

PARTIES: THE QUEEN
v
JIMBERRY

TITLE OF COURT: In the Supreme Court of the Northern
Territory of Australia

JURISDICTION: Supreme Court of the Northern Territory of
Australia exercising Territory jurisdiction

FILE N°: 97 of 1993

DELIVERED: Delivered at Darwin 3 February 1994

HEARING DATES: Heard at Darwin 13, 14, 15, 16 September 1993

JUDGMENT OF: Mildren J

CATCHWORDS:

CRIMINAL LAW: Voir dire: Admissibility of confessional
statement; accused's right of silence; test for voluntariness.

CRIMINAL LAW: Voluntariness of confession; Anunga guidelines
- need for presence of interpreter and a prisoner's friend;
qualities necessary to be present in prisoner's friend; non
compliance with requirement to inform prisoner of his right to
communicate with a friend or relative to advise whereabouts;
non provision of legal representative when requested.

Statutes

Evidence Act s26L
Criminal Code s192(1), (2), (4)
Criminal Code s 188(1), (2) (a), (b), (c)
Police Administration Act s140(b), s137, s141

Cases

The King v Lee (1950) 82 CLR 133
R v Anunga (1976) 11 ALR 412
R v Weetra (Unreported NT Supreme Court, 7.12.93 Mildren J)
Williams v The Queen (1986) 161 CLR 278

REPRESENTATION:

Counsel

Crown: J Karczewski
Defendant: R Davies

Solicitors

Crown: DPP
Defendant: NAALAS

Judgment Category classification: CAT B
Court Computer Code: 9308403
Judgment ID Number: MIL94005
Number of pages: 12
Local Published

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

Nº 97 of 1993
(9308403)

BETWEEN:

THE QUEEN

Plaintiff

AND:

ROY JIMBERRY

Defendant

CORAM: Mildren J

REASONS FOR DECISION

(Delivered 3 February 1994)

This is an application, pursuant to s26L of the *Evidence Act*, to rule on the admissibility of two confessional statements made by the accused to police on 29 April 1993. After hearing evidence and submissions, I held that neither of the confessional statements were voluntary and I said that I would publish my reasons at a later time. These are those reasons.

The accused, a full-blood Aboriginal, was charged with unlawfully assaulting E.R. with intent to have carnal knowledge of her, contrary to s192(1) of the *Criminal Code*. The charge also alleged two circumstances of aggravation: (1) that the accused thereby caused bodily harm to E.R. (s192(2)); (2) that the accused thereby had carnal knowledge of E.R. (s192(4)). There was also an alternative count of aggravated assault (ss188(1),2(a)(b) and (k)).

The facts which the Crown intended to prove involved an incident which occurred on the evening of 28 April 1993 at a place called the Taxi Range, about 8-9 kilometres from Beswick Community, which is a "dry" community. The place is so called as it is the boundary of the restricted area, and is the place where members of the community returning to it with alcohol alight from taxis. It is a popular drinking spot. On that day,

the accused, E.R., and others had proceeded to the Taxi Range and retrieved a quantity of alcohol hidden in the bush. They consumed the alcohol throughout the afternoon and into the night. Both the accused and E.R. became quite intoxicated, and eventually were left alone together. It was at this time that it was alleged that the accused committed the alleged offences against E.R. After the alleged assault, E.R. managed to kick the accused in the chest and run off. Later, both E.R. and the accused were picked up by a passing motorist and driven into Beswick. The victim, who was noticeably bleeding from head wounds, went to the home of an acquaintance and asked him to take her back to the Taxi Range to continue drinking and he did so, but upon arrival, she complained of not feeling well, and asked to be taken to the Beswick Clinic where she was seen by a nursing sister. Thereafter, at 2218 hrs, the police at Maranboy were informed and Senior Constable Jenkinson and Constable Gibson attended at the clinic. After enquiries had been made there, a search was unsuccessfully made to locate the accused and the alleged crime scene. The following morning the accused was arrested by a police aide and taken to Maranboy Police Station. The exact time of arrest is not clear, but is likely to have been at about 7.00 a.m. At 0817 hrs, Senior Constable Jenkinson had a conversation with the accused at the police station which was recorded by a hand-held tape recorder. This was the first of the two confessional statements which I was called upon to consider. Mr Davies, who appeared for the accused, submitted that this confession was not voluntary because it could not be shown that the accused chose to speak in the exercise of a free choice to speak or to remain silent: *The King v Lee* (1950) 82 CLR 133 at 149. The same submission was made in relation to the second confession.

At the beginning of this conversation, Senior Constable Jenkinson administered a caution to the accused as follows:

"JENKINSON Roy, I want to ask you some questions about some trouble that happened last night with Vicki Robinson. Do you understand that?

JIMBERRY Yeah.

JENKINSON Talk up nice and loud for me if you can okay?

JIMBERRY Yes.

JENKINSON I must tell you first that you only have to answer my questions if you want to, do you understand that?

JIMBERRY Yeah.

JENKINSON Do you have to answer my questions?

JIMBERRY No.

JENKINSON If you do answer my questions your voice will go whatever you say will go on this tape and I might use this tape as evidence do you understand that?

JIMBERRY Yeah.

JENKINSON What might I do with this tape?

JIMBERRY (Inaudible)

JENKINSON What might I do with this tape?

JIMBERRY Hand it over courthouse."

It is obvious that no attempt was made at this stage to properly comply with the Anunga guidelines relating to the need to ensure that Aboriginal persons in custody fully understand the caution by seeking to get the accused to explain the various elements of the caution in his own words: see *R v Anunga* (1976) 11 ALR 412 at 414-5. After this, the accused was told that he was under arrest "for two warrants" and "also for that trouble last night," and after a few perfunctory questions about how he was feeling and when had he had his last drink, he was asked a couple of questions about "the trouble last night" between the accused and E.R. which led to certain admissions by the accused. Thereafter the following was said:

"JENKINSON Okay look we want to talk to you more about this in town okay who do you want to sit with you when we talk to you again, do you want someone to be with you? Who would you like to be with you?

JIMBERRY Don't know.

JENKINSON Who do you want to be you friend. Can you name someone from Beswick you'd like to have sit with you?

JIMBERRY I'll get my lawyer.

JENKINSON Sorry.

JIMBERRY I'll get my lawyer.

JENKINSON Your lawyer okay and um who else what about a friend from Beswick? Family, brother, father,

uncles?
 JIMBERRY I don't know.

JENKINSON Hey?
 JIMBERRY All my uncles died.

JENKINSON All of them, well what about a friend what
 about one of your friends.
 JIMBERRY Norman. I know Norman.

JENKINSON Norman Lane or Franky Lane.
 JIMBERRY Norman.

JENKINSON Okay if we can't get Norman how about Franky
 is he alright?
 JIMBERRY Norman.

JENKINSON Hey?
 JIMBERRY Norman.

JENKINSON Okay well we'll try and get Norman first
 alright? Okay. Okay what we'll do is Roy is
 we'll give you some breakfast alright and
 we'll put you in the cells for a little while
 okay while we go and talk to some other people
 alright so can you.
 JIMBERRY Yeah."

At no time during any of this conversation, was a prisoner's friend present. Senior Constable Jenkinson had no recollection of ever speaking to the accused previously. No interpreter was present.

This conversation concluded at 0821 hrs. Thereafter no attempt was made by the police to contact the Katherine Regional Aboriginal Legal Aid Service. The reason for this, according to Senior Constable Jenkinson, was that he was concerned to obtain a prisoner's friend for the accused, and thereafter, he forgot that he had asked for a lawyer. He similarly did not inform Katherine police about this request.

At about 11.30 a.m. Senior Constable Jenkinson and Constable Gibson attended at Norman Lane's house at Beswick. It is not clear what the police were doing between 8.21 a.m. and 11.30 a.m. Part of this time undoubtedly was taken up in travelling from Maranboy to Beswick, a distance of some forty kilometres by road, and in communicating with the Katherine CIB. The rest

of the time remains unexplained. When the police spoke to Norman Lane, according to Senior Constable Jenkinson, he asked Lane "if he would come and sit with Roy and be his prisoner's friend, to which Norman agreed." Senior Constable Jenkinson could remember nothing more of this conversation which was not recorded in any way - not even by notes in his notebook. After speaking to detectives from Katherine and completing certain statements, Senior Constable Jenkinson and Constable Gibson returned to Maranboy Police Station and provided meals to both Lane and the accused. Detective Senior Constables Farmer and Brown from Katherine CIB also went to Maranboy Police Station. Before the meal had been provided, Det Brown had a brief conversation with the accused to enquire if Lane was the friend he wanted and to inform him that they would be taking them both to Katherine after he had finished his meal to conduct a formal interview. No proper record was made of this conversation. At this time the accused was in a cell at the rear of the police station. Lane sat outside the cell. There is no evidence that Lane spoke to the accused at this time, although he was in the accused's vicinity for about half an hour. According to Lane, the accused did not speak to him at all. At 1305 hrs Detectives Farmer and Brown left Maranboy with the accused and Lane to drive to Katherine. At no time did the police comply with s140(b) of the *Police Administration Act*, which requires the police to defer any questioning of a person in custody until he is informed that he may communicate with a friend or relative to advise that person of his whereabouts.

Upon arrival at Katherine police station, the accused and Lane were placed in an interview room. There is no evidence as to what took place between Lane and the accused whilst waiting there. Detective Farmer spent about fifteen to twenty minutes preparing for the recorded interview which began at 1352 hrs and concluded about one hour later.

At the beginning of the record of interview, after a few formal questions, Det Farmer explained to Lane in the accused's presence his role as the prisoner's friend. The

accused was then asked a number of questions about his background, education, schooling, and language, and was told what the allegations against him were. After this, Det Farmer attempted to explain the caution to the accused in the manner set out in the Anunga guidelines. I use the word 'attempted' because I am not satisfied that the attempt was successful. The accused has only a very basic understanding of the English language. From time to time during the record of interview he appeared to be unable to understand what was being said to him, and there were a number of occasions when he conversed with Lane in various languages: Maiali, Creole and pidgin English. Det Farmer attempted to use Norman Lane to explain to the accused the concept that he had the right to decline to answer any questions. The critical parts of the interview on this issue were as follows:

"FARMER Alright. I just wanna explain now what your rights are Roy - Okay. You don't have to talk to me unless you want to. Do you know what that means?

JIMBERRY Yeah.

FARMER What does that mean?

JIMBERRY If you don't wanna talk to me I say yes.

FARMER Sorry?

JIMBERRY Yeah. Yes - you know.

FARMER I'll - I'll just explain again mate. You don't have to talk to me unless you want to. Do - do you know what that means?

JIMBERRY No.

FARMER Alright. That means exactly what it - what I say and that is that if you don't want to talk you don't have to talk. Do you understand that?

JIMBERRY Yeah.

FARMER Alright. What it means today is that you've got a choice - all right. You've got two things. You can decide yes I'm gonna talk to the policeman or you can decide no I'm not going to talk to the policeman. Its up to you. Alright.

JIMBERRY Yeah.

FARMER Do you understand that - you've got that choice?

JIMBERRY Yeah I'm gonna talk to the policeman.

FARMER Yeah but you - but you don't have to if you don't want to. Its up to you. You - you've got to decide. Do you want to talk or not talk - that's up to you. Okay. Can - Norman perhaps you can.

LANE Him - him ask you if like (inaudible) that question or you don't wanna talk - if you don't wanna talk you don't wanna talk, like that. You know what I mean?

JIMBERRY Yeah.

LANE So you can just - if you don't wanna talk (inaudible) you don't wanna talk but if you wanna say something that (inaudible). But if you don't wanna talk - you don't wanna talk.

JIMBERRY Yeah.

LANE You know what I mean?

JIMBERRY Yeah.

FARMER So do you understand now you've got that choice?

JIMBERRY Yeah.

FARMER Alright. Okay. So if you - if you do talk to me what we say is going to be recorded on these cassette tapes and on the video tapes. Do you understand?

JIMBERRY Yeah.

FARMER Alright.

JIMBERRY Right.

FARMER That's everything we say will be recorded here.

JIMBERRY Mmm - yeah.

FARMER Alright. And anything you say - or anything you do - is going to be recorded on the tapes and on the video camera.

JIMBERRY Yeah.

FARMER Alright. And later I might show these tapes or show this video tape to the judge in court. Do you understand that?

JIMBERRY Yeah.

FARMER Did - do you know what happens in court?

JIMBERRY Yeah.

FARMER What happens?

JIMBERRY You go to court and the - the judge gonna lock you up. The judge.

FARMER Yeah - the judge.

JIMBERRY Have a look at it - you know.

FARMER Have a look at it?

JIMBERRY Yeah.

FARMER Alright. So that's - that's gonna become the
 thing called evidence.
JIMBERRY Yeah.

FARMER Alright. And the judge looks at that and he
 decides what he's gonna do about this trouble
 when he looks at this tape or listens to this
 tape. Do you understand?
JIMBERRY Yeah - I understand.

FARMER Alright. So that what we say today is gonna go
 to court.
JIMBERRY Yeah.

FARMER Okay. Alright. I'll just go back to that first
 bit about that choice that you have - where
 you can choose to - to talk or not to talk. Do
 you understand what that all means - about the
 choice?
JIMBERRY Yeah.

FARMER What does that mean?
LANE If you wanna talk that means you wanna talk,
 but if you wanna talk, well just talk. That's
 your choice.
JIMBERRY Yeah.

FARMER Can you just tell me in your words just so I -
 I - I'm sure you understand that?
JIMBERRY Yeah I understand.

FARMER Yeah - alright. But I just - I just want you
 to tell me in your words Roy what that means -
 what I've explained about that choice? Just so
 that I know, and the judge knows, that you
 understand what your - your rights are.
JIMBERRY Yeah.

FARMER Okay. So you just tell me in your words what
 it means - that choice thing?
JIMBERRY (inaudible) for the evidence with my story.

FARMER Yeah. But do you have to talk to me if you
 don't want to?
JIMBERRY Yeah. Yeah - I'll talk to you.

FARMER Yeah - you'll talk to me but I just want you
 to make sure you understand that you don't
 have to if you don't want to - okay.
JIMBERRY Yeah.

FARMER Do - do you know that?
JIMBERRY Yeah.

FARMER If you - if you want to say I don't want to
 say anything else - we'll stop this right now.
 That's - that's how it works - okay. That's

the choice we have.
JIMBERRY Yeah.
FARMER Okay?
JIMBERRY Right.
FARMER So what do you want to do? Do you want to talk
about this or what?
JIMBERRY No I wanna talk - talk about this.
FARMER Okay. You don't want to stop?
JIMBERRY I don't wanna stop."

It is apparent that the accused was unable to explain in his own words that he had a free choice to speak or to remain silent. The best he could manage despite the valiant efforts of Det Farmer was to acknowledge by a simple "yeah" that he understood that this was his right. I am satisfied that the accused wanted to speak to the police, but that is not the point. As was observed in *The King v Lee* (1950) 82 CLR 133 at 149:

"The word 'voluntary' in the relevant connection does not mean 'volunteered.' It means 'made in the exercise of a free choice to speak or be silent.'"

I am far from satisfied that the Crown, upon whom the burden of proof lies, has established on the balance of probabilities that the first confession was voluntary in the relevant sense. No prisoner's friend or interpreter was present; no attempt was made to explain the caution in the manner suggested by this Court in *R v Anunga* (guideline 3); and the accused's command of English was not good. His negative answer to the question "Do you have to answer my questions" is to be contrasted with his inability to later explain the freedom of choice which the law allows him, and must be considered in this context. As to the video recorded record of interview at Katherine Police Station, by the time this commenced the accused had been in custody for seven hours. He had not been told of his right to communicate with a friend or relative as required by s140(b) of the *Police Administration Act*. When asked whom he would like as a friend, he had nominated a lawyer but this choice was ignored and denied to him. He was then taken to Katherine Police Station with his second

'choice' as prisoner's friend. No attempt was made, before he 'chose' Norman Lane, to explain to him the sort of qualities a prisoner's friend was expected to have: see *R v Weetra* (unreported, 7/12/93).

The accused was then taken from Maranboy to Katherine for the specific purpose of a recorded record of interview. He was not taken before a Justice or offered police bail. He was throughout in police custody and not free to go, and this was made clear to him. No real attempt was made to explain his right of silence until after the record of interview had begun. The police, in effect, presented him with a *fait accompli*, designed, albeit not deliberately, to weaken any resolve the accused might have had to exercise his right of silence had he so decided whilst at Maranboy. Nor must it be forgotten that the police in the Northern Territory have been given wide powers by statute to detain persons "for a reasonable period" for the sole purpose of interviewing them without the need to bring them before a justice. The powers conferred by s137 of the *Police Administration Act* create serious inroads into the liberty of the subject which the common law had jealously guarded (see *Williams v The Queen* (1986) 161 CLR 278), although some protection of those suspects who are charged with serious offences is now offered by the provisions of ss140 and 141. In cases involving full-blood Aboriginal persons with limited understanding of English held under the provisions of s137, if the provisions of ss140 and 141 are not complied with, if requests for a lawyer are ignored, if those arrested are detained for lengthy periods before any interview begins (irrespective of whether or not there are legitimate reasons for this), if the persons selected as a prisoner's friend is not the accused's true choice, and if, before the caution is administered the accused is taken away many kilometres from his community and is faced with a virtual *fait accompli* by a police expectation that there is to be a confession obtained, the question whether any confession so obtained is a voluntary one is sharply focused. In this case, even the language employed by Det Farmer, before the caution was administered, contained an assumption that the

accused would answer questions about the events of the evening before. For example, when explaining to Lane, in the accused's presence, what his role was, Det Farmer implied that there was about to be an interview with the accused about those matters in which the accused would participate:

"FARMER Alright. Just before we go any further I'll explain what your role here is today Norman. I'm gonna be speaking to Roy about a - an allegation that last night he - um - sexually assaulted a girl by the name of Vicki Robertson.

LANE Yes.

FARMER Okay. That's what I'm going to be speaking to him about.

LANE Yeah.

FARMER I'm gonna ask him some questions about that - alright. Do you understand that?

LANE Yes.

FARMER And what I say to him is going to be recorded on these tapes.

LANE Yes.

FARMER Okay. The reason I'm talking to him about this is that this trouble will have to go to the - before the court and a judge will have to decide what to do about the trouble. Do you understand that?

LANE Yes.

FARMER Alright. And for that reason the judge might want to listen to what Roy says today - about this trouble. Do you understand that?

LANE Yes.

FARMER So these tapes are gonna be played in court. Do you understand?"

Ultimately, the question for this Court is whether the Crown has proved on the balance of probabilities that the second confession was voluntary. The accused gave me the strong impression, on watching the video tape played in court, that he well-fitted the description in *R v Anunga* at 414 of an Aboriginal who is basically courteous and polite, and willing to answer questions by white persons in authority in the way he thinks the questioner wants. So much was evident, for example, by the way he described the length of the stick he thought he "might have" used, even though he continuously

maintained that he "might have" hit the victim with a stick or a stone and really did not remember whether he hit her at all, as he was blind drunk. Given the background which I have mentioned to the recorded interview at the Katherine Police Station, the accused's inability to properly explain back the caution, his limited understanding of English, and his apparent desire to assist the police by doing or telling them what he thought they wanted him to say or do, I was far from satisfied that the Crown had established, on the balance of probabilities, that that confession was voluntary.

Accordingly, both records of interview were rejected as inadmissible, and it was therefore unnecessary to consider the submissions made by Mr Davies that I ought to reject the confessions on other grounds.