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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 24 OF 1994

BETWEEN:

THE QUEEN

AND:

MURRAY GRAHAM LAWSON

CORAM: MARTIN CJ.

REASONS FOR JUDGMENT

(Delivered 28 November 1994)

At about 6.30pm on 9 March 1993, Senior Constable Edwards and Detective Sergeant Smith arrested the accused, Murray Graham Lawson, after pulling over a motor vehicle in which he was travelling with his mother, as driver, on McMillians Road, Darwin. At that time the accused was aged 21 and had left school after achieving little by way of formal education. He had learning difficulties, particularly with reading and writing. He is of aboriginal descent. In the words of his counsel assented to by one of the police, "He's not particularly a bright man".

On the evening of 6 March 1993 there had been two armed

hold ups in the Darwin area, one at the Airport Hotel and another at the Asian Gateway restaurant. The motor vehicle identified as having been used in the Asian Gateway robbery was examined and was found to bear a fingerprint of the accused. It was not his motor vehicle, and it was for the offence of stealing that motor vehicle that he was arrested. The police also wished to question him about the robberies.

Whilst he was in the motor vehicle on the journey from McMillians Road to the Police Headquarters, Edwards evidence was that the accused asked him a couple of things and that he said: "Look, Barney will have a talk to you at Berrimah. He wants to talk to you about some robberies as well. He'll talk to you back there. I won't say any more to you about it". The reference to "Barney" was to Detective Senior Constable Barnett.

During the course of the remainder of that evening, and until about 2pm the following day, the accused was held in police custody and a number of events occurred including some questioning by the various members of the police force concerning, in particular, the Asian Gateway robbery. During the last of those interviews which commenced at 11.47am on Wednesday 10 March and concluded at 12.08pm that day, the accused confessed to having robbed the restaurant. For that he was committed for trial and upon the indictment being presented and his plea of not guilty taken, an application was made for the conduct of a voir dire upon the grounds that the confession was not voluntary, but that if

it were found that it was, then it should be excluded in the exercise of the Court's discretion as it would be unfair to the accused to permit it to be used against him upon his trial.

His counsel in the application for the conduct of the voir dire hearing noted a number of matters upon which the accused would rely. They included four separate allegations of assault by one or more members of the police upon the accused whilst he was held at the Headquarters, verbal threats and inducements to confess, breaches by police of the general orders issued by the Commissioner of Police in relation to the interviewing of suspects, and of certain provisions of the *Police Administration Act* in that regard, and other improper behaviour on the part of the police including denying him the opportunity to speak to his lawyer, Mr Stubbs, in private at the police station, and delay in taking him before a Court. Altogether a formidable array of accusations of illegal and improper conduct on the part of the police.

The credit of the police witnesses was very much called into question, and the Crown also elected to call the solicitor, who attended upon the accused within the precincts of the Police Headquarters on the morning of 10 March, as to what then happened as between himself, the police and the accused. His evidence, and that of police, was in conflict in relation to a significant matter of timing and order of certain events whilst the solicitor was present on that morning, and in respect of that, the Crown invited the Court to accept the evidence of the solicitor as opposed

to that of the police. The accused also gave evidence, but otherwise called no witness in his case.

It is convenient to deal with the matter by first turning to the areas of factual dispute, of which there are many. The onus lying on the Crown to show on the balance of probabilities that the confession was made voluntarily, commenced, but it is the evidence of the accused by which he has attempted to lay the foundation for exclusion of the evidence upon that basis. He commenced by giving a short outline of what he had done on the evening of 6 March when the alleged robberies took place. He conceded that he had stolen the motor car for the use of a man called Sean Hansen early in the evening, and had left it for Hansen at a suburb in Darwin, and reported to him where it was. The accused said he remained at home, watched some television, had something to eat and fell asleep. Later in the evening Hansen arrived and after the accused had accepted \$20 offered to him by his father for the purpose of going out, he and Hansen went into town to a nightclub. The robberies are alleged to have occurred during the period whilst the accused says he was at home.

Although he said that he had been drinking Bundaberg rum during the course of the day of 9 March, it was not suggested that that may have had any effect upon him in relation to the events which followed. He said that on arrival at the Police Headquarters he was placed into what was called an interview room adjacent to the CIB muster room and Smith and Edwards remained there. After

a while, Detective Sergeant Chapman entered the room, the others remaining. Smith and Edwards both deny that they remained in the interview room after placing the accused there on bringing him back to Headquarters. They said they had no interest in the accused beyond having arrested him for the stealing of the motor vehicle and they knew that there were other detectives who wanted to speak to him about the robberies. The accused said that after a brief exchange of pleasantries, Chapman said to him: "You've been in a bit of trouble lately haven't you?". To which he said: "No" and Chapman added: "Come on you can tell us before Barney and Hambleton get here". The accused responded: "I don't know what you're talking about. I want to see a lawyer". Whereupon he says Chapman slapped him in the back of the head and went on to say: "Come on you can tell us". The accused protested that he wanted to see a lawyer and wanted to make a telephone call for a lawyer, and the policeman responded: "No you are not entitled to one; you've hit the big time now". It was then said by the accused that Detective Senior Constable Barnett and Sergeant Hambleton entered the room, whereupon Edwards, Smith and Chapman stood near the door.

The accused then alleges that Barnett said: "Looks like you've been doing a few robberies", and he replied: "I don't know what you've talking about. I want to see a lawyer. I want to make a phone call", and that Barnett replied: "You're not entitled to one". Hambleton then said: "Well it looks like we're going to have to give you a hiding then". Whereupon Hambleton was said

to have reached out across the table towards him, he kicked the table and Smith pinned him by the arms, Barnett kicked him in the chest and Edward slapped him a backhander on the left hand side of his face. Each of the policemen gave evidence and each of them denied that any such incident had occurred, in so far as they admitted being present at the relevant time.

On being informed by the police that they knew he had stolen a Commodore motor vehicle and accusing him of the robbery, the accused confessed to stealing the car, but denied the other offence.

Barnett used a hand held tape recorder to then record a brief conversation with the accused, during which he informed him that he intended to ask him some questions, but before doing so, asked if there was anybody that the accused would like him to notify that he was in police custody. That undeniable piece of evidence is surprising given the accused's accusations as to what had happened just before. The accused nominated his mother and father, gave the address where they might be found and their telephone number. That tape recording was then stopped, and about fifteen minutes later recommenced when there was a further discussion between Barnett and the accused, during which the accused confirmed that since the previous discussion he had spoken to Mr Stubbs, a solicitor from the Aboriginal Legal Aid Service, and the accused said he no longer required the police to contact his mother. If any of the police denied the accused's request

that he be permitted to contact a lawyer that is reprehensible. However, he was shortly thereafter given the opportunity to nominate whom he would like to be contacted, and his request was fulfilled. As a consequence Mr Stubbs telephoned and spoke to the accused. He had made no confession in relation to robberies in the meantime.

The evidence of Mr Stubbs is that Mrs Lawson had contacted him and told him of the arrest of her son, whereupon he phoned police headquarters and spoke to Hambleton who confirmed that the accused was there and told Stubbs that they wanted to interview him about stolen cars, that he had been arrested for that, and that he had admitted to being so involved. Stubbs then raised the question of whether he was wanted for questioning in relation to an armed robbery, and that Hambleton replied to the effect of "a couple". According to Stubbs, Hambleton said that the accused had not then been questioned about armed robberies on tape, whereupon Stubbs asked if he could speak to the accused, and he was permitted to do that. During that conversation, Stubbs informed the accused generally as to his right to silence and the accused confirmed that he had already made admissions about stealing motor vehicles, whereupon he was informed by Stubbs that the police might wish to question him about armed robberies, and the accused said that he did not wish to answer any questions about that subject. Completing the discussion with the accused, Stubbs then spoke to Hambleton and enquired as to whether it was intended to question the accused about armed robberies and the policeman

had replied: "Not specifically", but that "We know he knows who did". According to Stubbs, he then said to the policeman: "Will you ring me if you're going to question him about the armed robberies with a view to gathering evidence against him?" and that Hambleton agreed to do so. The accused says that during this conversation he was handed a piece of paper by Hambleton on which was written words to the effect that he was only wanted for an interview regarding the stolen motor vehicle and not in relation to a robbery.

A little after 8pm, the accused, together with Barnett and Hambleton, went to a room in which there was video and audio recording machinery ("the video room") and over the next half an hour an interview took place concerning the stealing of the motor vehicle said to have been used in the Asian Gateway hold up. After a series of formalities to do with the recording of the interview and confirming that the accused had spoken to Stubbs, Barnett informed him that he would like to ask him some questions about the motor vehicle and gave him the usual caution. The accused acknowledged that he understood it, he also acknowledged he was under arrest, and when asked what his rights were replied: "I don't have to say nothing if I don't wish to". He acknowledged that he was aware that the recording may go to Court and be used in evidence. He confirmed to the police that he had stolen a car, from whence it had been taken, how he had gone about stealing it and driven it to the Nightcliff shops. He told the police how he had then gone home and told Sean Hansen that the vehicle was

waiting for him and said that although he did not know Hansen very well he had just done it for him. According to the accused, Hansen then left and did not return until about nine o'clock. Barnett then asked: "We've been informed that that motor vehicle has in fact been used in an armed robbery at the Asian Gateway which is an Asian restaurant in Aralia Street, Nightcliff. What can you tell me about that?", and the accused replied: "Sean later on told me um the next day that he'd done it". Barnett continued: "Were you aware at the time that he took the motor car what he was doing to do with the motor car?" and the accused replied: "No". It is suggested that raising the issue of the robbery in the context of the investigation concerning the stolen motor vehicle amounted to a breach of any undertaking given by Hambleton to Stubbs. According to the accused, after that interview he was asked about a shotgun which was said to have been used at the Asian Gateway cafe and he said that he told the police it was near a tower at another Darwin suburb, Casuarina, under a drum. According to the accused information as to the whereabouts of a shotgun had been given to him by Sean Hansen. The police contend that the discussion about the gun arose spontaneously from the accused as they were returning from the video room to the interview room, whereupon Barnett again produced the hand held tape recorder and the following conversation took place:

Barnett: "Since the interviews stopped you've told me you'd be happy to go and show me a shotgun that you believe has been used to commit a serious offence. Do you agree with that?".

Lawson: "Yeah".

Barnett: "I'm now just asking you that so its recorded on the tape since the tape was stopped before that you agreed to come and show us where the shotgun is"

Lawson: "Yeah"

Barnett: "Okay. Thanks very much".

Lawson: "You're welcome".

Barnett: "Just one thing. You know you don't have to do this if you don't want to?"

The accused replied in the affirmative.

The accused then went with Barnett and Hambleton in a motor vehicle to a water tower located on Parer Drive, and according to the accused on looking around the tower and not finding a gun, the police suggested they go to a nearby school and have a look there. They drove around for about five minutes and found a water tank, nearby to which was located some 44 gallon drums. According to the police, the accused's description of where Hansen told him the gun was, led them to go first to the Parer Drive water tank, but that thereafter, the accused took them directly to the place where it was found. The accused denied that he was aware of the existence of the water tank at the school. The police were criticised over this incident for their failure to make any notes as to just in what circumstances and where the accused informed them as to where the gun would be found. The tape recorded interview simply disclosed that the accused had agreed to show them where it was. The police version is that the accused described where the gun was by reference to a general description

of a water tower at Casuarina, and Hambleton drove to a location where he knew there was a water tower and that it became apparent that that was the wrong area. The accused then directed him to what he described as a water tank located in the grounds at the back of the Casuarina High School. Hambleton was previously unaware of the location of that tank. There was some confusion between the terminology "water tower" and "water tank", but I accept in general terms the police evidence in regard to this matter. There was nothing to suggest that they knew where the gun was located prior to the accused telling them that he would take them to where it was, and the fact is the accused did take them to where it was, although it took a little time to find its precise location. The accused had information as to where it was, but there is nothing else about this incident which would link the accused with the robbery. At the scene where the gun was found another hand held audio tape recording was made of the discussion between Barnett and the accused. The accused was given a caution and when asked if he understood it, he responded: "Yeah mate". When asked if he understood his rights, he replied: "Don't have to say nothing" and acknowledged it could go to Court. Further questions and answers ensued regarding the finding of the shotgun. The accused was then asked to confirm that he had agreed to wait at the scene until the forensic photographer arrived, and the accused again answered: "Yeah mate".

At that stage the police had a confession as to the stealing by the accused of the motor vehicle which was used in

the robbery (from which he does not resile) and that he knew where a shotgun had been hidden which could have been used in the commission of the offence. He had consistently denied having taken part in any robbery. Notwithstanding his allegations that the police had assaulted and threatened him, he had made no confession.

On arrival at Headquarters, after locating the shotgun, his mother was present and he spoke to her. He was then taken for a second interview about another stolen motor vehicle which is of little further interest. After that video recorded interview, they returned to the interview room. According to police records, Mrs Lawson arrived after the accused had spoken to police about the second motor vehicle matter, and a statement was then taken from her at about midnight. The accused's father arrived thirty minutes after midnight. Mrs Lawson then went and arranged for some food for her son. She came back to the Police Headquarters later in the evening and again saw her son and delivered the food. The accused acknowledged in cross-examination that had he complained to his mother concerning police conduct, she would have taken it up on his behalf.

It was during this interval, late at night, that the accused said that one or the other of Barnett or Hambleton told him that if he did not tell them about the armed robbery he would not be released, and that he again denied having anything to do with it, nominating Hansen as the one who could have. Later,

according to the accused, Sergeant Fry spoke to him saying that if he, Lawson, told him where Hansen was then he could be out that evening, but that the accused told the policeman he did not know where Hansen then was.

Following that, the accused said he was taken by Hambleton and Barnett from the interview room, in which he had spent most of the time, to the watch house, which is built into the Police Headquarters. There is a long passageway adjacent to the CIB muster room which leads to the watch house and it cannot be seen into except by anyone who happens to be in the passageway itself. The accused says that whilst in that passageway he was assaulted by those two policemen, he went to the ground and he was kicked a few times in the back and the side, and was told that he could expect more of it if he did not tell the police what had happened. He was further told that he would not be getting out until he did. The next morning the same two policemen came and collected him from the watch house and took him back to the interview room, and in the accused's words: "I copped another hiding", in the passageway. On this occasion he said he was hit on the back of the head and went to the ground, that he placed his hands on his head to protect himself and he was kicked a few times including in his genitals. The police deny that any such assaults took place.

Taken back to the interview room, the accused became aware that Hansen was then in custody in the room next door and

that Chapman was questioning him. According to the accused, he was speaking to him in a very loud and very angry voice accusing Hansen of having committed both robberies, but that Hansen admitted to the Airport Hotel job, but not the Asian Gateway. The accused's mother arrived again and spoke to the accused in relation to some banking transaction. Whilst Mrs Lawson was present the accused says that Chapman came into the room, in which he and his mother were, and told him that Hansen did not admit to the Asian Gateway robbery, and the accused responded: "Why would I do the robbery and borrow \$20 off my dad to go out that night if I'd done the robbery?". Chapman then left, according to the accused, and returned to speak to Hansen. Barnett and Hambleton arrived and asked Mrs Lawson to leave, telling the accused that Stubbs was there wishing to talk to him and adding: "But if you sign anything you wont be getting out of here". The accused said: "What do you mean?". They said: "If you sign anything at all you wont be getting out of here. You'll be staying here because we want to make further investigations". How the police could have anticipated what followed shortly afterwards is not explained.

The police remained present whilst Stubbs spoke to the accused. They explained this by saying that they were aware that Stubbs was acting for Hansen and they did not want anything to be passed as between Hansen and Lawson by medium of Stubbs. It also appears that the police may have conveyed to Stubbs that the accused may have been involved in criminal activity with Hansen and that he, Stubbs, might have to ensure that he did not take

any instructions from Hansen lest he ends up in a conflict of interest situation. For his part, Stubbs professed to fully understand his obligations as a lawyer in situations such as that, but in any event, since the police would not allow him to speak to the accused unless it be restricted to giving him advice as to his rights, he felt powerless to do otherwise. That is what he did.

There is a conflict of evidence which assumes some importance between the police and Stubbs as to the time at which he saw the accused. The police chronology, which was made by Barnett, shows the time as being between 9 am and 9.30 am, and in cross-examination Barnett adhered to that view that his record was accurate. He was quite adamant about it. He acknowledged that the record was a compilation of hurriedly written notes made at various times concerning different incidents, during the course of the investigation (possibly including notes written on the back of his hand), and that the document produced as an exhibit was the second attempt to make up the written chronology. He said the first was so badly written that nobody except him could read it. Stubbs, however, whose evidence I was asked to accept by the prosecutor in preference to that of the police, said that he arrived at Headquarters at about five to nine and after some enquiries about another person, which only took a few minutes, he was told at 9.07 am that the records of interview with Hansen had been completed and that he had confessed to the Airport Hotel armed robbery, whereupon Stubbs was permitted to see Hansen. Stubbs

went on to say that at approximately 9.25 am he asked if he could see the accused and he was permitted to do so under the circumstances already described. He confirmed that he asked the police to leave, but that they declined to do so, and that during the course of his giving advice to the accused, the accused said that he was not guilty of any armed robbery and that he did not want to answer any further questions.

For what purpose, it is not made clear, Stubbs then wrote a document in the form of a statutory declaration as follows:

"I, Murray Graham Lawson of 122 Progress Dr. Nightcliff, hereby solemnly and sincerely declare as follows:

1. I am in police custody at Berrimah Police Station at 9.40 a.m on Wednesday 10/3/93.
2. I have been held for questioning in relation to armed robberies since the afternoon of 7/3/93.
3. I have given the police all the assistance I can in relation to their questions.
4. I have not been involved in any armed robbery offences.
5. I do not wish to answer any further questions of police in relation to this or any other matters.

DECLARED at Darwin 10/3/93"

Stubbs invited the accused to sign the document, but he declined. The accused says that was because he had been told he would not get out if he signed anything. Stubbs signed it and he invited Detective Sergeant Fry to do so. He did, and added the date and time, 10.3.93 - 09.44. There is no reason to think

that the notation made by Sergeant Fry was other than accurate. He took a copy of the document for his records.

Before preparing that document, Stubbs said that he said to the accused: "Will you do me the courtesy of ringing us if you change your mind on that score" (meaning, that the accused did not wish to answer any further questioning about any armed robberies), that the accused had replied that he would and that he, Stubbs, then asked Fry: "Don, will you ring us if Murray Lawson indicates that he wishes to be further questioned about the armed robbery matters?", and that he responded: "Yes". Stubbs had nothing further to do with the matter, but happened to be in the Court of Summary Jurisdiction at approximately 2.30 pm that day when the accused was brought in, charged with armed robbery and bailed. He says that at no stage was he contacted by the accused or Fry prior to the confession being made in relation to such an offence.

According to the accused, the police present in the vicinity of the room where the interview was conducted with Stubbs were Fry, Hambleton and Barnett. In that he may have been mistaken as from the other evidence it would seem that only Fry and Hambleton were in that position. It is part of the accused's case that the police acted unfairly or improperly because they did not contact Stubbs before questioning him further about the robbery, contrary to the alleged undertaking given by Fry. Was there such an undertaking? I am invited by the Crown to prefer the evidence

of Stubbs on this point and I do. He made a detailed note of his dealings with the accused and the police on 9 and 10 March, at about that time. Fry did not deny that Stubbs had said: "Would you do me the courtesy of ringing me up if he changes his mind", but said that he did not agree to do so; "The only agreement that I would entertain is the one of the accused" he said, a position quite like that adopted by Barnett to the effect that he only takes notice of an accused when it comes to whether or not he wishes to answer questions.

Hambleton, although present at the time, did not recall the discussion between Stubbs and Fry. The Crown position is that the evidence of Stubbs is to be preferred and on balance I consider it should be. Accordingly, the agreement or understanding reached between Stubbs and Fry was breached by the Sergeant, and since Hambleton was present at the time it follows that he was aware of it and also breached it. But what are the consequences? Firstly, there is no evidence that the accused was denied any request to telephone Stubbs or anyone else when he agreed to be interviewed further about the Asian Gateway robbery shortly after Stubbs left. Next, he made no admissions as to his involvement in that robbery beyond that already conceded by him, that is, that he had stolen the vehicle used. His consistent line throughout that interview was that Hansen had said he did it and to provide details. There was no confession by the accused at that stage. It was only after another turn of events which will be considered later that the accused confessed. In all the circumstances as

I find them it would not be unfair to the accused to admit his confession at trial because there was a breach of agreement on the part of the police. The accused was well aware of his right to remain silent and ultimately it was his decision, influenced by his later discussion with Hensen, that caused his confession to be made. Reprehensible conduct on the part of police is not to be condoned, but it is a factor to be weighed along with all other factors (*Driscoll v R* (1977) 51 ALJR 731 at 741).

Another pointer to the time during which Stubbs and the accused were together comes from Chapman's notes made in relation to his dealings with Hansen. He puts the time at which Stubbs arrived at either 9am or 9.09am and departing at 9.21am, and that accords with Stubbs' records. I find that the notes made by Barnett were inaccurate in that respect, but I accept that he believed that the record was accurate. He had no independent recollection of times.

At 10.16am, the accused was again taken to the video room by Hambleton and Barnett, that is, about half an hour after Stubbs had departed. According to the accused, fifteen to twenty minutes after Stubbs had departed the police came back in and said: "Right, its time to tell us what happened", that he said: "What do you mean" and they said: "We're going back up and make another interview now and you've got to tell us what happened", whereupon he was taken to the video room. He asserted in evidence that he did not want to speak to police at that time, but that he did so

because he was told that if he did not he would be bashed and would not be let out of the police station. Barnett's evidence was that after Stubbs left, the accused told him he was prepared to say who it was that robbed the Asian Gateway and nominated Hansen. That interview lasted about 25 minutes and was conducted on the part of the police by Hambleton. The accused acknowledged that he was aware that the interview was being recorded on video cassettes; when asked if he agreed that he had been in custody since yesterday, replied: "Yeah mate"; he understood that he was in custody because police were enquiring into an armed robbery of the Asian Gateway on 6 March; he acknowledged that he had received advice from Stubbs the night before and that morning, and that Stubbs had said: "I don't have to say nothing if I don't wish to or anything and if I say something that I should ring him up and tell him and whatnot". Hambleton then gave him another full caution and told him that he wanted indications from the accused of other knowledge that he may have about that particular robbery, reminded the accused that Hansen was being interviewed in relation to that robbery, and invited the accused to tell him of any dealings that he had had with Hansen in relation to it. The accused told how Hansen had a shotgun at the accused's mothers place and the following day asked the accused to get him a Commodore, which he did, and reiterated much the same information as he had given to the police previously about the dealings with the motor vehicle and his activities on the night of 6 March. He told how later Hansen told him that he had held up both the hotel and the restaurant and that Hansen had also told him that

he had left a bag at Casuarina near a water tank "or something - water tower under a 44 gallon drum". The accused then said: "I'll assist you in any way I can". A large number of questions were then asked of the accused in clarification of what he had just told the police. During the course of this elucidation, Hambleton referred to an earlier conversation in which the accused had given him a description of the clothes that Hansen was wearing. That conversation is not otherwise recorded, and Hambleton conceded that there were other discussions with the accused other than those that were the subject of formal record. During the course of this interview the accused occasionally called Hambleton "Mate". During the course of this conversation the accused confirmed that Hansen had told him that he "Stashed the gun at Casuarina High School".

The interview was certainly concerning the Asian Gateway robbery, but not principally the accused's involvement in it, rather as to his knowledge of the involvement of Hansen and others. It was not put to the accused that he had had any part in the robbery. If the accused is to be believed as to the command by police that he tell them what happened, the video record shows that the enquiry was to find out what the accused knew of Hansen's involvement. There was no confession by the accused. He was then returned to the interview room near the CIB muster room. The apparent friendly familiarity between the accused, Hambleton and Barnett during the course of that interview was explained by the accused as being: "Just a way you would answer a person I suppose; just a common

expression. Its just like your walking down the street and someone says "Oh g'day mate. How are you?"; Oh not bad mate". When pressed by me as to why having said that he was in fear of the police that he was going to be kept for up to four weeks and had been threatened with further bashings, he should call Hambleton "mate" during the interview, he ultimately responded: "Its just an expression". He denied he was relaxed during the interview. I have reviewed the interviews and during the course of the interview the accused was well spoken, there was no suggestion that he was frightened or that he was doing anything other than cooperating with the police in relation to that matter. His demeanour and manner of expression were not consistent with a person in fear of the police.

After that interview the accused says that he was in the interview room with Barnett when Chapman came in and said: "Come on you may as well admit to it" and that he replied: "I didn't do it", and that Chapman then said: "Well I just won't let you out of here unless you admit to it or unless you get someone that admits to it" and added: "If you admit to it you can say that you used a stick instead of a gun because it won't be as serious a charge as robbery with a gun". The accused went on to tell me that he eventually admitted to it and that he agreed to do another interview because he wanted to get out of there, that he was scared and that he knew he would not get out unless he made a statement. Thereafter he was taken back to the video room to undergo a further recorded interview. He says prior to that he was told by the police

what he should say (I gather an outline of the facts relating to the restaurant robbery) and that after he had undertaken that fourth interview, he was allowed to see Hansen. They had an argument as to who it was that put the other in. He was then charged, taken to Court and bailed.

The police version of these episodes is quite different. According to Barnett, when the first video recorded interview on the 10th was completed, the accused was taken back to the interview room, Barnett started speaking to other detectives and a short time later the accused asked if he could speak to Hansen. After consultation between police, he was given permission to do so and thereafter Chapman approached Barnett and said something along the lines of: "He wants to see you", referring to the accused. Chapman says that he took the accused out of the room where the accused and Hansen had been after he heard a banging on the door to that room, which was shut. As he returned him to the room from which he had previously come, the accused sat down and Chapman said to him: "It was a silly thing you did" and the accused agreed, saying that he did not use a firearm but used a stick. Chapman agreed that he initiated the conversation and that he then left the interview room and spoke to Barnett. They went straight back into the room and spoke to the accused. Barnett's evidence was that when he went into the room after Chapman had told him that the accused wanted to see him, the accused simply said: "Barney, I done the takeaway job", and that when he enquired why, the accused said: "Bloody stupid". He was then asked whether he wanted to

talk to Barnett about it on tape and the accused replied: "Yeah lets get it over with. I never used - I didn't use a gun I used a stick covered up". They then proceeded to the second video recorded interview which commenced at 11.47 am on 10 March.

After the usual preliminaries, Barnett informed the accused in accordance with s142(2) of the *Police Administration Act* that at the conclusion of the interview he would be given a full copy of the audio tapes and a notice informing him as to how his solicitor could contact the police and arrange to view a copy of the video tape. Barnett then introduced the subject of the interview, that is, an armed robbery at about 8pm at the Asian Gateway restaurant on 6 March and gave the usual caution, which the accused indicated he understood. "I don't have to say nothing if I don't wish to". When the accused acknowledged he was familiar with the restaurant, Barnett asked: "What can you tell me about this place?" and the accused replied: "I robbed it". When asked to expand on that, the accused said that he had walked into the restaurant with a shirt over his head and a stick under a cloth and said: "Give me the cash till", and, "the bloke did and I left". A long series of questions followed concerning the detail, including as to his driving to the shop in the Commodore which he had previously stolen. He said he had decided to commit the offence on the spur of the moment. As to his departure, the accused said that he simply drove past the front door of the shop, but that he did not see any people in the street at that stage and he was not aware of anybody having followed his motor vehicle after

he had left the restaurant.

In addition to the alleged improprieties leading to the making of this record, the police were also criticised for not suggesting that the accused had used a shotgun rather than a stick, and that as he drove past the restaurant there was a person on the footpath. As to those matters, the police acknowledged that normally they would put to an accused any difference between what the accused may say about an incident and what the statement of witnesses may say, to give the accused an opportunity to comment. The police acknowledged that that was the usual practice, but said that in this case they had simply forgotten about it, and acknowledged that they were in error in not doing so. I doubt that there was any need for such an admission. Mr Mangrai, who was the person attending in the restaurant when the robbery occurred, said that he saw the offender holding something in both hands, "It was as if he was holding a gun, with his right hand back and his left hand forward, the barrel was sticking about five centimetres out past his hand. I did not see the butt of the gun which was wrapped in a sarong". His statement was taken on 6 March, and on 27th of that month he made a further statement that he had been shown a shotgun amongst other things, but had not seen it, "The towel was covering something on the night a man committed an armed robbery on the takeaway shop. When he came into my shop he was carrying something under his arm and hand but it was covered by that towel. On the night it happened I told police it was a sarong but now I see the towel I'm sure that is what was covering

the thing he was carrying". It is doubtful that it could be said that the only witness to the hold up identified whatever it was that was being carried by the offender, as a shotgun. Mr Kyio stated that he was working at the restaurant and was told about the robbery, he ran to the street. He heard a car start its motor really loud, and that he went onto the street and "this car drove out off the curb and directly at me I was standing on the side of the road with War's sister and this man drove his car straight at us. We both jumped off the road because he was going to run over us". It may have been remiss for the police not to have asked the accused about that, but he was not being questioned about a driving offence. They were concentrating on the robbery.

As to the assaults, the accused says he was bruised on his back and suffered a cut or tear to his scrotum. His evidence was that his mother and father were aware of those injuries. As to the injury to his scrotum, he says he sewed it up with a needle and cotton following his father's practice of attending to cuts. He said he was ashamed to seek treatment, but he said that there was still a scar. Leaving aside the difficulty I have in accepting that he attended to any injury in that way, it is significant that neither his mother nor his father, nor anybody else, was called to give evidence about having seen any such injury or injuries. It is also significant, I consider, that in his first interview with the police after the alleged assaults upon him, he did not make any admissions. There is evidence, which I accept, that the

size of the room in which the accused says he was assaulted by three or four police officers together was such as to not have accommodated them all, and for the assault to have taken place in the manner in which he described it. It is improbable that Smith or Edwards would have had any reason to be involved in an assault upon the accused. They had simply arrested him in relation to the motor vehicle offence and had nothing to do with the investigation of the robbery. The accused made no complaint to the commander of the watch house following the alleged assault on the way from the interview room to the watch house on the night of 9 March, and although, if such an assault had taken place, he may have had little confidence in his complaint being taken seriously, he did nothing by way of complaint upon his release the next day. He had immediate access to solicitors when he was taken before the Court of Summary Jurisdiction, Stubbs and Ms Hardy of the same office, being present. Whatever diffidence a person may feel, justified or not, about complaining of being assaulted by police in the precincts of a police station (or anywhere else where there are no independent witnesses) there are opportunities in the Territory for any such complaints to be made and investigated when the person is released from custody.

It is acknowledged that there are special considerations going to the difficulty faced by an accuser, when an allegation of assault is made against police when there are no witnesses other than police, but the police are entitled to have all the evidence on the matter carefully weighed and their evidence not rejected

simply because they may be perceived to have an advantage in such a conflict. Were it otherwise, every accusation of assault by police where there is no other witness would have to be upheld; that would be a disastrous situation for law enforcement authorities and for the administration of criminal justice. However, the task of the accused becomes easier if there is some evidence of injury consistent with the nature of the attack alleged. I do not accept that the accused was assaulted in the manner alleged at any stage during the time he was in the custody of police.

This finding necessarily calls in question the credit of the accused and raises the real issue of his ability to fabricate stories which he thinks may suit his ends. That is not to say, of course, that everything about which he gave evidence supporting the exclusion of the confessional material is to be rejected simply because his credibility is seriously called in question in relation to one aspect of it.

The major issue in relation to voluntariness now to be determined, is whether on the balance of probabilities, the confession which the accused made in the second video taped interview on the 10th was brought about by any threats or inducement offered by any of the police. The critical conflict in that regard arises between the police evidence that after the first video interview on that day the accused was permitted to speak to Hansen alone, and having done so, indicated a willingness to confess to

the robbery. The accused says he did not speak to Hansen until after the second video interview and that he made the confessions in that interview because of the pressure exerted upon him by police, threats that he would not be permitted to leave until he confessed, and the inducement offered to the effect that if he said that he had a stick and not a gun, he would receive more favourable treatment in that the police would accept that version of the facts and not press to have him dealt with on the basis that he was armed with a deadly weapon such as a shotgun. All of the police who are in a position to assist the Court say that the confession came after the accused had had discussions with Hansen. Although there are question marks over the chronology prepared by Barnett, his record shows that the accused was put in the interview room with Hansen at 11.25 and returned to the room in which he had been previously held a few minutes later, whereupon he spontaneously acknowledged his guilt. The chronology in relation to Hansen was not put into evidence by either side and Hansen was not called by either party, although both had spoken to him. I consider it more probable that the police version of the order of events is correct. There was evidence already referred to which pointed to the accused having been involved in one or both robberies on the night of 6 March. His consistent position from the start was that he had not been involved in any robberies, but had simply stolen the car which was used, and that on the basis of what Hansen had told him, Hansen was the perpetrator of both offences. At the end of the first video recorded interview on the 10th the police had shifted their attention from the accused

to Hansen for the Asian Gateway robbery and went to a great deal of effort to obtain full and detailed information from the accused as to his knowledge of Hansen's involvement in that offence. There was evidence from the accused that after that he was badgered and threatened by the police to change his story, especially with threats to keep him detained. He also relies upon the inducement in relation to the weapon. As to the threat to keep him detained indefinitely, it is just not believable in the light of the fact that his mother had been in and out of the police station on at least four occasions since he was arrested the previous night, his father had been there once, and further, the accused had twice had communication with Stubbs, a solicitor. I do not accept that even if the words alleged had been spoken that the accused would really feel threatened by them, especially in a way which would cause him to shift from a position where the police had just taken a long statement in which he pointed the finger at Hansen to one where he was accepting sole responsibility for a serious offence such as robbery. His explanation to the police in the first video interview as to his reaction when Hansen was said to have informed him that he was involved in both robberies is indicative of the accused's awareness of the seriousness of the offence. I do not accept that any threat was made to him as alleged, but if there was anything like that, then I do not accept that it was operating on his mind so as to cause him to make a confession, nor do I accept that any inducement, such as an offer to accept a story that he was armed with a stick rather than a shotgun, would of itself have had any such effect upon him, and given the other findings, that

is all that was left.

The other explanation is that he did have a discussion with Hansen between the first and second video recorded interviews and that something transpired between them which caused his change of heart. In the absence of any other reason, especially any such as is alleged by the accused, the explanation can only lie in that direction. The accused may well now think that what then caused him to confess ought no longer prevail over him.

There are other grounds put forward as to why the confession should be excluded based upon the residual discretion of the Court. It is said that the police exceeded their powers under s137 of the *Police Administration Act* and that the accused was held for a unreasonable period prior to being taken before the Court. I am not satisfied that the period the accused was held was unreasonable taking into account the criteria in subsection (2) of s137. The law permits the police to hold a person in custody to enable that person to be questioned or investigations to be carried out to obtain evidence of, or in relation to, an offence, whether or not it is the offence in respect of which the person was taken into custody. The accused was taken into custody in respect of the stealing of a motor vehicle, but he was told immediately that the police also wished to talk to him about the robberies. He was questioned about the stealing of the motor vehicle, another motor vehicle and about the robberies. There were indications, to which I have already referred, pointing to

the accused's involvement in one or more of those serious offences. The police were seeking Hansen at the same time to question him in relation to the robberies. As the investigations proceeded, it became known to the police that the accused had said that Hansen was involved in both robberies and that Hansen had denied that he was involved in the Asian Gateway robbery. It was reasonable for the police to take time to investigate those conflicting stories by questioning the accused further. The police were investigating two robberies; they needed time to interview Hansen to assess relevant material in preparation for interviews with the accused; time to communicate or permit the accused to communicate with his relatives and legal adviser, and the time taken for the interviews themselves and other investigations to be carried out, for example, in locating the shotgun. They were also awaiting results from fingerprint tests on the shotgun recovered late on 9 March, but took the accused to court before receiving them. The accused was allowed the opportunity for rest between approximately 2am and 8.30am. The proposition put by counsel for the accused that the accused should have been released or taken before the court once he had made a denial of participating in the robbery is not sustainable.

It is then said that the General Orders of the Commissioner were not complied with in relation to the recording of the earliest interviews with the accused. Those orders require that all interviews with suspects that are conducted at police stations where electronic recording facilities are available will

be recorded electronically and in respect of offences for which the penalty exceeds seven years, they shall be recorded on video and audio. All other interviews for suspects shall be recorded on audio. Barnett was aware of these provisions when he first spoke to the accused about the stealing of the Commodore motor vehicle, but that does not carry a penalty in excess of seven years and thus to video record was unnecessary and audio recording was sufficient compliance in his view. In that he was right. However, counsel for the accused points to the singular "open ended" question put in the middle of that interview about the motor vehicle, "We've been informed that that motor vehicle has in fact been used in an armed robbery at the Asian Gateway which is an Asian restaurant in Aralia Street, Nightcliff. What can you tell me about that?" The accused immediately denied any involvement, saying that Hansen had told him that he had done it and the police pressed the matter no further. There was no confession and no question was raised as to what was said during the course of that interview as audio taped. It may have been better had Barnett not ventured upon the robbery while interviewing about the stealing of the motor car. Had the accused made any admission in relation to the robbery at that stage, and if the audio recording had not been discontinued and video recording put in its place, a more significant question could have arisen. But that is not the case.

It is also suggested that the police failed in not having administered the usual caution to the accused once he had been arrested and prior to entering upon any interview. The accused

does not complain about the interviews and confessions concerning the stealing of the motor car. On the police evidence, which I accept, there was no opportunity to caution him before he admitted to stealing the car but he denied any involvement in the robberies. He was on notice from the police who arrested him that Barnett and Hambleton wanted to talk to him about robberies as well as the motor vehicle offence, and it was the accused who, with that knowledge, naturally enough, wanted to make his position quite clear right at the beginning. As to his confessions to robbery, they came much later and after he had been warned not only by the police, but also advised by his own solicitor as to his rights to remain silent.

The General Orders also require that oral statements be reduced into writing as soon as possible and each person present when the words are uttered should be asked to read and verify the accuracy of the notes, including the suspect. Any subsequent record of the conversation should include a reference to the earlier admissions. By record, in this context, I take it to mean an audio or video record. What is complained of is that the police did not make any notes of some of the earlier oral statements made by the accused. Their explanation is that it was not necessary because immediately thereafter the accused confirmed the statements made by him on audio or video record. Such is the case. This is not a matter where there is dispute between the accused and the police as to what was said between them where a conversation was not recorded in writing and adopted. There is no dispute as

to what the accused said, he affirmed it in the recorded interviews. It would seem, from Barnett's views, expressed under cross-examination, that s142(1)(a) of the *Police Administration Act* provides a proper guide to him as to what he should do. It provides that evidence of a confession or admission made by a person suspected of having committed an offence is not admissible as part of the prosecution case unless, 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 conversation was electronically recorded. I accept that as a reasonable explanation for his failure to abide by the General Order. In all the circumstances such a breach, if there be one, would not render any original confession, not recorded by notes, inadmissible because it would be unfair to the accused to admit it.

I am satisfied on the balance of probabilities that the confessions made by the accused were voluntary. I am not satisfied that the confessions should be excluded in the exercise of the discretion.

The confessions are admissible in evidence upon the trial of the accused.