R v Kanaris [1999] NTSC 94

PARTIES:	THE QUEEN
	v
	PAUL MICHAEL KANARIS
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	9605267
DELIVERED:	3 September 1999
HEARING DATES:	18 August 1999
JUDGMENT OF:	Riley J

REPRESENTATION:

Counsel:

Crown:	J. Karczewski
Defendant:	J. Tippett; D. Dalrymple

Solicitors:

Crown:	Office of the Director of Public Prosecution
Defendant:	David Dalrymple & Associates

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ril99025

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

R v Kanaris [1999] NTSC 94
No. 9605267

BETWEEN:

THE QUEEN
Appellant

AND:

PAUL MICHAEL KANARIS
Respondent

CORAM: RILEY J

REASONS FOR DECISION

(Delivered 3 September 1999)

[1] The accused is charged with various counts relating to the supply of heroin, the possession of a trafficable quantity of heroin, the possession of anabolic steroids, the possession of cannabis and the simple possession of heroin.

The Crown Case

[2] For present purposes the Crown case is that prior to 8 March 1996 the accused made arrangements for the delivery to him in Darwin of 28 grams of heroin. Police became aware of this and conducted what has been described as a "controlled delivery". Police seized the parcel and substituted plaster of Paris for some of the heroin. The parcel was collected by police at Ansett

Freight in Darwin on 7 March 1996. On Friday 8 March 1996 an officer wearing Ansett Freight clothing delivered the parcel to the accused at the premises of Yesterday's Autos. The accused took possession of the parcel and opened the covering box. The heroin was located in a Post-Pak envelope inside that box. He secreted the Post-Pak (which was at that time unopened) under some dash mats at the premises.

[3] At around 12 pm on 8 March 1996 Gail McNamara, a person to whom it is alleged the accused had supplied heroin from August 1995 to that date, phoned the accused to arrange for a further supply to her of heroin. The accused got into a vehicle and drove to the Shell Service Station on the corner of Daly and McMinn Streets to deliver heroin to Ms McNamara. Police followed but were observed by the potential purchaser who waved the accused away. The accused became aware of the police presence and a car chase ensued.

[4] During the course of the car chase the accused released the contents of three foils of heroin into the air as he drove. He was finally pulled over at the Salonika Crossing and placed under arrest.

[5] At 12.40pm police attended at Yesterday's Autos and conducted a search of the premises where they located the Post-Pak of heroin, 11 foils of heroin, steroids, cash and other drug paraphernalia. A fingerprint on one of the foils was found to match a fingerprint of the accused.

[6] At 12.57pm the accused was logged into the watchhouse at the Peter McAulay Centre and his property was seized.

[7] At 4.10pm police attended at the accused's home at 433 Trower Road Brinkin and conducted a search of his bedroom where a foil of heroin, steroids, cannabis and other items were found and seized.

[8] At 5.32pm the accused was removed from the cells for the purpose of partaking in a record of interview. That record of interview was conducted between 5.47pm and 6.52pm. At the conclusion of the record of interview personal details were obtained from the accused and he was returned to the watchhouse at 7.50pm. He was then formally charged. Prior to that time he had been held under s 137 of the *Police Administration Act*.

[9] At 8.15pm the accused spoke to his brother-in-law, who is a solicitor.

Application for Separate Trials

[10] The accused faces seven counts contained in the one indictment and those counts are as follows:

> Count 1
>
> Between 1 August 1995 and 7 March 1996 at Darwin in the Northern Territory of Australia unlawfully supplied to Gail McNamara heroin, a dangerous drug specified in Schedule 1 of the Misuse of Drugs Act.
>
> Section 5(1) & (2)(a)(ii) of the Misuse of Drugs Act

Count 2

On 8 March 1996 at Darwin in the Northern Territory of Australia unlawfully supplied to Gail McNamara heroin, a dangerous drug specified in Schedule 1 of the Misuse of Drugs Act.

Section 5(1) & (2)(a)(ii) of the Misuse of Drugs Act.

Count 3

On 8 March 1996 at 25 Daly Street, Darwin in the Northern Territory of Australia unlawfully possessed a Postpak of heroin, a dangerous drug specified in Schedule 1 of the Misuse of Drugs Act.

AND THAT the unlawful possession involved the following circumstance of aggravation:

(i) the amount of the dangerous drug was a traffickable quantity.

Section 9(1) & (2)(b)(ii) of the Misuse of Drugs Act.

Count 4

On 8 March 1996 at 25 Daly Street, Darwin in the Northern Territory of Australia unlawfully possessed 11 foils of heroin, a dangerous drug specified in Schedule 1 of the Misuse of Drugs Act.

AND THAT the unlawful possession involved the following circumstance of aggravation:

(i) the amount of the dangerous drug was a traffickable quantity.

Section 9(1) & (2)(b)(ii) of the Misuse of Drugs Act.

Count5

On 8 March 1996 at 25 Daly Street, Darwin in the Northern Territory of Australia unlawfully possessed anabolic steroids, a dangerous drug specified in Schedule 2 of the Misuse of Drugs Act.

Section 9(1) & (2)(f)(ii) of the Misuse of Drugs Act.

Count 6

On 8 March 1996 at 433 Trower Road, Darwin in the Northern Territory of Australia unlawfully possessed a foil of heroin, a dangerous drug specified in Schedule 1 of the Misuse of Drugs Act.

Section 9(1) & (2)(c)(ii) of the Misuse of Drugs Act.

Count 7

On 8 March 1996 at Darwin in the Northern Territory of Australia unlawfully possessed cannabis, a dangerous drug specified in Schedule 2 of the Misuse of Drugs Act.

Section 9(1) & (2)(f)(ii) of the Misuse of Drugs Act.

[11] The accused seeks a direction that counts 1 and 2 be separately tried. Those counts relate to the supply of heroin to Ms McNamara. The first count, which is based upon the testimony of Ms McNamara, alleges that the defendant supplied her with heroin on unspecified dates between 1 August 1995 and 7 March 1999.

[12] The second count is based upon the evidence summarised above relating to the accused having received a telephone call from Ms McNamara on 8 March 1996, his travelling to the Shell Service Station to provide her with heroin and then the car chase that followed.

[13] Mr Tippett, who appeared with Mr Dalrymple on behalf of the accused and presented this part of the argument, did not make any submission that the various counts could not be joined in the same indictment pursuant to s 309 of the *Criminal Code*. The thrust of his submission was that I should exercise my discretion under s 341(1) of the Code to direct that there be a

separate trial in respect of counts 1 and 2. Section 341(1) is in the following terms:

> "(1) Where before a trial or at any time during a trial the court is of opinion that the accused person may be prejudiced or embarrassed in his defence by reason of his being charged with more than one offence in the same indictment or that for any other reason it is desirable to direct that the person should be tried separately for any offence or offences charged in an indictment the court may order a separate trial of any count or counts in the indictment."

[14] The accused says that he is both prejudiced and embarrassed in his defence as a result of him being charged in the manner set out in the indictment.

[15] In relation to count 1 it was his submission that the evidence is entirely contained in the evidence of Ms McNamara. In relation to count 2 it was submitted that there was no evidence that Ms McNamara received heroin on 8 March 1996. It was said that the closest the Crown case came to that occurring was the evidence of Ms McNamara that she made a telephone call after which she went to an area near the Shell Service Station on Daly Street where she expected to meet the applicant to receive some heroin. No transaction took place on that day. It was therefore submitted that the counts were "a transparent attempt to link allegations of supply with later allegations of possession." It was submitted that this was a device which was artificial and designed to facilitate the improper use of evidence on one set of offences to support or corroborate the evidence of Ms McNamara that goes solely to supply.

[16] In his submissions Mr Tippett acknowledged that it was not necessary that Ms McNamara actually receive heroin for the accused to be found guilty of supply. Section 3(6) of the *Misuse of Drugs Act* makes it clear that a person may be guilty of supply of a dangerous drug if the person takes, or participates in, a step in the process of that supply. It was on that basis that the Crown presented its case in relation to count 2.

[17] Further it was submitted on behalf of the accused that Ms McNamara is an indemnified witness and as such warnings of the kind discussed in *R v Chai* (1992) 60 A Crim R 305 would be required. It was submitted that if all of the counts were heard together such a warning "would be completely undermined by the presence of evidence of possession that is inadmissible upon the two counts of supply". It was also submitted that there would need to be a corroboration direction in relation to the evidence of Ms McNamara and "that direction would be given in the face of a direction that the jury be required to disregard the substantial body of evidence related to the counts of possession in the context of such a direction". It was then said that the warnings could not effectively overcome the adverse effect on the jury of hearing the substantial body of inadmissible and consequently prejudicial evidence relating to the charges of possession upon the charges of supply.

[18] In reply Mr Karczewski who appeared on behalf of the Crown submitted that the evidence relating to the possession of heroin on 8 March 1999 would also be called in relation to counts 1 and 2. The evidence of the obtaining of the Post-pak of heroin and the subsequently discovered 11 foils found in the

premises (one of which contained the fingerprint of the accused) is independent evidence, not coming from Ms McNamara, that corroborates her evidence. It is independent testimony that affects the accused by connecting or tending to connect him with the crime. It implicates him in that it demonstrates a fund of heroin from which the supply to Ms McNamara could have been made as she claimed. The evidence indicates that the heroin which was released in the course of the car chase was not heroin in the possession of the accused for his personal use and it therefore serves to corroborate Ms McNamara's evidence that the accused was dealing in heroin on an on-going basis.

[19] On that basis it was submitted that the evidence was admissible in relation to counts 1 and 2 and, as presently informed, I agree that that is so.

[20] Even if some of the evidence is not to be admitted because of the circumstances prevailing when the matter proceeds to trial, this does not mean that there should be an order for separate trials of counts 1 and 2. Provided that an appropriate direction can be given to the jury as to the use it should make of evidence admissible towards proof of one offence but not admissible towards proof of another a direction to the jury may be sufficient to guard against the risk of impermissible prejudice. If such a direction is not sufficient to guard against the risk of impermissible prejudice then separate trials should generally be granted: *Sutton v R* (1984) 152 CLR 528 at 541-2. It is a matter for the Court to consider whether impermissible prejudice would arise in the circumstances of this case and whether such

prejudice could not be cured by direction given at the trial. As presently informed I do not see that any significant evidence, inadmissible towards the proof of the guilt of the accused of counts 1 and 2, will be received by virtue of these counts being heard at the same time as the remaining counts or vice versa. In the event that this may turn out not to be the case then I am of the view that an appropriate warning can be given to avoid the risk of impermissible prejudice.

[21] Further, the accused has not identified any specific defence in relation to any of the counts which would give rise to prejudice should the matters be heard together. The submissions of Mr Tippett were couched in terms of speculation as to the risks which *may* arise.

[22] It is to be expected that there will be numerous directions required to assist the jury in its deliberations in this matter. Directions as to corroboration of the evidence of Ms McNamara and directions arising out of her status as an indemnified witness are likely to be required. I do not see these directions as being unacceptably "undermined" by the seven counts being heard together. In cases such as this there will always be the risk that circumstances will arise where appropriate directions to the jury will not provide a sufficient safeguard against prejudice to the accused so as to ensure that he receives a fair trial. However, in the circumstances of this matter, I do not consider that the risk is such as to require that there be a separate trial in relation to counts 1 and 2.

[23] I therefore reject the application to direct that there be a separate trial of counts 1 and 2 in this matter.

The Disputed Evidence

[24] The Crown wishes to lead evidence from Brigid Young who was, at the time, a Police Auxiliary working at the Berrimah Police Watchhouse. Ms Young was aware that the accused was in custody in relation to drug offences, including possessing heroin, and was held pursuant to s 137 of the *Police Administration Act* during further investigation. Her evidence is as follows:

> "Whilst the Deft. was being processed, he was observed to complain about pain, suffer uncontrollable shaking and was beginning to sweat.
>
> I/S "What is wrong? Are you okay?"
>
> H/S "I have just got some cramps. Yeah I'm fine"
>
> He continued to be processed, however I noticed he appeared pale and the previous symptoms continued. He began to double over and held on to the fingerprint bench to steady himself. Again I asked if he was okay and if I could help.
>
> I/S "Still got the cramps?"
>
> H/S "Yeah, I'm alright. How long is this going to take?"
>
> I/S "A few hours at least, as there is paperwork to complete and then they will charge you when the file is done and all that stuff"
>
> He accepted this and appeared to be looking better. We talked about being born in Darwin and discussed the high school we attended, being Nightcliff High School. We further discussed many Greek families in Darwin and I informed him my sister-in-law belonged to one of them and although he didn't know her, he stated he knew of the family.

He then again appeared pale and was stooped in his posture and said he was again in pain.

I was concerned he was in discomfort and was watching him to try and identify if he was faking illness or if he was genuinely sick.

I asked if he was taking any medication or if he had any pre-existing condition that he had not informed the receiving members about. He stated no to both inquiries.

He was returned to cell M6 after processing and he continued to be uncomfortable.

I/S "What is the matter?"

H/S "I want to go to the hospital"

I/S "Why?"

H/S "Because I feel like shit, I want something to fix this up"

I/S "So when did you have your last hit?"

H/S "What?"

I/S "When did you have your last hit? You are obviously going into withdrawals, so when was it?"

H/S "This morning"

I/S "This morning"

H/S "Yeah"

I/S "And what was it, heroin?"

H/S "Yeah"

I/S "Oh, you idiot. How often do you use it?"

H/S "Depends, I couldn't have any before 'cos your mob chased me."

I/S "Chased you?"

H/S "Yea, so can you get me up to the hospital?"

I/S "I'll see what I can do"

I returned to the main charge room area and notified the Watch Commander S/Sgt Swift of the Deft's condition. He advised me to monitor him and to call up a unit if Deft required transportation to hospital.

At 2015 hrs, the Deft's brother-in-law called the watchhouse and prior to Deft receiving call, permission was sought from Det. Martin. The Deft was then removed from cell M6 and spoke to his brother-in-law, Kelvin Strange, for only a few minutes and was returned to cell M6 at 2017hrs.

The Deft began to dry wretch and I attended cell M6 to check on him. He was again displaying the symptoms stated earlier and was trying to vomit. He again asked how long it would be before he would be getting out.

I/S "When I am informed then I'll let you know. How are you feeling now? Do you want tea or coffee or a meal?"

H/S "No, I just want to get out"

I returned to the charge room and called Accident and Emergency at Royal Darwin Hospital and spoke with a male doctor on duty.

I informed the doctor of the situation and he was not very sympathetic and told me to give the Deft. some Panamax and see if that alleviated any of the pain. In the event that did not seem to assist, I could always arrange for him to be conveyed to RDH, but told me to leave it for a while and give the Panamax time to work.

I re-attended cell M6 and gave the Deft. two Panamax at 2145hrs. The Deft's condition appeared to settle down after he was given the tablets.

At 2240hrs S/Sgt Mark Jeffs attended the watchhouse and prisoner was taken to the charge room where he was formally charged and bail refused. His rights were explained to him and he stated he wanted to make application to a Magistrate for bail. S/Sgt Jeffs had been informed of his condition and stated he wanted the Deft to be conveyed to RDH and when that was done he would call the duty Magistrate.

The Deft was returned to cell M6 and attempts were made to get a unit to convey Deft to RDH, however all units were busy on other jobs at the time and as Deft's condition did not deteriorate he had to wait until one was available.

> I ceased duty at 2300 hrs. The on coming shift were made aware of the Deft's condition and what steps had taken place during the course of my shift and the arrangements to have Deft. conveyed to RDH for treatment."

[25] The evidence of Ms Young was contained in two statutory declarations the first (Exhibit P3) was made on 11 May 1997 and the second (Exhibit P4) was made on 17 August 1999. Ms Young also gave evidence before me and was subjected to cross-examination.

[26] It is clear that Ms Young was not part of the investigative team. She was a police auxiliary attached to the Watchhouse. Ms Young said, and for the purposes of this application I accept, that in making the enquiries set out above she was fulfilling what she called her "duty of care" to the accused to "ensure that nothing untoward happens to (prisoners) whilst in the cells and if they require medical treatment to seek it". When the information was provided to her by the accused in relation to his use of heroin she made no record of that other than to make the following entry upon the offender journal (Exhibit P2) at 1950 hours on 8 March 1996:

> "Young reports prisoner back from interview. No longer held on s 137 PAA. Prisoner can be charged and have bail considered. Members McDonagh/Martin objecting to bail, bail refusal to be done. Prisoner is now being processed and is beginning to suffer with withdrawals from heroin. He has not had any since this morning. Pain/shakes and sweating beginning. S/Sgt Swift to be notified. Prisoner may have to be conveyed to RDH later on shift."

[27] Division 6A of the *Police Administration Act* deals with the recording of confessions and admissions. Section 142(1) of that Act provides as follows:

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

[28] Section 143 of the Act then provides:

> "A court may admit evidence to which this Division applies even if the requirements of this Division have not been complied with, or there is insufficient evidence of compliance with those requirements, if, having regard to the nature of and the reasons for the non-compliance or insufficiency of evidence and any other relevant matters, the court is satisfied that, in the circumstances of the case, admission of the evidence would not be contrary to the interests of justice."

[29] The effect of s 142(1) is clear. Evidence of a confession or admission made to a member of the police force is not admissible as part of the prosecution case except in the circumstances provided for in par (a) and par (b). The confession or admission will be admissible as part of the prosecution case if, in the circumstances provided for in (a), the substance of the confession or admission is confirmed by the person concerned, and in (a) and (b) the confirmation or the confession or admission was electronically recorded, and where that recording is available to be tendered in evidence. In all other cases falling within the ambit of s 142 the evidence will not be admissible

unless the Court permits its admission under s 143 on the basis that the "admission of the evidence would not be contrary to the interests of justice".

[30] In *R v Charlie* (1995) 121 FLR 306, Mildren J considered what was meant by the expression "questioning" in s 142 of the Act. He said (312):

> "The word "questioning" is not defined by the Act. The questions which were asked related only to whether the accused knew why he was arrested and if he knew what his rights were. Section 142 is designed to ensure that admissions made during questioning about the offence is recorded. I consider that "questioning" means questions about the circumstances of the offence: see *R v Maratabanga* (1993) 3 NTLR 77 at 91-92."

See also *The Queen v Lees & Cameron* (1997) 3 NTJ 1339 at 1362.

[31] In this case the admission was not made "before the commencement of questioning". All "questioning" of the accused had been completed at that point in time. The record of interview was conducted between 5.47pm and 6.52pm. The conversation took place after that time.

[32] Likewise the admission was not made "during questioning" but rather took place after the questioning had been completed.

[33] The position is that any admission made by the accused was made to a member of the police force (Ms Young), by a person suspected of having committed a relevant offence (the accused), and is therefore not admissible by virtue of s 142 unless it falls within the exceptions provided for in that section. It does not do so. The conversation occurred after the completion of "questioning" and it was not electronically recorded.

[34] Accepting that s 142(1) of the *Police Administration Act* applies to make the evidence of any admission by the accused to Ms Young "not admissible as part of the prosecution case", the question that then arises is whether there is a discretion to admit the evidence pursuant to s 143 of the Act.

[35] Section 143 permits "evidence to which this Division applies" to be admitted. That section permits the exercise of a discretion to admit the evidence because the evidence that is excluded under s 142(1) is "evidence to which this Division applies". I am therefore required to consider whether the admission of the "evidence would not be contrary to the interests of justice".

[36] It has been said that the purpose of s 142(1) is to safeguard a suspect against unfair methods of obtaining incriminating evidence against him. The primary object is not to protect the guilty from acknowledging their guilt but to ensure that alleged confessions or admissions are genuinely and voluntarily made and not unfairly obtained: *R v Grimley* (1994) 121 FLR 236 at 275.

[37] In the circumstances of this matter the conversation between the accused and Ms Young was quite divorced from the interrogation procedure. It occurred after questioning by investigating officers had been completed and it arose out of the concern of Ms Young for the well being of the accused. She sought information in order to determine whether some action ought to be taken to protect his welfare such as having him taken to Royal Darwin Hospital or, as in fact occurred, given some medication designed to relieve

his apparent extreme discomfort. To my mind it is clear that Ms Young was at all times acting with the desire to fulfil the "duty of care" in relation to the accused which had been imposed on her. Her questioning had nothing to do with the investigative process and that is confirmed by the fact that her conversation with the accused only came to light some 12 months after the occurrence and then only in the course of her making a statement as to his presence in custody. The detail of the conversation was not revealed to others until the making of the statutory declaration in 1999 (Exhibit P4).

[38] The information provided to Ms Young was voluntarily given by the accused. There was, in the cross-examination of Ms Young, a suggestion made that the conversation did not occur in the manner she described. However, she denied that and no further challenge to the accuracy of her evidence was forthcoming. There is no suggestion that the condition of the accused at that time was other than as she described it or that the information conveyed was other than the truth. The evidence is probative of the accused being associated with heroin on that day, indeed having been in possession of heroin on that day, and that there had been a car chase as alleged by the Crown.

[39] In the circumstances I rule that the evidence can be admitted.

———————————————