounds by either Snr Constable Board or Acting Sgt Butcher that Clinton Weston was implicated in the alleged assault upon SH on 18 March 2003.

[44] The arrest of Clinton Weston was unlawful. He was then held under s 137(2) of the Police Administration Act for questioning. Section 137(2) provides as follows :

> "(2) Notwithstanding any other law in force in the Territory (including the common law), but subject to subsection (3) a member of the Police Force may, for a reasonable period, continue to hold a person he has taken into lawful custody in custody to enable –
>
> (a) the person to be questioned; or
>
> (b) investigations to be carried out,
>
> to obtain evidence of or in relation to an offence that the member believes on reasonable grounds involves the person, whether or not –
>
> (c) it is the offence in respect of which the person was taken into custody; or
>
> (d) the offence was committed in the Territory,
>
> and the person shall not be granted bail under Part III or section 33 of the *Bail Act* while so detained, whether or not he or she has been charged with an offence."

[45] The written submission made by counsel for the Crown on the issue of unlawful arrest includes the following:

> "The court focus should be on the fact that (a) any unlawfulness was really only technical. There was a reasonable basis for a belief at the time of his arrest that the accused had committed the rape, and this belief was held by those investigating the matter; (b) any unlawfulness was not deliberate; and (c) it was not calculated to cause an untrue admission to be made – 'the exercise of the discretion must be governed by the effect of the illegality or impropriety rather than by the inherent quality of the conduct of the police or other person in a position of authority over the

confessionalist' (*R v Swaffield*, per Brennan CJ (1998) 192 CLR 159 @ 174"

[46] However, none of the police officers could have had a reasonable belief that an offence of rape had been committed. At the time of Clinton Weston's arrest on the morning of 7 June 2004, there had been no complaint of rape received by police. There was no evidence at the time of Clinton Weston's arrest that an offence of rape had been committed on 18 March 2003 upon SH. There was no evidence at that time on which any of the police officers could have formed a belief on reasonable grounds that Clinton Weston had committed any offence at all.

[47] The effect of the unlawful arrest of Clinton Weston on the morning of 7 June 2004, is that he was not in lawful custody at the time police were interviewing him pursuant to s 137 of the Police Administration Act. The s 137 form relating to Clinton Weston forms part of Exhibit P23. This document indicates Clinton Weston was arrested outside the Goldfields Hotel in Tennant Creek at 10.12 am on 7 June 2004 for an offence of attempt sexual intercourse without consent. He was conveyed to the Tennant Creek Police Station. Following some preliminary matters he was taken from his cell for the purpose of the record of interview at 1327 hours. The record of interview itself commenced at 1333 hours on the same day.

[48] Clinton Weston was unlawfully arrested by ACPO Holt outside the newsagency/Goldfields Hotel on Hudson Street, Tennant Creek at 10.12 am on 7 June 2004. Clinton Weston was conveyed to the Tennant Creek Police

Station. CIB members Acting Sgt Butcher and Snr Constable Board acquiesced in the unlawful arrest. At the request of Acting Sgt Butcher, Snr Constable Board recorded a conversation with Clinton Weston pursuant to s 140 of the Police Administration Act. This occurred at approximately 10.40 am on 7 June 2004. There was still no evidence on which any of the police officers could have formed a belief on reasonable grounds that Clinton Weston had committed an offence.

[49] The total effect of what occurred is that Clinton Weston was unlawfully arrested at 10.12 am on 7 June 2004 and conveyed to Tennant Creek Police Station. He was then unlawfully detained under s 137 of the Police Administration Act for the purpose of undertaking a record of interview.

Prisoner's Friend

[50] The next challenge to the admissibility of the record of interview conducted with Clinton Weston, is with respect to the prisoner's friend, who in this case was Mr Neil Hayes.

[51] The essential challenge is that there was a breach of guideline No 3 in *R v Anunga* (1976) 11 ALR 412 at 414-415 and in breach of the express requirements in the Police Standing Orders. The relevant guideline in *R v Anunga* (supra) is as follows:

> "Where practicable 'a prisoner's friend' should be present during interrogation. The 'prisoner's friend' should be someone in whom the prisoner will have confidence, by whom he will feel supported."

[52] Kearney J considered the rule relating to the prisoner's friend in the Police General Orders in *R v Butler (No 1)* (1991) 102 FLR 341 at 344. Kearney J quoted guideline No 2 from *R v Anunga* and then said:

> "I consider that it is desirable that a "prisoner's friend" should desirably possess other qualities as well as those emphasised above. He should be aware of the respective rights and duties of the police and of the suspect in that interview, so that he can ensure that the suspect is aware of the possible consequences of the answers he gives. He should be seen to be independent of the police and have a temperament such that he is not himself intimidated by the interviewing environment. He should be able to speak the suspect's principal language. There will usually be practical difficulties in obtaining the services of people with all the desirable attributes. In any event, the choice of the "friend" is for the suspect alone, not the police, though the police may assist in securing the services of a "prisoner's friend", if expressly requested to do so by the suspect: see *Gudabi v The Queen* (1984) 1 FCR 187 at 199-200. The Commissioner's General Orders Q2.8, 2.9 and 2.16 provide suitable instructions to interrogating police officers in relation to the "prisoner's friend".

See also *R v Weetra* (1993) 93 NTR 8.

[53] The prisoner's friend selected by Clinton Weston was Mr Neil Hayes, after a discussion with his mother Pauline Weston and ACPO Holt. Mr Hayes is a cousin/brother to Clinton Weston and was selected by Clinton Weston to sit with him

[54] Order 5 in Police General Orders Q2 reads as follows (Exhibit D16):

> "5. The Role of a 'Prisoner's Friend"
>
> 5.1 The 'prisoner's friend' must understand his/her role – the following procedures will ensure that this point is not overlooked.

5.2 Prior to commencing an interview in the presence of a ‘prisoner’s friend’, Police are to explain to the chosen ‘friend’ in simple terms:

5.2.1 the reason for the interview;

5.2.2 the form the interview will take;

5.2.3 brief particulars of the alleged offence;

5.2.4 that the ‘friend’ has been chosen by the suspect to sit with the suspect in a supporting role;

5.2.5 the right of the ‘friend’ to assist or support the suspect with help or clarification if at any time it appears necessary;

5.2.6 the right of the ‘friend’ to talk to, or otherwise communicate with the suspect at any time that he/she is acting as a ‘friend’; and

5.2.7 the right of the suspect to communicate with the ‘friend’ at any time for advice or for any reason.

5.3 The above points, and any other conversation with the ‘prisoner's friend’, are to be recorded, generally by the same means as the interview with the suspect.

5.4 If practicable, a statement should be taken from the ‘prisoner's friend’ at the conclusion of the interview with the suspect, to clarify that the ‘friend’ understood his/her role and was satisfied that Police conducted the interview in a fair and proper manner. If the ‘prisoner's friend’ is unable to read, the statement should be read to him/her and suitable wording incorporated in the statement to describe the relevant circumstances.

5.5 Should a ‘prisoner's friend’ speak or communicate with a suspect or vice versa during a record of interview, the words or fact of communication should be accurately recorded in the record of interview. In addition any questions put by the interrogating member direct to the ‘prisoner's friend’ and the replies received must also be accurately recorded in the record of interview.

5.6 A ‘prisoner's friend’ should be invited to identify themselves in all records of interview at which he/she is present.

5.7 It should be clearly understood that the qualities that should be met by a person acting as a ‘prisoner's friend’ are:

5.7.1 The person should be ‘someone in whom the suspect has apparent confidence … by whom the suspect will feel supported’.

5.7.2 The person should be a person ‘who knows and is known to the suspect’.”

[55] In the record of interview with Clinton Weston (Exhibit P9), Acting Sgt Butcher said to Mr Hayes (Exhibit P9):

> “Butcher: Cousin-brother right. Neil the reason that you [are] here obviously is because Clinton’s asked for you to be here and you’re here because Clinton’s under the age of 18 [he is] required to have an adult parent or [guardian] sit with him in the interview. Alright now you [are] here to make sure we treat him fairly and to make sure that he understands what’s happening. You understand that?”
>
> Hayes: Yeh.
>
> Butcher: You Clint – Clinton doesn’t understand something you tell us we’ll ask him in a different way. You can talk to Clinton any time you want you can ask us questions. Feel free to speak whenever you want, alright. Understand that?”

[56] Acting Sgt Butcher went on to explain that Mr Hayes could speak to Clinton Weston at any time and if Clinton Weston did not understand something he could be asked again in a different way.

[57] Mr Hayes was essentially there in the capacity of a parent or guardian. Whilst in many circumstances that person can also act in the capacity of a prisoner's friend, I have some concerns as to whether Mr Hayes had the capacity to fulfil the role of a prisoner's friend as required under Police General Orders.

[58] There is evidence Acting Sgt Butcher explained to Clinton Weston what was the role of the prisoner's friend. In the record of interview (Exhibit P9):

> "Okay. So Clinton you can talk to Neil anytime you want alright. You can ask him questions, ask advise, if you don't understand something you can tell him or us."

[59] Mr Kilvington submitted that Mr Hayes filled the description used by Muirhead J in *Rockman v Stevens* 1981 Aboriginal Law Bulletin 7, as "a piece of appropriate furniture at the interview". Other than to be present, Mr Hayes did not participate in the record of interview either by advising Clinton Weston or clarifying a question for him. Mr Hayes gave evidence on the voir dire. He stated he was told by the detectives to sit with Clinton Weston in the interview room to help out and talk with Clinton. He stated during his evidence in chief that Clinton answered the police questions of his own free will. He gave evidence that he sat in the interview room because it was against aboriginal law for Clinton to have his mother sit with him during the interview. He gave evidence that Clinton speaks Pigeon English. In cross examination he said he did not know if Clinton Weston speaks Warumungu. Mr Hayes initially stated in cross examination that he did not know what was happening when police were asking all those questions. He then said both he and Clinton understood that they did not have to answer the questions. Mr Hayes gave evidence that, before he went into the interview room, both the man and lady police officers spoke to him and told him to sit as a witness that the police were treating Clinton Weston properly. He was told that he was there to look after Clinton. Mr Hayes stated he did not speak during the interview and agreed that it was confusing for him. He said he thought it was his role to sit there and make sure that

the police did a fair thing. In re-examination, Mr Hayes was asked if he understood that he was allowed to say something during the interview if he wanted to, or not, and he replied "No". He stated that when police had told him he was to sit in the interview to protect Clinton he understood this to mean that he "was there just to sit down and see if they treat him good, that's all". He was asked what would he have done if police were not treating Clinton good and he replied "probably say something".

[60] I had the opportunity to view the video of the record of interview and observed both Clinton Weston and Mr Hayes through the interview. Having viewed the video of the record of interview and heard and seen Mr Hayes give evidence on the voir dire, I have grave doubts that Mr Hayes had a proper understanding of the role of a prisoner's friend. He was an appropriate person to sit in as a parent or guardian. As the interview involved an allegation of attempted sexual intercourse without consent, it would not have been appropriate in aboriginal law for Clinton Weston to have his mother sit with him. The evidence which is not challenged, is that aboriginal law required there to be a male person present with him at the interview, as it involved allegations of a sexual offence. I accept Mr Hayes was a person with whom the accused, Clinton Weston, felt comfortable and was there as a support person. However, I consider that Mr Hayes had a scant understanding of what was required of him in the capacity of a prisoner's friend as set out in the Police General Orders.

Interpreter

[61] The interviewing officers, Acting Sgt Butcher and Snr Constable Board, did not make any attempts to obtain an interpreter. Acting Sgt Butcher did seek advice from ACPO Holt who is related to the accused. ACPO Holt told Acting Sgt Butcher that the accused had an adequate understanding of English and did not need an interpreter. In his evidence on the voir dire, ACPO Holt did give evidence to the effect that he thought Clinton Weston did need an interpreter because he could not understand big words. However, he then made reference to the requirement to have a male person sit with him as a prisoner's friend and upon being asked if he thought Clinton Weston needed an interpreter in addition to a prisoner's friend he replied "no". Under cross examination ACPO Holt gave evidence that he thought Clinton Weston might need an interpreter. He stated he did not say this to Acting Sgt Butcher of the CIB because it was the job for the CIB to decide whether or not Clinton Weston required an interpreter.

[62] In Police General Order Q2 (Exhibit D16), the *R v Anunga* guideline No 1 provides as follows:

> "1. Origin
>
> 1.1 The 'Anunga' Guidelines were first enunciated by the Supreme Court of the Northern Territory in the case of *R v. Anunga and others* in 1976. Judgement was delivered by Chief Justice Forster and Justices Muirhead and Ward agreed with his reasons for decision. The guidelines have evolved, and continue to evolve, to the present time.
>
> 1.2 The guidelines are not strict rules of law. Compliance with the guidelines will generally result in the admission of the

> evidence obtained thereby. Non-compliance will not necessarily result in exclusion of the evidence. However, member should endeavour to comply with the guidelines so far as is possible. When the circumstances of a particular case necessitate non-compliance with one or more of the guidelines, then evidence should exist to explain such non-compliance."

[63] This is reflected in Police General Orders Q2 (Exhibit D16):

> "2.2 Investigators must determine, as part of the investigation, whether or not a particular suspect is entitled to the benefit of the guidelines. Evidence must be gathered to demonstrate whether or not a particular suspect is so entitled. Such evidence might include:
>
> 2.2.1 the investigator's observations of, and dealings and conversation with the suspect;
>
> .....
>
> 2.2.3 evidence from relatives and acquaintances of the suspect's use and understanding of language."

[64] The Anunga Guidelines are set out in the decision *R v Anunga* 11 ALR 414. They apply to persons who are being questioned as suspects. The first guideline deals with the issue of an interpreter , Forster J at 414:

> "(1) When an Aboriginal person is being interrogated as a suspect, unless he is as fluent in English as the average white man of English descent, an interpreter able to interpret in and from the Aboriginal person's language should be present, and his assistance should be utilized whenever necessary to ensure complete and mutual understanding."

[65] Acting Sgt Butcher and Snr Constable Board conducted a record of interview with Clinton Weston. A reading of this record of interview indicates Clinton Weston responded with apparent understanding to the questions. Clearly there were limits to his comprehension and ability to express himself. However, he was asked questions in simple English and

responded in very basic English. He was able to relate an event. In addition to this, Clinton Weston gave evidence on the voir dire. He did have an interpreter present to assist him when he gave evidence on the voir dire hearing. However, the greater part of his evidence he was able to give without the assistance of an interpreter. Clinton Weston was able, unassisted by the interpreter, to give a quite lengthy account, being his version of what occurred on 7 June 2004 at the time of his arrest and subsequently at the Tennant Creek Police Station. He was also able to give evidence as to the version of events relating to SH that he states he was attempting to tell Snr Constable Board.

[66] Clinton Weston was 16 years of age at the date he gave the record of interview. He has lived for many years in an urban environment close to the township of Tennant Creek. He has had a limited amount of schooling. There was evidence that he speaks English at home.

[67] I have concluded that the fact Clinton Weston did not have an interpreter present though his record of interview is not of itself a breach of the Anunga Guidelines or Police General Orders such that the record of interview should be excluded on this basis alone. However, the combination of the facts: that Clinton Weston is a juvenile, he is aboriginal, he had no access to legal aid, he had no interpreter and a person with him who was perfectly adequate as a parent or guardian but not as a prisoner's friend, does give rise to a concern about the conduct of the record of interview.

Undue Pressure - Inducement

[68] The next challenge to the admissibility of the record of interview with Clinton Weston, is an allegation that Snr Constable Board exerted undue pressure upon Clinton Weston.

[69] The police document headed "Investigatory Detention – Section 137 Police Administration Act – Chronology of Events", is Exhibit P23. This document states Clinton Weston was arrested outside the Goldfield's Hotel at 10.12 am on 7 June 2004 and conveyed to the Tennant Creek Watchhouse. Between 10.27 am and 10.32 am he was processed and placed in FZ cell. Between 10.35 am and 10.37 am an interview pursuant to s 140 of the Police Administration Act was recorded. Transcript of this record of interview is Exhibit P22. The Chronology of Events (Exhibit P23) then states Clinton Weston was taken out of his cell at 12.25 for a cigarette. He was returned to the cell at 12.28.

[70] Clinton Weston has given evidence as to a conversation he had with Snr Constable Board when Snr Constable Board took him out of the cell so that Clinton Weston could have a cigarette. Copy of the offender journal which is Exhibit D13 states:

"Date	Time	Comments
07/06/04	12.29	1. Holt Rpt Clinton Weston out from FZ Cell for smoke 2. By CIB member Board Nad back in cell after his smo 3. ke AIO."

The offender journal does not state what time Clinton Weston was returned to his cell.

[71] The offender journal (Exhibit D13) records 13.25 as being the time Clinton Weston was taken from his cell for a record of interview. The chronology of events (Exhibit P23) states he was taken out for interview at 13.27. The record of interview (Exhibit P9) is shown as commencing at 13.33 hours.

[72] The evidence of ACPO Holt is that Snr Constable Board asked him to take Clinton Weston out of his cell. This was at about 12.30 pm. The evidence of ACPO Holt is that at this stage, Clinton Weston had not asked for a cigarette. ACPO Holt agreed in cross examination that it was Snr Constable Board's idea to bring Clinton Weston out for a cigarette and Snr Constable Board who initiated this. Clinton Weston gave evidence that he was in his cell. He stated he did not ask for a cigarette, that Snr Constable Board came into his cell and asked Clinton Weston if he wanted a cigarette. Clinton Weston said Snr Constable Board took him outside. Clinton Weston gave evidence that when they got outside, Snr Constable Board had said "you want to tell me the stories what happened that night?" His evidence is he told Snr Constable Board that SH had approached him while he was sitting down drinking with a mob of people and asked him if there was any chance for a date that night. He stated he told Snr Constable Board that he and SH agreed to have sex. They were having sex when Adrian Williams approached them. Clinton Weston said he was explaining that Adrian Williams started grabbing at the girl, he fell on top of her, the girl was

kicking and scratching at Adrian who punched her to the side of the face. Adrian Williams then got up and walked away. It was Clinton Weston's evidence that he tried to tell his story to Snr Constable Board. Snr Constable Board had told him to say that he and Adrian Williams had walked up to that girl, asked her for sex, punched her and raped her. It is Clinton Weston's evidence that Snr Constable Board said it would help if Clinton Weston followed Snr Constable Board's story, and it would be over and done with. Clinton Weston gave evidence that when he told his story in the record of interview it was not a true story because Snr Constable Board forced him to tell lies. Under cross examination Clinton Weston gave evidence that Snr Constable Board did not want to listen to him when he tried to tell the truth. He stated he was telling Snr Constable Board that he had sex with that girl with her consent. He agreed that rape is a serious offence. He said he was aware that you can get life imprisonment if you commit rape. He stated Snr Constable Board was saying it would help me to get it over and done with. In this way he says he was forced by Snr Constable Board to tell the story he told in the record of interview.

[73] Clinton Weston stated under cross examination that he did not know how the story told by Snr Constable Board was going to help him. He said he felt nervous because Snr Constable Board kept breaking up his story. When asked in cross examination if he had told his cousin/brother, Neil Hayes, what Officer Board had told him to say, Clinton Weston replied that he did not because Officer Board had told him to keep it a secret. At the

conclusion of his cross examination, Clinton Weston gave very lengthy evidence as to his having consensual sex with the girl and what had happened afterward.

[74] Under cross examination, Snr Constable Board agreed he spoke with Clinton Weston outside the watchhouse while Clinton Weston was having a cigarette at 12.29 on 7 June 2004. Snr Constable Board denied that Clinton Weston tried to tell him his story. Snr Constable Board denied that Clinton Weston was telling him he had consensual sex with the girl. Snr Constable Board said there was no discussion of the allegation. He denied that he had told Clinton Weston to follow Snr Constable Board's story as that would help him. Snr Constable Board denied that he had told Clinton Weston to say that he and Adrian Williams raped that girl and that he should follow the police story. Snr Constable Board gave evidence that he and Clinton Weston did have a discussion about football. He denied there was any discussion about the police allegations.

[75] I did not find the evidence of Clinton Weston to be credible on this aspect. I do not believe his story that Snr Constable Board forced him to follow the police story and to tell police in his record of interview that he and Adrian Williams had raped the girl.

[76] I am not prepared to find that the record of interview is inadmissible on the basis that an inducement was held out to Clinton Weston to tell a version of the incident as suggested by Snr Constable Board.

Failure to contact Aboriginal Legal Aid

[77] In the decision of *R v Collins & Ors* (1979) 4 NTR 1, Gallop J expressed a duty that existed upon police to contact Aboriginal Legal Aid when an aboriginal person was arrested outside of Darwin or Alice Springs.

[78] Police General Order C1 deals with juveniles. Copy of General Order C1 was tendered Exhibit D15. General Order 3.5 states as follows:

> "3.5 Who else should be informed before conducting an interview?
>
> (i) the relevant Aboriginal Legal Aid Service, if Aboriginal.
>
> (ii) Community Welfare or the designated contact, if the juvenile's parents are unable to attend or an acceptable person can not be located.
>
> 3.5.1 Community Welfare and Correctional Services contact officers are available at Darwin, Katherine, Tennant Creek, Alice Springs and Nhulunbuy. Officers in Charge of police stations should ensure that up to date names and telephone numbers of contact officers for their respective areas are available to all members under their control.
>
> 3.5.2 The Don Dale Centre, Berrimah, is the after hours contact point for Darwin police who need to interview a juvenile and require the presence of a Community Welfare Worker."

[79] Police General Orders A7 titled "Arrests" was tendered Exhibit D14. Paragraph 28.2 and 28.3 provide as follows:

> "28.2 Subject to paragraph 28.5 and to any 'protocol agreement', an Aborigine taken into police custody (not including protective custody) is to be asked, on arrival at the Police Station, whether he/she wishes Aboriginal Legal Aid informed.
>
> 28.3 If the Aborigine is a juvenile, the member in charge will notify Aboriginal Legal Aid as well as the parent, guardian or other person responsible for the juvenile. (Refer also to Part 3 of the

Custody Manual – Children (Juveniles) as Offenders). The nearest Aboriginal Legal Aid Service is to be contacted as soon as practicable whenever an Aborigine in custody requests legal assistance or where the Aborigine is unable, for whatever reason to make a decision. However, this action is subject to any existing protocol agreement between the local police and Aboriginal organisations."

[80] These orders are made pursuant to s 26 of the Juvenile Justice Act which provides as follows:

> "The Commissioner of Police may, by general orders issued under section 14A of the *Police Administration Act*, issue guidelines, not inconsistent with that Act or this Act, in relation to the arrest of juveniles and the investigation of offences committed or believed to have been committed by juveniles."

[81] The consequence of non-compliance is that admissions are prima facie inadmissible pursuant to s 34 Juvenile Justice Act which provides as follows:

> "(1) Where, in proceedings against a juvenile in respect of an offence, upon objection being taken to the admission of evidence on the ground that the evidence was obtained in contravention of, or in consequence of a contravention of or a failure to comply with, this Act or the general orders referred to in section 26 in relation to the juvenile, the Court is satisfied, on the balance of probabilities, that the evidence was so obtained, the Court shall not admit the evidence unless it is also satisfied, on the balance of probabilities, that admission of the evidence would specifically and substantially benefit the public interest without unduly prejudicing the rights and freedom of any person.
>
> (2) The matters that a Court may have regard to in satisfying itself as required by subsection (1) include –
>
> (a) the seriousness of the offence in the course of the investigation of which the provision was contravened or was not complied with, the difficulty of detecting the offender, the need to apprehend the offender urgently and the need to preserve evidence of the facts;

(b) the nature and seriousness of the contravention or failure; and

(c) the extent to which the evidence that was obtained in contravention of, or in consequence of the contravention of, or the failure to comply with, the Act might have been lawfully obtained.

(3) This section is in addition to, and does not derogate from, any other law or rule under which a Court may refuse to admit evidence."

[82] The evidence in this matter is that police made no effort to contact the Aboriginal Legal Aid Office. The evidence of both Acting Sgt Butcher and Snr Constable Board is that they were not aware of the requirement to contact Aboriginal Legal Aid with respect to the two juveniles.

[83] ACPO Williams gave evidence that he was aware of the requirements that when aboriginal juveniles are arrested, police have to contact Aboriginal Legal Aid and advise them the juvenile is in custody. ACPO Williams stated that on the Monday 7 June 2004, when Clinton Weston was arrested, it was a court week in Tennant Creek. He gave evidence there is an Aboriginal Legal Aid Office in Tennant Creek.

[84] Evidence was given that during court week there are always one or two lawyers from the Central Australian Aboriginal Legal Aid Service who come to Tennant Creek to represent people in court. ACPO Williams stated that if he had been asked to make a call to Aboriginal Legal Aid he would not have had any difficulty in locating a lawyer. He stated the Aboriginal Legal Aid Office was only 100 metres away. Alternately, he would go to the nearby court house. ACPO Williams stated he did not contact Aboriginal Legal Aid

himself because he assumed either the watch-house keeper or a CIB member would do this. It is ACPO Williams' evidence that once he brought Clinton Weston into the police station, he was going back out on patrol on general duties. In re-examination ACPO Williams gave evidence that he always followed this procedure, relating to contacting Aboriginal Legal Aid, when he was working at Tennant Creek. He said he had on a number of times called the Aboriginal Legal Aid Office from Tennant Creek and they would follow up the call.

[85] ACPO Holt gave evidence that he was aware there was a rule that when an aboriginal juvenile was brought in under arrest, somebody from the police station would automatically contact Aboriginal Legal Aid to advise them there was a juvenile in custody.

[86] A failure to comply with Police General Orders has led to a record of interview being ruled inadmissible (*LLH* (2002) 132 A Crim R 498).

[87] Had Aboriginal Legal Aid been contacted and had an opportunity to speak with Clinton Weston, the record of interview may never have been given.

[88] Ms Ratcliffe on behalf of the Crown, submitted that par 28.5 of General Order A7 "Arrests" Exhibit D14 applies. This provides as follows:

> "The above instructions do not apply to an Aborigine arrested and detained for a reasonable period under section 137 of the PAA. On such occasions, Aboriginal Legal Aid/relatives etc. will not be notified until the investigation has been completed."

[89] I do not accept this argument with respect to Clinton Weston for two reasons:

(1) Clinton Weston had been unlawfully arrested and was not under lawful detention under s 137 of the Police Administration Act.

(2) 28.5 of General Order A7 does not apply to juveniles in view of the provisions of General Orders C1 (Exhibit D15) paragraph 3.5, which has already been set out in the course of these reasons – par [78].

[90] There was a failure by police to comply with Police General Orders to notify Aboriginal Legal Aid that a juvenile, namely Clinton Weston, had been arrested. The evidence is that it being a court week in Tennant Creek it would have been very easy to contact a lawyer from one of the Aboriginal Legal Aid Services. With the benefit of legal advice, this record of interview may never have been given.

Conclusion

[91] I propose to rule the record of interview is not admissible on the trial of Clinton Weston for the following reasons.

[92] The offence is alleged to have occurred on 18 March 2003. The first time police spoke with Clinton Weston about the allegations was on the morning of 7 June 2004, some fifteen months after the offence is alleged to have occurred.

[93] I have already stated the reasons why I have found that the arrest of Clinton Weston on the morning of 7 June 2005 was unlawful. He remained under arrest at the Tennant Creek Police Station unlawfully during 7 June 2004 and was unlawfully detained at the time he commenced a record of interview.

[94] Clinton Weston was at that time a juvenile aboriginal and entitled to certain safeguards and protections. I have found that CIB members who undertook the record of interview made no attempt to contact Aboriginal Legal Aid to advise them that a juvenile, Clinton Weston, was in custody. This is in contravention of Police General Order C1 3.5.

[95] During the record of interview Mr Neil Hayes sat with Clinton Weston. I have found that Mr Hayes was an appropriate person to be present in the capacity of a parent or guardian. However, he was not suitable in the role of a prisoner's friend, particularly as there was no interpreter present and no contact had been made with Aboriginal Legal Aid.

[96] The combination of all these factors leads me to conclude that the Crown have not proved on the balance of probabilities that the admissions made in the record of interview were voluntary.

[97] Accordingly, I rule the record of interview made with Clinton Weston on 7 June 2004 is not admissible on the trial of Clinton Weston.

Adrian Williams

[98] The Crown bears the onus of satisfying the Court on the balance of probabilities that the admissions made by Adrian Williams were voluntary (*McDermott v The King* (1948) 76 CLR 501 at 511-512; *R v Lee* (1950) 82 CLR 133 at 144).

[99] Mr Goldflam appeared as counsel for Adrian Williams. There are challenges to the admissibility of evidence including the record of interview with Adrian Williams. Mr Goldflam pointed to a number of matters which he submits are relevant to the issue of voluntariness. .I shall deal with each of these challenges.

[100] Firstly there is an objection to the evidence obtained from the seizing of Adrian Williams' jeans shortly before midnight on 18 March 2003 and the taking of the buccal swab on the morning of 19 May 2003.

[101] There is also an objection to the admissibility of the record of interview which commenced at 10.43 am on 7 June 2004 and the second record of interview which commenced at 5.20 pm on 7 June 2004.

[102] It is Mr Goldflam's submission that Adrian Williams was unlawfully arrested on 18 March 2003, and accordingly, the clothing taken from him was unlawfully seized. Mr Goldflam referred to two passages from the decision of Kearney J in *R v Grimley* (1994) 121 FLR 236 at 252:

> "Police in the Territory may lawfully arrest a person without warrant, and take him into custody, only where they believe on reasonable

> grounds that he has committed, is committing, or is about to commit an offence; see s123 of the Act. …"

and at page 257:

> "There is one aspect of the evidence I merely mention in passing, since nothing was sought to be made of it in argument. When Police merely suspect a person they cannot proceed to obtain evidence by seizing his clothing, unless they have lawful authority to do so; cf s119(1) of the Act and see *Levine v O'Keefe* [1930] V.L.R. 70. Improperly obtained evidence may be excluded from the evidence at trial; see *Bunning v Cross* (1978) 141 CLR 54, at pp75-80, for the relevant factors."

[103] Evidence as to the arrest of Adrian Williams was given by Michael Valladares. Constable Valladares gave evidence that on the night of 18 March 2003 at Tennant Creek he was rostered on general duties with Constable Josette Kelly. They spoke to a female aboriginal who stated she had been assaulted by two aboriginal males, they tried to rape her and she had run away. She described the two aboriginals as being full blood. They were in their 20's. They were both about 174 cm tall, one was skinny with short hair wearing a black t-shirt and black jeans. The second person was medium build, with short hair, an orange t-shirt and blue jeans. Constable Valladares and Constable Kelly then conducted patrols of the town area looking for anyone matching that description. Constable Valladares gave evidence that while they were conducting patrol they received information from Tennant Creek Night Patrol that they had seen a person fitting the description of one of the suspects running from the scene and jumping a fence into the sporting club. They gave the name Adrian Williams, who was

wearing an orange top and jeans. Constables Valladares and Kelly located a person of that description on Crown land near Blain Street. He gave the name Adrian Williams. He was wearing an orange top and jeans. Constable Valladares asked Adrian Williams some questions. He gave evidence that he observed blood on Adrian Williams' clothing which he thought may have been the blood of the victim. He pointed the blood out to Adrian Williams. Constable Valladares gave evidence that he believed Adrian Williams may have been one of the offenders. He then arrested Adrian Williams and told him he was under arrest for attempted sexual assault. Constable Valladares took Adrian Williams to the watch-house. He was processed into the cells. Constable Valladares notified the CIB that they had a juvenile in custody.

[104] Constable Valladares gave evidence that he seized the clothing from Adrian Williams that had blood on it as he believed this may have been the victim's blood. He believed this to be evidence in the offence. Constable Valladares gave evidence he wanted to seize Adrian Williams' clothing as an exhibit and to make sure it did not get cleaned up by the offender. He referred to there being taps in the watch-house and toilet facilities. Constable Valladares stated he believed he had the power to seized the clothing pursuant to s 144 of the Police Administration Act. At the time he seized the clothing Constable Valladares provided Adrian Williams with suitable replacement clothing.

[105] Under cross examination Constable Valladares gave evidence that he had recorded in his notebook when he first spoke to Adrian Williams the date of

birth for Adrian Williams. He knew straight away Adrian Williams was a juvenile. He reported this fact to the Officer in Charge, Tennant Creek Police Station immediately upon their arrival. He stated he was aware of the requirement to have a parent or guardian contacted as soon as a juvenile is arrested and to have a parent or guardian present during any interviewing. He agreed that he was aware in March 2003 that a parent or guardian was to be present during anything done by the juvenile in the investigation. There was no parent or guardian present when Adrian Williams' clothing was seized.

[106] Under cross examination, Constable Valladares agreed that when he observed Adrian Williams on the night of 18 March 2003 wearing similar clothing to the description that had been given by the victim, Constable Valladares formed the belief that Adrian Williams was a suspect. Under re-examination Constable Valladares stated that as at 18 March 2003, he understood he had a power to arrest a person without warrant under s 123 of the Police Administration Act. He stated this section gave police power to arrest a person without warrant where the police officer believes on reasonable grounds that a person has committed or may commit an offence. It is Constable Valladares' evidence that once he saw blood on the clothing of Adrian Williams he believed Adrian Williams may have committed the offence and that is why he arrested him.

[107] Section 123 of the Police Administration Act provides as follows:

> "(1) A member of the Police Force may, without warrant, arrest and take into custody any person where he believes on reasonable grounds that the person has committed, is committing or is about to commit an offence."

[108] On all of the evidence that was within the knowledge of Constable Valladares, I have come to the conclusion that there were reasonable grounds for Constable Valladares' belief that Adrian Williams had committed an offence.

[109] Accordingly, I reject the submission made by Mr Goldflam on behalf of Adrian Williams, that the arrest of Adrian Williams on the night of 18 March 2003 was unlawful. I have concluded that it was in fact a lawful arrest and Adrian Williams was in lawful custody.

[110] Constable Valladares gave further evidence that he did not realise as at 18 March 2003 that there was a requirement that a parent or guardian be present at the time the clothing was seized. He stated he now knows this is the case. Constable Valladares said if he could not get a parent promptly he would still seize the clothing otherwise important evidence could be lost.

[111] I now turn to consider the effect that the absence of a parent or guardian has with respect to the seizure of the clothing of Adrian Williams for forensic testing.

[112] The power to seize clothing is set out in s 144 of the Police Administration Act which provides as follows:

(1) Where a person is in lawful custody, a member of the Police Force may search his person, the clothing that he is wearing and any property in his immediate control and may use such force as is reasonably necessary for this purpose, if he believes on reasonable grounds that it is necessary to do so –

(a) for the purpose of ascertaining whether there is concealed on his person, in his clothing or in that property, a weapon or other article capable of being used to inflict injury upon a person or to assist him to escape from custody; or

(b) for the purpose of preventing the loss or destruction of evidence relating to an offence.

(2) The member may seize any weapon or other article referred to in subsection (1) or anything relating to an offence, found as a result of a search in accordance with that subsection.

(3) Subsection (1) does not authorize a member to require a person to remove any clothing that he is wearing unless the member has reasonable grounds for believing that the removal and examination and detention of such clothing may afford evidence of the commission of an offence, and the person is provided with adequate clothing to replace the clothing removed.

(4) Any search carried out pursuant to subsection (1) shall, wherever practicable, be carried out by a member of the same sex as the person searched.

(5) Nothing in this section shall be taken to prevent the search of the person of a person, or of property under the control of a person and the removal from that person of any property for safe keeping upon his being admitted as an inmate of a gaol, lock-up, prison or like place after being charged with an offence."

[113] I note that there has been an amendment to s 144 since 18 March 2003, namely Act No. 11 of 2005. The amendment is included in the above recital of the section but nothing turns on the amendment for the purpose of these proceedings.

[114] Mr Goldflam argues that the seizure of the clothing was illegal under s 25 of the Juvenile Justice Act which provides as follows:

"(1) Subject to subsections (2), (3) and (4), where a member of the Police Force or other person with the power to arrest believes, on reasonable grounds, that a juvenile –

(a) has committed an offence which, if committed by an adult, is punishable by imprisonment for 12 months or longer; or

(b) is implicated in the commission of such an offence,

the member or that other person shall not interview the juvenile in respect of an offence or cause the juvenile to do anything in connection with the investigation of an offence –

(c) unless a person who is not a juvenile or a member of the Police Force but is –

(i) a parent or guardian of the juvenile;

(ii) a relative or friend of the juvenile acceptable to the juvenile;

(iii) some other person acceptable to the juvenile who is not, in the opinion of the member of the Police Force or that other person, an accomplice of the juvenile in the alleged offence or likely to lose, destroy or fabricate evidence relating to the offence; or

(iv) a legal practitioner acting for the juvenile,

is present while the member or that other person interviews the juvenile or the juvenile does the act, as the case may be; or

(d) unless –

(i) the member or that other person has taken reasonable steps to secure the presence of a person referred to in paragraph (c);

(ii) it was not practicable for such a person to be present within 2 hours after he was requested to be present; and

(iii) another person who is a person of good repute who has not been concerned in the investigation of the offence and who has no interest in the outcome of the investigation is present during the interview or while the act is done, as the case may be.

(2) Nothing in subsection (1) shall prevent a member of the Police Force from interviewing a juvenile in respect of an offence, or causing a juvenile to do anything in connection with the investigation

of an offence, in the presence of a member of the Police Force who is a parent or guardian of the juvenile.

(3) Nothing in subsection (1) derogates from the power of a member of the Police Force or any other person with the power to arrest to require, under section 134 of the *Police Administration Act* or under any other Act, a juvenile to furnish to him the name and address of the juvenile.

(4) Nothing in this section affects the operation of Part V or VI of the *Traffic Act* and, subject to section 53, a juvenile may be dealt with under Part V or VI of that Act as if the juvenile were an adult."

[115] There is evidence that Constable Muir observed Constable Valladares remove the jeans of Adrian Williams. There was no independent adult present when the jeans were taken.

[116] Mr Goldflam submits this was also a breach of Police General Order C1 articles 10.1:

> "One of the persons specified in section 25(1)(c) of the *Juvenile Justice Act* must be present when a member needs the juvenile to do anything in connection with an investigation of an offence. This includes taking intimate and non-intimate samples and identifying material, such as photographs and fingerprints."

[117] Both Constable Valladares and Constable Muir gave evidence that they were aware that an adult must be present with the juvenile when a member needs to do anything in connection with the investigation of an offence against a juvenile. It is Constable Muir's evidence that immediately after the second conversation with Adrian Williams at 2.59 am, the t-shirt and jeans were seized. The first conversation at the police station was at 2.06 am. Under cross examination Constable Muir agreed that removing an item of clothing and handing it over to police for forensic investigation of that clothing is a

thing in connection with the investigation of an offence. Constable Muir gave evidence he was aware of this on 19 March 2003.

[118] Constable Dash gave evidence that he believed the jeans were taken from Adrian Williams at the time he was placed in the cell. Constable Dash was not present when this occurred. He gave evidence relating to a recommendation of the Deaths in Custody Inquiry as to the removal of trouser belts. This appears to be a somewhat speculative statement on the part of Constable Dash, as neither Constable Valladares or Constable Muir referred to this as being a reason why they had asked Adrian Williams to remove his jeans.

[119] Constable Dash gave evidence he had two conversations with Adrian Williams on 19 March 2003, the first at 2.06 am and the second at 2.59 am. Transcript of the audio taped conversations is Exhibit P6. In the record of conversation that commenced at 2.06 am, Constable Dash advised Adrian Williams that his grandmother Ivy and his Aunt Hannah had already been to the police station and knew Adrian Williams was being held at the police station. Adrian Williams said he did not want either of them to sit with him during the record of interview, he wanted to talk by himself. Constable Dash assessed Adrian had been drinking. He advised Adrian Williams he had to have someone sit with him, that he should think about it and they would talk later.

[120] At 2.59 am, Constable Dash had a further conversation with Adrian Williams who told him he would find out tomorrow who would sit with him at the interview. Constable Dash asked Adrian Williams if he wanted to participate in a police line-up. Adrian Williams declined. Constable Dash explained that police would be keeping the jeans as there was blood on them and they intended to check to see if it was the girl's blood. Constable Dash advised Adrian Williams that the jeans would be returned after the tests were complete. Adrian Williams was told he was to be discharged and be given a lift home. He was advised police would come to his home later in the morning and might take a photograph of him. The conversation concluded at 3.02 am and Adrian was released to go home.

[121] Section 25(1) of the Juvenile Justice Act does provide that police not interview a juvenile in respect of an offence or cause the juvenile to do anything in connection with the investigation of an offence, unless this is done in the presence of one of the nominated persons in s 25(1)(c). I consider asking Adrian Williams to remove his jeans so that police could send the jeans away to have the apparent blood stains tested, meant that Adrian Williams was being asked to do something in connection with the investigation of an offence.

[122] Constable Valladares stated that he wanted to seize the jeans immediately to ensure evidence would not be destroyed. Constable Valladares was concerned that Adrian Williams may be able to wash out the blood if the

jeans were not removed and this would mean the possible loss of vital evidence.

[123] I accept that Constable Valladares was either unaware or did not turn his mind to the fact that there should have been a person present, who fitted the description as required by s 25(1)(c) of the Juvenile Justice Act, when the jeans were removed. Similarly, Constable Muir who was also present, does not appear to have properly addressed that issue. I consider on all the evidence that the failure to have a person present was not a deliberate flouting of the law by the two police officers but rather that it was done because Constable Valladares had a genuine concern that if the jeans were not removed forthwith evidence would be destroyed. Pursuant to the provisions of s 34(1) of the Juvenile Justice Act, I have a discretion to nevertheless admit the evidence.

[124] In exercising this discretion, I am required to have regard to the matters set out in s 34(2) which provides as follows:

> "(2) The matters that a Court may have regard to in satisfying itself as required by subsection (1) include –
>
> (a) the seriousness of the offence in the course of the investigation of which the provision was contravened or was not complied with, the difficulty of detecting the offender, the need to apprehend the offender urgently and the need to preserve evidence of the facts;
>
> (b) the nature and seriousness of the contravention or failure; and
>
> (c) the extent to which the evidence that was obtained in contravention of, or in consequence of the contravention of, or the failure to comply with, the Act might have been lawfully obtained."

[125] In this matter, Adrian Williams was facing an allegation of a serious offence, there were difficulties in detecting the offender as the victim had not positively identified her attackers. There was an urgent need to preserve evidence, being the blood stains on the jeans. I accept that there were adult persons relatively close by who could have been brought in at short notice to witness the seizure of the jeans.

[126] In the context of the circumstances of this matter, I do not regard the failure by police to have a person present at the time of the removal of the clothing, amounts to a serious contravention or failure. Overall, Adrian Williams appears to have been fairly treated at the time of his initial presentation to Tennant Creek Police Station on the night of 18 March 2003. He was provided with replacement clothing. Relatives had been advised he was being held under arrest. He was assessed to have been drinking. He was discharged without there being any formal record of interview. He was advised it would be necessary to have a person sit with him during any subsequent record of interview. Had there been a person with Adrian Williams the police had every right to seize the jeans to have forensic tests carried out.

[127] I am satisfied on the balance of probabilities that admission of the evidence obtained as a consequence of the forensic tests on the jeans would substantially benefit the public interest without unduly prejudicing the rights and freedom of Adrian Williams.

[128] For these reasons, I rule that the results of the forensic tests made on the clothing of Adrian Williams that were seized on or about 18 March 2003, are admissible on his trial.

The Buccal Swab

[129] The next subject of a challenge is the buccal swab taken from Adrian Williams at his home on the morning of 19 March 2003.

[130] The taking of a buccal swab is authorised pursuant to s 31 of the Juvenile Justice Act. Reference was made to Police General Order F3.

[131] It is not in dispute that police utilised the procedure under s 145B of the Police Administration Act. Copy of the signed consent form duly signed and authorised is Exhibit P1.

[132] For differing reasons, Constable Dash and Constable Muir were both in error and somewhat confused at the time, as to the correct procedure for obtaining a buccal swab from Adrian Williams.

[133] There are important differences between the procedure under s 31B of the Juvenile Justice Act and s 145B of the Police Administration Act.
Section 31B is the appropriate provision where a juvenile is under suspicion for committing a crime, as was Adrian Williams. Section 145B of the Police Administration Act provides for a voluntary procedure.

[134] There are additional safeguards built into the procedure under s 31B of the Juvenile Justice Act.

[135] I accept, on the evidence, that Constable Dash and Constable Muir both made a genuine error. I accept they both acted under the belief they could obtain a buccal swab from Adrian Williams. The taking of the buccal swab was in the presence, and with the consent, of a guardian, being Hannah Williams. It was done with the authorisation of a superintendent.

[136] There is no undue prejudice to the right and freedom of the accused. The evidence from the buccal swab could substantially benefit the public interest, in that DNA evidence from the accused is a vital part of the investigation.

[137] I would exercise a discretion under s 34 of the Juvenile Justice Act to admit the evidence obtained from the buccal swab upon the trial of Adrian Williams.

The record of interview which commenced at 10.43 am on 7 June 2004.

[138] It is relevant that as at 7 June 2004, Adrian Williams was a juvenile aged 17 years. I consider it also relevant that he was being questioned about an offence alleged to have occurred some 15 months beforehand, i.e. on 18 March 2003. He had been arrested on 18 March 2003 with respect to the allegations and then discharged home. The police had seized his jeans for forensic tests. They had taken photos of him on the morning of 19 March

2003 and a buccal swab. Adrian Williams heard nothing further about this matter between 19 March 2003 and the date of his arrest on 7 June 2004, a period of some 15 months.

[139] The evidence is that police in Tennant Creek had been in possession of the results of the DNA tests from the blood on the jeans of Adrian Williams for a period of approximately 12 months. In that 12 months period, police had done nothing to follow up the allegations with Adrian Williams. There is no evidence Adrian Williams had any obligation to follow up the matter with police. The evidence is that during the 15 months since the date of the alleged offence, Adrian Williams had been at large. He was still residing at Mulga Camp near Tennant Creek. There are no allegations of any prior or subsequent similar offending. There is no evidence Adrian Williams was likely to flee the jurisdiction.

[140] In the circumstances that existed on 7 June 2004, his arrest for the offence alleged to have occurred on 18 March 2003 was not of such urgency that it had to be dealt with by police immediately after his arrest on a warrant of apprehension and whilst he was still in custody on the warrant of apprehension.

[141] Mr Goldflam then referred to Police General Order C1 – Juveniles, being Exhibit D15. He referred to the requirement, Standing Order C3.5, that the Aboriginal Legal Aid Service should have been informed before conducting an interview with a child.

[142] I agree with the submission made by Mr Goldflam that the effect of the failure to do this was to deprive Adrian Williams of any effective source of advice, support or protection. I have already referred to the evidence of ACPO Williams in the reasons for judgment relating to Clinton Weston. There would have been no difficulty in contacting Aboriginal Legal Aid as it was court week in Tennant Creek. There were Aboriginal Legal Aid lawyers close by. I have also previously referred to the evidence of ACPO Holt on this issue. Both ACPO Holt and ACPO Williams were aware of the requirement to contact Aboriginal Legal Aid before conducting an interview with a juvenile who was aboriginal. Acting Sgt Butcher gave evidence that as at 7 June 2004, she was not aware of this requirement. She also gave evidence that she has since been advised of the requirement and has "done it religiously since then". Snr Constable Board also gave evidence that he did not know about this rule at the time Adrian Williams was interviewed on 7 June 2004. Snr Constable Board stated he found out about the requirement to contact Aboriginal Legal Aid at a later time and agreed that he is bound to comply with that requirement.

[143] I agree that the failure to contact Aboriginal Legal Aid was a serious omission. The effect of it was to deprive Adrian Williams of his rights. Adrian Williams was in a vulnerable position as a juvenile who had been placed in custody.

Interview Pursuant to s 140 Police Administration Act

[144] The next subject of complaint by counsel on behalf of Adrian Williams, is the failure by police to conduct an interview pursuant to s 140 of the Police Administration Act with Adrian Williams. Section 140 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 given in evidence; and
>
> (b) may communicate with or attempt to communicate with a friend or relative to inform the friend or relative of the person's whereabouts,
>
> and, unless the investigating member believes on reasonable grounds that –
>
> (c) the communication would result in the escape of an accomplice or the fabrication or destruction of evidence; or
>
> (d) the questioning or investigation is so urgent, having regard to the safety of other people, that it should not be delayed,
>
> the investigating member must defer any questioning or investigation that involves the direct participation of the person for a time that is reasonable in the circumstances and afford the person reasonable facilities to enable the person to make or attempt to make the communication."

A similar provision is also set out in Police General Order Q1 – Questioning and Investigation Clause 10 (Exhibit P28).

[145] Acting Sgt Butcher gave evidence that she informed Adrian Williams in front of his aunt, Hannah Williams and Snr Constable Board, that he was under arrest for the assault matter. She gave evidence that Adrian Williams

was advised that police would be conducting an interview a short period of time after that. Her evidence is that Adrian Williams was asked if he wished to have anyone else present other than his aunt and he had stated he was "happy with his Auntie".

[146] There is no electronic record of such a conversation as required by s 141 of the Police Administration Act and no satisfactory explanation as to why it was not practicable to electronically record the conversation. Acting Sgt Butcher gave evidence to the effect that it was done in the watch-house which is on audio and video and that was why she did not do it on a hand held recording device. However, no audio or video recording of such a conversation in the watch-house has been tendered in evidence and no satisfactory explanation as to just why there is no electronic recording of such a conversation. Neither Snr Constable Board or Hannah Williams, when asked, confirmed that such a conversation took place. There is no reference to a conversation pursuant to s 140 of the Police Administration Act in the formal record of interview with Adrian Williams that commenced at 10.43 am on 7 June 2004. I am not able to find that there was an interview with Adrian Williams pursuant to s 140 of the Police Administration Act on the morning of 7 June 2004. This is also a serious omission in the Crown case, particularly, in view of the evidence that in accordance with aboriginal law, Hannah Williams was not an appropriate person to be sitting with Adrian Williams through the record of interview. There is no evidence Adrian Williams had been informed when he went into

the record of interview commencing at 10.42 am on 7 June 2004, that he would be asked questions about an alleged sexual offence. Had he known this, it may have affected his response to whether it was "okay" for Hannah Williams to sit with him. On my findings, the only information imparted to Adrian Williams prior to the commencement of the first record of interview on 7 June 2004, was a statement by Snr Constable Board addressed to Adrian Williams in the car on the way from his home in Mulga Camp to the police station on the morning of 7 June 2004.

[147] Mr Goldflam made a number of submissions addressing his concerns about the manner of the arrest of Adrian Williams effected by police on the morning of 7 June 2004. The evidence of Acting Sgt Butcher and Snr Constable Board on that aspect is that, Snr Constable Board said to Adrian Williams police would deal with outstanding warrants first and would then be speaking to him in relation to an alleged assault which had occurred the previous year in a laneway behind a garage. Adrian Williams had replied "that wasn't me that was Clinton Weston". It is not in dispute that police arrested Adrian Williams on a warrant of apprehension. Adrian Williams was subsequently refused bail on the warrant of apprehension and remanded in detention till the following day when court was sitting in Tennant Creek. He was arrested for the offence of assault and subsequently interviewed while he was being held in custody on the warrant of apprehension.

[148] I accept that Acting Sgt Butcher and Snr Constable Board proceeded this way in a genuine belief that they were complying with correct procedures. I

note the matters set out in the extract from the police college manual (Exhibits P11 and P17). The practise of holding a person on one charge and then interrogating them on another, has been the subject of judicial consideration. In *R v Echo* (1997) 6 NTLR 51 at 59, Martin CJ said:

> "… There is a question of high public policy involved where a person charged with an offence but in police custody pursuant to an order of a magistrate or court is questioned by police for investigative purposes. One of the purposes of compelling police to take a person in their custody before a justice or court, is to provide the opportunity for a decision as to whether or not he should be remanded in custody or upon bail. It is an abuse of an order of remand in custody of a person for police to utilise the occasion for further interrogation of that person. He or she would not have been in custody had it not been for the order made for the purpose of ensuring that the person is brought to the court on the fixed date.
>
> The law has a strong bias in favour of personal liberty and the writ of habeas corpus, civil remedies for false imprisonment and statutes relating to bail, all reinforce it. The requirement to bring an arrested person before a justice or a court of competent jurisdiction as soon as is practicable after a person has been taken into custody under s 137(4) of the Police Administration Act, or provide the opportunity for an application for bail as here, is a significant part of the laws armory to safeguard the liberty of the subject, and ensure that such a person has the protection under law through the court. Such a person is brought within the jurisdiction of the court which assumes responsibility for the person's release or continued detention whilst the process of prosecution is undertaken.
>
> If a person is committed to the custody of a member of the police by the magistrate or court it is not with a view to enabling further investigation to be carried out. …"

See also decision of Mildren J *R v Emily Jako, Theresa Marshall & Maris Robinson* (unreported) [1999] NTSC 46; [4] and [5] delivered 29 April 1999.

[149] Whilst I accept Acting Sgt Butcher and Snr Constable Board were acting in accordance with their understanding of correct police procedures, there were

two unfortunate consequences for Adrian Williams of proceeding in this way.

[150] Firstly, when police arrested him at his home in Mulga Camp on 7 June 2004 on the warrant of apprehension, neither he, or any possible prisoner's friend, were made aware he would also be arrested for the offence alleged to have occurred on 18 March 2003. There was no opportunity to consider who would be an appropriate prisoner's friend.

[151] Secondly, having been arrested and remanded in custody to the following day to appear at court, he was, as a juvenile, even more vulnerable when he went into the record of interview at 10.43 am on 7 June 2004. That this was a possibility is acknowledged by Snr Constable Board in his evidence under cross examination.

Prisoner's Friend

[152] The next issue is the position of Hannah Williams as prisoner's friend. Both Acting Sgt Butcher and Snr Constable Board gave evidence to the effect that they considered Hannah Williams as being the guardian and prisoner's friend of Adrian Williams.

[153] Police General Order Q2.5 (Exhibit D16), sets out the way in which police should brief the prisoner's friend as to their role. These provisions are set out in full in par [52] of these reasons for judgment.

[154] There is no evidence police complied with 5.2.3. Hannah Williams was never advised that the alleged offence was an attempted sexual assault. There is undisputed evidence from ACPO Williams and ACPO Holt that it is against aboriginal law for Hannah Williams, as a woman and Adrian Williams' aunt, to sit as a prisoner's friend while her nephew was being interviewed about a sexual matter. Hannah Williams herself gave evidence that it is wrong for Warumunga people to have young men talk about sexual matters in front of their aunt. She said it is against our law. Hannah Williams gave evidence that if she had known there was to be talk of sexual matters she would have got her brother to sit with Adrian Williams. When asked if she felt she could interrupt and stop the interview, Hannah Williams stated that she felt "bad".

[155] I accept that it was not appropriate in aboriginal law for Hannah Williams to sit with Adrian Williams, either as a guardian or prisoner's friend, during the interview with Adrian Williams that touched on sexual matters. I accept that aboriginal law requires that a male person sit with Adrian Williams whilst he was being questioned about an alleged sexual offence. I find that this situation inhibited Adrian Williams in answering the questions. The situation may have been avoided by police had they explained to Hannah Williams and Adrian Williams at the outset that they wanted to interview him about an allegation of a sexual offence. Alternately, arrangements could have been made for an appropriate male person to sit with Adrian Williams during the record of interview.

[156] With respect to the second record of interview which commenced at 5.20 pm on 7 June 2004 (Exhibit P10), there are similar deficiencies. There is no evidence Adrian Williams was briefed beforehand as to what the second interview would be about. There is no evidence Hannah Williams had any information as to what was going to happen in the second record of interview other than that she had been told by Acting Sgt Butcher to return to the police station.

[157] There was no real opportunity for Adrian Williams or Hannah Williams to indicate that it concerned an allegation where it would not be appropriate for Hannah Williams to sit in on the record of interview. The video of the record of interview shows Adrian Williams expressed some embarrassment at the questioning and a reticence to answer certain questions. There is undisputed evidence that in aboriginal law it was not appropriate for Hannah Williams to sit through this interview which concerned allegations of a sexual offence. I accept the evidence that Hannah Williams was not an appropriate person to sit with Adrian Williams as a prisoner's friend.

The Second Record of Interview

[158] The second record of interview does contain leading questions and questions from Acting Sgt Butcher that amount to cross examination. The Crown have highlighted the questions and answers in the record of interview which it is conceded amount to cross examination and should not be included if the

record of interview is found to be admissible. Examples of such questions and answers are (page 17):

> "BUTCHER So why do you think she'd tell us that you had sex with her? Why would she tell us that?
>
> WILLIAMS: I dunno. I didn't have sex with her."

page 18:

> "BUTCHER: So Adrian why would, why would [SH], why would that girl tell us that you both had sex with her why would she say that?
>
> WILLIAMS: I didn't have sex with her."

page 21:

> "BUTCHER: So can you tell me why Clinton and that girl would both be lying?
>
> WILLIAMS: I dunno."

[159] I would agree that there are a number of questions in the second record of interview that are intimidatory cross examination. In her statutory declaration sworn 9 June 2004 (Exhibit P24) Hannah Williams stated as follows:

> "Later in the day, about 4:00pm in the afternoon, the lady came back and picked me up again. She told me that they wanted to talk to Adrian again about the girl because there was more things they had to talk about that they didn't talk about in the morning. I went back to the Police Station again and sat in on second interview with Adrian. The Police explained Adrian his rights again and then asked him more questions about the girl.
>
> The Police were asking him questions about a rape from last year. Adrian was happy to answer questions about what happened like, who he was with and where it happened. When the Police were asking him about the sex part Adrian didn't want to talk about it. I think he was shy about the lady was asking him about it and because I was there too. The lady did try and ask him about the sex part lots

> of times but I don't think Adrian wanted to talk about it. He answered some of the questions.
>
> At the start of the interview the Police told Adrian that he didn't have to answer questions if he didn't want to but I think he felt like he had to because they asked him lots of questions."

[160] Mr Goldflam made quite extensive submissions about the fact that there was no interpreter present during the record of interview. A reading of the two records of interview, indicates to me that the interviewing officers did not give any real consideration to obtaining an interpreter. Evidence was given by ACPO Holt that it is not often at Tennant Creek Police Station that police bring in an interpreter. His evidence is that it is the practise at Tennant Creek that unless the prisoner asks for an interpreter then they normally do not get one. He stated if they ask for an interpreter "we will find an interpreter".

[161] If this evidence is correct as to the practises at Tennant Creek Police Station, it is a cause for some concern. The Anunga Rules and General Orders Q2, which have been quoted in these reasons for judgment, place a positive duty on police to ascertain if any interpreter is required and to take steps to procure an interpreter in appropriate circumstances.

[162] Having made that general observation, I am not in a position to find that a failure to obtain an interpreter is of itself a reason to exclude the record of interview. Adrian Williams appears to have understood the caution. He does have a grasp of basic English. His answers were responsive to the questions. He demonstrated a reasonable understanding of the English

language even though his capacity to express himself in that language appears limited.

Conclusion

[163] My reasons for ruling with respect to the admissibility of the records of interview are based on the following combination of circumstances. The offence allegedly occurred on 18 March 2003. Adrian Williams had been arrested on that date and discharged in the early hours of the following day. He was spoken to by police later in the morning of 19 March 2003. Photographs were taken of him and a buccal swab obtained. Despite the fact that police had received the results of the forensic tests made from blood on his jeans some three months later, Adrian Williams heard nothing further from police until some 15 months later. This is a long time, particularly in the life of a 17 year old boy, which was the age Adrian Williams was on the date of his arrest on 7 June 2004.

[164] Adrian Williams was arrested on a warrant of apprehension relating to some unrelated property offences. He was not told at this time that police also intended to arrest him for an alleged offence of sexual assault. This meant neither he nor the people at his home where he was arrested, were alerted to the fact that Hannah Williams was not the appropriate person to accompany him to the Tennant Creek Police Station.

[165] In the car on the way to the police station, Snr Constable Board told him they also wanted to question him about the alleged assault in March of the

previous year. Adrian Williams immediately denied his involvement and implicated Clinton Weston.

[166] On arrival at the police station an application was made by telephone to a magistrate. Adrian Williams was remanded in custody to appear at court in Tennant Creek the following morning.

[167] He was then arrested for an offence of assault upon SH on 18 March 2003 and at 10.43 am commenced a record of interview in relation to this allegation.

[168] At this time he was doubly vulnerable; (1) he was a juvenile 17 years of age; (2) he was in custody on another matter until at least the following morning.

[169] Police at Tennant Creek did not advise Aboriginal Legal Aid that they had a juvenile in custody, even though there were lawyers from the Aboriginal Legal Aid Office readily contactable and in close proximity.

[170] Hannah Williams, who sat with Adrian Williams, both as his guardian and as a prisoner's friend, was not an appropriate person in aboriginal law to be with him while he was interviewed about an alleged sexual offence. Both ACPO Holt and ACPO Williams attested to this as did Hannah Williams. In his statutory declaration Neil Hayes stated (Exhibit P25):

> "Clinton's mother could not sit with him for this, cause in aboriginal way that shame and they can't talk about this."

[171] Had Adrian Williams had the benefit and protection of some legal advice, and/or had with him an appropriate prisoner's friend, he may never have made these admissions or undertaken a record of interview.

[172] My ruling is that both records of interview made by Adrian Williams on 7 June 2004, are not admissible on his trial. I am not satisfied on the balance of probabilities that the admissions made in these records of interview were voluntary – see *Wendow & Ors v R* (1963) 109 CLR 559 at 572; *MacPherson & Ors v R* (1981) 147 CLR 512; *Njana* (1998) 99 A Crim R 273 at 276.

Summary of Rulings

[173] 1. The record of interview made by Clinton Weston on 7 June 2004 is not admissible on the trial of Clinton Weston.

2. The two records of interview made by Adrian Williams on 7 June 2004 are not admissible on the trial of Adrian Williams.

3. The forensic evidence obtained from the clothing of Adrian Williams by police on or about 18 March 2003 and the buccal swab obtained from Adrian Williams on 19 March 2003, are admissible on the trial of Adrian Williams.

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