

*The Queen v Vigona* [1999] NTSC 120

PARTIES: THE QUEEN

v

MARK VIGONA

TITLE OF COURT: SUPREME COURT OF THE  
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE  
NORTHERN TERRITORY  
EXERCISING TERRITORY  
JURISDICTION

FILE NO: 9725968

DELIVERED: 6 October 1999

HEARING DATES: 13 – 15 September 1999

JUDGMENT OF: RILEY J

**REPRESENTATION:**

*Counsel:*

Applicant: R. Noble  
Respondent: D. Dalrymple

*Solicitors:*

Applicant: Office of the Director of Public  
Prosecutions  
Respondent: Dalrymple & Associates

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

*The Queen v Vigona* [1999] NTSC 120  
No. 9725968

BETWEEN:

**THE QUEEN**  
Applicant

AND:

**MARK VIGONA**  
Respondent

CORAM: RILEY J

REASONS FOR DECISION

(Delivered 6 October 1999)

- [1] The accused is charged with one count of having had sexual intercourse with Karen Mitchell without her consent.

**The Crown Case**

- [2] In summary form the Crown case alleges that on or about 20 November 1997 Karen Mitchell had been to a nightclub in the centre of Darwin where she was in the company of three female friends. During the course of the evening there was some social interaction between members of her group and a group of young men, of whom the accused, Mark Vigona, was one. When the nightclub closed at about 4am Ms Mitchell and her friends took a taxi from the nightclub to the residence of Ms Mitchell at the Ross Smith

Hostel in Parap. Ms Mitchell was dropped off at that location and the taxi continued on with her friends. In the meantime the accused and his friends had followed in another taxi. Ms Mitchell, it seems, waived that taxi down and asked one of the men, who was known to her, whether they wanted to “come in and have a drink and a smoke”. The men, including the accused, accepted.

- [3] After a period the two associates of the accused left but the accused remained talking to Ms Mitchell.
- [4] In her evidence Ms Mitchell said that sometime thereafter the accused left and she shut the door to the flat and “just flaked out”. The door was not locked. Her next recollection was of waking up to find the accused on top of her. He was trying to pull her “T-shirt across” and she felt that she was wet and saw blood. She said she struck the accused and chased him from the room accusing him of being a “rapist”. She caught up with him, and stabbed him with a knife that she had collected in the course of her pursuit.
- [5] She continued to pursue him and, with the help of others, he was located at Kurringal Flats. Police were called and the accused was arrested.
- [6] The accused participated in an electronically recorded record of interview with Detective Senior Constable Neil Bernard Grant and Detective Senior Constable Jacleen Sue Schlein. The interview commenced at about 18 minutes to 3pm on Thursday 20 November 1997.

[7] The Crown wishes to lead evidence relating to the record of interview and to have that record admitted into evidence. Mr Dalrymple, who appeared on behalf of the accused, indicated that the evidence would be objected to on the basis that the record of interview was not voluntary and, further, that it would be unfair to admit it. The objection based upon the admission being unfair was subsequently abandoned by Mr Dalrymple. There was no suggestion of misconduct on the part of the officers and no submission that the will of the accused was overborne. In relation to the issue of voluntariness, the submission was made that the accused did not adequately comprehend his right to silence.

[8] I heard evidence from Detective Grant and Detective Schlein and the accused also gave evidence.

### **The Record of Interview**

[9] In the record of interview the accused confirmed his presence at the flat of Ms Mitchell on the night. He confirmed that his friends were there and that they left prior to his own departure. He differed from Ms Mitchell in his recollection of what then occurred. He did not say that he left the flat and then returned. Rather he said that Ms Mitchell was, at that time, in a condition which he variously described as “passed out, drunk, yeah, asleep, call it whatever.” He said he had sexual intercourse with her and then, when she awoke, he was sitting next to her and “she just went stupid”. He said that she ran after him with a knife, that she punched him and that she

stabbed him with that knife in a manner which was described as “a bit of a poke”.

- [10] In the course of the record of interview it was suggested to him that Ms Mitchell could not have given him permission to have sex with her because of her condition. He responded as follows:

“Yeah that’s what I mean there’s no permission, you know. That’s – that’s why I – understand what I’m in here for”.

- [11] Although there are matters of significant difference between the versions of events provided by Ms Mitchell in her evidence before me, and by the accused in his record of interview, there is a measure of agreement in relation to the immediate circumstances in which sexual intercourse occurred.

### **Voluntariness**

- [12] It was the submission of Mr Dalrymple that the accused did not understand his right to silence. Mr Dalrymple accepted that the accused had been informed of his right but submitted that, in all the circumstances, he did not appreciate or understand that he had a choice whether to answer questions or not.

- [13] The accused is a person of Aboriginal descent. His first language is English. He does “speak a bit of Tiwi”. His education was obtained in schools in Darwin and Perth, although he also attended school at Garden Point on the Tiwi Islands for grade 5 through to grade 7. In his High School

years he attended a variety of schools in Darwin and Perth and he said he was in a “special class” rather than in the mainstream. The special class was related to learning “trade stuff” and he said he was an average student. He left school halfway through year 12.

[14] The record of interview indicates that the accused has a good grasp of the English language.

[15] In the course of the record of interview the accused was asked questions relating to his understanding of the caution and the following exchange occurred:

“Grant: Do you underst – do you have to talk to me?

Vigona: Do I have to?

Grant: Yeah.

Vigona: It’s for my sake, yeah, I probably, I do (inaudible).

Grant: Well that – that’s for you to decide - - -

Vigona: Yeah.

Grant: - - - whether it’s right or wrong to talk - - -

Vigona: Yeah.

Grant: - - - to talk to me - - -

Vigona: Mmm.

Grant: - - - but I – I – I want you to understand fully that you don’t have to.

Vigona: Mmm.

Grant: All right. You – you say ‘don’t want to talk to you, that’s it’. Zip the lip and that’s the end of it. Do you understand that?

Vigona: Yep. I understand that.

[16] There is nothing in the course of the conversation which suggests that the accused did not understand that he did not have to answer questions. Indeed in his evidence before me he indicated that he wanted to tell the police what had happened.

[17] The following exchange occurred with Mr Noble who appeared on behalf of the Crown:

“You could think clearly, you know what he was asking you?---  
Yeah, sort of, yeah.

And you knew this was very important?---Yeah, yeah.

You knew you’d done the wrong thing?

You wanted to tell your side of the story, is that right?---Yeah.

You wanted to tell your side of the story?---Yeah, something like that.

Is it – well I don’t want to – I only want you to answer ‘yes’ or ‘no’ if you’re correct about that Mr Vigona. Did you want to tell your side of the story?---Yeah, yeah.

So you knew you didn’t have to say anything to the police because Detective Grant explained that to you, didn’t he?---Yeah.

He did explain it to you?---That I didn’t have to speak to them?

Yes?---Yeah, I knew I didn’t have to speak to them but I just wanted to get out of there, I just – you know, I didn’t know what was happening.”

[18] In support of his submission Mr Dalrymple relied upon a combination of factors. He pointed to the events leading up to the conducting of the record of interview and noted that the accused had been at the nightclub, Rattle and Hum, until 4.00 am that morning. The accused had been consuming alcohol. He then went to the residence of Ms Mitchell where he consumed some more alcohol and smoked some cannabis. The accused eventually arrived at his nephew's flat at about dawn and there had something to eat and a short sleep. Not long thereafter he was arrested and taken to the Peter McAulay Centre where he was kept until the interview commenced shortly before 3.00 pm.

[19] It was submitted that at the time the record of interview commenced the accused had been without proper sleep for many hours, that he had consumed alcohol and cannabis, and that at the time of the interview he was, as he said, "a bit sick from the other night" and suffering from a "hangover". It was not suggested that he was then under the influence of alcohol or drugs. The submission seemed to be that the condition of the accused in some way contributed to his lack of understanding or appreciation of his right to silence.

[20] I do not regard this submission as carrying any weight. The accused was asked in the course of the record of interview whether he wished to carry on and he replied in very clear terms that he did, saying "no, it's all right". When he gave evidence before me he confirmed that, at the time the interview commenced, he appreciated the seriousness of the situation and he



went on to agree that he could think clearly and that he wanted to tell his side of the story.

[21] It was further submitted that the accused was not given a chance to exercise his right to silence. When the warning had been given Detective Grant then proceeded immediately to ask questions regarding the substantive issues. He did not pause to inquire of the accused whether he wished to answer questions. As a matter of record that was so. However, it was clear by then that the accused wished to put forward his side of the story. In response to a question whether he had to talk to police officers, he responded “it’s for my sake, yeah, I probably do ...”.

[22] In this response the accused was not simply agreeing but rather was providing a basis for wanting to tell his story. Even then Detective Grant proceeded to advise the accused that if he did not want to talk “that’s it, zip the lip and that’s the end of it.” The accused responded by saying that he “understood that”.

[23] This was not simply a situation of what has been described in other places as “gratuitous concurrence”. Consideration of the record of interview confirms that. By way of example, in the course of the record of interview the accused was asked about an incident where he searched in the pocket of the jeans of Ms Mitchell and he was asked what he had been looking for. He responded by inquiring whether he had to answer the question and when it was confirmed that he did not have to do so he said: “I won’t answer it”.

This, read in the context of the interview, indicated an understanding on his part that he did not have to answer questions. When a question arose with which he did not wish to deal he politely asked whether he had to respond. He then exercised his right to remain silent in relation to that matter and went on to respond to other questions.

[24] At one point in his evidence the accused was asked what he understood by the caution and he responded that “I just had to answer whatever they said to me”. I do not accept his evidence on this point. It is quite inconsistent with the evidence that he gave regarding his understanding of the caution, and it is inconsistent with his exercise of his right to remain silent when a topic with which he felt uncomfortable was raised.

[25] The accused did endeavour to suggest a difficulty in comprehending the English language. In the course of his evidence before me he was taken to passages in the record of interview in which he had described Ms Mitchell as having been “asleep” and having then been “awake” and having “woken up” at times crucial to the issue of whether or not she had consented to his sexual advances. In his evidence he said that the expression “asleep” meant “laying down in the bed” and the expression “woke up” meant she was “getting up and getting off the bed”. These are meanings that the words do not have and, I find, were not intended by him at the time. Indeed in the record of interview he referred to Ms Mitchell “laying down” and yet talking to him. This is quite inconsistent with his suggestion that “laying down” was the equivalent of being asleep. I find that he did not confuse the

differing concepts. I do not accept that he used the words set out above in other than their ordinary sense.

[26] It was the submission of Mr Dalrymple that the accused did not understand his right to silence. However it does not necessarily follow that a record of interview will be excluded if the accused does not understand his right to silence: *Dumoo v Garner* (1998) 143 FLR 245; *Azar v The Queen* (1991) 56 A Crim R 414 and *R v Nundhirribala* (1994) 120 FLR 125. In this case that issue does not arise. In my view the accused clearly understood that he had a right to silence.

[27] The accused in this matter did understand his right to silence. He chose to provide his version of events to the police in the record of interview. In the circumstances I propose to admit the evidence relating to the record of interview.