PARTIES:	BASIL DUMOO
	v
	DONALD ANTHONY GARNER
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA60 OF 1997 (9623579)
DELIVERED:	23 February 1998
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JUDGMENT OF:	Kearney J

CATCHWORDS:

Criminal Law and Procedure – Appeal and new trial, pardon and inquiry subsequent to conviction – Appeal and new trial – Justices appeal – Incriminating admissions – Whether wrongly received into evidence – *Anunga* guidelines – Police General Order Q2 – Voluntariness of the admissions – Whether a legal requirement that appellant knew of right to speak or to remain silent before making admissions – "Gratuitous concurrence" – Role of a 'prisoner's friend' – Operation of the 'unfairness' discretion and the 'public policy' discretion – Whether separate exclusionary discretions, requiring separate consideration –

R v Anunga (1976) 11 ALR 412, applied.
R v Lee (1950) 82 CLR 133, applied.
Wendo v The Queen (1963) 109 CLR 559, applied.
R v Warren [1982] 2 NSWLR 360, approved.
R v Cumes (1990) 102 FLR 113, followed.
Collins v The Queen (1980) 31 ALR 257, not followed.
Azar (1991) 56 A Crim R 414, followed.
R v Nundhirribala (1994) 120 FLR 125, followed.
Bunning v Cross (1978) 141 CLR 54, applied.
Cleland v The Queen (1982) 151 CLR 1, applied.
R v Swaffield (unreported, High Court of Australia, 20 January 1998) applied.

Evidence Act 1995 (C'wth), ss84, 85
Evidence Act 1995 (NSW), ss84, 85
Police Administration Act (NT), ss14A, 140, 143

REPRESENTATION:

Counsel:

Appellant:	C.F. Thomson
Respondent:	I. Rowbottam

Solicitors:

Appellant:	NAALAS
Respondent:	Office of the Director of Public Prosecutions

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

No. JA60 of 1997 (9623579)

IN THE MATTER OF the *Justices Act*

AND IN THE MATTER of appeals from convictions by the Court of Summary Jurisdiction at Darwin

BETWEEN:

BASIL DUMOO
Appellant

AND:

DONALD ANTHONY GARNER
Respondent

CORAM: Kearney J

REASONS FOR JUDGMENT

(Delivered 23 February 1998)

This is an appeal pursuant to s163(1)(b) of the *Justices Act* against convictions by the Court of Summary Jurisdiction at Darwin on 1 May 1997.

The charges against the appellant, a mature Aboriginal man from Port Keats, were that on 23 October 1996 he brought liquor into a restricted area and there consumed it, contrary to ss75(a) and (c) of the *Liquor Act*. He pleaded not guilty to both charges but was convicted and fined. He appeals on

the ground that incriminating admissions he made to the police were wrongly received into evidence against him.

The case before the Magistrate

The evidence for the prosecution before the Magistrate consisted of incriminating admissions made by the appellant when interviewed by Constable Lindsay at Port Keats on 25 October 1996. The appellant had unsuccessfully sought to have the record of that interview excluded from the evidence. Had he succeeded, he would necessarily have been acquitted on both charges, because there was no other evidence against him. I turn to the interview in question.

(1) The police interview of 25 October 1996

After both Constable Lindsay and Aboriginal Community Police Officer Perdjert formally introduced themselves, the interview proceeded as follows:

"LINDSAY: Thank you. Basil can you tell me your full name?
DUMOO: My name's Basil Dumoo.

LINDSAY: And whereabouts do you live Basil?
DUMOO: (Numarluk?)

LINDSAY: Port Keats.
DUMOO: Port Keats.

LINDSAY: And how old are you?
DUMOO: 32.

LINDSAY: And whereabouts were you born?
DUMOO: Here.

LINDSAY: And where did you go to school?

DUMOO: St Johns and here.
LINDSAY: And what level did - what grade did you get to at school?
DUMOO: 10.

LINDSAY: Can you read English?
DUMOO: Yep.

LINDSAY: Can you understand me when I talk to you?
DUMOO: (Inaudible).

LINDSAY: Okay. Basil - ah - *before we started this talk I asked you if you wanted someone to sit with you. Is that right?*
DUMOO: *(Inaudible).*

LINDSAY: *And what did you tell me?*
DUMOO: *No.*

LINDSAY: *You happy to sit here by yourself?*
DUMOO: *Yes.*

LINDSAY: Okay. *If you have any problems with my questions Basil, if you don't understand, you can ask Ernie [Officer Perdjert] for help in your own language, or you can just tell me and I'll try and explain that question better.*
DUMOO: Right.

LINDSAY: Okay.
DUMOO: Yeah.

LINDSAY: Now are you drunk or sober?
DUMOO: Sober.

LINDSAY: Okay. Um - your (sic) not - are you tired?
DUMOO: No.

LINDSAY: Now you understand Basil that your (sic) free - your (sic) not under arrest, your (sic) free to leave at any time? So if you want to you can get up and just walk out. Okay.
DUMOO: Mm.

LINDSAY: Now Basil do you agree that before we started this talk I took the plastic off these three cassette tapes?
DUMOO: Yeah.

LINDSAY: And I put them in that machine.

DUMOO: Yes.
LINDSAY: And do you agree this machine's now working?
DUMOO: Yeah.

LINDSAY: Now I advise you Basil that our conversation is being recorded on this machine and when we're finished I'll give you one of the tapes. Do you understand that?
DUMOO: Yes.

LINDSAY: Now Basil I want to talk to you about some grog, some liquor that was taken into the restricted area on Wednesday night. Do you understand that?
DUMOO: Yeah.

LINDSAY: *Before we go any further I'll advise you that you don't have to talk to me if you don't want to. Do you understand that?*
DUMOO: *Yeah.*

LINDSAY: *So do you have to answer my questions?*
DUMOO: *No.*

LINDSAY: Okay. Now if - if you don't want to answer my questions, or if you don't want to answer one question, you tell me - you tell me that you don't want to answer it. Okay.

DUMOO: Yeah.

LINDSAY: And anything that you do say will be recorded on this machine and may later be used as evidence in court. Do you understand that?
DUMOO: Yeah.

LINDSAY: Who might listen to these tapes in court?
DUMOO: Judge.

LINDSAY: Judge. Now when the Judge listens to these tapes and he - that Judge will hear what your (sic) saying now. Now if he thinks that your (sic) guilty what can he do to you?
DUMOO: Lock me up.

LINDSAY: Yeah. What other sort of things can he do? Could he make you pay a fine?
DUMOO: Yeah.

LINDSAY: Or make you do that work?
DUMOO: Yeah.

LINDSAY: What's that work called?
DUMOO: (No reply).

LINDSAY: The community work?
DUMOO: Community.

LINDSAY: *Do you want to answer my questions Basil?*
DUMOO: *Yeah.*

LINDSAY: Okay. What can you tell me about Wednesday night?
DUMOO: Went to Daly, brought 6 carton, drinking all night and had one carton left and Paul came along and maybe a dozen left.

LINDSAY: Okay.
DUMOO: We had – we had – we drank all that beer. Stayed there for a while till we got sobered up and left."
(emphasis added)

The questioning then turned to the detail of the offences alleged. The appellant admitted that he had participated in the drinking, and knew that he was committing an offence. His answers constituted the incriminating admissions relied on by the prosecution, and concluded:

"LINDSAY: And how many beers did you drink at Redcliff?
DUMOO: Plenty.

LINDSAY: Plenty? (Laughter)
DUMOO: Yeah. (Laughter)

LINDSAY: Okay. Now is that Redcliff Outstation - is that on the Port Keats side of the Moil (sic, Moyle) River or the other side?
DUMOO: This side.

LINDSAY: This side. Now what does that Moil (sic, Moyle) River mean? Are you allowed to drink beer this side of the Moil (sic, Moyle) River?
DUMOO: No.

LINDSAY: Is that restricted area?
DUMOO: Restricted area.

LINDSAY: Yep.
DUMOO: Then came back.

LINDSAY: Came back to Port Keats. Did you have any beer in the car when you came back to Port Keats?
DUMOO No. That afternoon we went to (inaudible).

LINDSAY: That - that Thursday afternoon?
DUMOO: Yeah.

LINDSAY: Alright. Who's (sic) money bought all that beer at Daly River? Who paid for it?
DUMOO: Me.

LINDSAY: Now John Boscow and Paul Smiley did they give you some money for that beer?
DUMOO: Yep.

LINDSAY: How much did they give you?
DUMOO: Twenty bucks each.

LINDSAY: Okay. Was that for one carton each?
DUMOO: Yeah.

LINDSAY: Do you have any questions there ACPO Perdjert?
PERDJERT: No I've got no questions Constable.

LINDSAY: Okay. Are you allowed to drink beer at Redcliff?
DUMOO: No."

(2) The submissions before the Magistrate

As to the incriminating admissions in the interview Mr Howse then of counsel for the appellant made 3 submissions.

(a) The admissions at pp5-6 were involuntary and thus inadmissible in evidence. This was because it had not been established that when the

appellant spoke to the police he *knew* that he did not have to do so, and thus it had not been shown that he spoke in the exercise of a free choice to speak or to be silent. The failure to establish that the appellant spoke freely with knowledge of his rights occurred because Constable Lindsay in the interview failed to comply with guideline (3) in *R v Anunga* (1976) 11 ALR 412 at 414-5. *Anunga* guideline (3) provides:

> "(3) Great care should be taken in administering the caution when it is appropriate to do so. It is simply not adequate to administer it in the usual terms and say, "Do you understand that?" or "Do you understand you do not have to answer questions?" Interrogating police officers, having explained the caution in simple terms, should ask the Aboriginal to tell them what is meant by the caution, phrase by phrase, and should not proceed with the interrogation until it is clear the Aboriginal has apparent understanding of his right to remain silent. Most experienced police officers in the Territory already do this. The problem of the caution is a difficult one but the presence of a "prisoner's friend" or interpreter and adequate and simple questioning about the caution should go a long way towards solving it."

(b) If submission (a) were rejected, the admissions (now found to have been made voluntarily) should nevertheless be excluded in the exercise of the Court's discretion to exclude such admissions, on the basis that it would be unfair to the appellant to allow them to be used in evidence against him, in light of the circumstances in which they were obtained. The circumstances relied on were those referred to in submission (a), the failure to comply with *Anunga* guideline (3). This is the "unfairness" discretion referred to in *R v Lee* (1950) 82 CLR 133 at 150-151.

(c) Alternatively, the admissions should be excluded in the exercise of the Court's discretion because their probative value is outweighed by their

prejudicial effect on the appellant. This is the *Christie* discretion (*R v Christie* [1914] AC 545) referred to, for example, by Gibbs J in *Driscoll v The Queen* (1977) 137 CLR 517 at 541. There was clearly no substance in this submission, in the circumstances of this case; the only prejudicial effect of the admissions lay in their probative value.

I note that his Worship also considered (see p15) whether the admissions should be excluded in the exercise of the "public policy" discretion referred to in *Bunning v Cross* (1978) 141 CLR 54 at 64, as applied to admissions in *Cleland v The Queen* (1982) 151 CLR 1.

(3) The decision of the Court

His Worship ruled on 8 April 1997 that the admissions should be received into evidence because they were made voluntarily, and no unfairness had been established which would enliven any of the discretions to exclude them. Clearly, his Worship had listened to the tape of the interview, and had no transcript of it.

In his reasons, delivered orally from notes, his Worship dealt first with the question whether the admissions had been made voluntarily; in doing so he traversed and commented on parts of the interview set out at pp4-5, viz:

> "… Constable Lindsay did not ask Mr Dumoo to tell him what was meant by the caution phrase by phrase. Mr Dumoo was told [p4]: 'You don't have to talk to me if you don't want to. Do you understand that?---Yeah'. Mr Dumoo didn't say 'yes'. He didn't say a lengthy 'yeah'. It was a short 'yeah'. 'So do you have to answer my questions?---No'. 'If you don't want to answer my questions or if you don't want to answer one question, you tell me, okay?'. The response there was something along

> the lines of 'ugh', which I interpret to be a grunt [The answer was in fact "Yeah"].
>
> 'Anything you do say will be recorded on this machine and may later be used as evidence. Do you understand that?'. I couldn't discern a response there, so I take it there was no answer. [The answer was in fact "Yeah"] 'Who might listen to the tape?---Judge'. That answer was given very quickly. 'Judge. Now when the Judge listens to these tapes, if he thinks you're guilty, what can he do to you?---Lock me up'. 'What other sort of things can he do?'. There was no answer to that. Constable Lindsay said: 'Pay a fine?---Yeah'. And then: 'Do work. What's that work called? Community work?' Mr Dumoo repeated: 'Community work', and then he was asked: 'Do you want to answer any of my questions?---Yeah'."

His Worship observed at this point:

> "The prosecution bears the onus of proving that the confession is voluntary. The prosecution must satisfy that onus on the balance of probabilities. What is there in this case to indicate that the confession is voluntary?"

I consider, with respect, that this was the correct approach. His Worship then sought to answer the question he had posed by examining another part of the interview at pp4-5, viz:

> "Mr Dumoo was asked [p5]: 'Do you want to answer any of my questions?'. He said: 'Yeah'. This follows immediately after [p4]: 'You don't have to talk to me if you don't want to?---Yeah'."

I observe that the first question and answer mentioned does not in fact follow "immediately after" the second 'question' (which was not in fact framed as a question). A question and answer *somewhat similar* to the first question and answer *does* follow "immediately after" it, though it relates to 'having to' answer a question, not 'wanting to', and yielded the answer "No"; see p4.

Nothing turns on that, since his Worship immediately corrected this confusing reference:

> "… When Constable Lindsay questioned Mr Dumoo, he said to him [at p4]: 'You don't have to talk to me if you don't want to. Do you understand that?---Yeah'. The next question was: 'So do you have to answer my questions?---No'."

His Worship then again posed the question:

> "What is there here to indicate that the confession is voluntary?"

By way of seeking the answer, he looked again at the questions and answers on pp4 and 5, viz:

> "Mr Dumoo was asked [see p5]: 'Do you want to answer any of my questions?---Yeah'. This comes after Mr Dumoo has been asked [p4]: 'You don't have to talk to me if you don't want to', and given the answer: 'No'. *The answer 'No' removes any potential confusion that might arise from the use in the previous question of the words 'Do you understand that'*?" (emphasis added)

Once again a measure of confusion has crept in. His Worship clearly had in mind both questions and answers emphasized at p4, but inadvertently quoted the question and answer emphasized at p5. The appellant did not answer "No" to the 'question' "I'll advise you that you don't have to talk to me if you don't want to"; see p4. As already noted, this 'question' was in the form "I'll advise you …", and not in the form of a question; it was followed immediately by the question "Do you understand that?", to which the answer was "Yeah". The reference to a "No" answer was clearly to the answer to the "do you have to" question *following* the "do you understand" question and answer; see p4. In proceeding to explain why any "potential confusion" was removed by this

answer "No", his Worship clearly had in mind the inadequacies of the "Do you understand" type of questioning, condemned in *Anunga* guideline (3). He said:

> "Magistrates have some awareness of the danger of the use of the expression 'do you understand that?'. That expression with Aborigines from communities or poorly educated urban Aboriginals often invokes a face saving 'yes' in a situation where the listener does not understand. *The answer 'no' to the question 'so do you have to answer my questions' [p4] clarifies in this case that there is no misunderstanding.*
>
> This contrasts with the situation that occasionally occurs when a suspect answers 'yes' to that question. There then ensues a long and tortuous process whereby police endeavour to explain that a choice exists; that choice being to speak or remain silent, which should be fairly acted upon." (emphasis added)

It can be seen that his Worship relied on the consistency in the two answers emphasized at p4 as establishing that the answer "No" indicated a clear understanding on the appellant's part that he did not "have to answer" the police questions; that is, as indicating that he understood that whether he answered those questions or not, was a matter for his own free choice. It is obvious, I think, with respect, that taken alone the consistency in the answers to the 2 questions on p4 would have been a most insecure foundation for a conclusion that the appellant understood that he had a free choice to speak or remain silent when questioned; see, for example, the questions and answers of this type in *R v Li* [1993] 2 VR 80 at 84. However, his Worship did *not* rest on this consistency alone to conclude that the admissions were made voluntarily;

as the next passage in his judgment indicates, he also relied on 4 further reasons. He continued:

> "I have no doubt that the confession in this case is voluntary. *Apart from the answer 'no',* as set out above [see passage emphasized on p4], *voluntariness is established by*: (1)the immediate strong answer: 'Judge', to the question [p4] I noted as: 'Who might listen to the tapes?'; (2) the answer [p4]: 'Lock me up', to the question I noted as: 'Judge. Now when the judge listens to the tapes and thinks you're guilty, what can he do to you?'; (3) the ease displayed by the defendant when interviewed, as demonstrates by his humorous answer [p5]: 'Plenty', to the question I noted as: 'How many beers did you drink at Red Cliff?'.
>
> This answer was followed [see p5] by laughter from the police officer and the defendant; (4) the impression I gained that the defendant has a practical understanding of English no worse than the *average white man of English descent*." (emphasis added)

Reasons (1) and (2) do not bear on voluntariness. The words last emphasized come from *Anunga* guideline (1); see p26. The 'impression' stated in reason no.(4) stands in sharp contrast to Constable Lindsay's assessment (p21); however, his Worship then set out 4 reasons for his 'impression', viz:

> "That impression was gained by: (a) the fact that the defendant did not ask the police officer to rephrase or clarify his questions; (b) his lengthy answer [see p5]: 'Went to a place' - that I noted as Bernie [sic, Daly] - 'brought six cartons. Drinking all night. We had one carton left when Paul came along and me and he had one dozen left'.
>
> Constable Lindsay said: 'Okay', and the defendant went on: 'We drank all the beer. Stayed there for a while till we got sober up and left'; (c) his unsolicited explanation that he was not drinking beer on the return journey as he drove: 'Cause I had the kids with me - two kids'; (d) the change in the inflection of his voice when questioned about the Chulas, including the almost contemptuous 'no' when asked about Johnny Chula and then his quick response: 'They're all there', when asked about Gordon Chula. His reference to: 'They're all there', meant that they were all in Port Keats."

His Worship then expressed his conclusion:

> *"In this case, the police officer did not have Mr Dumoo tell him what was meant by the caution phrase by phrase in simple terms.* That failure does not mean that I am unable to be satisfied that the confession was voluntary. The defendant's answers to questions show a level of understanding to the extent that I am satisfied that, when he answered: 'No' to the question [p4]: 'So do you have to answer my questions?', he understood what was asked of him. He understood that he had a choice to either speak or be silent." (emphasis added)

The sentence emphasized is clearly a reference to the non-compliance with *Anunga* guideline (3) ; see p7.

His Worship then turned to Mr Howse's second submission (p7), the question whether these admissions, which he was now satisfied had been made voluntarily, should nevertheless be excluded from the evidence, in the exercise of the 'fairness' discretion in *R v Lee* (supra). He said:

> "Mr Howse asked me to exclude the confession in the exercise of the *Lee* discretion. The effect of his submission, as I understand it, was that the police officer had breached police guidelines. The police guidelines were not tendered. My familiarity with the police guidelines is poor. I do not know whether, as at 25 October 1996 - the date of the interview - there was a police guideline that the suspect should be asked to explain what is meant by the caution phrase by phrase."

I note that the relevant "police guideline" is that set out in Police General Order Q2.5.3, in force at the time, implementing *Anunga* guideline (3); it provides:

> "Great care should be taken in administering the caution when the stage has been reached that it is appropriate to do so. The suspect should be asked to explain what is meant by the caution, phrase by phrase. *Questioning should not proceed until it is apparent that the suspect understands the right to remain silent."* (emphasis added)

His Worship continued:

> "However, I will assume, for the purpose of this case, that such a guideline existed on 25 October 1996. *If such a guideline existed, it is wrong and it should be rephrased*. The caution generally commences with a statement to the effect that: 'You are not obliged to answer any questions', or as in this case [p4]: 'You don't have to talk to me if you don't want to.'
>
> To then invite the suspect to repeat his or her understanding of the phrase is contradictory. The police officer is inviting comment in a situation where the police officer has said: 'You don't have to talk to me'. See here the article [p32] by his Honour Mildren J 'Redressing the Imbalance against Aboriginals in the Criminal Justice System' (1997) 21 Crim LJ 7, the relevant citation being at page 11.
>
> A fair situation should be encouraged when dealing with Aboriginal people such as that suggested by Mildren J [p32] where the choice is given at the end of the cautioning process and not at the beginning. See page 12 of Mildren J's article." (emphasis added)

The only inference to be drawn from these observations, and the passages emphasized below and at p15, is that his Worship paid no attention to the requirement in Police General Order Q2.5.3 and *Anunga* guideline (3) that the person being questioned be asked to give his understanding of the caution, because it was "wrong"; he gave no consideration to the obvious failure to comply with it. With respect, neither *Anunga* guideline nor guideline Q2.5.3 is 'wrong', and his Worship lacked competence to embark upon that question. These guidelines are to be accepted as such, and it is vital that they continue to be observed by the courts. The logical contradiction to which his Worship referred (above) has never occasioned the slightest difficulty in practice since the *Anunga* guidelines were promulgated over 20 years ago. No doubt the

formulation of the guidelines could be improved, but failure to bear them in mind constitutes error; they must be taken into account where appropriate.

His Worship then expressed his conclusion on the submission based on the *Lee* discretion, and his reasons therefor:

> "There is no unfairness in this case. *The fact that a police officer did not follow his guidelines does not enable me to work out how it would be unfair to use the confession against the defendant.* The confession does not disclose that the defendant is confused or did not understand what was asked of him or that the defendant meant to say something other than what he said. *To follow the guidelines set out for police creates contradiction which has the potential to promote unfairness.*" (emphasis added)

As to the sentence last emphasized, I observe that it discloses error in the approach to the guidelines, for the reasons set out at p14. His Worship then turned to consider the *Bunning v Cross* 'public policy' discretion. He said:

> "In [the course of] submissions, I adverted to the possibility that Mr Howse was confusing the *Lee* discretion with the *Cleland* discretion [*Cleland v The Queen* (1982) 151 CLR 1, extending the *Bunning v Cross* discretion to confessions]. Assuming that there was illegal conduct on the part of police, I am satisfied that the public interest in bringing a wrongdoer to justice outweighs the appearance of curial support of police illegality. The police illegality in this case is minor and is based on a rule [the reference is clearly to Police General Order Q2.5.3] that needs re-writing for the reasons given above."

I note that the 'public policy' discretion is not limited to police illegality; it embraces police impropriety. See the discussion in *Ridgeway v The Queen* (1995) 184 CLR 19 at 36-37. Failure to comply with Q2.5.3 did not involve illegality, but impropriety. Although it does not seem to have been explicitly referred to in this case, illegality in the police questioning lay in the failure to

comply with the requirements of par(b) of s140 of the *Police Administration Act*; this required Constable Lindsay, before questioning the appellant, to inform him that he could communicate with a friend or relative, and to defer questioning him for a reasonable time while affording him reasonable facilities to enable him to seek that communication.

The proceedings on appeal

As noted earlier, the appeal challenges the convictions on the sole basis that the incriminating admissions were wrongly received into evidence.

(1) The submissions on appeal – the appellant's submissions

(a) Voluntariness of the admissions

Before turning to the submissions, I note that from early times at common law, a confession was received in evidence on the basis that it was trustworthy and probative evidence, the rationale usually advanced being that it is improbable in ordinary circumstances that a defendant would falsely state that which tends to incriminate him and expose him to punishment; see *Sinclair v The King* (1946) 73 CLR 316 at 334, per Dixon J. Accordingly, the *circumstances* in which the confession came to be made were all-important; it was considered that they had to be such as to assure its trustworthiness, thus maintaining the underlying rationale for admissibility. If the circumstances were *not* such as to assure its trustworthiness, the danger that the confession was unreliable could lead to its exclusion, lest its admission led to a wrongful conviction. Hence the distinction, drawn over 200 years ago in *R v Warickshall* (1783) 1 Leach 263 at 263-4; 168 ER 234 at 235:

> "A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers …[whereas] a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected".

The test - whether the circumstances had assured the trustworthiness of the confession - was whether it was made voluntarily. Voluntariness was the gatekeeper for reliability. The rules to determine voluntariness were spelled out in *R v Lee* (supra) at 144, viz:

> "… such a [confessional] statement may not be admitted in evidence unless it is shown to have been voluntarily made in the sense that *it has been made in the exercise of free choice and not because the will of the accused has been overborne* or his statement made as the result of duress, intimidation, persistent importunity or sustained or undue insistence or pressure, and (2) that such a statement is not voluntary if it is preceded by an inducement, such as a threat or promise, held out by a person in authority, unless the inducement is shown to have been removed. These two 'rules' are, of course, well established, but it is important, we think, in this case to observe that they seem to be not really two independent and co-ordinate rules. *There seems to be really one rule, the rule that a statement must be voluntary in order to be admissible.* Any one of a variety of elements, including a threat or promise by a person in authority, will suffice to deprive it of a voluntary character." (emphasis added)

So the essence of voluntariness, the test for reliability, lay in the confession being made in the exercise of the confessionalist's free choice; the antithesis of that free choice, an overbearing of his or her will however that occurred, rendered reliability dubious.

A separate reason for voluntariness being treated as the litmus test for admissibility is the existence of the privilege against self-incrimination; on

this right to remain silent when questioned see *Petty v The Queen* (1991) 173 CLR 95 at 99.

The common law requiring that incriminating admissions be made voluntarily if they are to be admissible in evidence, applies in the Territory; cf. now the *Evidence Acts* 1995 of the Commonwealth and New South Wales, which focus instead on misconduct (s84) and reliability (s85). Relevant propositions relating to the requirement of voluntariness (and to the exclusionary discretions) are usefully summarized in *MacPherson v The Queen* (1981) 147 CLR 512 at 519-520. It is clear in the Territory that the prosecution must prove that the admissions relied on were made voluntarily, the standard of proof being the balance of probabilities: *Wendo v The Queen* (1963) 109 CLR 559, *R v Warren* [1982] 2 NSWLR 360, *R v Cumes* (1990) 102 FLR 113 at 116. Proof of voluntariness has been said to be required for a variety of policy reasons: the unreliability of enforced or induced admissions, the existence of the privilege against self-incrimination, and a desire to control improper police practices; see *R v Toomey* [1969] Tas. S.R. 99.

I turn to the appellant's submissions. In summary, Mr Thomson of counsel for the appellant advanced the same line of argument as that put before his Worship.

He submitted that to establish that the admissions were made voluntarily the prosecution must prove *as a legal requirement* that the appellant *knew* before he made those admissions that he had the right to speak or to remain

silent, and that he then spoke in the exercise of that right; for this proposition he relied on *Collins v The Queen* (1980) 31 ALR 257 at 274-275 per Muirhead J. I note that it has been said at various times in various jurisdictions that to speak in the exercise of a free choice to do so, the confessionalist must understand that he or she had such a choice in the first place, because to exercise a choice predicates an awareness that the choice exists. For example, see in Papua New Guinea, *R v Toronome-Tombarbui* [1963] P&NG LR 55 at 63; in Queensland, *R v W* [1988] 2 Qd. R 308 at 314; in Victoria, *R v Li* (supra) at 87 and *Nguyen* (1995) 78 A Crim R 582 at 586; and in this jurisdiction, *Collins v The Queen* (supra) at 274-5 (Muirhead J) and 322 (Brennan J), followed by me in *Butler (No.1)* (1991) 57 A Crim R 451 at 452 and 455, and *R v Cumes* (supra) at 127.

The relevance to the voluntariness of admissions of the confessionalist's lack of awareness that he had a free choice to speak or to be silent, was discussed most closely by the Court of Criminal Appeal in New South Wales in *Azar* (1991) 56 A Crim R 414 at 418-420. It appears from that authority that in that jurisdiction the fact that at the time a confessionalist speaks he is not aware that he can choose not to speak, does *not* prevent his confession being categorized as voluntary, though his lack of awareness of his right to silence may be significant on the question whether his will was overborne. After noting that what will render a confessional statement involuntary is usually "some matter external to the accused" Gleeson CJ said at 419-420:

> "8. It is also important to note that what is involved is an inquiry as to the *accused's will*, rather than as to the *accused's state of knowledge, including knowledge of his legal rights*. What a person knows or does not know may be relevant, as an evidentiary fact, to

the question whether the person's will has been overborne, but knowledge or belief, on the one hand, and will, on the other hand, are different concepts.

9. There is no justification for the proposition that a statement is voluntary in the relevant sense only if the maker of the statement was aware, at the time it was made, that the law offered a choice between speaking or remaining silent. Admissions are frequently made by accused persons, often to persons other than police officers, and sometimes to police officers, in circumstances where the maker of the statement is uninterested in, and unaware of, the legalities of the situation. Indeed if, as has been noted above [citing *R v Kempley* (1944) 44 SR (NSW) 416; *R v Owen* [1951] VLR 393, *R v Travers* (1957) 58 SR (NSW) 85, and *R v Zion* [1986] VR 609], a statement may be voluntary even though made pursuant to a legal obligation, a fortiori a statement may be voluntary even though the maker is unaware of what the law requires." (emphasis added)

His Honour then referred to *Stapleton v The Queen* (1952) 86 CLR 358 at 375

and continued :

"10. There are numerous statements in the law reports to the effect that a confessional statement to a police officer is not inadmissible merely because no caution has been administered. *It is hardly likely that those statements were intended to apply only in the case of an accused person who knows of his right to silence even without a caution.*

On the other hand, *a person's awareness, or lack of awareness, of his right to silence may be of practical or evidentiary significance* if an issue arises as to whether the person's will has been overborne, for example, by police officers in the course of questioning. Whilst the failure of police to caution a suspect before questioning is often relied on as a reason for rejecting evidence of admissions on the grounds of unfairness, it may also be of factual relevance to the question of voluntariness: *Banner* [1970] VR 240 at 247; *Van der Meer* (1986) 35 A Crim R 232 at 237. Just as the fact that a person is mentally handicapped may be of relevance to an argument that his will has been overborne, so also the fact that a person is unaware of his legal rights may, in combination with other facts and circumstances, be relevant to such an argument. However, mentally handicapped people can make voluntary admissions (*Sinclair* (1946) 73 CLR 316) and so can people who are unaware of their legal rights." (emphasis added)

A similar view was subsequently taken in this jurisdiction in *R v Nundhirribala* (1994) 120 FLR 125 at 132-3. Having reconsidered the question, I am persuaded that the approach in *Azar* (supra) and *R v Nundhirribala* (supra) is correct, for the reasons stated by Gleeson CJ, and should be followed in this jurisdiction. If the appellant did not know at the time he made the admissions that he had the right to speak or to be silent, that lack of knowledge did not per se render his admissions involuntary, though it "may be of practical or evidentiary significance" in determining whether he spoke in the exercise of a free choice. I reject Mr Thomson's submission (p18).

Mr Thomson submitted that parts of the transcript of the voir dire proceedings before his Worship showed that Constable Lindsay, then a Police officer for 8½ years, considered that the appellant was a person to whom the *Anunga* guidelines applied. I consider it is obvious that they do; they are "general guidelines for the conduct of police officers when interrogating Aboriginal persons" – see *R v Anunga* (supra) at 413. Constable Lindsay agreed in cross-examination with the proposition that the appellant was "not as fluent in English as the average white man of English descent", though he considered that the appellant "does speak very good English on a Port Keats standard", that being a place where the inhabitants "do have a very good grasp of the English language in the majority of cases" though "somewhat less" than "the average white fellow at a footy match". I note that *Anunga* guideline (3) was intended to remove reliance upon such subjective assessments. He said that he was unaware on 25 October 1996 that the Police General Orders

obliged him to have the appellant "read back" the terms of the caution, phrase by phrase; in fact, they do not - "read back" was the expression used in cross-examination by Mr Howse, quite misleadingly, since both *Anunga* guideline (3) and Police General Order Q2.5.3 (see p13) require that the appellant be asked to explain what the caution meant. However, it is clear that his Worship was well aware of what the *Anunga* guideline and Police General Order required in that regard; see p12.

Police General Order Q2 of May 1992 is directed at "Questioning people who have difficulties with the English language - the '*Anunga*' guidelines". I note that the raison d'etre for the *Anunga* guidelines as regards Aboriginals, is *not* limited to language difficulties. Mr Thomson submitted that Constable Lindsay had demonstrated that in the interview he had ignored *Anunga* guideline (3) and Police General Order Q2.5.3. I consider it is clear that he did not apply the *Anunga* guidelines or General Order Q2, in any meaningful respect.

Mr Thomson noted that in *R v Nundhirribala* (supra) at 134 Mildren J considered that where the *Anunga* guidelines apply to an accused who is having the caution explained to him, his answers such as "yeah" to questions like "Do you understand that?", are "virtually worthless". I respectfully agree; see p32. His Honour considered at 134 that the "most important part of [*Anunga*] guideline (3)" is that an "interrogation should not proceed until the Aboriginal [being questioned] had an apparent understanding of his right to remain silent". I respectfully agree; I consider that that is the fundamental

purpose of Police General Order Q2.5.3, and *Anunga* guideline (3). For a police officer to continue with an interrogation in the absence of such an objectively established "apparent understanding" is to run the risk that admissions thereby obtained will be excluded, as was made clear in *R v Anunga* (supra) at 415. Of course, exclusion does not automatically follow – see *Gudabi v The Queen* (1984) 52 ALR 133.

Mr Thomson submitted that here the appellant's answers of "yeah" and "no" to Constable Lindsay's questions intended to inform him of his right to silence (p4), were indicative of exactly the sort of evil that the *Anunga* guidelines were directed at. His answers were examples of what has been called "gratuitous concurrence" by Professor Eades in her article 'Aboriginal English and the Law' (CLE Dept., Queensland Law Society Inc., 1992) at pp51-54. With reference to the questioning of Aboriginal people in police and courtroom situations Professor Eades explains "gratuitous concurrence" in this way at p51:

> "Often it seems that the Aboriginal person thinks that if they agree with whatever the non-Aboriginal person in authority is suggesting, then they will get out of trouble more quickly. The agreement is made regardless of either an understanding of the question or a belief about the truth or falsity of the proposition being questioned. Thus, it does not necessarily mean the Aboriginal person agrees with the proposition."

I accept that the phenomenon of "gratuitous concurrence" in these circumstances is well-established, as Forster J pointed out in *R v Anunga* (supra) at 414, and the possibility that it occurred here is not excluded.

Mr Thomson further submitted that although the answer "Judge" to the question (p4) "Who might listen to these tapes in Court?" was correct, it did not establish that the appellant was aware of his right to remain silent when being questioned. That is correct.

Mr Thomson submitted that the Magistrate's finding that the answer "No" to the question "So do you have to answer my questions?" demonstrated that the admissions were voluntary, constituted an error in law. This was because both this and the preceding question and answer (see p4) were wholly insufficient to demonstrate that the appellant understood his right to silence and was able to exercise a free choice to speak or be silent. That is correct, but as noted at p11 his Worship relied on 4 further matters as well as those questions and answers.

Mr Thomson submitted that the Magistrate's finding (p12) that the appellant "has a practical understanding of English no worse than the average white man of English descent", was against the weight of the evidence. I referred at p21 to Constable Lindsay agreeing that the appellant was "not as fluent in English as the average white man of English descent". Mr Thomson also noted a question directed to Officer Perdjert:

> Q. "He can hold a conversation in English quite okay. But Constable Perdjert, because his English isn't as good as a white man's English, if he had to hold a conversation about things that were a little bit complicated, he might find that hard, mightn't he?
>
> A: Might find it very hard, say."

There is a practical distinction between fluency in English or ability to "hold a conversation" in English on the one hand, and the notion of a "practical understanding of English" on the other. It will be recalled that his Worship had listened to the tape of the interview, and formed his evaluation solely on that basis. I have also listened to the tape, and consider that his Worship's assessment is not clearly wrong.

Mr Thomson submitted that the absence from the interview of an interpreter and a 'prisoner's friend' was a consideration relevant both to the voluntariness of the admissions and to the exercise of the exclusionary discretion. I agree. He submitted that the appellant's right to silence could have been exercised and protected by the presence of an interpreter who could have ensured that he understood his right to silence, or by the presence of a 'prisoner's friend' who could have assisted the appellant to exercise that right by offering him support or assistance. I agree; see pp27-28.

It seems clear that Constable Lindsay – and his Worship – considered that the appellant's English skills were at such a level that the presence of an interpreter would have been superfluous, and the appellant was outside the situations envisaged by *Anunga* guideline (1) and Police General Order Q2.5.1 (see p26). The matter of having a 'prisoner's friend' present was never explicitly raised by Constable Lindsay with the appellant in those terms; he

asked the appellant (p3) if he "wanted someone to sit with" him, and he said that he did not. There is nothing to suggest that the role of a 'prisoner's friend' was explained to the appellant, as required by Police General Order Q2.7.4.1; see also p27.

Anunga guideline (1) deals with interpreters, viz:

> "When an Aboriginal person is being interrogated as a suspect, unless he is as fluent in English as the average white man of English descent, an interpreter able to interpret in and from the Aboriginal person's language should be present, and his assistance should be utilized whenever necessary to ensure complete and mutual understanding."

Police General Order Q2.5.1 adds a gloss to this:

> "Notwithstanding that the suspect may speak some English, an interpreter should be present, and the interpreter's assistance utilised whenever necessary, in order to ensure complete and mutual understanding."

Anunga guideline (2) deals with the concept of the 'prisoner's friend' and is accurately summarized by Police General Order Q2.5.2, when persons are being questioned as suspects, viz:

> "Where practicable, a "prisoner's friend" should be present. This may be the same person as the interpreter. The friend should be someone in whom the suspect has confidence, and by whom the suspect will feel supported."

This has since been amplified in the case-law; see pp27-28.

Mr Thomson noted Constable Lindsay's offer (p3) to the appellant of "help in your own language" from Officer Perdjert, if he had "any problems with [any] questions … [or] … if you don't understand". He submitted that Officer Perdjert was a person totally inappropriate to perform such a role, citing Brennan J (as he then was) in *Collins v The Queen* (supra) at 322 on the inutility of a 'prisoner's friend' selected by the police, rather than by the appellants, viz:

> "The presence of Armstrong [the 'prisoner's friend'] does not advance the prosecution case. *A prisoner's friend is intended to enhance the suspect's ability to choose freely whether to speak or to be silent.* Bobby Armstrong became, from the beginning of each of the interviews with Collins, Williams and Woods, an interpreter acting in response to police instruction, and he was manifestly not available for private consultation with any of the appellants to whom he was translating the introductory remarks of Sergeant Chung." (emphasis added)

I consider that Officer Perdjert at the interview was a 'person in authority' and to use him in the role suggested by Constable Lindsay would have been fraught with peril for the prosecution; see *R v Dixon* (1992) 28 NSWLR 215 at 221-223.

I consider that a 'prisoner's friend' is intended to serve a useful purpose at a police interview, and is not simply "a piece of appropriate furniture" in the room, as Muirhead J graphically put it in *Rockman v Stevens* (1981) 1 Abor. Law Bull. 6. In his article in (1997) 21 Crim LJ 7, Mildren J said at 10:

> "In *Butler (No 1),* Kearney J emphasised that the prisoner's friend should be aware of the respective rights and duties of the police and of the suspect in the interview, so that he or she can ensure that the suspect is

> aware of the possible consequences of his or her answers; the friend should be seen to be independent of the police and have a temperament such that he or she is not intimidated by the interviewing environment; and the friend should be able to speak the suspect's principal language. For the suspect's choice of friend to be an effective one it is clear that the suspect as well as the friend must know what function it is that the friend is to perform, so as to avoid the danger that the choice will be an entirely inappropriate one. The accused should be told that the function of the friend is to act in an advisory role to the accused and to assist him or her to understand the matters which the police wish to speak about, that preferably the friend should be someone who is able to speak the same language, and someone who is also reasonably fluent in English. The suspect should be told that the prisoner's friend should be someone that he or she trusts and has confidence in, and will feel supported by. The suspect should also be told that he or she will be afforded the chance to speak privately to the friend before any formal record of interview takes place, that the suspect should choose someone who is aware of the rights of a suspect and the rights and duties of police when interviewing suspects, that the friend should be someone independent of the police, someone not likely to be afraid of the police and someone not involved in the investigation either as a suspect or as a witness. (See *Weetra* (1993) 93 NTR 8 at 11). Clearly this explanation should be recorded in the most common Aboriginal languages as should the explanation of the friend's role by the police to the friend, and copies of those recordings should be available in all police stations. Both explanations should be given at an appropriate time, and the explanations recorded, preferably on videotape in the case of serious offences. It is no use telling the accused what the friend's role is so as to help in making an appropriate choice, if the choice has already been made. It is of little use explaining to the friend and to the accused that they can have a private conversation, if the record of interview has already commenced. It is pointless giving an explanation of these roles in English, if neither the suspect nor the friend has a good command of English."

I respectfully agree that this passage states the objectives to be aimed at as regards a 'prisoner's friend', and the practical means to attain them. In practice, in the settlements, persons possessing some or all of the desirable qualities mentioned are often not available. Nevertheless, it is desirable that the person to be questioned be told about the 'prisoner's friend' in the detail

set out by Mildren J. In the present case, there is nothing to suggest that the appellant was told *anything* about the role and function of a prisoner's friend, as required by guideline Q2.7.4.1.

(b) Exclusion of the admissions – the 'unfairness' discretion

Before dealing with the submissions on the 'unfairness' discretion, I note that the relevant question on this aspect is stated in the headnote to *R v Lee* (supra), at 134 as:

> "…whether in all the circumstances it would be unfair to use the statement against the accused, *regard being had to the propriety of the means by which the statement was obtained.* If there has been some impropriety in the obtaining of the statement, *it is relevant to consider the likelihood or otherwise of its having led to an untrue admission.* If the judge thought that the impropriety was calculated to cause an untrue admission to be made, that would be a reason for exercising his discretion against admitting the statement. If, on the other hand, he thought that it was not likely to result in an untrue admission, that would be a good - though not a conclusive - reason for admitting the statement." (emphasis added)

It can be seen that this approach tended to focus attention on police behaviour, and on the reliability of the admission.

The question of unfairness, like the question of voluntariness, arises from the *circumstances* in which the confession was made; see *R v Lee* (supra) at 152. His Worship had to "form a judgment upon the propriety of the means by which the [confession] was obtained by reviewing all the circumstances and considering the fairness of the use made by the police of their position in relation to the accused": *McDermott v The King* (1948) 76 CLR 501 at 513 per Dixon J. In assessing the 'fairness' of police behaviour in this regard, the *Anunga* guidelines and Police General Orders issued under s14A of the *Police*

Administration Act (NT) by the Commissioner, provide a general yardstick; they indicate the standard of propriety to be observed by the police.

The 'unfairness' to a defendant which enlivened the *Lee* discretion to exclude the resulting confession was initially seen to lie in admitting in evidence against him a (voluntary) confession obtained from him by police by improper or unfair (but not necessarily unlawful) means; the focus was on what the police had done or not done, on the *nature* of their conduct.

Later the focus changed, concentration now being on whether the reception into evidence would be unfair to the defendant, in the sense that it would impinge on his right to a fair trial. Thus Dawson J in *Cleland v The Queen* (supra) at 30 considered that the unfairness by the police which would enliven the discretion must be such as "would preclude a fair trial".
His Honour considered that in turn this would arise *only* where "the evidence was in some way unreliable or untrustworthy", because of the way in which it had been obtained. The focus had changed from the *nature* of police conduct, to the *effect* of that conduct on the defendant; see *Van der Meer v The Queen* (1988) 82 ALR 10 at 26. The rationale for the unfairness exclusionary discretion now explicitly lay in the defendant's right to a fair trial, which could be jeopardised by the admission into evidence of a confession obtained in circumstances which cast doubt on its reliability and thereby increased the risk of his or her wrongful conviction, a consequence of significance not only to the particular defendant, but more widely to the maintenance of community confidence in the proper administration of criminal justice.

Still later, it was considered that 'unreliability' was not the *only* basis for discretionary exclusion on the basis of unfairness. The discretion would also be enlivened where the circumstances in which the confession was made may have had some material effect on the defendant – for example, by resulting in his making a confession which (however reliable) he would not otherwise have made at all. See *Duke v The Queen* (1989) 180 CLR 508, and the considerations treated as relevant to this issue in *Foster v The Queen* (1993) 113 ALR 1 at 8-10. This approach in the more recent authorities focuses on the extent to which the circumstances impact on the defendant's exercise of his free choice to speak or to be silent. In that situation the importance of an adequate caution which informs the defendant of his right to choose to speak or to be silent, is highlighted. It is clear that while the absence of a caution may result in exclusion, this does not necessarily follow; see *Stapleton v The Queen* (supra) at 375-6. Against this general background I turn to the submissions.

Mr Thomson submitted that if the admissions were held to have been made voluntarily - that is, made in the exercise of the appellant's free will to speak or to remain silent - they should nevertheless have been excluded from the evidence in the exercise of the Court's discretion, on the basis that to use them in evidence against the appellant on his trial would be unfair to him, for the reasons he had already advanced on the issue of voluntariness.

He submitted that in particular the unfairness lay in Constable Lindsay proceeding with his questioning, before the appellant had demonstrated that he understood that he had a right to silence.

He also submitted that the Magistrate had erred in law, in the course of exercising his discretion, in finding Police General Order Q2.5.3. was "wrong" (see p13). He submitted that, to the contrary, for the person being questioned to be asked to explain to the interrogator, in his own words, what he understood by the caution administered to him, was the best way to demonstrate that he understood that he had a right to silence. I have already indicated (p14) that I consider that his Worship erred in this respect.

In his reasons, at pp13-14, his Worship referred to the article by Mildren J in (1997) 21 Crim L J 7, which, inter alia, recommended better ways in which police could elicit information from Aborigines. At p11 of the article, dealing with the caution presently administered by the police prior to questioning an Aboriginal suspect, his Honour said:

"The main difficulties seem to be as follows:

1. It is common practice for the police to break up the caution, usually into three segments, and at the end of each segment to ask the suspect 'Do you understand that?', to which the subject will usually reply 'yes'. In most cases the value of that answer is nil. *It would be better to avoid the question 'Do you understand that?' completely, and instead to ask the suspect to repeat what has just been said in his or her words.*

2. There is a problem with the expression 'you are not obliged to answer any questions' which is often explained by police as 'you do not have to answer any questions'. Most Aboriginals have difficulty with the expression 'have to' and will frequently answer 'yes' if asked the question 'Do you have to answer my questions?' The reason for this may

be because the suspect uses the expression 'have to' to mean 'want to'. Alternatively, the suspect may be answering the question 'yes' out of politeness, or 'gratuitous concurrence' (see D Eades, *Aboriginal English and the Law* (Continuing Legal Education Department, Queensland Law Society Inc, 1992, p53) or may be using the expression 'have to' correctly. There may be cultural reasons why the suspect 'has to' answer the question'; pressure may have been brought to bear by relatives who do not wish to suffer 'payback' if he or she is not dealt with by the police. It would be better to avoid the expression 'have to' altogether. …

3. There is also a difficulty in the order in which the ideas and concepts are contained in the caution. Usually the first idea conveyed is that the suspect does not have to answer any questions. If a suspect is told that he or she can remain silent and in fact does so when invited to repeat back the caution, it may not be clear whether the suspect is exercising a right of silence or whether he or she is simply unable to repeat the caution. It is inherently contradictory to tell a suspect that he or she does not have to answer your questions and then insist upon an answer to the very question which the suspect has been told he or she does not have to answer. This could be avoided by rearranging the ideas contained in the caution in a more logical way.' (emphasis added)

His Honour later observed at p11 that -

> "I doubt if there is anything more difficult than trying to explain the caution in simple English"

and proceeded to suggest a process of questioning designed to ensure that the purpose of cautioning was better achieved, a process with which I respectfully agree.

(c) Exclusion of the admissions - the 'public policy' discretion

There is a discretion to exclude on the grounds of public policy a confession unlawfully or improperly obtained, though it is made voluntarily and its reception into evidence does *not* affect the fair trial of the defendant;

see *R v Ireland*, (1970) 126 CLR 321, *Bunning v Cross* (supra) and *Ridgeway v The Queen* (supra).

Mr Thomson submitted as follows. The Magistrate erred in law in the exercise of his exclusionary discretion, in finding (p15) that "the public interest in bringing a wrongdoer to justice" for bringing liquor into a restricted area and consuming it, outweighed "the appearance of curial support" for police impropriety which would flow from the admission of the evidence in question. The offences charged were minor in nature. The police interviewer was apparently 'ignorant' of the relevant Police General Orders, basic guidelines governing his everyday work. No evidence of the offences alleged, other than the admissions, had been attempted to be obtained, despite *Anunga* guideline (5) and Q2.5.5. To admit the admissions in those circumstances was to encourage continued abuse of power by the police. Most police, in the situation of Constable Lindsay, in practice had no difficulty in asking suspects to explain in their own words what the caution meant.

(2) The submissions on appeal - the respondent's submissions

Mr Rowbottam of counsel for the respondent submitted as follows. There was no "gratuitous concurrence" by the appellant in the interview, as submitted by Mr Thomson (pp22-23). See, for example the appellant's response "No" to the interrogator's question (p4) "So do you have to answer

my questions?"; "gratuitous concurrence", would have resulted in a "Yes" answer.

The lack of a 'prisoner's friend' had not been raised before the Magistrate by Mr Howse. It was clear from the record of interview (p3) that an offer to have a 'prisoner's friend' present was made to the appellant, who had rejected it. I consider that there is a vast difference as regards a 'prisoner's friend' between what was said at p3 and what *Anunga* guideline (2), Q2.7.4 – 2.7.6 and the subsequent case-law (pp26-28) indicate should be said.
Mr Rowbottam submitted that *Gudabi v The Queen* (supra) at 146 showed that the police cannot force a suspect to have a 'prisoner's friend' present; that is correct, but does not apply in the circumstances here.

The record of interview showed that the interrogator had questioned quite speedily, but the appellant's answers were meaningful and responsive in their context, and the dialogue showed that he was at ease. I accept that.
Mr Rowbottam submitted that the tone, inflection, length and detail of the appellant's answers were rightly considered by his Worship to indicate a level of understanding of English sufficient to indicate that they were given in the free exercise of his will, and were hence voluntary; I accept that his Worship's conclusion to that effect was correct.

On the issue of the exercise of the discretion to exclude, the appellant bore the onus of establishing that on the balance of probabilities the record of interview ought to have been excluded. I accept that. Mr Rowbottam submitted that the magistrate had exercised his discretion correctly, because the appellant had not discharged that onus.

Finally, *R v Gudabi* (supra) showed that failure by police to follow the guidelines does not automatically result in the exclusion of the evidence. I accept that.

Conclusions

I have already expressed my opinions on various issues, in the course of discussing the case and the submissions.

The two-fold rationale for the application of the guidelines set out in *R v Anunga* (supra) at 413 and 414, clearly applied in this case. First, even if Aboriginals understand English, they may not understand the concepts which English phrases and sentences express, because "their concepts of certain things and the terms in which they are expressed may be wholly different to white people". Second, as in *R v Anunga* (supra) at 414 -

> … "most Aboriginal people … will answer questions by white people in the way in which they think the questioner wants. … there is the same reaction when they are dealing with an authority figure such as a policeman. …Some Aboriginal people find the standard caution quite bewildering, even if they understand that they do not have to answer

questions, because, if they do not have to answer questions, then why are the questions being asked?"

The appellant clearly fell to be questioned in accordance with the *Anunga* guidelines. As Police General Order Q2.5.10 makes clear, police are to interpret those guidelines broadly, and apply them "at every stage of the investigation".

Speaking generally, the purpose of the *Anunga* guidelines and Police General Order Q2 is to ensure that Aboriginals are not intimidated when questioned by police, are properly treated when arrested, fully understand that they do not have to answer questions by police, have access *in every case* to a 'prisoner's friend', and access to an interpreter where appropriate. In *R v Anunga* (supra) at 415, the Court warned that "police officers who depart from [the *Anunga* guidelines] without reason may find statements are excluded." The question in this case is whether 'reason' has been shown for the departures from the guidelines which occurred. His Worship clearly believed (p15) that sufficient reason had been shown. I respectfully disagree; I consider that no substantial reason for the departures from the guidelines appears.

Several matters stand out. No interpreter was available at the interview; in practical terms, I consider that none was needed. The offer (p3) that

Officer Perdjert could help the appellant with matters he could not understand was inappropriate, because he was a 'person in authority'; the offer was no substitute for the presence of an interpreter or a 'prisoner's friend'.

The appellant was never informed in meaningful terms about the role and function of a prisoner's friend. There was no compliance by Constable Lindsay with guidelines Q2.7.4 – Q2.7.6.

The interview suffered the vice of the "Do you understand that?" and "Do you have to answer my question?" type of questioning, condemned as "simply not adequate" in *Anunga* guideline (3) at p7. The "great care" stressed in *Anunga* guideline (3) and Q2.5.3 as necessary when the caution is administered, was wholly lacking; importantly, no attempt was made to have the appellant state in his own words his understanding of the caution "You don't have to talk to me if you don't want to." The questioning continued thereafter despite the fact that it was never made objectively clear *in the record of interview*, in the way indicated by *Anunga* guideline (3) and Q2.5.3, that the appellant apparently understood his right to remain silent. Some parts of the questioning consisted of questions which suggested the answer wanted or expected; the "great care" to avoid such a formulation, required by *Anunga* guideline (4) and Q2.5.4, was not taken. There does not appear to have been any follow-up investigation, after the appellant's admissions, to obtain

independent corroborating evidence, in contravention of *Anunga* guideline (5) and Q2.5.5.

It is a basic obligation for members of the Police Force to be familiar with Police General Orders, and to apply them. Guideline Q2.7.3 makes it clear to police that "a relevant consideration in the exercise of the Court's discretion [to exclude admissions] is the lengths to which Police have gone in order to comply with the [*Anunga* guidelines]." Here there was a wholly inadequate attempt to comply with the guidelines.

(1) On the question of voluntariness

I do not consider that it has been shown that his Worship's conclusion that on the balance of probabilities the admissions were made voluntarily, in the sense that the appellant freely chose to speak when questioned by Constable Lindsay, and his will in that regard was not overborne, has been shown to be wrong. The admissions were thus admissible in evidence, as a matter of law.

(2) On the question of discretionary exclusion

The case was argued on the traditional basis that the *Lee* discretion and the *Bunning v Cross* discretion were *separate* exclusionary discretions, requiring separate consideration. It appears, however, from the recent

decision of the High Court in *R v Swaffield* (unreported, 20 January 1998) that the question of discretionary exclusion at common law requires consideration whether a voluntary confession obtained by some impropriety or illegality by police is thereby of dubious reliability; and, if not, whether this voluntary and reliable confession should be received in evidence requires consideration in terms of –

> "… an overall discretion which might take account of all the circumstances of the case to determine whether the admission of the evidence or the obtaining of a conviction on the basis of the evidence is *bought at a price which is unacceptable, having regard to contemporary community standards*." (emphasis added)
>
> (see Toohey, Gaudron and Gummow JJ at p36)

This approach sees what was formerly the 'fairness' discretion as applicable only in cases where police conduct results in a voluntary confession of dubious reliability, such that it would be unfair to use it at trial. What was formerly the 'public policy' discretion applies when considering the reception of a voluntary and reliable confession; it involves consideration of the kind and degree of the police impropriety or illegality which resulted in the confession, the weight of the factors relevant to the public interest depending on the nature of the charge and the circumstances of the case.

As the exclusion involves a discretionary decision, I bear in mind that on appeal vitiating error in fact or law must be shown, there is a strong

presumption that the decision was correct, and it must be shown to be plainly wrong. See generally *House v The King* (1936) 55 CLR 499 at 505.

The failure to comply with the spirit of the *Anunga* guidelines and of the Police General Orders, including the failure thereby to make it clear to the appellant that he had a free choice to speak or to be silent, and the failure to comply with s140, did not in my opinion render his voluntary admissions unreliable in any way; accordingly they should *not* be excluded from the evidence on the basis that their reliability is dubious. Insofar as the *Lee* discretion applies in this situation, the admissions were rightly not excluded in the exercise of that discretion. Reception into evidence of the admissions does not involve a risk of the appellant being improperly convicted.

As to what formerly was the 'public policy' discretion, I note that s143 of the *Police Administration Act* provides that where, as here, evidence is obtained in breach of s140 of that Act, it may nevertheless be admitted –

> "… if, having regard to the nature of and the reasons for the non-compliance … 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."

His Worship's conclusion not to exclude on the 'public policy' ground miscarried, because of the errors identified at pp14-15. Accordingly, it is necessary to consider afresh whether the admissions should be excluded. I

consider that they should, in light of the existence of, and non-compliance with, the *Anunga* guidelines and those in Police General Order Q2, in all the circumstances of the case.

A weighing process is necessarily involved both in the application of s143 and in the exercise of the "overall discretion" referred to in *R v Swaffield* (supra). On the one hand, the public interest against sanctioning unlawful or improper conduct by police; on the other, the public interest in ensuring that relevant evidence is received and guilty criminals are punished. Have the convictions here been bought at too high a price?

Here it cannot be said that the failure to observe the guidelines occurred despite reasonable efforts to do so, or that the failure amounted to a technicality in the sense that it had little impact on the appellant. No reasons for the non-compliance with s140 have been adduced. The non-observance of the guidelines and of s140 appear to have been due to ignorance or simple disregard. As to the nature of the charges, in the circumstances of this case (where they were second offences) the appellant faced maximum penalties of $2000 or 12 months imprisonment; he was fined a total of $500, with $40 victim's levy.

In all the circumstances, bearing in mind the nature of the charges involved, I consider that the public interest that the *Anunga* guidelines and the

matters in Police General Order Q2 be observed in the investigation of crime (an essential safeguard for the protection of Aboriginal persons) in this case outweighs the goal of bringing this particular wrongdoer to conviction and punishment. To adopt what was said in *R v Ireland* (supra) at 335, these convictions, obtained by police conduct which was unlawful and improper when measured by s140 and the guidelines, were obtained at too high a price. In terms of *R v Swaffield* (supra), the convictions were bought at an unacceptable price, "having regard to contemporary community standards" as indicated by the *Anunga* guidelines and the Police General Orders. The admissions should have been excluded in the exercise of what was the 'public policy' discretion, and is now the "overall discretion" referred to in *R v Swaffield* (supra).

For these reasons, the appeal is allowed, the convictions of 1 May 1997 are quashed, and the fines and victims' levies imposed set aside. As it is clear that the admissions wrongly received into evidence constituted the whole of the incriminating evidence against the appellant the appropriate dispositive order, in lieu of the orders made below, is that he is not guilty of the offences charged, for lack of incriminating evidence, and is acquitted and discharged.

Orders accordingly.

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