

PARTIES:

THE QUEEN

v

ROBERT SAMUEL MELLORS

TITLE OF COURT:

SUPREME COURT OF THE NORTHERN TERRITORY

JURISDICTION:

SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction

FILE NO:

9809500

DELIVERED:

21 June 2000

HEARING DATES:

30, 31 May 2000

JUDGMENT OF:

THOMAS J

**CATCHWORDS:**

CRIMINAL LAW -- EVIDENCE -- ADMISSIBILITY

Application to exclude evidence – statutory declaration of accused – results of buccal swab of accused – results of blood sample of accused – whether accused was a suspect at time of interview – whether cautioned as to his rights – Court’s discretion on grounds of unfairness to accused – accused not a suspect at time of interview – making of statement and giving of buccal swab were voluntary – accused consented to both – no improper conduct by police officers – whether grounds of unfairness - statement and buccal swab are admissible on trial.

*Evidence Act 1939* (NT), s 26L; *Police Administration Act 1978* (NT), s 142(1)(b) and 145A.

*R v Grimley* (1994) 121 FLR 236; *R v Swaffield*; *Pavic v The Queen* (1998) 192 CLR 159, applied.

*McDermott v The King* (1948) 76 CLR 501, cited.

**REPRESENTATION:**

*Counsel:*

Applicant:	D Bamber
Respondent:	R Noble

*Solicitors:*

Applicant:	Central Australian Aboriginal Legal Aid Service
Respondent:	Office of the Director of Public Prosecutions

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

*The Queen v Mellors* [2000] NTSC 41  
No. 9809500

BETWEEN:

**THE QUEEN**

AND:

**ROBERT SAMUEL MELLORS**

CORAM: THOMAS J

REASONS FOR RULING

(Delivered 21 June 2000)

- [1] The accused, Robert Samuel Mellors, has entered a plea of not guilty to a charge that:

“On 28 January 1998 at Alice Springs in the Northern Territory of Australia, had sexual intercourse with AS without her consent.”

- [2] This is an application pursuant to s 26L of the *Evidence Act 1939* (NT) to exclude certain evidence the Crown propose to call upon the trial of Robert Mellors. The evidence the Crown seek to call is as follows:

- (1) Statutory declaration of Robert Mellors declared on 29 January 1998 (Exhibit P1).

- (2) The results of a buccal swab taken from Robert Mellors on 29 January 1998.
- (3) In the alternative to the results of the Buccal swab the Crown seek to tender the result of a blood sample taken from the accused on 8 May 1998 following a record of interview with the accused Robert Mellors on a completely separate alleged offence.
- [3] Under the application pursuant to s 26L of the *Evidence Act* the defence also seek to exclude the results of the blood test taken on 8 May 1998.
- [4] The essence of the defence objection to the admissibility of items (1) and (2) is that at the time the police interviewed Mr Mellors on 29 January 1998 he was a suspect in respect of an alleged offence of sexual intercourse without consent upon AS on 28 January 1998. The police did not caution Mr Mellors as to his rights to remain silent or that the statutory declaration would be used against him and did not warn him as to his rights in respect of the taking of a buccal swab or that the results of such a swab could be used in evidence against him.
- [5] Accordingly, on the defence submission, neither the making of the statutory declaration or the giving of the buccal sample were voluntary and should be excluded. Alternately, such evidence should be excluded in the Court's discretion on the grounds of unfairness to the accused.

- [6] The first issue is whether or not when police interviewed Mr Mellors on 29 January 1998, he was a suspect in respect of the alleged offence.
- [7] The evidence of the two police officers who spoke to Mr Mellors on 29 January 1998, is that at the time Mr Mellors made the statutory declaration he was not a suspect in the offence.
- [8] On this issue I make the following findings:
- [9] On 29 January 1998 police investigations into this allegation were in the early stages. Detective Senior Constable Brayshaw and Senior Constable Paula Dooley-McDonnell were called on duty at approximately 11.30 pm on 28 January 1998 to investigate a sexual assault alleged to have occurred at House 2 Ilparpa Camp, Alice Springs. They attended there shortly after midnight. They conducted some inquiries at House 2 and in the surrounding houses and then went to Alice Springs Hospital and spoke to a Constable Guest who was with AS. They then went off duty and returned to duty at 2.00 pm on 29 January. Detective Meggett had obtained a statement from the victim but no offender had been identified. The victim had given a description that the person was aboriginal, young, skinny and may not have had any hair. Shortly before 4.00 pm on 29 January 1998, police returned to Ilparpa Camp and spoke with Victoria Cameron, Beverly Cameron and AS, the victim. They then spoke with Mr Mellors and asked if he would return with them to the station. Mr Mellors agreed to accompany them. He was not under arrest.

- [10] I accept the evidence of Detective Senior Constable Brayshaw and Senior Constable Dooley-McDonnell that at this time Mr Mellors was not a police suspect. He did fit the general description of the offender as given by AS, in that he was aboriginal, young, skinny and had a short tuft of hair at the front. I accept that this was a very general description and accept the evidence of Senior Constable Dooley-McDonnell that at that time it was not uncommon for young aboriginal men to have this form of haircut with a tuft in the front. Detective Senior Constable Brayshaw and Senior Constable Dooley-McDonnell were also in possession of information that AS had made a statement to the effect that earlier in the day Mr Mellors had asked her for sex when she was at the telephone box and she had taken this as a joke. The police officers also had information from Detective Meggett who had obtained a statement from AS saying that if it had been Mr Mellors who had raped her she would have recognised his voice. When Senior Constable Dooley-McDonnell first spoke with AS, AS spoke about a man hanging around the camp and asking questions. Both before and after interviewing Mr Mellors, Detective Senior Constable Brayshaw and Senior Detective Dooley-McDonnell interviewed a number of people who had been present at House 2 Ilparpa Camp that night. Subsequently, a young aboriginal man, Bevan Button, was also asked and agreed to give a buccal swab. The other persons who made statements did not go with police to the police station.
- [11] In summary, the situation is that when Mr Mellors was asked to accompany police back to the police station he was a person who fitted the general

description of the perpetrator given by AS. However, the police officers who interviewed Mr Mellors also had information that AS did not think it was Mr Mellors because if it had been she would have recognised his voice.

[12] I accept the evidence of Detective Senior Constable Brayshaw and Senior Constable Dooley-McDonnell that at the time they obtained the statement from Mr Mellors on 29 January 1998, they did not consider him to be a suspect for the offence. He was interviewed as a person who had been at House 2 Ilparpa Camp during the night and was a possible witness. I accept the evidence of Senior Constable Dooley-McDonnell that there were quite a few young men at the scene (t/p 46).

[13] In matter of *R v Grimley* (1994) 121 FLR 236, Kearney J analysed the authorities regarding the issue of a police suspect. His Honour, in that case, was dealing with the interpretation of “a person suspected” in the context of s 142(1)(b) of the *Police Administration Act 1978* (NT). With respect I agree with his Honour’s statement at 258 – 259:

“.... Suspicion in general lies somewhere between mere speculation that the person committed the offence, without any factual foundation – a mere idle wondering – and a belief based on reasonable grounds that he committed it. It is a state of mind which arises from a consideration of known facts less than those required for a belief, resulting in an apprehension that the person might possibly have committed the offence. It requires a degree of conviction which is beyond mere speculation, and based upon some factual foundation. ....”

[14] Being satisfied as I am that the two police officers did not consider Mr Mellors to be a suspect at the time he was interviewed on 29 January 1998,

and applying the principle expressed by Kearney J in *R v Grimley* (*supra*) as set out above, I find that Mr Mellors was not a suspect at the time of his interview on 29 January 1998 in respect of the alleged offence.

[15] There was no reason for the police officers to caution Mr Mellors as to his rights or advise him that his statement may be given in evidence in a court of law.

[16] I am satisfied that although Mr Mellors now says that on 29 January 1998 he did not want to accompany police back to the police station he did not communicate that to police at the time. Mr Mellors has given evidence that in January 1998, he knew he did not have to go to the police station with the two police officers, he knew he did not have to answer police questions if he did not want to and he knew he did not have to give a sample from his mouth. His evidence is when police did ask him to go with them to the police station they did not threaten him or order him into the car but asked him to go with them because they wanted to have a talk at the police station and Mr Mellors said “okay”.

[17] I find that Mr Mellors is not an unsophisticated young aboriginal man from a remote aboriginal community. He does understand English and can read and write in the English language. He is not highly educated but does appear to have a certain street wiseness and to be well aware of his rights when dealing with police officers.

[18] At the police station Mr Mellors went with police to an office upstairs and Detective Senior Constable Brayshaw typed on the computer as Mr Mellors answered certain questions. This took a little while and toward the conclusion of the statement Detective Senior Constable Brayshaw asked if Mr Mellors would give a sample from his mouth. Mr Mellors gave evidence that Detective Senior Constable Brayshaw had said the mouth swab was to see whether or not he had sex with AS. When asked if he believed Detective Senior Constable Brayshaw that the mouth swab would show if he had sex with AS, Mr Mellors said “no” and when asked why he didn’t believe him, Mr Mellors said he didn’t know (t/p 78).

[19] Mr Mellors then gave evidence that Detective Senior Constable Brayshaw put the swab into Mr Mellors mouth and rubbed it. Senior Constable Dooley-McDonnell was not in the room but had come in and out of the room during the interview. Mr Mellors’ evidence under cross examination is that Detective Senior Constable Brayshaw stood up on his side of the desk, reached across, put the swab into Mr Mellors’ mouth, gave it a little wiggle and then pulled it back out while Mr Mellors sat there. Under further cross examination Mr Mellors agreed that he himself put the swab into his own mouth. Mr Mellors agreed that he had made up the story about Detective Senior Constable Brayshaw putting the swab into his mouth and that this never happened. Mr Mellors gave evidence under cross examination that he knew at the time he did not have to give the swab if he did not want to. He

agreed that he was aware the mouth swab would be used to check if he had raped AS because the police officer had told him this.

[20] In examination in chief, Mr Mellors gave evidence that when Detective Senior Constable Brayshaw asked him if he would consent to having a swab done, Mr Mellors had replied that he would not. It is Mr Mellors evidence that Detective Senior Constable Brayshaw had said to him “You must be telling lies” and went on to say that if Mr Mellors didn’t give the sample he would go to prison. I do not accept this evidence from Mr Mellors. I do not accept that his reason for giving a mouth swab was because of a threat from Detective Senior Constable Brayshaw that if Mr Mellors did not he would go to prison. Mr Mellors gave further evidence that when asked to sign the statement he had said he did not want to and Detective Senior Constable Brayshaw had said if he did not sign he would go into the police cells. I do not accept this evidence from Mr Mellors that the reason he signed the statement was because he had been threatened by Detective Senior Constable Brayshaw that he would be placed in the police cells.

[21] When cross examined it was put to Detective Senior Constable Brayshaw that he had taken the swab prior to taking a statement. This question was presumably put on instructions from Mr Mellors. Detective Senior Constable Brayshaw said the swab was taken at the end of the statement. Under cross examination, Mr Mellors agreed the swab was taken at the end of the statement. It was also put to Detective Senior Constable Brayshaw in cross examination that he had said to Mr Mellors if he did not give a swab

they would have to take a sample of his blood. This also was presumably a question put on instructions. In his evidence, Mr Mellors said (t/p 81) that Detective Senior Constable Brayshaw said nothing about blood. It was never put to Detective Senior Constable Brayshaw in cross examination that he had threatened to put Mr Mellors in prison if Mr Mellors refused to give a mouth swab or to sign the statement. I formed the impression Mr Mellors made this up when he was giving evidence and that it had not been part of his earlier instructions to his lawyer. Even if that were not the case, I do not accept Mr Mellors as a credible witness and I do not accept his evidence that he was threatened by Detective Senior Constable Brayshaw that he would be put in prison if he did not give the buccal mouth swab or that he would be placed in the police cells if he did not sign the statement.

[22] The date on which the statement was made and the swab taken was prior to the amendment to the *Police Administration Act* in particular s 145A which deals with the taking of buccal swabs. Section 145A provides as follows:

“(1) Subject to any general orders or directions issued or given from time to time by the Commissioner of Police, a member of the Police Force holding the rank of Superintendent or a higher rank may carry out or cause to be carried out a non-intimate procedure on a person –

- (a) whom the member reasonably suspects has committed a crime; or
- (b) who is in lawful custody charged with an offence punishable by imprisonment.

(2) A member of the Police Force authorised by a member holding the rank of Superintendent or a higher rank may cause a sample by buccal swab of a person to be taken by directing the person to provide the sample.

(3) A person is not to be taken to have provided a sample unless the sample is sufficient to enable an analysis of it to be carried out.

(4) A member of the Police Force may use reasonable force when exercising his or her powers under this section."

[23] Detective Senior Constable Brayshaw gave evidence that at the time he requested the swab there was no legislative authority for such a procedure nor were there any specific CIB police protocol or procedures in place. Detective Senior Constable Brayshaw stated it was his practice at that time to advise the person what the swab would be used for, to ask for their consent and explain it was their choice.

[24] I accept the evidence of Detective Senior Constable Brayshaw and Senior Constable Dooley-McDonnell that the purpose of seeking the swab was to eliminate Mr Mellors as a possible future suspect.

[25] I am satisfied on the balance of probabilities that both the making of the statement by Mr Mellors and the giving of the buccal mouth swab were voluntary. I am satisfied Mr Mellors consented to both and that he knew he had the choice to either consent or refuse. I do not accept that he consented because he was threatened that if he did not he would go to prison.

[26] I now deal with the question whether in the exercise of my discretion this evidence should be excluded on the ground of unfairness (*McDermott v The King* (1948) 76 CLR 501 at 512 – 513).

[27] At the time the buccal swab was taken, s 145A was not in force. However, even if it had been it would not be applicable to Mr Mellors because Mr Mellors was not a suspect for an offence nor was he under arrest.

[28] I find that there was no improper conduct on the part of the police officers. I am satisfied that in obtaining the statement and giving the buccal swab, Mr Mellors' consent was sought and obtained. Police did not employ illegal or improper methods to obtain the statement and the buccal swab.

[29] Mr Bamber, on behalf of the defence, referred me to the authority of *R v Swaffield; Pavic v The Queen* (1998) 192 CLR 159 at 189 – 190 Toohey, Gaudron and Gummow JJ said:

“*Unfairness*

The term ‘unfairness’ necessarily lacks precision; it involves an evaluation of circumstances. But one thing is clear:

‘[T]he question is not whether the police have acted unfairly; the question is whether it would be unfair to the accused to use his statement against him ... Unfairness, in this sense, is concerned with the accused’s right to a fair trial, a right which may be jeopardised if a statement is obtained in circumstances which affect the reliability of the statement.’

Unfairness then relates to the right of an accused to a fair trial; in that situation the unfairness discretion overlaps with the power or discretion to reject evidence which is more prejudicial than probative, each looking to the risk that an accused may be improperly convicted. While unreliability may be a touchstone of unfairness, it has been said not to be the sole touchstone. It may be, for instance, that no confession might have been made at all, had the police investigation been properly conducted. And once considerations other than unreliability are introduced, the line between unfairness and policy may become blurred.”

- [30] Applying this principle to the facts I have found in this matter I am not persuaded that either the statement or the result of the mouth swab should be excluded on the ground of unfairness.
- [31] On 31 May 2000 I ruled that the statement made by Mr Mellors on 29 January 1998 and the result of the buccal mouth swab taken on that date were admissible on the trial for the offence to which he has entered a plea of not guilty. I now publish my reasons for this ruling.