PARTIES:	THE QUEEN
	v
	REUBEN JAMES JONES
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	Original Criminal Jurisdiction
FILE NO:	152 of 1996 (9521313)
DELIVERED:	20 October 1998
HEARING DATES:	14, 15, 16 September 1998
JUDGMENT OF:	MILDREN J

REPRESENTATION:

Counsel:

Prosecution:	Mr R Noble
Respondent:	Mr D Dalrymple

Solicitors:

Prosecution:	Director of Public Prosecution (NT)
Defendant:	Dalrymple & Associates

Judgment category classification:	C
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. 152 of 1996 (9521313)

BETWEEN:

THE QUEEN

AND:

REUBEN JAMES JONES

CORAM: MILDREN J

REASONS FOR RULING

(Delivered 20 October 1998)

MILDREN J:

The accused is charged with that on the 17 June 1990 at Darwin he unlawfully assaulted Rachelle Farrell with intent to have carnal knowledge of her and that he thereby had carnal of her, contrary to s192 of the *Criminal Code*. He is further charged with one count of unlawful entry with intent to commit an offence involving circumstances of aggravation. The crown case is that at the time the complainant was residing with her husband and three children at an address in Limmen Street Wagamen. In the early hours of the

morning of Sunday 17 June 1990 she was asleep in her daughter's bed when she was awoken by someone kissing her. She dosed back to sleep momentarily but the person concerned was persistent and woke her again by placing his hand in her genital area. Thinking that this person was her husband sexual intercourse took place. In finding the intercourse uncomfortable she complained, "Don't I have a say in this", poking the person in the ribs. At this stage the person concerned desisted and left the room. It was dark in the house at the time and she only got a glimpse of the person concerned. After this person left the room she got dressed and walked out to the bedroom door. She saw the person walking down the stairwell towards the rooms on the ground floor of the house. Thinking this was strange she went to the main bedroom and discovered that her husband was still in bed. She complained to her husband of attempted sexual intercourse by an unknown intruder and the matter was reported to the police. Samples were taken from the bed clothes and from the complainant's panties from which some blood typing was done by the police forensic biologist. Following this, further enquires at that stage were fruitless and there the matter rested.

On 9 April 1995 two police constables were dealing with a disturbance in Cavenagh Street when an incident took place involving the accused who had injured his arm in the course of breaking a shop window. An off-duty police officer who was in the vicinity apparently saw the incident and recognised the accused. The accused was taken by the police to the Royal Darwin Hospital for treatment and the accused was duly summonsed. On 9 June 1995 the accused pleaded guilty to an offence in relation to that matter. In the

meantime samples had been taken from blood found on the broken glass and sent to the police forensic section. The results of those samples were placed into what I understand to be a DNA database.

At some time before 30 May 1995 the complainant telephoned the police from interstate to advise of her change of address. She spoke to Detective Sergeant Barry Frew who had not been involved in the initial investigation into the alleged sexual assault in 1990. He noted down her new address and arranged for archives to send the file to him. After he received the file and had read it, he noted that it was a 1990 matter, telephoned the forensic department and requested that they do further tests on the exhibits which once located were taken to the forensic department on 20 July 1995 for DNA testing.

Subsequently Detective Sergeant Frew was informed by someone in the forensic section that there was a match between the DNA taken from the exhibits in relation to the 1990 investigation and the blood sample taken from the broken glass on 9 April 1995 and the accused was the person whose DNA from the blood sample matched the DNA found on the 1990 exhibits.

On 13 September 1995, Detective Sergeant Frew and Detective Senior Constable Barnett went to the accused's house at Palmerston. The accused was arrested for unlawful sexual assault and unlawful entry and taken to police headquarters at Berrimah. At the time of the accused's arrest Detective Sergeant Frew complied with the provisions of s140 of the *Police*

Administration Act by cautioning the defendant etc, but that conversation was not electronically recorded. Detective Sergeant Frew repeated that process with Detective Senior Constable Barnett during a tape-recorded interview once the accused had arrived at the Berrimah Police Complex. One of the questions asked of the accused was whether the accused wanted anyone notified that he was in police custody. The accused asked to speak to a lawyer. Detective Sergeant Frew told the accused that when he spoke to his lawyer he should discuss with him that the police "would like to take fingerprints, photographs, and we would also like a blood sample".

After the accused had spoken to his solicitor, Detective Sergeant Frew again requested the accused provide him with a blood sample and to sign a consent form. Before the accused signed the form Detective Sergeant Frew said:

> …I'm asking for a sample of blood, you are on a charge of unlawful sexual assault, the specimen that is collected may provide evidence relating to an offence, do you realise that?

After attending to some other formalities the accused was asked to read aloud what was written on the consent form onto the tape. The form, which the accused so read, contained the following:

> …I have been requested to consent to taking a specimen from my body which includes a sample of blood. I have been informed that the specimen collected may provide evidence relating to the said offence or to any other offence punishable by imprisonment.

The accused was unsure whether to sign the form and requested to speak to his solicitor again. This was attended to, and once again the accused was told that the taking of specimens "may provide evidence for us".

Subsequently, the accused signed the consent form and he was taken to the Royal Darwin Hospital where a blood sample was taken which was later given to the forensic section of the police department. That sample has since been used to carry out a number of DNA tests upon which the crown intend to rely at the trial.

Mr Dalrymple, for the accused, submitted that I should exclude the evidence relating to the sample in the exercise of my discretion.

Mr Dalrymple's first submission was that the police did not obtain the sample lawfully and in compliance with s145(3)(a) of the *Police Administration Act*.

That subsection provides that a member of the police force may arrange for the taking of such a sample from a person in lawful custody for the purpose of having it analysed

> …if the member has reasonable grounds for believing that an analysis or other examination of the specimen may provide evidence relating to the offence or to any other offence punishable by imprisonment, and —
>
> (a) the person has given his consent in writing;…

Mr Dalrymple submitted that the police had no such reasonable grounds because Detective Sergeant Frew already believed that the police had strong evidence of a match between the 1990 samples and the sample of blood obtained from the glass in 1995.

Detective Sergeant Frew said that he had two reasons why he wanted a further blood sample. First there may be difficulties of proof relating to the accused being the person whose blood was taken from the broken glass window. Secondly, if that became an issue in the trial, it may be necessary to have to prove that the accused had committed a previous offence.

I do not consider there to be any substance in the submission that the police did not have reasonable grounds for believing that a specimen of blood may provide evidence relating to this offence. On the contrary, the information already to hand indicated strongly that a further blood sample would provide very probative evidence. I do not consider it is to the point that the police already had a sample of blood which they may have been in a position to prove came from the accused. I think the police were justified in seeking to obtain a sample of blood which unquestionably would be the accused's blood. Even if the police already had a sample which they could prove to be that of the accused, I do not think that this fact by itself prevented them from seeking a further sample, as clearly that sample also, in the circumstances, may well have provided evidence relating to the offence.

Next, Mr Dalrymple submitted that the accused had not given any informed consent to the taking of the sample, because the accused was not told that a sample was already available to the police. The accused, in his evidence, said that if he had been informed that the police already had a sample, it is likely from what he had been told subsequently by his legal advisers, he would have been advised not to provide another sample and that acting on that advice, he would not have consented. Be that as it may, he did consent on this occasion after he had spoken to his legal advisers on two occasions. There is, in my opinion, no requirement for the police to reveal information of the kind suggested by Mr Dalrymple. There was nothing misleading or tricky in the way in which the police obtained the accused's consent. It was not suggested, for example, that the taking of the sample might exclude him as a possible suspect. The accused had already been arrested for this offence and at that stage the accused knew nothing about the information which was in the hands of the police and which the police thought was sufficient to effect an arrest.

Mr Dalrymple relied upon the case of *R v Sharpe* (1983) 33 SASR 366. In that case the accused had been suspected by police of having been involved in the murder of a woman in South Australia. At the time of the accused's interview her body had not been found. The accused denied that he had been involved in the murder but admitted that he had been told where the body was buried. The accused was arrested by Western Australian detectives (the interview took place in Perth). He had been brought before a magistrate in Perth and committed to the custody of a South Australian detective so that he

might be returned to South Australia and there be dealt with according to law. After the accused had been taken to Adelaide he was delivered into the custody of the officer in charge of the city watchhouse. In the ordinary course of things he would have come before a magistrate at ten o'clock the following morning. However, at about 9.30 am the South Australian detective spoke to the accused in the cells and asked him if he would like to show the police where the deceased was buried. The police then drove the accused to a place in the country where the accused identified the burial spot. The accused was then driven back to Adelaide and he appeared before a magistrate that afternoon.

The Crown wished to lead this evidence because it showed, so the Crown submitted, precise knowledge of the place where the deceased was buried.

Cox J held that the police were required to bring the accused before a magistrate at 10.00 am and that his further detention thereafter was illegal. Further, the accused had initially told police that he did not know where the deceased had been buried, but after police had persuaded him that the parents of the deceased would like to know where the body was so that she could be given a proper burial, the accused repeated that he had nothing to do with her death but that he would show police where she was buried according to information that he had been given by others. By the time the police had asked the accused to show them where the body was buried, the police already knew where the body was as, in the meantime, it had been located. There was therefore, no need for the accused's guidance in the search for the body on

humanitarian grounds. The purpose of the expedition was to see whether the accused would incriminate himself by showing a precise knowledge of the burial spot. His Honour held that evidence should be excluded because it was unlawfully and unfairly obtained.

His Honour held that the request implied that the body had still not been found and that this was culpably misleading.

However, in this case, there was nothing misleading in relation to anything said by the police to the accused.

I therefore do not consider that the sample was obtained in circumstances that amounted to a breach of s145(3)(a) of the *Police Administration Act*.

Mr Dalrymple's alternative submission was that the police acted improperly because they concealed from the accused the fact that they already had the sample. There is no obligation on the police to provide information of this nature even to a person who is under arrest. The accused was well aware of the nature of the charge, the identity of the complainant, the location and the date of the crime. There was no falsehood expressed or implied or dishonest trickery: c.f. *The Queen v Szach* (1980) 23 SASR 504 especially at 582-583.

On 13 September 1996 the accused also participated in a formal record of interview which was recorded on audio and video tape. By this time the police

were aware that the accused had, for some years previously, lived in the same house where the victim had been living at the time of the alleged assault. During the course of that record of interview the accused was questioned about this. The accused denied having anything to do with the alleged assault. Towards the end of that interview the accused was told by Detective Sergeant Frew:

> …I think I should tell you that we have a witness that will give evidence ah- that you were present in the house. Do you understand that?

The accused was not asked any further questions of any relevance relating to the matter and there the matter rested. He was subsequently released without being charged.

In the meantime the results of the further blood tests became available to the police and confirmed a "match" with the samples taken in 1990. On 4 November 1995 the police again attended at the accused's home and he was again arrested in relation to the same matter. He was again cautioned and taken through the s140 procedure which was recorded on an audio tape recorder and conveyed to the police headquarters where a formal record of interview was undertaken which was recorded electronically. The accused maintained that he was innocent of the alleged charges. During the course of the record of interview he was reminded of the occasion when a sample of his blood had been taken and was told by Detective Sergeant Frew that the sample of blood tested "…comes up to match DNA sampling which is on the girl's clothing…that she was wearing that night". Detective Sergeant Frew then

asked, “Can you tell me how that got there?” The accused said “Oh-Serg I couldn’t tell you but I’d have to be blind drunk Serg to do such an offence”. A number of questions were then asked about the accused’s memory, his drinking, what he drinks and what he does when he gets blind drunk and so forth. He was further questioned about the house, as well as a number of other matters of no real significance. Subsequently Detective Sergeant Frew asked him:

> …So you would have no explanation for why…your blood should be in the house or actually your DNA…should be in the house? And there’s no reason why it should be on her clothing? No explanation for that?
>
> Answer: No Sergeant

Counsel for the accused, Mr Dalrymple submitted that this record of interview was involuntary. The accused gave evidence that he was told on 13 September that the police had a witness who would give evidence that the accused was present in the house. He understood that to mean that the police had an eye-witness. He said that after the first interview had concluded he had asked the police who this witness was and was told that he would have to find that out. Although he said that at the time of the second interview the existence of this mystery witness was still playing on his mind, it is apparent that the decision to freely and voluntarily submit to a further record of interview had nothing to do with the existence or otherwise of that witness. Further, there is nothing in the second record of interview which amounts to an admission against his interests other than the accused confirming that he

had himself lived in the house at Limmen Street Wagaman for some years prior to 1990.

Nevertheless, I consider that the information given by the police to the accused as to the existence of this witness was misleading and, notwithstanding Detective Sergeant Frew's evidence, I consider that it was deliberately misleading. If I thought that the accused had confessed because of that misleading information, I have no doubt that I would have held that the evidence was inadmissible. It is of some significance that although the accused gave evidence, he did not say that he agreed to participate in this record of interview because of the misapprehension under which he laboured. I was therefore satisfied that he voluntarily participated in the record of interview.

However I do not think the manner in which Detective Sergeant Frew informed the accused of the evidence of the DNA match and his subsequent questioning of the accused as to whether he had any explanation for that match was fair to the accused. In the first place, evidence of the DNA match is only a piece of circumstantial evidence. If there is a match, the only inference which could be drawn from the match was that the defendant could not be excluded, and that therefore it was possible that he was responsible for the stains found on the victim's clothing. In the absence of other evidence, the match by itself could not prove that the defendant was the person responsible for the stains found on the clothing: see *Pantoja* (1996) 88 A Crim R 554 at 559, 564, 583 to 584. The manner in which Detective Sergeant Frew imparted

the information of the matching results suggested that there was no doubt that it was the accused's DNA on the 1990 sample.

Detective Sergeant Frew then asked the accused for an explanation as to "How that got there?" Such a question is obviously unfair; it lead to the accused speculating that he would have to have been blind drunk to do such a thing. This lead then to a line of questioning which explored the accused's drinking habits, whether he has had memory lapses after getting drunk and other material which is not probative and which, in my opinion, should be excluded.

Having regard to the fact that there are in fact no admissions against interest other than the accused having lived in the house previously, and having regard to the small amount of the interview which might be left as admissible evidence before the jury, due to the difficulty of editing the tape, I considered that the appropriate course was, in the exercise of my discretion, to exclude the whole of the tape. In fairness to the Crown, Mr Noble did not really urge me to take the course of editing. He conceded that the questioning of the accused in relation to the DNA was unfair and that much of the rest of the tape contained material which was of no probative value, although potentially prejudicial to the accused. He conceded that virtually the only piece of information in the second record of interview of any interest to the Crown related to a few questions as to the accused's knowledge of the house and that that information was also available to the Crown in admissible form in the first record of interview, to which there was no objection. Those

concessions reinforced my own view that the tape ought not to be admitted into evidence, in the exercise of my discretion, and accordingly I excluded it.