R v Cotchilli [2007] NTSC 52

PARTIES:	THE QUEEN
	v
	COTCHILLI, RUSSELL
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	20600016
DELIVERED:	23 October 2007
HEARING DATES:	27-31 August & 12 September 2007
JUDGMENT OF:	MILDREN J

CATCHWORDS:

EVIDENCE – Admissions – Aboriginal of low intelligence -whether suspected of commission of an offence – whether caution understood - whether statement should have been required to be taped – whether admissible – whether detention unlawful

EVIDENCE – admissions – Aboriginal of low intelligence suspected of murder – Anunga guidelines not complied with – record of interview conducted after suspect had previously exercised the right to remain silent – whether voluntary or should be excluded in the exercise of discretion

Statutes:
Bail Act, s 16
Crimes Act 1914 (Cth), s 23C, s 23D
Evidence Act, s 26L
Police Administration Act, s 123, s 137, s 137(2), s 138, s 138(h), s 138(j), s 138(p), s 138(q), s 139, s 140, s 141, s 142, s 142(1), s 142(1)(a), s 143

Police Commissioner's General Orders, General Order Q2

References:
Cross on Evidence, 4th Aust ed, Butterworths, Sydney, 1991- (loose-leaf edition)

Citations:
Followed:
R v Anunga (1976) 11 ALR 412
R v Lee (1950) 82 CLR 133

Referred to:
Cleland v The Queen (1982) 151 CLR 1
McDermott v The King (1948) 76 CLR 501
Pollard v The Queen (1992) 176 CLR 177
R v Grimley (1994) 121 FLR 236
R v Louie Riley (unreported, Mildren J, delivered 23 June 1994); [1994] NTSC 62
R v Parker (1989) 19 NSWLR 177
R v Scotty [2007] NTSC 43
R v Wilson (unreported, Kearney J, 20 November 1998)
Sinclair v The King (1946) 73 CLR 316
Tan Seng Kiah v The Queen (2000) 10 NTLR 128
The Queen v Ireland (1970) 126 CLR 321
Tofilau & Ors v The Queen [2007] HCA 39
Williams v The Queen (1986) 161 CLR 278

REPRESENTATION:

Counsel:

Director of Public Prosecutions:	A Elliott
Accused:	J Tippett QC and R Goldflam

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Accused:	Northern Territory Legal Aid Commission

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

R v Cotchilli [2007] NTSC 52
No. 20600016

BETWEEN:

THE QUEEN
Plaintiff

AND:

RUSSELL COTCHILLI
Defendant

CORAM: MILDREN J

REASONS FOR RULING

(Delivered 23 October 2007)

[1] This is an application pursuant to s 26L of the Evidence Act to seek rulings on the admissibility of confessional statements made by the accused and upon which the Crown seeks to rely at the accused's trial. The admissibility of the confessional statements are challenged on the ground that they are inadmissible by virtue of the provisions of the Police Administration Act and were, in any event, obtained involuntarily. Alternatively it is submitted that I should exclude them in the exercise of my discretion.

Background facts

[2] The accused is charged with the murder of Leanne Cooper (the deceased) at Alice Springs on or about Wednesday 21 December 2005.

[3] The Crown case is that the deceased's body was found in the dry bed of the Todd River near the Stott Terrace Bridge, Alice Springs, on the morning of Thursday 22 December 2005. There were 14 stab wounds to various parts of the body, some of which penetrated vital organs including the upper part of the left lung, deep penetrating wounds to the heart and wounds to the stomach and liver. The cause of death was multiple stab wounds to the chest. The deceased also had a blood alcohol reading of 0.122 per cent and cannabis metabolites were also detected in samples taken from the body.

[4] The deceased was an Aboriginal female aged 23, 164 cm in height and weighing 68 kg.

[5] When the body was discovered at about 11:00 am on 22 December, the police were called and an examination of the crime scene located a knife handle with no blade nearby. A knife blade consistent with having become detached from the handle was found underneath the body. The knife blade was bloodstained. A fingerprint thumbprint or similar print was found on the blade. The print does not belong to the accused and has not been identified. There is evidence which suggests that the print was probably left after the deceased's blood came to be left on the knife blade.

[6] The autopsy report indicates that the examination was commenced at 1500 hours on 22 December 2005. At that stage there was evidence of early decomposition of the body. Post mortem hypostasis was not identified. Rigor mortis was partially developed. The autopsy report does not indicate

the likely time of death. The pathologist, Dr Sinton, gave evidence at the committal that he attended the scene at 1300 hours on 22 December and that the injuries were inflicted "some hours, seven or eight perhaps" prior to this.

[7] A large number of samples were submitted for testing for DNA. The results of those tests did not implicate the accused, nor for that matter, any other individual.

[8] A number of enquiries were made by police for the purpose of locating possible witnesses. One of the persons spoken to was David Jabarula West, who was interviewed and from whom a statement was taken by police on Saturday 24 December 2005. According to his statement West slept at his 'Uncle's Wayne Halik camp' under the bridge with his wife on Wednesday night, 21 December, after consuming some "Fruity Gordo" with another unidentified Aboriginal man. He awoke the following morning at 6:00 am but did not see the deceased's body and had no knowledge of how the deceased met her death.

[9] Mr West's wife, Joanne Granites had previously been interviewed by police on Thursday 22 December. According to her statement she went to sleep under the bridge with her husband. There was also a white man near there and the accused. She was "full drunk" and went straight to sleep. Apart from seeing the body of the deceased later on 22 December, she claimed to have no knowledge of how the deceased met her death.

[10] The accused was first interviewed by police on Sunday 25 December 2005. According to his statement (Ext P2), he, David West and Joanne Granites consumed a 5 litre cask of moselle on the evening of Wednesday 21 December under the bridge. As it was starting to get dark an aboriginal man and an aboriginal woman walked up to where they were and they had a conversation with them both. The accused gave a detailed description of both of these people, neither of whom he knew. The accused gave an account of seeing the aboriginal man and woman later arguing over money and the man threatening to kill her. He described a large knife which this man had in his possession and which he began swinging around. Nothing happened initially and the accused fell asleep. Later in the evening he was awoken by yelling and he heard the voices of the same two people arguing some distance away. He then gave an account of witnessing the man assaulting the women with his fists, dragging her by the hair and stabbing her with the knife. He claimed he was too drunk to get up and fell asleep. The following morning when he awoke, he saw the deceased's body but was too scared to go to the police.

[11] The police believed that the description the accused gave fitted one Reid, who was arrested at 1620 hours on 25 December. Enquiries subsequently satisfied the police that Mr Reid was not involved and he was released without charge on 26 December.

[12] On the following day at 9:45 am, Detective Senior Constable Butcher, who had first interviewed the accused, and her partner, Constable Karamanidis,

were driving along the Stuart Highway near the Old Timer's Camp heading towards Alice Springs when they saw the accused walking in the opposite direction. The police stopped and spoke to the accused who indicated that he knew who had killed the deceased. The accused was then taken to the Alice Springs Police Station where a further statement was obtained. In this statement the accused said that the killer was his brother, Darren Cotchilli, and that the victim was related to Darren's wife, Francine Colliger. In this statement (Ext P3), he gave a broadly similar account of the circumstances of the homicide. He told police that he had not told the truth previously because he was, in effect, afraid of his brother. He indicated that his brother lived at Mutitjulu in a blue house which he described and that he had left Alice Springs to return to Mutitjulu the previous evening.

[13] At 5:00 am on 23 December, Detective Butcher and Constable Karamanidis drove to Mutitjulu Community near Uluru, some 400 km from Alice Springs, where they located and arrested Darren Cotchilli, who was brought back to Alice Springs. Darren Cotchilli participated in an electronically recorded interview in which he claimed that at the relevant time he was working at Mutitjulu. This claim was able to be verified by police and he was released without charge the following day.

[14] On 29 December police obtained a warrant to search certain clothing being worn by the accused for blood and other forensic evidence relating to the deceased (Ext D4). On 30 December at 1445 hours police located the accused on the footpath outside of the Gap View Hotel. At this stage it is

clear that the accused was a suspect. The evidence of Detective Butcher was that she explained to the accused that she had a warrant to seize his clothing and that they wanted to take him back to the police station so that he could be given replacement clothing. He was also formally cautioned. The accused then got into the police vehicle. The clothing which the accused was wearing was a pair of jeans and a blue and yellow T-shirt. According to Detective Butcher this was different clothing from what the accused had been wearing earlier. Constable Karamanidis said in evidence that these clothes were different from what the accused had been wearing on 27 December, but he could not remember what the accused had been wearing prior to that. I note that the warrant authorises the police to "search the person of, the clothing that is being worn by and the property in the immediate control of Russell Cotchilli and if necessary by force, and to seize the thing described above…" However, earlier in the warrant "the clothing that is being worn by Russell Cotchilli" is described as:

> "A red short sleeve button up shirt with a dark pattern on the midriff
> A pair of blue denim jeans
> A pair of runners – dirty (grey/white)."

[15] The conversation with the accused at this stage was not electronically recorded. Notwithstanding that the accused is plainly Aboriginal, no effort was made to comply with the Anunga guidelines when administering the caution. I will return to this topic later. Constable Karamanidis said that the police did not have a tape recorder in the vehicle. He acknowledged this to be a mistake on his part.

[16] Either before or after the accused entered the car – it is not clear exactly when – the accused was told that the police wanted to seize the clothes he was wearing previously and the accused agreed to show them where they were. The accused led the police to a drain near a railway crossing in Espie Street, where some belongings were found in a back-pack, but these did not belong to the accused. The police then returned to the station with the accused, arriving at a little after 3:00 pm. The accused's shoes were seized. The accused was spoken to again. There are no notes or electronic recordings of this conversation. All that Detective Butcher and Constable Karamanidis remember is that the accused said that he had left the shirt he had been wearing in the Todd River and that he was willing to taken them to where it was located.

[17] At 1542 hours the police left the station with the accused to search for the shirt. Despite having just left the police station, the police did not bring with them any electronic recording equipment such as a video camera or a tape recorder. On the way to the river, Detective Butcher administered another caution. Subsequently, as the police vehicle was proceedings towards the Stott Terrace Bridge, the accused is alleged to have said:

> "I was holding that girl's head when she been stabbed. There blood on my jean and shirt."
>
> Detective Butcher said: "Russell. Stop there. You have been cautioned before and now I will caution you again. You do not have to talk about that trouble to us. If you say anything it will be taken down still (sic) and can be used in Court. Do you understand that?"

Accused: “Yes”.

[18] At some stage Detective Butcher made a note of this conversation in her investigation diary (Ext P17).

[19] Thereafter, the vehicle parked in a barbeque area on the corner of Leichhardt Terrace and Stott Terrace. The accused and the police alighted. The accused took police to a tree but there was nothing there. Subsequently the accused thought he may have thrown the shirt into a bin in a laneway behind the Melanka Lodge. This was searched without any results. Subsequently searches were made again at Espie Street and at a place called Namatjiri Camp because the accused said that he had given the shirt to Anthony Armstrong who was staying there, but he could not be located. Unsuccessful efforts were then made to locate Mr Armstrong at the Coles complex. The police and the accused then returned to the Alice Springs Police Station, arriving at 1640 hours. At 1647 hours Constable Karamanidis arrested the accused for the murder of the deceased and the accused was taken into the watch-house and placed in a cell and held pursuant to s 137(2) of the Police Administration Act (the Act). That provision enables a person who has been arrested and taken into lawful custody to be held without bail for a reasonable period to enable the person to be questioned, or to enable investigations to be carried out, to obtain evidence of, or in relation to, an offence. It will be necessary to consider the provisions of the Act in more detail later.

[20] At 1659 hours, Detective Butcher had a conversation with the accused in the presence of Constable Karamanidis in purported compliance with s 140 of the Act which was recorded on tape (Ext P4). The accused was again formally cautioned in English without the presence of an interpreter. The accused was not asked to repeat the caution in his own words, phrase by phrase, as suggested by guideline 3 in *R v Anunga* (1976) 11 ALR 412 at 414-415. Detective Butcher, after administering the caution, asked the accused:

> "… do you want anyone notified, do you want us to tell anyone that you're here at the police station?"

[21] The accused nominated Anthony Armstrong and Karen Cotchilli and also his father, Tony Cotchilli. Detective Butcher attempted to obtain details as to where these people, and also the accused's brother Darren and his mother, were likely to be found. The accused was then asked:

> "BUTCHER: Alright now when we were in that car Russell you told us about that girl, you said that you were there with her when that man stabbed her, is that right?
>
> COTCHILLI: Yeah.
>
> BUTCHER: Right. You told us that you were holding her at one point is that right?
>
> COTCHILLI: (inaudible)
>
> BUTCHER: Russell, after you told us that we give you that caution again, you remember?

COTCHILLI: Yeah.

BUTCHER: Ok now Russell you been drinking today?

COTCHILLI: Yeah.

BUTCHER: Alright do you… are you a little bit drunk now? You still got a little bit of grog in your system?

COTCHILLI: Yeah.

BUTCHER: Big mob or half mob or little bit.

COTCHILLI: Half.

BUTCHER: Half alright. Have you been smoking any gunja or anything today?

COTCHILLI: No.

BUTCHER: Alright what about sniffing are you sniffing petrol today?

COTCHILLI: Last night."

[22] The accused was then told that he was going to be fed and after he had had a sleep and the affects of the alcohol had worn off, the police would come back and talk to him. He was then asked if he wanted an interpreter. The accused nominated an interpreter in the Kukatja language. He was then asked about who he wanted as a prisoner's friend:

"BUTCHER: Russell, after that grog's worn off and you've had a feed and that sleep we're going to do that interview with you, alright? Now you can have someone sit with you in that interview – we call that the prisoner's

> friend – a support help person. Do you want someone to sit with you…?"

[23] The accused then nominated his sister, Karen.

[24] Arrangements were then made by other police officers to locate Karen Cotchilli and Anthony Armstrong, but not Darren Cotchilli or either of the accused's parents. These enquiries were made between 1725 and 1823 hours without success. It appears that Detective Butcher and Constable Karamanidis did nothing further after 1708 hours to pursue any enquiries into the matter that day and both went off duty.

[25] I note also that at 1655 hours the water to the accused's cell was cut off to prevent the loss of any forensic evidence. The Watch-house Log (Ext P16) indicates that forensic samples were taken from the accused between 1746 and 1805 hours. These included swabs from the accused's hands, fingernail scrapings and the accused's jeans. As noted previously these items revealed nothing of forensic significance. There is no evidence that the water to the accused's cell was turned back on at any time.

[26] The following morning, Detective Butcher and Constable Karamanidis attended at the watch-house and had a further brief taped conversation with the accused at 0641 hours. A caution was again administered in English. The accused was told that "two units" had been sent out to locate Karen Cotchilli, Anthony Armstrong and Darren Cotchilli, but that they could not be located. The accused was again cautioned and asked if he knew where

these people could be located. He replied, “In town”. He was told that the police would try again to locate them. He was also told that the police would obtain an interpreter in Kukatja and that the police would come back and speak to him later.

[27] Between 0646 and 0845 hours Detective Butcher and Constable Karamanidis drove around Alice Springs looking for the nominated persons. It appears that other police may also have been involved in another vehicle. At 0849 hours Detective Butcher and Constable Karamanidis returned to the watch-house and again spoke to the accused in his cell. This conversation was tape recorded (Ext P6). After again cautioning the accused, Detective Butcher informed him that his brother Darren had been located and informed of his whereabouts, but the others had not been located. The accused was asked if there was anyone else he could think of who could sit with him in the interview. After a long pause, the accused said, “No”. Detective Butcher then asked:

> “So what do you want to do? (no answer – long pause) Do you want someone or do you want to sit on your own or we’ve got an interpreter for you?”
>
> COTCHILLI: Sit on my own.
>
> BUTCHER: You want to sit on your own? Are you sure about that? (no answer – long pause). You have to use your voice, mate.
>
> COTCHILLI: Yes.

BUTCHER: OK, Russell. What we're going to do is we'll go up and organise that interpreter to come into the station and as soon as I've got (inaudible) we'll come back and get you and we'll take you up and do our interview, OK? Do you understand that?

COTCHILLI: Yeah.

BUTCHER: Interview concluded at 8:52 am."

[28] Thereafter Detective Butcher and Constable Karamanidis "went mobile" to see if they could still locate a prisoner's friend, notwithstanding that the accused had said that he would sit on his own. After attending at a number of places they located Darren Cotchilli at Abbott's Camp who suggested that a person known as "Jon-Jon" would be a suitable person. They then proceeded to Indarpa Camp and spoke to "Jon-Jon", whose real name is John Raymond Jebydah. Mr Jebydah apparently agreed to assist. Detective Butcher rang the watch-house and asked police there to speak to the accused to see if Mr Jebydah was acceptable to him. There is no record of this conversation, but in any event Mr Jebydah returned to the Alice Springs Police Station with the police officers in order to fulfil the role of prisoner's friend. The police arrived back at the station at 10:28 am, arranged for an interpreter, Mr Trew, to arrive and made preparations for the formal record of interview.

[29] According to Detective Butcher, she explained to Mr Jebydah his role at Indarpa Camp. At 11:40 am the accused was taken from his cell and given the opportunity to speak with Mr Trew and Mr Jebydah privately. At 1205

hours, Detective Butcher and Constable Karamanidis conducted a formal record of interview with the accused, which was recorded both on videotape and audio tape in the presence of Mr Jebydah and Mr Trew (Ext P7). After the accused had been cautioned, the accused stated that the person who murdered the deceased was a half-caste Aboriginal man whom he did not know, but who had given him the name of Jason. Jason had told him that he was staying at Hidden Valley. He gave a description of Jason. He was asked a lot of questions concerning changes in his story, which he blamed in part on his sniffing petrol, which caused his head to spin. He was told that the police intended to make some enquiries about Jason and they may wish to speak to him again. He was asked which house Jason was living in at Hidden Valley Camp and, with the help of a map and the prisoner's friend, a particular "blue house" was nominated. The interview concluded at 2:03 pm. It will be necessary to return to this record of interview in more detail later.

[30] At 2:10 pm the accused was returned to the watch-house and held under s 137 of the Act. After taking a statement from Mr Trew, Detective Butcher and Constable Karamanidis returned Mr Jebydah to Indarpa Camp. Thereafter they made further enquiries before arriving at Hidden Valley Camp at 4:00 pm where efforts to locate "Jason" proved to be fruitless. Police then made enquiries at other locations to see if any information concerning "Jason" could be found, again without any results. Detective Butcher and Constable Karamanidis returned to the station at 1643 hours and spoke to Sergeant Ordelman who was supervising their investigation. By

this time Detective Butcher had formed the view that the accused was the offender and a decision was made to re-interview the accused (Tr p 50).

[31] Ext P12 indicates that at 1651 hours the accused was taken out of his cell to have a cigarette. The circumstances giving rise to this were explained by Detective Butcher who said, in evidence in chief, that once she and Constable Karamanidis got to the watch-house, either the accused or the watch-house staff indicated that he wanted a cigarette, so he was taken out of the cell to the sally port, which is just outside the watch-house door and Constable Karamanidis gave him a cigarette. As he was having a cigarette, Detective Butcher told the accused that they were going to interview him again and to think about whom he wanted for a prisoner's friend. After he had had a couple of puffs he said, "I killed that girl. She bin swear me". Detective Butcher said she cautioned him, told him to stop, went inside and got a tape recorder from behind the watch-house counter and then had a further conversation with him which was electronically recorded.

[32] The recorded conversation (Ext P8) begins at 1659 hours. A further caution was administered. After that the following conversation ensued:

> "BUTCHER: OK Russell, we just came down and brought you out for a cigarette outside, is that right?
>
> COTCHILLI: Yeah.
>
> BUTCHER: And while you were having a cigarette did you tell us something?

COTCHILLI: Yeah.

BUTCHER: What did you tell us?

COTCHILLI: I killed that woman.

BUTCHER: You killed that woman?

COTCHILLI: Yeah.

BUTCHER: OK. Do you want to tell us any more about it?

COTCHILLI: He sweared me.

BUTCHER: Sorry?

COTCHILLI: He sweared me."

[33] The accused was then told that the police were going to do another interview and he was asked whom he wanted to sit with him during the interview. He said, "No-one". When asked if he wanted an interpreter, he said, "No". The tape concluded at 1702 hours.

[34] Thereafter the police decided to get an interpreter and arranged for Mr Trew to be present. Detective Butcher said in evidence:

> "Even though he seemed to communicate fairly well with us, from the interview it was obvious sometimes he preferred to talk in language, so to ensure that he understood and in fairness to him we decided that it would be more appropriate to have an interpreter in the room."

[35] The second record of interview, which was recorded on video and audio tape commenced at 1803 hours and concluded at 1932 hours. During this

conversation the accused made a confession to killing the deceased as the result of stabbing the deceased with a knife in the chest and choking her with his knee. After the completion of the record of interview, he was formally charged with the deceased's murder. The accused was again placed in the watch-house at 1942 hours and held overnight.

[36] The following morning, Sunday 1 January 2006, at 8:20 am, the accused was spoken to by Detective Butcher in the presence of Constable Karamanidis. This conversation was also taped. Apart from indicating to the accused that police were trying to locate witnesses to obtain further statements, there is nothing else of interest. The "Query Offender Journal" indicates that the accused was "taken off s 137" at 1348 hours on 1 January 2006 some 45 hours after his arrest. Precisely when he was brought before a Magistrate is not clear. He was still in the watch-house on the morning of 2 January 2006. It is possible that he was brought before a Magistrate sometime around 10:00 am on 2 January or shortly thereafter.

Summary of accused's submissions

[37] The accused challenges the admissibility of the evidence relating to all of the conversations which Detective Butcher had with the accused on the following grounds:

1. The evidence relating to conversations which were not electronically recorded are inadmissible because of the failure of the Police to comply with s 142 of the Police Administration Act.

2. The evidence relating to all conversations were not voluntary.

3. Alternatively to 1 and 2 above, the conversations should be excluded in the exercise of the Court's discretion.

Evidence of accused's intellectual disability

[38] The accused, according to the record of interview Ext P7, is a full blood Aboriginal male, aged about 24. He gave his date of birth as 1 January 1983. It is common for Aboriginal people who do not know their birth date to say they were born on 1 January. He told the psychologist, Mr Franklin, that he is aged 26, but, as Mr Franklin observes, he looks to be older. He was born in Derby, Western Australia. He says in the record of interview that he lives in "Kintore" (which the interpreter stated was "Kiwirrkura") and which the accused spelt out as "Kiwikrrkurra" on a piece of paper for Mr Franklin. The correct spelling for the community is "Kiwirrkurra". It is located in WA near the Northern Territory's border with WA in the East Pilbara region. The accused stated that he attended school at Yirara College in Alice Springs to Year 12. He claimed in the record of interview to be able to read and write a "little bit". He told Mr Franklin that he can read a newspaper on occasions but cannot read books. He was able to write his name and has some proficiency with letter formation. It is not unusual for Aboriginal people to say they have studied at school to Year 12 but to be virtually illiterate in the English language or, for that matter, any language.

[39] The accused called evidence and tendered a report from Mr Franklin, who conducted an assessment of the accused at the Berrimah Correctional Centre on 20 July 2007. The assessment was carried out in less than ideal conditions over a period of 1 hour and 40 minutes in an interview room in C Block. An interpreter in Luritja was employed.

[40] Mr Franklin is very experienced in assessing indigenous Australians. He has been in practice for 35 years and has assessed numerous Aboriginal people for intellectual and educational reasons and also for forensic reports since 1981. He is well qualified to express the opinions he has formed.

[41] The Crown did not call any psychological evidence. I do not know whether the Crown has made any attempt to have the accused assessed by another psychologist.

[42] Mr Franklin observed that the accused has very limited English skills. The accused was easily confused with complex sentences. The best he was able to do was respond with two or three word statements. He did not use sentences. His expressive English is limited to using a few basic words to express sentences and he often used ecoleic language i.e. copying the words said to him. Mr Franklin's opinion was that his grasp of English was more like English as a foreign language rather than English as a second language. Because of this, assessment of verbal mental abilities was not pursued and tests were carried out utilising non-verbal responses. This type of assessment is considered to be fairer for many indigenous individuals.

[43] The results of the tests indicated that the accused's reasoning ability is well below the average range and fell only in the first percentile. Mr Franklin concluded that the accused's reasoning ability was that of an eight year old. He was described as a very simplistic thinker with very little capacity to engage in logical or critical thinking and not likely to be able to plan ahead. However, he knows what is doing at any point in time and can recognise right from wrong. He appeared to be reclusive, anxious and depressed.

[44] Mr Franklin did not consider that the accused was incapable of telling lies; but it was possible that he might introduce false events into answers to questions where he felt that he was expected to answer questions in a particular way and it was quite possible he might confabulate if asked questions repeatedly. He also considered that he was more vulnerable to intimidation than most ordinary persons.

[45] Although Mr Franklin did not conduct any specific tests designed to see whether the accused was deliberately pretending to be less smart than he really is, Mr Franklin was of the opinion that the test results were consistent with an inability to focus and concentrate, rather than any conscious effort at pretence. In his opinion the accused was cooperative and responded to the tests to the best of his ability.

[46] I have no reason to doubt Mr Franklin's findings and I accept his evidence and the opinions he has expressed.

Admissibility of conversations on 30 December 2005 prior to arrest on 31 December 2005

[47] At the time when the police told the accused they had a warrant to search and seize his clothing, the accused was clearly a suspect. The principal attack on the admissibility of the conversations between the police and the accused whilst driving around in the attempt to locate the clothing worn by the accused at the relevant time was based on non-compliance with s 142(1) of the Police Administration Act, which provides:

> "**142. Electronic recording of confessions and admissions**
>
> (1) Subject to section 143, evidence of a confession or admission made to a member of the Police Force by a person suspected of having committed a relevant offence is not admissible as part of the prosecution case in proceedings for a relevant offence unless –
>
> (a) where the confession or admission was made before the commencement of questioning, the substance of the confession or admission was confirmed by the person and the confirmation was electronically recorded; or
>
> (b) where the confession or admission was made during questioning, the questioning and anything said by the person was electronically recorded,
>
> and the electronic recording is available to be tendered in evidence."

[48] There is no question that the offence is a "relevant offence" as defined by s 139 of the Act. There is no definition of "confession", "admission" or "questioning". Unless whatever the accused said to the police amounts to an admission evidence of the conversations would not be admissible. Mr Elliott

for the prosecution did not suggest that what the accused said did not amount to an admission. At first he submitted that there was no "questioning", but later he conceded that because s 142(1) applies to admissions made before the commencement of questioning, the subsection applied to these conversations as well. He contended that the substance of the admissions was confirmed by the accused during an electronic recording.

[49] I accept that the accused volunteered to the police to take them to where he had left his clothing and that this was not the result of questioning. However, the only conversation which was subsequently recorded was the part of the statement the accused made in the police car concerning holding the deceased's head when was stabbed. This was partially confirmed in the taped conversation Ext P4 and also in the record of interview Ext P7. However, the whole of the admissions were not fully recorded. There is no mention of 'getting blood over his clothes'. There is no recording of anything the accused said relating to the location of his clothes. I do not think it can be said that the substance of the admissions were recorded. I am not satisfied that the police have complied with s 142(1) of the Act. In the result these conversations are inadmissible unless I admit them under s 143 of the Act, which provides:

> "**143. Certain evidence may be admitted**
>
> A court may admit evidence to which this Division applies even if the requirements of this Division have not been complied with, or there is insufficient evidence of compliance with those requirements, if, having regard to the nature of and

> the reasons for the non-compliance or insufficiency of evidence and any other relevant matters, the court is satisfied that, in the circumstances of the case, admission of the evidence would not be contrary to the interests of justice."

[50] The burden of satisfying the Court that I should admit these conversations under s 143 rests with the prosecution. There is no doubt that tape recorders were available at the Alice Springs Police Station. The accused was clearly a suspect and he was formally cautioned in English on two occasions. No interpreter was used. No effort was made to get him to repeat back, phrase by phrase, what the caution meant in accordance with guideline 3 in *R v Anunga* (supra). Detective Butcher said that she could converse with him in English, but later she obtained the services of an interpreter because she thought the accused needed one. It is difficult to see why she did not seek to comply with guideline 3. It would not have been difficult for her to have done so. The only effort made to comply with s 142(1)(a) did not cover all of the admissions. No reason has been offered by the police for why this was not done properly, other than it was an oversight that the tape recorder was not taken on either of the trips. It was submitted by Mr Elliott that I should find that the failure was not deliberate and is explicable by the inexperience of Detective Butcher and Constable Karamanidis and that the accused had sufficient English to understand the caution. I accept that the officers were inexperienced, but they knew from their training the requirements of s 142 of the Act and of the Anunga guidelines. Further, when the accused was arrested a little while later and held under s 137(2) of the Act, one of the reasons given for delaying any questioning of the accused until the

following morning was because the accused was intoxicated. Although the police had picked up the accused outside of The Gap View Hotel, no effort was made until after his arrest to test the accused's sobriety. Mr Tippett QC submitted that the police acted unfairly towards the accused. Constable Karamanidis conceded this, but denied he knew this at the time. Detective Butcher said that although she had obtained a search warrant, at the time the accused was detained under the search warrant she did not expect to find him, as she was looking for the accused's brother, Darren. I am unable to accept this. The purpose of locating Darren was to find out where the accused might be located so that the warrant could be executed.

[51] Having regard to the evidence of Mr Franklin as to the level of the accused's understanding of English, I am not persuaded that he understood his right to silence at the time when the first two cautions were administered. Bearing in mind the seriousness of the charge and all of the circumstances, I would not exercise my discretion to admit these conversations under s 143 of the Act, as I am not satisfied that the admission of this evidence would not be contrary to the interests of justice. Further, because the admissions were not properly recorded, I am not satisfied that they are reliable.

The taped conversation at 1659 hours on 30 December 2005 (Ext P4)

[52] This conversation had two purposes. First, the accused had been arrested and was being held pursuant to s 137(2) of the Act. Before the accused could be

questioned, the police were required to comply with s 140 of the Act which provides:

> **"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."

[53] As noted previously, Detective Butcher cautioned the accused in English without an interpreter and without complying with guideline 3 of the Anunga Guidelines. These guidelines are also incorporated in Police General

Order Q.2. Again, it is difficult to see why no attempt was made to ensure the accused understood the caution at this stage. The second purpose of the conversations was to record part of the one of the earlier conversations under s 142(1)(a) . I have already excluded this conversation. There is otherwise nothing in the conversation P4 which is admissible in evidence. This conversation will therefore be excluded.

The first record of interview Ext P7

[54] This conversation commenced at 1205 hours on Saturday 31 December 2005. By this time the accused had been held pursuant to s 137 since 1647 hours on Friday 30 December, a total of 19 hours and 18 minutes. Virtually nothing had been done between 1823 hours on the 30th and 0646 hours on the 31st to progress the matter. The police were aware that a reasonable effort had to be made to attempt to locate a prisoner's friend for the accused before commencing the record of interview. The difficulty for the police was that the nominated friends were not easily locatable late in the afternoon. I accept that it was not unreasonable to delay any further search for the nominated friend until the next day. Ultimately efforts to find the accused's sister were unsuccessful. The police located Mr Jebydah in the circumstances I have outlined. No criticism was directed at the manner in which Mr Jebydah was brought in as a friend.

[55] However, I note that s 140 required that the investigating officers defer any "investigation that involves the direct participation of the person for a time

that is reasonable in the circumstances". Although nothing turns on this, the police did not do this; swabs from the accused's hands and fingernail scrapings were taken between 1746 and 1805 hours on 30 December. Had any evidence of forensic significance been located, a question of the admissibility of that evidence would have arisen.

[56] Mr Tippett QC submitted that the record of interview Ext P7 was not voluntary. First, he submitted that the police did not attempt to administer the caution in accordance with guideline 3 (*R v Anunga* (supra)) which is in the following terms:

> "(3) Great care should be taken in administering the caution when it is appropriate to do so. It is simply not adequate to administer it in the normal terms and say, "Do you understand that?" or "Do you understand you do not have to answer questions?" Interrogating police officers, having explained the caution in simple terms, should ask the Aboriginal to tell them what is meant by the caution, phrase by phrase, and should not proceed with the interrogation until it is clear the Aboriginal has apparent understanding of his right to remain silent… The problem of the caution is a difficult one but the presence of a "prisoner's friend" or interpreter and adequate and simple questioning about the caution should go a long way towards solving it."

[57] In this case the prisoner's friend, Mr Jebydah, speaks very good English and is fluent in Kukatja, an Aboriginal language the accused apparently speaks. In addition he had the assistance of an interpreter, Mr Trew, from the Aboriginal Interpreter Service. Even though the accused had this assistance, it is still important that the caution be administered phrase by phrase and that the suspect be asked to say what he understands is meant by it. This is partly because the caution is inherently difficult to interpret from English

into Aboriginal languages. In this case, the explanation given by the accused, although perhaps not perfect, satisfies me that he understood his right to silence. I am also satisfied that he intended to speak to the police and tell them his story. However, it was submitted that the accused's will was overborne because of the time he was held in custody and because the water in his cell had been cut off for some 19 hours.

[58] Before dealing with this submission it is necessary to consider the provisions of s 137 and s 138 of the Act.

[59] Section 137 provides:

> "**137. Time for bringing person before justice or court**
>
> (1) Without limiting the operation of section 123, but subject to subsections (2) and (3) of this section, a person taken into lawful custody under this or any other Act shall (subject to that Act where taken into custody under another Act) be brought before a justice or a court of competent jurisdiction as soon as is practicable after being taken into custody, unless he or she is sooner granted bail under the Bail Act or is released from custody.
>
> (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.

(3) A member of the Police Force may continue to hold a person under subsection (2) for the purposes of enabling the person to be questioned or investigations to be carried out to obtain evidence of or in relation to –

(a) the offence in respect of which the person was taken into custody, only if it is an offence the maximum penalty for which, in the jurisdiction in which it is believed to have been committed, is imprisonment for any period; or

(b) an offence that is not the offence in respect of which the person was taken into custody, only if it is an offence the maximum penalty for which, in the jurisdiction in which it is believed to have been committed, is imprisonment for 5 years or more."

[60] Section 138 provides:

"**138. Determining reasonable period during which person detained, &c., to be brought before justice or court**

In determining what is a reasonable period for the purposes of section 137(2), but without limiting the discretion of the justice or the court, a justice or court before whom or which the question is brought shall, so far as it is relevant, take into account –

(a) the time taken for investigators with knowledge of or responsibility for the matter to attend to interview the person;

(b) the number and complexity of matters to be investigated;

(c) the time taken to interview available witnesses;

(d) the need of investigators to assess relevant material in preparation for interviewing the person;

(e) the need to transport the person from the place of detention to a place where appropriate facilities were available to conduct an interview or other investigation;

(f) the number of people who need to be questioned during the period of detention in respect of any offence reasonably believed to have been committed by the person;

(g) the need to visit the place where any offence under investigation is believed to have been committed or any other place reasonably connected with the investigation of any such offence;

(h) the time taken to communicate with a legal adviser, friend or relative of the detained person;

(j) the time taken by a legal adviser, friend or relative of the person or an interpreter to arrive at the place where the questioning or the investigation took place;

(k) the time taken in awaiting the completion of forensic investigations or procedures;

(m) the time during which the investigation or questioning of the person was suspended or delayed to allow the person to receive medical attention;

(n) the time taken by any examination of the person in pursuance of section 145;

(p) the time the person in custody has been in the company of police prior to and after the commencement of custody;

(q) the time during which the investigation or questioning of the person was suspended or delayed –

(i) to allow the person to rest; or

(ii) because of the intoxication of the person;

(r) the time taken to arrange and conduct an identification parade;

(s) the time taken for an operating electronic recording facility to become available to record the interviewing of the person; and

(t) any interruptions to the electronic recording of the interviewing of the person because of technical reasons (such as a breakdown in equipment or a power failure) beyond the control of the interviewing member."

[61] These provisions were introduced into the Act in 1988 to overcome the requirement of the common law that a person who is taken into custody must be brought before a justice as soon as practicable after being arrested and it is not lawful for the police to hold a person arrested for an offence merely for the purpose of questioning: see *Williams v The Queen* (1986) 161 CLR 278 at 283; 292-302; 303-313. In that case, Mason and Brennan JJ noted, at 296:

> "The competing policy considerations are of great importance to the freedom of our society and it is not for the courts to erode the common law's protection of personal liberty in order to enhance the armoury of law enforcement. It should be clearly understood that what is in issue is not the authority of law enforcement agencies to question suspects, but their authority to detain them in custody for the purpose of interrogation. If the legislature thinks it right to enhance the armoury of law enforcement, at least the legislature is able — as the courts are not — to prescribe some safeguards which might ameliorate the risk of unconscionable pressure being applied to persons under interrogation while they are being kept in custody."

[62] Wilson and Dawson JJ said, at 313:

> "If the law requires modification then it is better done, as Mason and Brennan JJ have pointed out, by legislation. For there must be safeguards, if necessary in the form of time limits, and they must be set with a particularity which cannot be achieved by judicial decision. Moreover, it is better that legislative change should take place against the background of the common law as it has been understood in this country, which has consistently viewed detention for the purpose of investigation as an unwarranted encroachment upon the liberty of the person. The experience of the common law is something which, in our opinion, should be borne steadily in mind if and when the changing needs of society appear to require statutory adaptation of the existing rules."

[63] The starting point is whether there was a lawful arrest in the first place. There was no warrant issued for the accused's arrest. The power to arrest without warrant is contained in s 123 of the Act, which provides:

> "**123. Arrest without warrant by members of Police Force**
>
> (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… an offence."

[64] The test as to the validity of an arrest under this section is two-fold. First the officer must, subjectively, believe that the person arrested has committed an offence. Secondly, the belief must be based on grounds which are objectively reasonable. This requires an examination of the information then known to the arresting officer: *R v Wilson* (unreported, Kearney J, 20 November 1998 at p 29). Reasonable grounds requires more than suspicion: *R v Grimley* (1994) 121 FLR 236 at 252. The arrest was affected by Constable Karamanidis at the police station on Friday 30 December 2005 at 1647 hours. Constable Karamanidis was not cross-examined to establish whether or not he held the relevant belief. However, I note that Detective Butcher said she held no such belief until after the police had returned from attempting to find "Jason" at 1643 hours on 31 December. No submission was made that there were no reasonable grounds, despite the paucity of evidence then available to the police to prove that the accused was the perpetrator. In those circumstances I will assume, it not being put in contention, that the arrest was lawful, although I entertain very grave reservations about this.

[65] In my opinion, the detention of the accused until the completion of the first record of interview went far beyond what was a reasonable period, having regard to the factors set out in s 138 and all of the circumstances. Subsection (h) specifically refers to, as one of the factors, "the time taken to communicate with a legal advisor, friend or relative of the detained person". Given the circumstances then prevailing, I accept that it was not

unreasonable to put off further attempts to locate the persons nominated by the accused until the following morning. None of those persons had known addresses or telephone contacts. Their whereabouts were unknown. Any hope of locating them rested on visiting the town camps or searching the river bed, streets or shops. However, the police made no effort to speak to the accused again on the evening of the 30th to see if there was anyone else who could be approached. On the following morning efforts were again made without success. Although the accused indicated in the conversation he had with police the following morning that he was prepared to be interviewed without a prisoner's friend, the police chose to ignore this and eventually located Mr Jebydah and had him brought to the police station by 10:28 am. Thereafter it was necessary to arrange for the interpreter to arrive and for the accused to have an opportunity to speak privately with Mr Jebydah and with the interpreter: see s 138(j). Section 138(p) requires consideration of the time the accused was in the company of police prior to and after the commencement of the custody. By the time the first record of interview commenced this was from 1445 hours on the 30th to 1205 hours on the 31st, or 21 hours and 20 minutes. This is a very long time and one which must be viewed with considerable caution, particularly where the accused is an Aboriginal with limited English speaking skills.

[66] I bear in mind also that the accused had said he had been drinking and the police thought he might be tired when he was arrested: s 138(q). However, I note that the police did not think he was too intoxicated to be taken to the

various locations where his clothes might be found during the afternoon of the 30th and the accused did not complain of tiredness.

[67] Section 137 is a significant derogation upon the rights of the liberty of the subject and there are no safeguards built into the provisions as recommended by four Justices of the High Court in *Williams v The Queen* (supra): *c.f.* Crimes Act 1914 (Cth) s 23C and s 23D where the maximum period of detention is 4 hours, or in the case of Aboriginal persons, 2 hours, unless the time is extended by a Magistrate or Justice of the Peace: see *Tan Seng Kiah v The Queen* (2000) 10 NTLR 128. Consequently, the Court must regard such a lengthy period of detention with considerable suspicion: see also the comments of Murphy J in *Cleland v The Queen* (1982) 151 CLR 1 at 15.
I note also that both Detective Butcher and Constable Karamanidis went off duty at 1708 hours on 30 December before enquiries to locate the accused's friends or relatives had been completed. Perhaps they were tired and anxious to get some rest, but s 138 of the Act does not indicate that that is a relevant factor to be considered. Perhaps if the accused had been spoken to again shortly after the initial enquiries to locate his friend had been completed, he may gave either waived his right to a friend or nominated someone else, in which case the interview might have been completed by at least some 12 to 14 hours earlier. Alternatively, he may have exercised his right of silence.
So far as the first record of interview is concerned, I am satisfied that the accused had not been lawfully detained until then.

[68] I do not think there is any substance to the submission about the water to the accused's cell being switched off. Whether it was switched on again after forensic sampling had been completed, I do not know. The accused made no complaint about it nor of being dehydrated. It was submitted that the police had acted in a cavalier fashion, designed to "soften up" the accused when the record of interview took place. I do not accept that submission. There is no indication in any event that the long delay in attending to the first record of interview had that effect.

[69] Next it was submitted that Mr Jebydah exhorted the accused during the record of interview to "tell the story, you told me the story now tell the same story". That was said to the accused in Kukatja and was not known to the police. There are two answers to that contention. First, Mr Jebydah is not "a person in authority": see *McDermott v The King* (1948) 76 CLR 501 at 571; *Tofilau & Ors v The Queen* [2007] HCA 39; *R v Louie Riley* [1994] NTSC 62 (unreported) at paras [37]-[40]. If the police were aware that the prisoner's friend had made an inducement to the accused and failed to correct it, that would have been different, but the police were not so aware. Secondly, in any event what was said by Mr Jebydah is not an inducement: see *Cross on Evidence*, 4th Aust ed, Butterworths, Sydney, 1991 (loose-leaf edition), para 33640.

[70] Next it was submitted that near the end of the record of interview the accused indicated that he wanted to exercise his right of silence, but was ignored by Detective Butcher. Without going into it in too much detail, there

was a tape change, after which Detective Butcher decided to re-caution the accused. The transcript reads as follows:

"BUTCHER:	Alright. Russell that – that caution that still applies on this tape same as before. You still don't have to talk if you don't want to. It's still your choice.
TREW:	**Your choice is there to talk or not do you understand?**
BUTCHER:	Okay.
JEBYDAH:	**Your choice, do you wish to talk or sit quiet?**
TREW:	This is your choice it's your right not to say anything or (inaudible).
JEBYDAH:	**It's up to you.**
BUTCHER:	You understand that still?
TREW:	**Do you understand?** (*shakes head*)
JEBYDAH:	**Do you understand?**
TREW:	Do you understand?
BUTCHER:	You still understand your rights Russell?
TREW:	**Do you understand your rights?**
COTCHILLI:	No response.
BUTCHER:	You understand it's still your choice whether you talk or sit quiet?

TREW: **Do you understand your choice?**

JEBYDAH: **Do you understand that you can talk or sit quiet?**

TREW: You understand that it's still your right to talk or sit (inaudible).

JEBYDAH: **Say yes or no.**

COTCHILLI: No.

TREW: No.

COTCHILLI: Wanna sit quiet.

BUTCHER: *You want to sit quiet?*

KARAMANIDIS: Okay that's fine but ---

BUTCHER: You – you still understand it's still you choice though. That it's still your choice to choose which one you wanna do. You understand that?

COTCHILLI: Yeah.

BUTCHER: Okay. And it's still gonna go on those tapes and they can still be played in that court for that judge.

TREW: **If you say more it will be recorded for the judge in the court.**

COTCHILLI: Yeah.

BUTCHER: Alright. Now Russell I've got a couple more questions I wanna ask you okay.

COTCHILLI: Mm.

TREW: **Now we're going to ask more questions**.

BUTCHER: Now I asked you before about what you said in the car yesterday I just wanna clarify, I just wanna go through what that was.

TREW: **Now I'm going to ask you from what you said yesterday in the car.**

COTCHILLI: Yeah.

JEBYDAH: **She's going to ask you what you said in the car and you tell her what you said they're asking again understand?**

TREW: (inaudible).

COTCHILLI: Yeah.

TREW: He asked what the thing she said in the car and do you understand.

BUTCHER: What you said to me in the car Russell was –

TREW: **This is what you said to me when in the car**.

BUTCHER: --- I was holding that girl's head when she been stabbed there's blood on my jean and my shirt.

TREW: **When you held her head**

BUTCHER: Can you just explain to me again what you mean by holding her head when she been stabbed?

TREW: **What did you hold her head for?**

JEBYDAH: **How did you hold her head?**

COTCHILLI: (no response).

KARAMANIDIS: Russell you can speak in your own language if you want if that's easier for you.

BUTCHER: Brendan can help you.

JEBYDAH: **You can speak English or your language**.

COTCHILLI: I just hold his head. Was holding her body, wasting that blood."

[71] The words in bold have been translated from Aboriginal languages used. The words in italics do not appear on the transcript but are plain from a viewing of the tape.

[72] I do not think there is any doubt that the accused indicated to the police that he "wanted to sit quiet" and that the police well knew that he wanted to exercise his right of silence. In fact it is plain that the accused's lack of responses to the questions in the early part of the passage quoted above were an exercise by him of his right of silence and that the words "wanna sit quiet" came as the result of persistent questioning designed to force him to acknowledge verbally that he knew about his right of silence. I am satisfied that there is no mistake by the police about this; indeed Detective Butcher frankly admitted she understood this to be so. Police General Order Q.2 3.1.8 provides:

> "As a general rule, if a suspect states that he/she does not wish to answer any, or any further, questions, the interrogation should not continue past that point."

[73] Detective Butcher agreed in cross-examination that when the accused indicated his choice not to speak, she did not respect that choice. Her reason for this was because "we were trying to ascertain further information about the alleged other person that Russell had given us". But the rest of the interview was not confined to this and the police sought further information about what the accused had told the police about holding the deceased's head when she had been stabbed.

[74] Constable Karamanidis' evidence was to the effect that he understood that the accused was merely stating his understanding of the caution and was not exercising his right of silence. I reject this explanation. It is plain on viewing the tape that at the point where Detective Butcher said, "You want to sit quiet?" she looked at Constable Karamanidis in a way which suggests to me that she not sure what to do and Karamanidis said, "Okay that's fine but…" indicating that he knew that the accused wanted to sit quiet, but he was trying to keep the conversation going.

[75] In my opinion, the police persistence in continuing the questioning of the accused after that point deprived the confession after that point of its voluntariness: see *McDermott v The King* (supra) at 511 per Dixon J. This is particularly so when an accused had been held in custody for a very long period of time. If I am wrong in that conclusion I would reject the rest of the

record of interview in the exercise of my discretion: see *The Queen v Ireland* (1970) 126 CLR 321 at 333 per Barwick CJ.

[76] It was further submitted that I should reject the whole of the record of interview because of the combined effect of being questioned at various times during the record of interview by police, the prisoner's friend and the interpreter. I do not accept this submission in so far as it relates to the earlier parts of the record of interview. There were a few occasions when questions were interpreted by both the prisoner's friend and the interpreter scattered throughout the interview. I am unable to see how this could have overborne the accused. It was also submitted that the accused was "suggestible", by which I take it to mean that the accused had words put into his mouth by others. I do not accept this submission. There is no evidence to support it, in my opinion.

[77] However, although s 137 of the Act enables the police to hold a person arrested for an offence in police custody without being able to apply for bail for the purpose of interrogating him, any confession or admissions so obtained must still be voluntary and this is so whether or not the period during which the arrested person is so held is objectively reasonable or not. Relevant to that question is whether the person has been held for so long and in such circumstances that his will has been overborne. The effect of being held in isolation in a police cell for many hours is likely to have a significant effect on the will of any accused person. Where the person is an Aborigine from a remote community experience suggests that lengthy

detention is likely to have a profound effect. So much is recognised by the two hour limit applicable in the cases of Aboriginals under s 23C of the Crimes Act 1914 (Cth) and the notorious fact that Aboriginals held in custody are more prone to suicide than other persons. As Gleeson CJ said in *Tofilau & Ors v The Queen* (supra) at [6] the concept of voluntariness is protean and as Dixon J observed in *McDermott v The King* (supra) at 511, "it does not matter by what means he is overborne". Long captivity was early recognised as a form of duress affecting the will of a confessionalist. In *Tofilau & Ors v The Queen*(supra), Gummow and Hayne JJ at para 37 quote a passage from the 1st (1849) Edition of *Best on Evidence* where the author stated:

> "… [T]he law on the subject as it stands at present is merely that every confession or criminative statement of any kind, which either has been extracted by any species of physical torture, coercion, or **duress of imprisonment**… ought to be rejected." (emphasis mine)

[78] It is not clear that if there is duress by persons in authority such as the police, the confession or admissions made are inadmissible irrespective of whether or not the duress had any subjective effect on the mind of the confessionalist: see *Tofilau & Ors v The Queen* (supra) at [53] to [59] per Gummow and Hayne JJ; [280] to [282] per Callinan, Heydon and Crennan JJ; although the majority judgment seems to prefer categorisation of "oppression" as basal involuntariness rather than part of the "inducement rule": see paras [327] to [329]. However, as the majority judgment observes

in para [330], “duress was the use of threat of either violence to the person **or imprisonment**” (emphasis mine).

[79] Although the accused did not give evidence, it must be borne in mind that because of his limited intellectual capacity and ethnicity, he may have difficulty in expressing himself about how the period of detention affected his will. However, I have the opinion of Mr Franklin to which I have earlier referred that the accused’s reasoning ability was at the level of an eight year old child and that he was liable to confabulation and more vulnerable to intimidation than most ordinary persons. The accused’s intellectual capacity is relevant to the question of voluntariness: *R v Parker* (1989) 19 NSWLR 177 at 183; *R v Scotty* [2007] NTSC 43 at [53]; although the mere fact that he is liable to confabulation does not mean that any admissions made were involuntary: *Sinclair v The King* (1946) 73 CLR 316 at 324, 328 and 336. I note that there is no evidence against the accused other than his admissions and the observations in *R v Lee* (1950) 82 CLR 133 at 159:

> “It is, of course, of the most vital importance that detectives should be scrupulously careful and fair. The uneducated – perhaps semi-illiterate – man who has a "record" and is suspected of some offence may be practically helpless in the hands of an over-zealous police officer. The latter may be honest and sincere, but his position of superiority is so great and so over-powering that a "statement" may be "taken" which seems very damning but which is really very unreliable. The case against an accused person in such a case sometimes depends entirely on the "statement" made to the police. In such a case it may well be that his statement, if admitted, would prejudice him very unfairly. Such persons stand often in grave need of that protection which only an extremely vigilant court can give them. They provide the real justification for the Judges' Rules in England and the Chief Commissioner's Standing Orders in Victoria, and they provide (if we are to assume that the requirement of

> voluntariness is not enough to ensure justice) a justification for the existence of an ultimate discretion as to the admission of confessional evidence. The duty of police officers to be scrupulously careful and fair is not, of course, confined to such cases. But, where intelligent persons are being questioned with regard to a murder, the position cannot properly be approached from quite the same point of view."

[80] As Deane J observed in *Cleland v The Queen* (supra) at 35:

> "…little is ordinarily required to persuade a trial judge that a confession obtained whilst an accused person is in custody, particularly unlawful custody, is not shown to be voluntary or is such that it would be unfair to the accused to admit it in evidence against him."

[81] The conclusion I have reached is that I am not satisfied on the balance of probabilities that, in the circumstances which I have outlined, the accused's statement to the police in the first record of interview was voluntary, let alone the second record of interview. By the time the second interview commenced the accused had been held under s 137 for 25 hours 16 minutes and had been in the company of the police for over 28 hours 30 minutes. Not only was the accused's custody unlawful, but it was in the circumstances inherently likely to result in untrue admissions. In any event, even if I am wrong in this conclusion, the period during which the accused could have been held in police custody under s 137 of the Act had long passed by the time of the commencement of the first record of interview and his detention at that time was unlawful. Accordingly, he should have been brought before the watch commander to apply for bail under the Bail Act, s 16, or before a Magistrate or justice. Although this may have required an application to be

made after Court hours, there was no difficulty in attending to this given that there is always a Magistrate or a Judge of this Court on duty at all times. Even if bail had been refused, the effect of s 16 of the Bail Act is that the accused must be able, as far as practicable to communicate with a legal practitioner. In these circumstances I consider that the admissions made in Ext P7 should be excluded in the exercise of my discretion.

[82] In view of the conclusions I have reached in paras [77] to [83] above, it follows that the admissions made subsequently to the police in Exts P8 and P9 must also be excluded and it is unnecessary to consider the separate grounds upon which the admissibility of those admissions has been attacked. Nevertheless I intend to deal with those submissions briefly.

The watch-house confession (Ext P8)

[83] It is clear that the police evidence as to what exactly happened when the accused made his unrecorded confession in the watch-house sally port was not forthright and clearly much more was said than was shortly afterwards electronically recorded on Ext P8.

[84] I reject as unlikely that the police took the accused out of his cell and took him to the sally port merely so that he could have a cigarette. The purpose of the visit was to carry out a further "s 140 conversation". Although the questioning and investigation under s 137 had been going on for many hours before this, once the police intended to conduct a second record of interview, it is open to the conclusion that this was not all part of "the

questioning": *Pollard v The Queen* (1992) 176 CLR 177; *R v Grimley* (supra). If that is so, s 140 applied and there could be no further 'questioning' of the accused until the requirements of s 140 had been complied with. Clearly, at the time of the watch-house confession, if this scenario were correct, those requirements had not yet been fulfilled.

[85] I think that at the very least the police intended to convey to the accused their annoyance with having been sent out on yet another wild goose chase and to express their disbelief in the existence of 'Jason'. What was said, I do not know, but the timing between the accused being taken out from the cell to have a cigarette and the commencement of the s 140 conversation suggests that much more was likely to have been said.

[86] According to Detective Butcher in examination in chief, all that was said in the sally port was that she told the accused that she intended to re-interview him, that she asked him who he might want as a prisoner's friend and the accused then said, after a couple more puffs of his cigarette, "I killed that girl. She bin swear me". In cross examination she conceded that Constable Karamanidis had also said to him at the time she was speaking to the accused that they had been to the Hidden Valley Camp. She denied that Constable Karamanidis had said anything else, such as that the results of their enquiries there had been that no-one knew of the existence of 'Jason'. However, it appears that at the committal she admitted saying to the accused that they had visited Hidden Valley Camp and found nothing, although in

her evidence before me, she maintained she could not remember saying that and maintained her denial of saying anything of the kind.

[87] Constable Karamanidis in his evidence in chief said:

> "We were both smoking, we were having a cigarette. Detective Butcher advised him that we – to think about who he wanted to – as a prisoner's friend again as he was going to be interviewed and I think at that stage I sort of said to him that we'd been to Hidden Valley and then after that that's when he made the admission to us."

[88] At first Constable Karamanidis maintained in cross-examination that this was all that was said. After close questioning he eventually conceded that he had probably said what the results of the enquiries were:

> "Q: So you probably told him that you spoke to people at Hidden Valley? – Yeah, maybe.
>
> Q: And did you tell him the results of those enquiries? – Yes, possibly I did.
>
> Q: And the results of those enquiries were that Jason was a fictious person, is that right? – Yeah, basically. But I wouldn't have said it like that, obviously.
>
> Q: Well you would have told him it was just bullshit, wouldn't you? – Yeah, whatever, yeah."

[89] If that is all that was said, that did not necessarily mean that the accused's confession in the sally port was involuntary or that it should necessarily be excluded in the exercise of discretion. However, I am not satisfied that this constitutes the whole of the conversation. The conversation should have been electronically recorded: see s 141 of the Act. The Court retains a

discretion to admit evidence of the conversation under s 143, including the accused's admissions, but in my opinion the admission of this evidence is not in the interests of justice because I have no confidence that I know all that was said and I am not satisfied that the evidence of this confessional statement is reliable. If, notwithstanding non-compliance with s 141, the substance of the admission was later recorded electronically on Ext P8 and therefore because admissible under s 142(1)(a) I would exclude it in the exercise of my discretion because I consider that the failure to comply with s 141 was inexcusable, because I am not satisfied that I have been told the whole of the circumstances leading up to the confession and that this leaves me to suspect that questioning may well have taken place which lead to the confession. This would operate as a separate reason for excluding the subsequent record of interview Ext P9 conducted shortly thereafter during which the confession was reaffirmed and questioned about.

Conclusions

[90] In conclusion, I have rejected all of the statements and admissions made by the accused after the accused was located outside the Gap View Hotel at 1445 hours on 30 December 2005.
