The Queen v Age [2011] NTSC 104

PARTIES:	The Queen v AGE, Steven
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	21041387
DELIVERED:	14 December 2011
HEARING DATES:	4, 7, 8, 9, 10, 11, 14, 15, 16, 17 and 18 November 2011
JUDGMENT OF:	BLOKLAND J

CATCHWORDS:

CRIMINAL LAW – EVIDENCE – Admissibility of evidence regarding the accused punching or fighting with Darryl Marshall – was it part of the closely connected events – did it form part of the *res gestae* – was it more prejudicial then probative – Held it formed part of the events being properly examined in the trial – evidence admitted.

Admissibility of Electronic Record of Interview – was it voluntary or alternatively should the court exercise its discretion to exclude it on the basis of unfairness – crown bears the onus to prove voluntariness on the balance of probabilities – accused indicated during the s 140 *Police Administration Act* conversation that he *was* obliged to answer police questions – s 140 conversation would not generally be determinative of a question of voluntariness as its purpose is not for soliciting incriminating answers – answers given for bulk of the s 140 conversation clearly indicate the accused thinks he must answer questions – Held that the court is not satisfied on the balance of probabilities in relation to voluntariness.

Editing Pre-recorded Evidence of children – should the questions regarding competency to give evidence be removed as irrelevant or otherwise inadmissible material – Held there was no indication in s 21B (4) that pre-recorded evidence should not be on a parallel with what would ordinarily occur before the jury – Held that editing was not required.

No case submission – no case to answer for murder or manslaughter or alternatively no case to answer for manslaughter – was the Crown able to prove the fatal injury was inflicted by the accused, other than by resort to impermissible speculation – Crown do not need to prove the precise mechanism of death – when considering a no case submission the Crown case must be taken at its highest – Held there was a case to answer – the case should go to the jury on murder.

Police Administration Act (NT) s 137, s 140

Dumoo v Garner (1998) 143 FLR 245*; O'Leary v The King* (1946) 73 CLR 566; *R v Garvey* [1987] 2 Qd R 623; *R v Gaykamanu* [2010] NTSC 12; *R v Harding* [1989] 2 Qd R 373;referred to

Ladd v The Queen (2009) 27 NTLR 1; *R v Robinson* [2010] NTSC 9; *The Queen v Benz* (1989) 168 CLR 110*;* considered

REPRESENTATION:

Counsel:

Crown:	Dr N Rogers SC, Mr S Robson
Accused:	Mr S Corish, Mr G Betts

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Accused:	Central Australian Aboriginal Legal Aid Service

Judgment category classification:	C
Judgment ID Number:	BLO 1115
Number of pages:	22

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

The Queen v Age [2011] NTSC 104
No. 21041387

BETWEEN:

The Queen

AND:

Steven Age

CORAM: BLOKLAND J

REASONS FOR RULINGS DURING THE COURSE OF THE TRIAL

(Delivered 14 December 2011)

Introduction

[1] Steven Age was on trial for the alleged murder of Matthew Walker. On 8 December 2010 Steven Age, the deceased and others were drinking in the yard of a house at 107 Bloomfield Street, Alice Springs. Other persons were present at various times, either inside or outside of the house. The relevant offending is alleged to have taken place in the front yard. Aside from the group of persons in the front yard, two children were sitting on a brick fence a short distance away. Those children gave pre-recorded evidence. In short, their evidence was that the accused punched the deceased and hit the deceased three times with an iron pole. Further, one of those witnesses says he kicked the deceased twice to the left ribs.

[2] The Crown alleged that it was only the accused who could be responsible for causing the fatal injury to the deceased. It was understood at the time of these rulings the medical evidence would be that it was highly unlikely an assault with the pole or a kick to the side could have caused the fatal injury. The case relied on the jury being asked to infer the accused caused the injury causing death. The Crown could not say how the injuries were inflicted but put its case on the basis the injury causing death was attributable to the accused.

[3] Most of the issues raised for pre-trial argument were resolved during the course of submissions. These are the reasons for the rulings I gave on the issues that remained.

Evidence of Darryl Marshall; Waylon Age; Clayton Spencer; regarding the accused punching or fighting with Darryl Marshall

[4] The Crown sought to rely on evidence in relation to either a fight between the accused and Darryl Marshall or the accused punching Darryl Marshall. It was said to be part of the closely connected events and formed part of the *res gestae*. Apart from forming part of the connected events it was led to show evidence of the accused's state of mind and demeanour on the evening of the alleged murder. It was put that the incident showed the accused had an aggressive state of mind close to the time of the alleged assaults on the deceased. It was acknowledged the manifestation of that aggression was directed to another person.

[5] Statements of Darryl Marshall, Waylon Age and Clayton Spencer were tendered. No evidence was called on the voir dire. In brief, Darryl Marshall stated the accused king hit him in the mouth when he was inside the house at 107 Bloomfield Street; that he then told the accused "come on, lets go outside and we will fight". He said he was angry with the accused because he hit him for no reason. They went outside. They then shaped up to each other but did not throw any punches. He then said the accused apologised to him and they shook hands and he went back inside. Waylon Age stated the accused came inside and offered to fight Darryl Marshall but Darryl Marshall walked away. Clayton Spencer described the incident as a fight and that he yelled at them to stop fighting and the accused then went outside.

[6] The accused objected to this evidence on the grounds that it could not be said to be part of the same event as the assaults on the deceased; it occurred inside the house, not outside; it is an incident with a different person and is highly prejudicial.

[7] I admitted the evidence. In my view it formed part of the events of the evening being properly examined in the trial.

[8] It was anticipated various witnesses would be giving evidence of the whereabouts of different persons at different times; their proximity to the deceased and accused and generally their observations of the events of the evening. It would, in my view be artificial to exclude this part of the

evidence as it is part of the facts bound up with and closely connected to the relevant events leading up to the death of the deceased. In my view the evidence is sufficiently proximate and closely connected to the altercation between the accused and deceased to form part of the *res gestae*. Even if it is not part of the *res gestae* the accused's demeanour close to the critical events is relevant.

[9] The Crown sought to use the evidence as evidence of the accused's state of mind and demeanour at the time close to the alleged altercation with the deceased. Elsewhere there was likely to be evidence of intoxication of the accused (and others). The Crown relied on the approach in *O'Leary v The King*[1] which allowed evidence of an accused's demeanour, including their intoxicated condition, how they reached that condition and how, while in that condition, they were behaving. In *Ladd v The Queen*,[2] Martin (BR) CJ, (without finally deciding), supported the application of the principle in *O'Leary v The King* to include evidence of a later incident than the one charged as capable of supporting a conclusion as to the state of mind of the accused.

[10] I acknowledge that without proper direction there was a risk of improper prejudice, however the events of the evening, over three to four hours, including this incident (if accepted) are closely connected in a way to make the proposed evidence admissible. If evidence of the apology by the

---

1 (1946) 73 CLR 566.
2 (2009) 27 NTLR 1 at 15.

accused to Darryl Marshall was given, that also was a matter the jury could have regard to in considering the accused's state of mind. There was other evidence proposed, closer to the infliction of the alleged injury to the deceased, (yet after this incident with Darryl Marshall), indicating a level of anger on the part of the accused.[3] This is to be contrasted with evidence led about a time earlier in the evening when the people the accused was socialising with were said to be having a "good time".[4]

[11] After deciding to admit the evidence on the basis of the statements, evidence in the trial was then given by the three witnesses. Clayton Spencer gave no evidence on the subject. Waylon Age described the incident somewhat differently to that anticipated, saying the accused punched Darryl Marshall three times (rather than a fight). Darryl Marshall gave evidence of events concerning his interaction with other witnesses earlier in the day. His evidence however focussed on being punched by the accused. His evidence was the accused hit him only once; that he told the accused to go out onto the road; after standing on the road he (Darryl Marshall) went back inside and "choked out" on the couch; he did not know how long they were standing on the road; the accused said "sorry bros, let's go" and they walked back inside. He said no other trouble happened that day. He said the group were all sitting and drinking in a "good way".

---

3 Pre-recorded evidence of Miles Turner. Pre-recorded evidence of Lloyd Age. Pre-recorded evidence of Terrence Age (18 July 2011).

4 Pre-recorded evidence of Gina Age (18 July 2011).

[12] As a result of the state of the evidence, further submissions were made and sought on whether the evidence still possessed probative value. I rejected two applications to discharge the jury. It was submitted on behalf of the accused, Mr Marshall did not know whether the incident with the accused occurred on that day or on another day. Given the detail Mr Marshall gave of the earlier events of the day, I found that conclusion could not be readily drawn. It was also submitted that given the apology and the time on the road there was no evidence of a continuing state of mind on the part of the accused and the prejudice remained.

[13] In my view, although there were credibility and reliability issues, the jury could consider those issues in the ordinary course. The incident was still a part of the immediate surrounding circumstances. The evidence was, in my view necessary for completeness and was relevant. I acknowledge the discretion to exclude on the basis of improper prejudice or weighing the prejudicial effect against the probative value.[5] I concluded the evidence was more probative than prejudicial.

[14] I advised counsel I intended to instruct the jury in the following terms about this evidence:

- the evidence can only be used if accepted as true;
- the evidence is part of the events of the night;

[5] Discussed by Deane J in *The Queen v Benz* (1989) 168 CLR 110 at 121 where His Honour was concerned with a statement containing an implied assertion where the question of identity of the two persons concerned had not been satisfactorily established by other evidence. In those circumstances the statement was considered to be unfairly prejudicial.

- if accepted, the jury may find the evidence helpful in relation to the accused's state of mind and demeanour on the night; whether he was in an upset, aggressive, intoxicated state of mind or mood and whether such a state of mind was manifested in this incident with Darryl Marshall;

- the jury will need to consider whether the incident is sufficiently close in time to the alleged incident with the deceased to help them;

- the jury may find the evidence as to times is not clear however it will be a matter for them to consider;

- if the jury consider the incident was sufficiently close in time to help them, it may assist them in considering the accused's state of mind on the night;

- in coming to any view on that, the jury will need to consider the evidence of the apology and the evidence of Darryl Marshall that no more punches were thrown when the two were on the street;

- as a matter of law it would be wrong to reason that because of this incident the accused must have fought the deceased and intended to cause serious harm to him;

- that would not logically follow; it cannot tell the jury anything regarding the accused's intention to cause serious harm to the deceased;

- if the evidence is not believed, or does not provide assistance, it should be disregarded.

Admissibility of the Electronic Record of Interview

[15] The admissibility of an electronic record of interview (EROI) conducted by police with the accused on 9 December 2010 was objected to on the basis it was not voluntary; alternatively that the court should exercise its discretion to exclude it on the basis of unfairness. The Crown bears the onus to prove voluntariness on the balance of probabilities. An unusual preliminary factor was raised. While in custody the accused indicated in the s 140 *Police Administration Act* conversation that he *was* obliged to answer police questions. I agreed with the submission made on behalf of the accused that this was a strong indication the confession was not voluntary. Both the Crown and the accused submitted the full circumstances of the s 140 *Police Administration Act* (NT) conversation,[6] a further preliminary conversation[7] and the EROI needed to be examined.

---

6 8 December 2010.

7 9 December 2010, 10:40 hours. In that conversation Detective Lee informed the accused that Matthew Walker was deceased. The electronic record of interview commenced at 10:55am on 9 December 2010.

[16] At the time of the EROI the accused was in lawful custody; he was held for the purposes of questioning in relation to murder.[8] The accused did not express any wish that he did not want to speak to police in either of the later conversations. The Crown argued the *Anunga Rules* did not apply as the accused spoke English. English was his first language and he did not speak any other Aboriginal language save for a little of Alyawarra. In the EROI the accused was asked "Ok. Can you understand everything that I am saying?" and he answered "yeah". The accused readily answered questions concerning his background; his schooling; and that he had been working at Tanami Downs Station. Further, it was put that the accused was able to communicate about his role in the offending; including apparently minimising his role and giving an explanation to police about an argument between the deceased and his nephew. It was submitted there was no gratuitous concurrence.[9]

[17] Police officers treated the accused as someone to whom *Anunga Rules* applied. Notwithstanding the accused spoke English, it is clear his English is heavily accented English and although functional in the sense of communicating every day descriptions of events, his English still appears basic. Although he answered a number of questions fairly readily, his response was often delayed requiring further prompting from police. It did

---

8 S 137 *Police Administration Act*.

9 In the sense of the cases determined since *Anunga* and explained further in *Dumoo v Garner* (1998) 143 FLR 245.

not appear to be standard English. It did appear to be a situation where the *Anunga Rules* applied.

[18] The s 140 *Police Administration Act* tape made on 8 December 2010 at 10:37pm was played. At that time the accused had been arrested for aggravated assault. The purpose of the s 140 is to advise of the reason for arrest; advise a suspect they are not free to leave and to enquire about whether there is anyone they want to have contacted. At that time, the accused was clearly in police custody and in accordance with usual protocol was advised he was not free to leave.

[19] The s 140 conversation would not generally be determinative of a question of voluntariness as its purpose is not for soliciting incriminating answers. Although neither the EROI nor the s 140 contain a significant number of answers that might be considered gratuitous concurrence, there are answers where it is not clear that the accused has understood the question. In my view the answers given for the bulk of the s 140 conversation clearly indicate the accused thinks he must answer questions.

[20] In evidence on the voir dire, (and referring to the s 140), when asked whether he was satisfied the accused understood the caution in the sense of his free choice to remain silent or speak to police, Detective Lee said "I probably wasn't satisfied that he understood that caution at the time". As to the use of the word "probably" Detective Lee said "yes it took a while to explain the caution. So at that time I probably believed that he didn't

understand it". Without setting out the whole of the s 140 transcript, in my view a fair indication of what was said is illustrated by the following:

Extract 1 from the Record of Conversation 8 December 2010 at 22:37 hours:

WALTERS: OKAY. STEVEN THE REASON WHY YOU'RE BEING TALKING TO AT THE MOMENT IS CAUSE YOU'VE BEEN PLACED UNDER ARREST - - -

AGE: YEAH.

WALTERS: - - - FOR AN AGGRAVATED ASSAULT THAT OCCURRED TONIGHT AT – AH – THE COTTAGES AT ONE "O" SEVEN BLOOMFIELD, OKAY. CURRENTLY ADVISE YOU AGAIN THAT YOU ARE UNDER ARREST AND YOU'RE NOT FREE TO LEAVE. DO YOU UNDERSTAND THAT"

AGE: YEAH.

WALTERS: YEP – OKAY.

AGE: YEAH.

WALTERS ALRIGHT. STEVEN, I'LL JUST ALSO FORMALLY ADVISE YOU THAT YOU DON'T HAVE TO SAY ANYTHING. ANYTHING YOU DO SAY CAN BE RECORDED AND MAY BE USED IN COURT AT A LATER DATE. DO YOU UNDERSTAND THAT? YEP – SO IF I ASK YOU A QUESTION DO YOU HAVE TO TELL ME ANSWER?

AGE: YEAH.

WALTERS: NO. OKAY, THAT'S – THAT'S THE THING WITH THIS CAUTION. OKAY. IF I ASK YOU A QUESTION YOU CAN SIT QUIET IF YOU WANT TO. DO YOU UNDERSTAND THAT?

AGE: YEAH.

WALTERS: SO IF I ASK YOU A QUESTION DO YOU HAVE TO TELL ME ANSWER.

AGE: YEAH I ANSWER IT.

WALTERS: YEAH NO – NO. YOU – YOU – YOU DON'T HAVE TO TELL ME ANYTHING YOU CAN SIT QUIET IF YOU WANT.

AGE: NO (INAUDIBLE)

WALTERS: ALRIGHT. SO IF – IF I ASK YOU A QUESTION DO YOU HAVE TO TELL ME THE ANSWER?

AGE: YEAH.

WALTERS: NO YOU DON'T. OKAY DO YOU – DO YOU UNDERSTAND THAT YOU DON'T HAVE TO ANSWER MY QUESTIONS?

AGE: NAH – (INAUDIBLE)

WALTERS: OKAY. ALRIGHT. SO IF I ASK YOU A QUESTION DO YOU HAVE TO TELL ME ANYTHING ABOUT THAT QUESTION?

AGE: MM – YEAH.

WALTERS: NO.

AGE: NO WORRIES.

WALTERS: OKAY. THAT'S –THAT'S THE THING STEVEN YOU DON'T HAVE TO ANSWER MY QUESTIONS. OKAY. ALRIGHT. SO IF I ASK YOU WHAT COLOUR'S YOUR SHIRT DO YOU HAVE TO TELL ME?

AGE: YEAH.

WALTERS: NO YOU CAN SIT QUIET. YOU DON'T HAVE TO TELL ME WHAT COLOUR YOUR SHIRT IS. YOU DON'T HAVE TO ANSWER ANYTHING I SAY ALRIGHT. SO AGAIN JUST TO MAKE SURE THAT YOU'RE (INAUDIBLE) WITH HOW THIS

WORKS. ALRIGHT. IF I ASK YOU A QUESTION YOU DON'T HAVE TO TELL ME ANYTHING. OKAY. SO IF I ASK YOU A QUESTION DO YOU HAVE TO TELL ME ANYTHING?

AGE: YEAH WELL I TELL YOU THE TRUTH.

WALTERS: YEAH THAT'S GOOD THAT YOU'LL TOLD ME THE TRUTH BUT DO YOU KNOW THAT YOU DON'T HAVE TO TELL ME TRUTH, YOU DON'T HAVE TO TELL ME ANYTHING. DO YOU KNOW THAT?

QGE: YEAH I KNOW THAT.

[21] In my view because the accused clearly articulated that he *had* to answer questions from police, steps were required to be taken to ensure that when it came to the formal record of interview on 9 December 2010 he was able to understand the caution.

[22] On 9 December 2010 at 9:40am Detective Lee had a brief conversation with the accused. He informed the accused of the death of the deceased. Detective Lee told the accused that he could see that he was visibly upset but he needed to ask "this question again". "Do you want to talk to myself and Constable Cox in a record of interview?" The response is inaudible. Consistent with police general orders Detective Lee advised the accused he could have someone sit with him. He then asked him if he spoke any other languages; the accused said no, just a little of Alyawarra. He was asked if he needed an interpreter and the accused said no. Although the transcript records "inaudible", Officer Lee's evidence that I accept is the accused answered "yes" when asked if he understood English.

[23] Detective Lee then satisfied himself that the accused did not need an interpreter and said "to go back to my original question, do you want to … ah … participate in an interview with myself and Constable Cox? you need to speak up Steven for the tape mate". The accused's answer is (inaudible) and "yeah". The primary purpose of the second interview was to advise the accused of the death of the deceased and to see if he wanted to participate in a record of conversation. In my view, given the answers the accused gave in the s 140, some attempt needed to be made to explain the caution either during the second conversation or the EROI to ensure the accused understood.

[24] There was a brief attempt to explain the caution to the accused in the EROI conducted on 9 December 2010. Although the accused indicates at one stage he did not have to answer questions and the choice was his, the conversation then lapses into confusion by the accused stating at one point "yeah I got – answered them questions". The relevant parts are as follows:

LEE; OKAY. NOW BEFORE – UM – MYSELF OR CONSTABLE COX TALK – ASK YOU ANY QUESTIONS IN RELATION TO THE – UM – THE MATTER THAT MATTER – THE DEATH OF – AH – MATTHEW WALKER, I'M OBLIGED TO TELL YOU THAT – AH – YOU DON'T HAVE TO SAY OR DO ANYTHING UNLESS YOU WISH TO DO SO. WHICH BASICALLY MEANS IS THAT – UM – YOU DON'T HAVE TO ANSWER MY QUESTIONS. ALRIGHT. YOU DON'T HAVE TO TALK TO MYSELF OR CONSTABLE COX AND IF YOU DO TALK TO US IT'S YOUR CHOICE. ALRIGHT. SO DO YOU UNDERSTAND WHAT THAT MEANS STEVEN?

AGE: YEAH.

LEE: OKAY SO DO YOU HAVE TO ANSWER MY QUESTIONS?

AGE: NUH.

LEE: OKAY SO WHO'S CHOICE IS IT?

AGE: MINE.

LEE: THAT'S RIGHT. ALRIGHT. DO YOU HAVE TO SAY ANYTHING TO ME?

AGE: AH – SO WHAT – WHAT OKAY (INAUDIBLE)

LEE: OH WELL WHAT – WHAT IT MEANS LIKE THE FIRST PART I SAID TO YOU SO DO YOU – DO YOU HAVE TO ANSWER MY QUESTIONS AND YOU SAID NO AND YOU SAID IT'S YOUR CHOICE TO - TO SAY – TALK TO ME OR SIT QUIET. THE SAME THING IS, I'M JUST ASKING YOU IN ANOTHER WAY. DO – DO YOU HAVE TO SAY ANYTHING TO ME? YOU CAN EITHER TALK TO ME OR SIT THERE AND BE QUIET.

AGE: YEAH.

LEE: SO WHOSE CHOICE IS IT?

AGE: YEAH I GOT – ANSWER THEM QUESTIONS.

LEE: PARDON?

AGE: I CAN ANSWER THEM QUESTIONS.

LEE: YEAH BUT WHAT I'M SAYING IS THAT – UM – YOU HAVE A CHOICE, YOU CAN - - -

AGE: YEAH.

LEE: - - - YOU – YOU – YOU IT'S YOUR CHOICE TO TALK TO ME. SO YOU DON'T HAVE TO TALK TO ME. SO YOU CAN SIT THERE AND BE QUIET AND NOT SAY ANYTHING OR YOU CAN CHOOSE TO ANSWER MY QUESTIONS.

AGE: YEAH.

LEE: ALRIGHT. SO WHO'S – WHO'S CHOICE IS IT TO TALK TO ME?

AGE: MINE.

LEE: THAT'S RIGHT. YEAH.

AGE: YEAH.

LEE: OKAY. I ALSO MUST INFORM YOU THAT ANYTHING YOU DO OR SAY WILL BE RECORDED AND MAY BE LATER GIVEN IN EVIDENCE. SO THAT MEANS THAT EVERYTHING WE'VE TALKED ABOUT NOW IS BEING RECORDED ON THOSE DVDS.

AGE: YEAH.

[25] Given the strong indications at the stage of the s 140 conversation that the accused thought he had to speak to police; given that police were not satisfied that he understood the caution at that earlier time; the caution administered at the start of the EROI does not suffice to show that the accused understood that he did not have to speak to police. In fact, the opposite is conveyed. It may have been a conversation that could have been salvaged, had the process outlined in *Anunga Rules* been followed; that is, to ask the accused to explain the meaning of the caution phrase by phrase, rather than what has occurred here. The conversation here skated over the *Anunga Rules* requirement when clearly the circumstances called for adherence to it.

[26] After the part of the conversation set out above the accused was asked who would listen to those tapes and he said "judge and the jury". He was asked where a Magistrate or Judge would be when they hear that evidence and he said "probably in front of me". I agree this part of the EROI indicates some understanding of a Court and its process on the part of the accused.

[27] The vast majority of the accused's answers are short, one word or minimal phrases. There is nothing in my view in the later parts of the EROI to indicate anything has changed in the accused's mind from the time of the s 140. It is not that I rejected the record of interview simply for failure on the part of police to comply with the *Anunga Rules*. In these circumstances there needed to be some appropriate testing of the accused's understanding which is the purpose of the requirement to ask an accused to explain in their own words the caution. The authorities indicate a mere breach of the guidelines does not necessarily render a record of interview inadmissible.[10] Here there was a reason to positively engage the substance of the guidelines.

[28] I do not agree with the submission made on behalf of the accused that the failure to obtain a prisoner's friend or interpreter or to find someone to sit with the accused in these circumstances would render the confession either involuntary or would by itself engage the exercise of the discretion. Here the accused spoke English, albeit at a rather basic and heavily accented level. He told police he did not want someone to sit with him. If police could not achieve effective communication in these circumstances, an

---

[10] Recently Kelly J had cause to consider this in *R v Robinson* [2010] NTSC 9.

intermediary of some form may have been of assistance, particularly if the intermediary had the attributes of a prisoner's friend. In the circumstances of the accused not nominating anyone however, it would be incorrect to hold on that basis that the EROI was not voluntary.[11]

[29] This case is not so solely about the failure to explain the caution or to have the accused explain back the caution phrase by phrase; it is that after expressing that he thought he *had* to speak to police, no mechanism was put in place to retrieve the situation. The Crown bears the onus to prove a confession is voluntary. Following the processes in *Anunga Rules* may have assisted in rectifying the accused's lack of understanding. Instead, the caution was glossed over in the EROI. I was not satisfied on the balance the confession was voluntary. For those reasons the EROI was excluded. There are overlapping considerations in relation to the exercise of the discretion however it is not necessary to consider those separately here.

Editing Pre-recorded Evidence under s 21B(4) *Evidence Act*

[30] Evidence was given by four children. It had been pre-recorded. The presiding Judge at the time of the pre-recordings made brief enquiries as to the competency of each of the children to give evidence. His Honour was satisfied all four children were competent to give evidence. They were all affirmed. The accused argued that as s 21B(4) *Evidence Act* provided the Court may have pre-recorded evidence edited "to remove irrelevant or

---

11 *R v Gaykamanu* [2010] NTSC 12, noting that the accused there was assisted by an ACPO with whom he could converse in his traditional language.

otherwise inadmissible material", the questioning as to competency should be edited from the recorded statement. It was acknowledged there was no prejudice to the accused.

[31] It may be that the practice varies,[12] however short, simple enquiries as to competence as occurred here may well in a given case take place before a jury. It is a process closely associated with the children being affirmed and although it might be said to be irrelevant in terms of the facts in issue, in this particular case leaving the competency questions as they were approximated what may well may have occurred in proceedings before a jury. These were short non-contentious enquiries with no prejudice. Nothing fell from the witnesses that should not have been before the jury. I did not regard the questions and answers inadmissible. There was no indication in s 21B(4) that pre-recorded evidence should not be on a parallel with what would ordinarily occur before the jury. I did not require the editing of the pre-recorded interviews on that basis.

Ruling on the no case submission

[32] At the close of the prosecution case, on behalf of the accused it was submitted he had no case to answer on the charge of murder (at least), and the alternative of manslaughter. It was suggested there was no case broadly because of the following:

---

[12] Eg in *R v Harding* [1989] 2 Qd R 373 the Court of Criminal Appeal (Queensland) reversed the earlier decision in *R v Garvey* [1987] 2 Qd R 623 which held that the inquiry should take place in the presence of the jury.

1. The Crown was unable to prove the fatal injury was inflicted by the accused, other than by resort to impermissible speculation;

2. Even if the Crown were permitted to invite the jury to infer the accused caused the fatal injury, the jury would not be in a position to reason the accused possessed the necessary intention as there was no act with which to link intent. Similarly, the Crown would be unable to prove the relevant conduct voluntary.

[33] It was acknowledged the Crown do not need to prove the precise mechanism of death; many examples have been referred to where no body is found. They are pertinent examples. It was suggested here however that because the direct evidence from Myles Turner and Lloyd Age did not describe an act on the part of the accused that could have caused death, the Crown could not prove either murder of manslaughter. Both Myles Turner and Lloyd Age saw the relevant surrounding events; the argument, the accused hitting the deceased with a bar and saw the deceased lying on the ground. There are differing accounts in their evidence. Myles Turner's evidence was he saw the accused kick the deceased to the left side of his ribs twice. As this evidence would be at odds with Dr Sinton's evidence on the cause of death, (which briefly, suggests the fatal injury would require an application of blunt force to the front of the abdominal region, with the anvil effect of the spine causing the rupture to the superior mesenteric artery), it was submitted a jury properly instructed could not convict.

[34] The authorities are clear that when considering a no case submission, the Crown case must be taken at its highest. First, if the jury accepted the deceased suffered a fatal injury in close time proximity with the assaults that did not contribute to death, that in itself raises a strong circumstance implicating the accused. Second, if all other persons or events are excluded beyond reasonable doubt as contributing to the fatal injury that is a further circumstance. Third, these two circumstances are capable of supporting a conclusion that Myles Turner was not correct that the kicks were to the ribs. That conclusion may well be drawn in any event from examining Myles Turner's evidence with Dr Sinton's findings. Given the close proximity of the ribs and the abdominal area, it was a reasonable inference open to the jury after considering all of the facts that Myles Turner misdescribed the kick. The Crown confirmed it would be inviting the jury to accept Myles Turner's evidence was truthful but mistaken on that one aspect.

[35] Whether the kicks (if accepted they occurred) could be proven to be voluntary (deliberate) and intentional, were also matters calling for the same reasoning process; an evaluation of Myles Turner's evidence of the kicks and the surrounding circumstances that bear on voluntariness and intention (or lack of it).

[36] I ruled the case should go to the jury on murder.

[37] On 18 November 2011 the jury returned a verdict of not guilty of murder but guilty in the alternative of manslaughter. The matter is listed for submissions on sentence on 23 December 2011 in Alice Springs.

[38] These reasons will be forwarded to counsel for the Crown and counsel for the accused.

_____