

PARTIES: THE QUEEN

AND:

KENNY CHARLIE

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 NO: No 166 of 1994  
(9415651)

DELIVERED: 25 October 1995

HEARING DATES: 25-27 September 1995

JUDGMENT OF: MILDREN J

**CATCHWORDS:**

**Criminal Law** – Evidence – Confessions and Admissions – Admissions made prior to commencement of questioning to be recorded – Sufficient if relevant facts admitted are confirmed and electronically recorded – Police Administration Act 1978 (NT) s142(1)(a)

**Criminal Law** – Evidence – Confessions and Admissions – Aboriginal accused – Admissions sought from accused in absence of a “prisoner’s friend” – Non-compliance with “Anunga Rules” – Evidence not excluded for reasons of public policy or unfairness to accused

**Criminal Law** – Evidence – Confessions and Admissions – Admissions by accused during questioning – Accused not permitted to communicate with friend or relative prior to questioning – Non-compliance with Police Administration Act 1978 (NT) s140 – Non-compliance by police not deliberate – Evidence not excluded for reasons of public policy or unfairness to accused

**Criminal Law** – Evidence – Confessions and Admissions – Evidence inadmissible by virtue of non-compliance with Police Administration Act 1978 (NT) s140 – Admissions made by accused admissible in the interests of justice – Police Administration Act 1978 (NT) s143

**Criminal Law** – Evidence – Confessions and Admissions – Unprompted admissions by traditional aboriginal accused who was drunk and had been recently assaulted – Whether to exclude on grounds of public policy or unfairness to accused – Evidence potentially reliable in the circumstances therefore not excluded

**Criminal Law** – Evidence – Confessions and Admissions – Silence in face of accusations as evidence of guilt – Accused’s reaction whilst being assaulted not probative – Accused not on equal terms with assailant

**Criminal Law** – Evidence Relationship evidence – Evidence of prior assaults on deceased by accused – Relevant to identity, motive and intent – Probative value not outweighed by prejudicial effect

Legislation

Police Administration Act 1978 (NT) ss 140, 142, 143  
Evidence Act 1939 (NT) s 26L

Cases

R v Maratabanga (1993) 3 NTLR 77 at 91-92, mentioned.  
R v Anunga (1976) 11 ALR 412, applied.  
Bunning v Cross (1978) 141 CLR 54, referred to.  
Grimley v The Queen (CCA (NT) - 27 July 1995), applied.  
R v Mitchell (1892) Crim Law Cases 503, approved.  
Parkes v R (1977) 64 Crim App Rep 35, mentioned.  
R v Alexander (1994) 2 VR 249, mentioned.  
Petty v The Queen (1991) 173 CLR 95 at 107, mentioned.  
R v Horne (1990) CrimLR 188 at 189, mentioned.  
Basha (1989) 39 A Crim R 337 at 339, considered.  
Drozd (1993) 67 A Crim R 112 at 113, mentioned.  
Wilson v The Queen (1970) 123 CLR 334 at 337, followed.  
R v Hissey (1973) 6 SASR 280 at 288-289, followed.  
R v Mills (1986) 1 Qd R 77, explained.  
R v Longford (1970) 17 FLR 37, mentioned.

REPRESENTATION:

*Counsel:*

Crown:	M. Carey
Defendant:	R. Davies

*Solicitor:*

Crown:	DPP
Defendant:	KRALAS

JUDGMENT CATEGORY:	CAT B
JUDGMENT ID NUMBER:	MIL95019
NUMBER OF PAGES:	23

IN THE SUPREME COURT  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA

No. 166 of 1994  
(9415651)

BETWEEN:

THE QUEEN

Plaintiff

AND:

KENNY CHARLIE

Defendant

**CORAM: MILDREN J**

**REASONS FOR RULING**

(Delivered 25 October 1995)

The accused is charged with the murder of a young aboriginal woman with whom he was living in a loose de facto relationship. The alleged murder occurred on 11 August 1994 at Yanyula camp, Borroloola. The deceased's death occurred on a Thursday, the day after most Aboriginal people in the community receive their Social Security payments.

The accused is an Aboriginal who was born on 2 March 1973 at Mt. Isa. He spent five years at Burketown Queensland. His mother was a member of the Garawa people from Woolagarang, some 200kms east of Borroloola. The accused's mother separated from his father in approximately 1977 or 1978. Thereafter the accused was brought up in Borroloola, where he was raised by Johnson Timothy and Maurine Timothy, the parents of one Phillip Timothy. Johnson Timothy is a senior member of the Yanyuwa people and an Yanyuwa speaker. This language is the language of the Timothy household. The accused spoke both Yanyuwa as well as Garawa, depending upon the person with whom he was conversing. He also spoke English as a third language.

The accused was initiated in 1984 and has gradually become more involved in tribal ceremonies as he has got older.

The accused has attended Borroloola Primary School and also spent two years at Kormilda College between 1986 and 1987. He was not academically successful but he was good at sports. He speaks English in the way many Aboriginal speakers in the community from which he comes speak it and he has limited literacy. He has participated in a stockmen's course, has worked in 1993 for 3 months for the Borroloola Council and has had one week's work in 1994 at Woolagarang under the CDEP program.

On Wednesdays and Thursdays it is common for there to be a lot of drinking in the community at Borroloola. On the day of the deceased's death the accused had been drinking most of the day. The evidence varies as to how drunk he became but it suggests that by the time of the deceased's death he was significantly intoxicated. The evidence also suggests that the deceased was also significantly intoxicated, as were many, although not all, of the people in Yanyula camp.

Late in the afternoon the deceased and the accused were at the house of one Leonard Norman. There was an argument of some kind between the deceased and the accused. Mr Norman asked them to leave his house and they did so. Shortly afterwards the deceased and the accused were seen in the grounds near Mr Norman's house. The accused was seen to have left the deceased on the ground; alternatively to have dropped her on the ground. It is not necessary to go into the details of this evidence. As may be expected, there are many witnesses who saw certain things immediately before and immediately after the time when the deceased was injured. The deceased was fatally stabbed by a knife. There were two significant stab wounds – one to the chest and one to the back. These wounds were between 17 and 18 centimetres in depth. Either wound would have caused the deceased's death. There were a number of other wounds inflicted upon the deceased and it is not necessary to go into them in detail. By this time it was already dark. After dropping or lowering the deceased to the ground the accused went to another nearby house and was seen to have sat on the verandah. Some witnesses saw the deceased laying on the ground. There was a hue and cry. The accused's brother, Phillip Timothy, was summoned, as was the deceased's brother, Ronnie Miller. They assaulted the accused. The first assault

occurred on the verandah upon which the accused was sitting. This was carried out by Phillip Timothy who gave evidence during the voire dire hearing. He said that the accused was sitting cross-legged with his head down in a 'sorry' position. He said that he could see the accused fiddling with his fingers. He said that he thought that the accused was really drunk. At this time Phillip Timothy did not know that the deceased was dead but he believed that the accused had stabbed her. For reasons for which are not entirely clear he claimed that it was his duty to punish the accused for what he did. He said that he had grabbed the accused by the head and said: "What have you done?" and then banged the accused's head against the wall of the building. He said that he got no reply and that he did this several times. He then went away to find out how the deceased was and learned that she had died. He then returned to the accused who was apparently still in the same position. He grabbed him again and said: "You killed her, you fucking bastard." He then used more violence on him, punching him in the face. It appears that he may well have knocked out the accused on the occasion that he assaulted him the first time and possibly knocked him out again when he assaulted him the second time. Phillip Timothy lifted the accused up and dragged him over to Johnson Timothy's house. There he punched him in the face again, knocking him to the ground. Thereafter the accused was also punched and kicked in the face by Ronnie Miller. The accused was injured; indeed he received a fractured jaw and a swollen lip. Phillip Timothy gave evidence that he had assaulted the accused on previous occasions when it had been reported to him that the accused had assaulted the deceased. On those occasions, the accused had resisted him and proclaimed his innocence from any wrongdoing.

Phillip Timothy and Ronnie Miller held onto the accused until Constable Keith Currie arrived. This was about 7.08pm. Sgt Currie arrested the accused and put him into a paddy wagon and took him to the police cells. He reversed the vehicle to the cell doors, opened the back of the paddy wagon and then the following conversation occurred:

"CURRIE: Kenny, come on get out. Do you know why you are here?"

ACCUSED: Yeah.

CURRIE: Can you tell me please?

ACCUSED: Cut him, you know.

CURRIE: Kenny Charlie you have been arrested for cutting your wife Annette Miller. Is that clear?

ACCUSED: Yeah.

CURRIE: Anything you say about this trouble will be written down. Is that clear?

ACCUSED: (Nodded his head.)

CURRIE: That Judge and that law court will be told what you say. Do you understand?

ACCUSED: Yeah.

CURRIE: You do not have to talk about that trouble unless you want to, is that clear?

ACCUSED: (Nodded his head.)”

Whilst speaking with the accused Currie noticed a strong smell of intoxicating liquor on the accused. The accused was unsteady on his feet, and his speech was soft and slurred.

“CURRIE: Kenny, go into the cells and rest.

ACCUSED: Just cut him, got angry for the grog.

CURRIE: Kenny, are you alright?

ACCUSED: (Nodded his head.)

CURRIE: Do you want a doctor or nurse?

ACCUSED: (Shook his head.)”

This is the first conversation objected to. After this, the accused was seen by Dr Fitzpatrick at 8.54pm and by Nurse Cottee in the cells at 9.05pm. Doctor Fitzpatrick did not think that the accused had any serious injury at that time. He did not then diagnose a fracture of the jaw.

The conversation between Const. Currie and the accused was recorded by notes made by Const. Currie about one hour later. The conversation was not recorded electronically. There were no witnesses present. There was a no hand held tape recorder available at Borroloola at the time.

Dr Fitzpatrick knew the accused and knew him to be a heavy drinker. When Dr Fitzpatrick arrived at the cells the accused was asleep. He said that the accused was easily aroused and he carried out an examination of him. He noted that he was oriented in time place and person, that there was no double vision and that his nervous system was normal. He noted a swollen upper lip, left ear and left cheek. He noticed that the lower jaw was not tender and that there was no malocclusion of the teeth, and the teeth were not damaged. He noted that the accused smelt of alcohol. He considered that the accused would have been “half shot” two hours before. The injuries that he saw did not then suggest to him that there was a fracture of the jaw although he thought there was a possible fracture to the facial bones. He gave the accused antibiotics.

Shortly after Dr Fitzpatrick’s examination Nurse Cottee was asked to dress a laceration to the accused’s left ear. This was superficial but the ear itself was swollen and oozing blood. At the time of dressing the wound, Nurse Cottee did not notice or pay attention to the accused’s state of intoxication but noted that he smelt of liquor.

At 7.40am the next morning the accused was spoken to by Det. Baird. This conversation was tape recorded and was admitted as Ext p25 on the voire dire. The accused was asked if he knew why he was under arrest. His response is not entirely clear but as best as I can make it out he said: “Um, stabbing my wife.” He was then cautioned, following which there was a conversation:

“BAIRD: Now, Um as a result of you, ah being under arrest, ah, Kenny, we are now required to offer you the opportunity to contact any one ah would you like for us or Noel to contact anyone and ah notify them of your arrest and then your whereabouts, whether it be relatives or whoever. Who would you like us to contact?”

ACCUSED: My family.

BAIRD: Your family, and who in particular, Kenny?

ACCUSED: Philip.

BAIRD: Sorry?

ACCUSED: Ah my brother Philip.

BAIRD: Philip?

ACCUSED: Timothy.

BAIRD: Sorry?

ACCUSED: Timothy.

BAIRD: Timothy is it. Okay we'll ah we'll notify him as ah as soon as we can – alright. Alright now I'll also inform you that ah can you tell me firstly can you tell me what your wife's name is?

ACCUSED: Annette.

BAIRD: Annette?

ACCUSED: Miller.

BAIRD: Miller. Alright and ah again you don't have to answer any of my questions Kenny, if you don't want to, you understand that?

ACCUSED: Yeah.

BAIRD: Okay would you like to tell me what ah quickly what occurred last night?

ACCUSED: Can't remember.

BAIRD: You can't remember yet you said that when we first started this talk that you stabbed her, is that right?

ACCUSED: Yeah.

BAIRD: Okay what did you stab your wife with?

ACCUSED: Knife.

BAIRD: Okay can you tell me where that knife is now?

ACCUSED: Don't know where it is, don't know where I left it but (inaudible).  
Must be at that house that camp where I stayed.

BAIRD: And ah I will inform you now that ah as a result of the injury your  
wife sustained last night she has passed away and you ah do you  
understand that Kenny?

ACCUSED: No answer (sobbing heard on the tape)

BAIRD: Do you understand that are you able to answer that, you obviously  
understand by your reactions I think it is appropriate that I will  
now conclude this interview, the time is now 7.47am."

This conversation was also objected to by counsel for the accused.

Later on 12 August 1994 the accused was transported from Borroloola to Katherine Hospital. He was seen by Dr P.D. Young at the Katherine Hospital at 22.42 hours. His ear was redressed and he was prescribed aspalgin (a pain killer) and antibiotics. He was still suffering from a swollen mouth and jaw soreness.

At 9.45am on 13 August 1994 x-rays revealed a fracture to the lower jaw which would require further medical treatment. This was not urgent as the swelling was required to lessen first. The accused was still unable to eat as at Monday 13 August 1994.

The Crown sought to lead the evidence of the admissions made by the accused to Const. Currie and to Det. Baird. These admissions went to prove only that the accused was the deceased's assailant. There were no actual eye-witnesses to the assaults upon the deceased.

The Crown also sought to lead evidence from Phillip Timothy of the assaults carried out on the accused. The Crown submitted that the fact that the accused did not resist, and was silent and passive gave rise to the inference that it was the accused who killed the deceased, because it was evidence of a guilty mind from which the jury could infer that he was the assailant, and that the injuries were carried out to the deceased wilfully.

The Crown also sought to lead evidence of a violent relationship between the accused and the deceased. The Crown proposed to call evidence from Vincent Charlie, Carol Charlie, Chloe Mulholland, Leonard Norman and Phillip Timothy. This evidence was also objected to by counsel for the accused.

After hearing submissions for counsel I ruled as follows:

- (1) The admissions made to Det. Baird were voluntary, and complied with s142 of the Police Administration Act.

I declined to exercise my discretion to exclude these admissions on public policy grounds, although I found that Det. Baird did not comply with s140 of the Police Administration Act and the admissions were therefore illegally obtained.

I declined to exercise my discretion to exclude those admissions on fairness grounds, and I exercised my discretion to admit the admissions pursuant to s143 of the Police Administration Act.

- (2) The admissions made to Const. Currie were voluntary. The admissions made to Const. Currie were admissible pursuant to s142 of the Police Administration Act; but if I was wrong in that conclusion, I would exercise my discretion to admit those admissions pursuant to s143 of the Police Administration Act. I declined to exercise my discretion to exclude them on fairness grounds.

- (3) The evidence relating to the assaults on the accused by Phillip Timothy and Ronnie Miller were admissible as tending to show the accused's guilt, but were not relevant to any other issues in the trial.

I exercised my discretion to exclude that evidence on the basis that the evidence had only slight probative value which was outweighed by its prejudicial effect.

- (4) The evidence contained in the Statements of Vincent Charlie, Carol Charlie, Chloe Mulholland, Leonard Norman and Phillip Timothy as to previous assaults by the accused on the deceased (the relationship evidence) was admissible.

I declined to exercise my discretion to exclude that evidence.

I indicated that I would publish my reasons at a later time.

I now do so.

#### Admissibility of Admissions

The first question was whether the admissions made to Const. Currie were admissible. Section 142 of the Police Administration Act provides as follows:

#### “142. ELECTRONIC RECORDING OF CONFESSIONS AND ADMISSIONS

(1) Subject to s143, evidence of a confession or admission made to a member of the Police Force by a person suspected of having committed a relevant offence is not admissible as part of the prosecution case in proceedings for a relevant offence unless –

- (a) where the confession or admission was made before the commencement of questioning, the substance of the confession or admission was confirmed by the person and the confirmation was electronically recorded; or
- (b) where the confession or admission was made during questioning, the questioning and anything said by the person was electronically recorded,

and

the electronic recording is available to be tendered in evidence.”

Clearly Const. Currie was a member of the police force who suspected the accused of having committed a relevant offence. Despite Mr Davies’ submission to the contrary, I

found that the admission which the accused made was made before questioning began. Although some questions were asked before the admission was made, I did not consider that there was any “questioning” within the meaning of s142. The word “questioning” is not defined by the Act. The questions which were asked related only to whether the accused knew why he was arrested and if he knew what his rights were. Section 142 is designed to ensure that admissions made during questioning about the offence is recorded. I considered that “questioning” means questions about the circumstances of the offence: see R v Maratabanga (1993) 3 NTLR 77 at 91-2.

Clearly, it is not practical for police to have tape recorders in their hands at all moments when carrying out an arrest or putting prisoners into police cells. Section 142 envisages that admissions may be made either before or after questioning and clearly an admission volunteered by a suspect to a police officer before any questioning commences is covered by the provisions of the section. In those circumstances s142(1)(b) provides that the admission is inadmissible, subject to s143, unless the substance of the admission is confirmed by the suspect and the confirmation is electronically recorded.

Counsel for the Crown submitted that the substance of the confession was confirmed in the recorded interview between Det. Baird and the accused. The Crown’s submission was that the section is directed towards the substance of the admission, not the substance of the conversation which contains the admission. Counsel for the accused, Mr Davies, submitted that it is the conversation containing the admission which should be confirmed.

In my view it is sufficient if the relevant facts which are admitted are confirmed. It is not necessary to confirm the whole conversation. Section 142(1)(a) specifically uses the words “the substance of the admission”, indicating that it is the admitted facts which have to be confirmed not necessarily the conversation during which the admission is made. Contrast this with s142(1)(b) where “the questioning and anything said by the person” must be electronically recorded.

Section 142 provides that the electronic recording must be “available to be tendered in evidence.” I considered that this means that the electronic recording is both physically

available as well as admissible in evidence and not rejected by the trial judge in the exercise of his judicial discretion. The recording of the conversation by Det. Baird was physically available. The conversation however was objected to, both on the grounds of voluntariness and on discretionary grounds. It was therefore necessary to decide whether the conversation with Det. Baird was “available” in the sense that it was able to be tendered in evidence by the Crown at the trial. However before dealing with this, I should note that Mr Davies also submitted that the admissions made by the accused to Const. Currie was not voluntary. I rejected this submission. Although the accused was intoxicated and in some discomfort because of the assaults on him, I was satisfied that his statement was voluntary. I did not accept that he was invited by Const. Currie to speak as suggested by Mr Davies. In my opinion this was an unprompted blurting out of something that the accused himself wanted to say.

Before dealing with the admissibility of the admission to Const. Currie any further, it is necessary to deal with the admissibility of the admissions made to Det. Baird. Mr Davies submitted that the admissions made to Det. Baird were not voluntary. I rejected this submission. I was satisfied that the accused was properly cautioned. I did not accept the criticisms made of the administration of the caution by Mr Davies. I was satisfied that the Crown had shown on the balance of probabilities that the accused understood that he had a choice to speak or to remain silent and that he exercised his right to speak in the full exercise of his own free will.

As to the matters going to discretion, I was satisfied not only that the accused understood the caution, I was also satisfied that he understood that what he said was being recorded on a tape recorder and that the tape recording may later be used in court against him at his trial.

No interpreter was present. Having listened to the tape, I was not satisfied that the accused’s understanding of English inhibited his ability to fully understand the caution. I was not satisfied that the lack of an interpreter gave rise to any unfairness to him. The accused appeared to have a more than adequate ability to understand the English language.

However, Det. Baird sought admissions from the accused in the absence of a prisoner's friend. The explanation which was given for this was that Det. Baird only wished to locate the weapon. I did not find this a convincing explanation. Detective Baird began, after the caution, by asking the accused to tell him "quickly" what occurred on the previous evening. This is a very open-ended question which in my view should not have been put to the accused in the absence of a prisoner's friend. Clearly guideline 2 of the Anunga Guidelines R v Anunga (1976) 11 ALR 412 was not complied with. However I was not satisfied that there was any unfairness in the sense that the absence of a prisoner's friend in the circumstances was likely to have a given rise to an unreliable confession; nor was I satisfied that there was any unfairness to the accused in the sense that the accused could not have a fair trial.

I took into account the accused was in custody at the time; that he was under arrest; and that he was not able to eat. I bore in mind that he had been subjected to an assault on the previous day by Phillip Timothy and by Ronnie Miller, and I took into account his general background including his age, racial and cultural characteristics, and the fact that it was not shown that he is a hardened criminal with extensive experience of police questioning. On the other hand there was no evidence that the accused was in any significant pain or discomfort such as to make questioning of him entirely inappropriate, although his pain and discomfort were nevertheless relevant to be taken into account in combination with other factors. I took into account also that the accused was unable to eat at that stage although he could drink and a drink had been given to him. I bore in mind also that one question which Det. Baird put to him was probably misleading when Det. Baird said to the accused that the accused had said, when they first began the recorded discussion, that the accused had stabbed the deceased. Having listened to the tape I am not satisfied that the accused had said that. I think it is more likely that the accused was merely acknowledging that he understand the purpose of his arrest. Nevertheless he had said words to the same effect to Const. Currie and I was satisfied that Det. Baird was aware of that conversation. I noted also that the accused did not deny what Det. Baird had put to him although he clearly could have done so had he chosen to do so. Further, the accused did not deny by evidence on the voire dire the substance of the conversation which he has alleged to have had with Const. Currie, nor did he claim to have no memory of it. In all the circumstances I was not satisfied that there would be any unfairness to the accused to admit this conversation in evidence against him.

Counsel for the accused submitted that s140 of the Police Administration Act had not been complied with. That section provides:

“140. PERSON TO BE WARNED AND GIVEN OPPORTUNITY TO INFORM FRIEND OR RELATIVE OF PERSONS WHEREABOUTS

Before any questioning or investigation under s137(2) commences, the investigating member must inform the person in custody that the person –

- (a) does not have to say anything but that anything the person does say or do may be given in evidence;
- (b) make communicate with or attempt to communicate with a friend or relative to inform the friend or relative of the person’s whereabouts,

and, unless the investigating member believes on reasonable grounds that –

- (c) the communication would result in the escape of an accomplice or the fabrication or destruction of evidence; or
- (d) the questioning or investigation is so urgent, having regard to the safety of other people, that it should not be delayed,

the investigating member must defer any questioning or investigation that involves the direct participation of the person for a time that is reasonable in the circumstances and afford the person reasonable facilities to enable the person to make or attempt to make the communication.”

I was satisfied that s140 of the Act was not complied with. There was no evidence that Det. Baird held any belief in accordance with either ss(c) or (d) of s140. Furthermore, it is my view that s140 contemplates that it is the accused personally who is to be afforded the opportunity to make a personal communication. Often this can be done by making a telephone available to the suspect. In the circumstances of this case, it is unlikely that the accused could have rung any of his family members. Nevertheless the police could have gone to find the accused’s brother and to tell him that the accused wanted to speak to him. Although s140 refers only to telling the suspect that he may communicate with or attempt to communicate with a friend or relative to tell them of his whereabouts, the requirement of

the section to delay for a reasonable time, suggests that the section envisages that more is likely to be said than “I am at the Borroloola Police Station.” Clearly, one purpose of delaying the questioning is to enable the communication to be made or attempted; another, no doubt, is to see if there is any reaction to the information so departed to the friend or relative. I do not think that s140 is complied with if the police do the informing as agent, as it were, for the suspect. The language of s140 does not contemplate that and it implies that the suspect may ask his friend or relative to obtain some assistance for him. It may be that efforts to locate the person concerned are fruitless. Section 140 envisages this – it speaks of “attempts to make the communication”. If the police, after using due diligence, are unable to find the person within a reasonable time, the section contemplates that questioning may nevertheless begin.

Unlike s142, the provisions of the Act do not say what are the consequences of a non-compliance with s140. I consider that Parliament must have intended that non-compliance with the section has the same consequences as other illegally obtained evidence. Consequently a breach of s140 gives rise to questions both of public policy as well as questions of fairness: see Bunning v Cross (1978) 141 CLR 54.

The evidence before me indicated that Det. Baird did not realise the implications of s140 and thought that he had complied with the section. As the evidence on this topic was not challenged, I was bound to accept that explanation. I found therefore that Det. Baird made an honest mistake and that his conduct in proceeding to question the accused was neither a deliberate breach of the section nor a reckless one. In those circumstances there was no reason to exclude the admissions on public policy grounds. As to fairness, it was submitted that the accused’s brother already knew where the accused was. Indeed the brother had assisted in his arrest, knew that the deceased had died and knew that the accused was believed to have killed her. On the evidence before me he had this knowledge for at least 12 hours prior to the commencement of the interview. Clearly if the brother had wanted to do something on the accused’s behalf of his own volition, such as contacting Aboriginal Legal Aid to provide advice or to arrange for the accused’s bail, he might have done something about this already. There was no evidence one way or the other as to whether the accused’s brother in fact did make any attempt to contact a lawyer or Aboriginal Legal Aid in Katherine concerning the fact that the accused was being held in custody. It may be that the accused’s brother did not wish to do anything of his own volition. There was no

evidence before me as to whether, if the accused had been given the opportunity to speak to his brother personally, he would have asked his brother to have helped obtain legal advice for him. When the accused was ultimately seen by a lawyer from Katherine Regional Aboriginal Legal Aid Service, he was apparently advised, and as a result, chose to remain silent. But the accused appears to have reached his own decision about this by 2.15pm on the day following his arrest. I take into account that there is a chance, although evidence is lacking – that a proper compliance with s140 may have facilitated that choice for the accused at an earlier stage and perhaps before any questioning had begun. However I considered the chance to be slight bearing in mind the apparent antipathy between the accused's brother and the accused. On the other hand, the accused had been in custody already for some 13 hours. The accused had slept through much of this time. He was still asleep at 6.30am on 12 August and he was awake by 7.15am. Precisely when he awoke is not clear. The recorded interview began at 7.40am. The accused had at least some time to consider his position, assuming that he understood the caution given to him by Const. Currie. I considered it likely that the accused knew that he did not have to answer any questions from what Const. Currie had told him.

In the circumstances I was satisfied that there would be no unfairness in the sense that there was a likelihood of the confession being unreliable or in the sense of denying the accused a fair trial. I accepted the criticism made by Mr Davies that the accused had not been asked any questions about the circumstances under which he had stabbed his wife so as to give the accused the opportunity to provide any innocent explanation which may have existed. On the other hand that opportunity was given to the accused at a later time and he declined to answer any questions when in a position to do so in the form of a formal record of interview. I concluded therefore that in the circumstances I should decline to exercise my discretion to exclude this evidence. I considered, moreover, that the Crown had established on the balance of probabilities that, pursuant to s143 of the Act I ought to admit the conversation with Det. Baird into evidence in the interests of justice. In considering the interests of justice I bore in mind the fact that the police had made extensive enquiries into the circumstances of the deceased's death and did not intend to rely solely on the admissions, as required by Anunga guideline number 5. I also took into account that the accused was still suffering to some degree from the assaults the previous day, and had not been able to eat although he had been able to drink; that he had been given prompt medical attention and that the police later that day took him to Katherine for the purpose of having x-rays. There was nothing to suggest, particularly having listened to the tape, that the

accused's medical condition affected his ability to concentrate or his ability to speak properly. I took into account as well the fact that the interview was very short – a total of 7 minutes – so that there was no oppressiveness. Further I took into account that s142 was complied with and that there was no evidence of oppressiveness by the police and no evidence of any underhand unfair or improper tactics used. I noted also the accused did not in fact provide the police with any useful information in locating the weapon used. I took into account also the nature of the charge the accused faced, its seriousness, the limited use of the admissions to the Crown in that they went only to the identity of the deceased's attacker, the availability of other evidence to the Crown to prove identity, and the interests of the public in ensuring that the perpetrators of crime are brought to justice: see Grimley v The Queen (Court of Criminal Appeal, 27 July 1995, unreported, at pps37-38). In my view the admission of the evidence would not have been contrary to the interests of justice, and accordingly the statement made by the accused to Det. Baird was admitted into evidence.

It therefore followed that the admissions made to Const. Currie were admissible vide s142 of the Police Administration Act because the substance of the admission made to Const. Currie was confirmed by the accused in a conversation which was electronically recorded and that recording was available to be tendered in evidence.

Nevertheless, I was asked by Mr Davies to exclude the conversation with Const. Currie in the exercise of my discretion. Mr Davies submitted that the fact that the accused was intoxicated to the degree that he fell asleep soon after being placed in the cells; his physical condition following the assaults upon him, the circumstances surrounding the making of the note of the conversation by Const. Currie, and the words said to have been uttered by the accused when taken in combination lead to the conclusion that it would be unfair to admit the conversation into evidence at the accused's trial because the admissions made were, in the circumstances, unreliable, were not of much probative force and were more prejudicial than probative. Alternatively, reliance was placed by Mr Davies upon the wider concept of unfairness as discussed in Bunning v Cross (1978) 141 CLR 54.

The fact that the accused was intoxicated is not by itself, in my opinion, a sufficient reason to exclude an unprompted admission made by the accused, whether to a police officer or to anyone else, where the admission is not the result of questioning. There was no evidence

that the accused's injury interfered with his mental processes. I did not agree that the circumstances suggested that the admissions may be unreliable. As to the notes, the conversation was recorded within an hour of the making of the admissions. The conversation was very short. The admissions were made to a police officer who had lived in the community for several years and was familiar with the way in which English is spoken by Aboriginal persons in that community. I considered that there was little risk that Const. Currie may have misunderstood what the accused said. It was submitted that the admission was ambiguous in that it was not clear of whom the accused was speaking. I disagree. The circumstances make it plain that he was speaking of the deceased. There was no evidence before me that the accused denied the conversation or had no recollection of it.

As to the wider concept of unfairness as discussed in Bunning v Cross, there was no illegal, improper or unfair conduct by Const. Currie towards the accused.

Accordingly I declined to reject the admissions made to Const. Currie in the exercise of my discretion.

Alternatively, if I was wrong in my conclusion that the admission to Const. Currie was admissible vide s142 of the Act, I considered that the Crown had established that the admission of the evidence was not contrary to the interests of justice. If there were non-compliance with s142 the failure could only have been a failure by Baird to put the conversation with Const. Currie to the accused, and to have obtained his acknowledgment of it. Const. Currie could not have tape-recorded the conversation at the time, as he had no hand-held recorder. The conversation contained an unprompted and unexpected admission. The accused was not spoken to again until the following morning. The conversation was recorded by Const. Currie in the form of his notes within an hour. He had much else to do. There is nothing to suggest that the conversation may have been unreliably recorded by Const. Currie, that the accused had no memory of it or wished to deny it. The same admissions were made to Det. Baird the next day after a proper caution. Having regard to the observations in Grimley, supra, at pps37-46 and the factors there mentioned, I considered that I would have exercised my discretion to admit the conversation with Const. Currie had it been necessary to do so.

### Evidence of the Assaults by Phillip Timothy and Ronnie Miller

The Crown sought to admit this evidence first, to show the accused's reactions to Phillip Timothy's allegations; secondly to rebut any suggestion that the police assaulted the accused; and thirdly as being relevant evidence as to why Const. Currie was unable to form an assessment of the accused's state of intoxication at the time of his arrest. Counsel for the accused submitted that the second and third reasons were not relevant to any issues in the trial at this stage. He submitted that he did not intend to suggest that the police assaulted the accused; nor did he propose to cross-examine Const. Currie to suggest that Const. Currie could in fact form an assessment favourable to the accused. I accepted this submission. If Mr Davies took another course at the trial, this would be a different matter, but at this stage neither the second nor the third reasons were relevant.

Counsel for the accused submitted that the accused's reaction in the circumstances was not probative of his guilt.

In some circumstances, silence in the face of accusations can be evidence of guilt. In R v Mitchell (1892) Crim.Law Cases 503, Cave J said at 508:

“Undoubtedly, when persons are speaking on even terms, and a charge is made, and the person charged says nothing, and expresses no indignation, and does nothing to repel the charge, that is some evidence to show that he admits the charge to be true. But, where a statement is made in such circumstances that the prisoner cannot repel the charge, it is absurd to say that his remaining silent is any evidence of the truth of the charge.”

See also Parkes v R (1977) 64 Crim.App Rep 35; R v Alexander (1994) 2 VR 249.

Other authorities speak about whether a response might reasonably have been expected, the response not being sought by or on behalf of a person in authority: see Petty v The Queen (1991) 173 CLR 95 at 107; R v Horne (1990) Crim.L.R. 188 at 189.

I considered that in the circumstances of this case an inference could be drawn from the evidence as to the accused's reaction. However on further reflection, since publishing my ruling, I think that this was wrong. It is difficult to see how the prisoner was on equal terms with his assailant. It is difficult to see how any reply could have been expected given the circumstances of his bashing. I now think that the evidence was inadmissible. At the time of my ruling I refused to admit it in the exercise of my discretion. My opinion was that the probative weight or value to be given to this evidence is minimal and was outweighed by its prejudicial effect. I do not think it is now necessary to dilate further on this issue.

### Relationship Evidence

The final question was the admissibility of the evidence of prior assaults by the accused on the deceased. First I should deal with a complaint made by Mr Davies that a number of further witness statements were provided to the accused since the committal. In the end this complaint was not persisted with but I indicated to Mr Davies what my views were. Mr Davies sought to cross-examine these witnesses on the *voire dire*. Although these witnesses gave evidence at the committal they were not lead on these additional matters the Crown now wish to lead at the trial. It was submitted by Mr Davies that the prosecutor should have properly proofed these witnesses before the committal and that he ought to have the opportunity to cross-examine them upon the *voire dire* at this stage.

I have some sympathy for Mr Davies' position. Although the witnesses were all at Borroloola and the committal occurred at Katherine which would have no doubt created logistical difficulties for the Crown, despite these difficulties, these witnesses should have been properly proofed before the committal stage. It appears that after the committal a more senior prosecutor from within the office of the Director of Public Prosecutions had charge of the matter and he decided to investigate this aspect of the case more fully. Consequently more information was forthcoming. However, the additional information had been made available to the accused's counsel; additional statements had been taken from these witnesses and had been provided to Mr Davies. I was satisfied that there were no deliberate tactics by the prosecution to hold back relevant information which should have been led at the committal. Mr Davies did not apply for a stay; nor did he ask me to order a further committal. The remedy sought was to cross-examine the witnesses upon the *voire dire*. In support of this procedure Mr Davies relied upon what appears to be the

practice of at least some judges in New South Wales. In Basha (1989) 39 A.Crim R 337 at 339 Hunt J said that he has in the past permitted the accused to cross examine a new witness on the *voire dire* before he was called at the trial and that he had been told that other judges have also done the same. A *voire dire* conducted under s26L of the Evidence Act empowers the trial judge to determine “any question relating to the admissibility of evidence and any question of law in the conduct of the trial.” Accordingly the remedy sought by Mr Davies may be available if it is shown that the accused could not have a fair trial at that stage unless given the opportunity to cross-examine the witnesses. However there was no suggestion by Mr Davies that there was any identifiable unfairness to the accused which could only be remedied by cross-examining these witnesses at the *voire dire* hearing. It was not suggested, for example, that the accused did not have full particulars of the allegations which were to be made against him or that Mr Davies was unable to obtain instructions concerning these matters. It was not suggested that cross-examination upon the *voire dire* was likely to elicit further information which would be of assistance to the accused at his trial. Rather, the suggestion was that Mr Davies hoped to so weaken the witnesses by testing them under cross-examination during the *voire dire* hearing that their evidence would be rendered innocuous at the trial. This hope was based really on little more than the fact that the witnesses were Aborigines. Indeed the submission was made that Aboriginal witnesses were notoriously unreliable. I rejected that submission. I did not think that the circumstances warranted the course suggested by Mr Davies. Any prejudice to the accused could be removed by the Crown making the witnesses available to Mr Davies: see Drozd (1993) 67 A.Crim R 112 at 113 per Macrossan CJ. This in fact was done.

The relationship evidence upon which the Crown proposed to rely showed that the accused was violent to the deceased on a number of occasions prior to her death. The violence involved bashings as well as the pulling of her hair although on no occasion had the accused previously used a weapon. These bashings occurred in circumstances when the deceased and the accused were both intoxicated and where the deceased had been drinking with others. There is evidence also that the accused on some of those occasions thought that the deceased should be with her mother minding the baby which the deceased and the accused had but I noted that this did not seem to be of a concern to the accused when the deceased went drinking with the accused. The evidence was that the baby was usually left with the deceased’s mother at a place called Police Lagoon some 15kms away. The Crown submitted that the relationship evidence gave rise to an inference of jealousy on the part of

the accused whenever the deceased went drinking with others as she had done on the night of her death. The evidence was relevant, not only to the question of the identity of her attacker, but also provided an explanation for the attack, a motive for it and it was evidence going to the accused's intent. The Crown submitted that the circumstances, including the slash wounds to the deceased's face, the injury by a blunt instrument to the deceased's face and the bruises to her head, coupled with the fatal stab wounds showed that the level of violence had escalated during the attack. There was evidence that the accused had asked the deceased to go home shortly before her death and that the deceased had refused to do so.

In my opinion the relationship evidence is relevant to each of these issues. In Wilson v The Queen (1970) 123 CLR 334 at 337 Barwick CJ emphasised that the fundamental rule governing the admissibility of evidence is that it be relevant to the questions to be decided by the jury. His Honour said:

“Evidence of a close affectionate relationship could properly have been used by the jury to incline against the conclusion, which might have otherwise been drawn from the circumstances, that the applicant killed his wife. Equally, evidence that there had developed mutual enmity could be used to induce the conclusion that he had killed his wife and that his story of an accidental shooting lacked credibility.”

Barwick CJ also accepted that the relationship between the accused to his victim may be relevant as explanatory of the conduct of the accused (p338) and may be relevant to the inference of motive (p339). In The Queen v Hissey (1973) 6 SASR 280, Bray CJ, Hogarth and Mitchell JJ said at 288-289:

“Evidence of this nature is not to be lead as evidence of bad character or of a tendency to use violence on the part of the appellant. Such evidence is admissible for the purpose mentioned by the learned trial Judge, namely that of showing the relationship existing between the appellant and the deceased (Wilson v The Queen) (1970) 123 CLR 334). We think that it was relevant and indeed important for the jury to know the general terms upon which the parties were living. If evidence of this nature were to be excluded as being technically inadmissible, then equally it

would be technically inadmissible for evidence to be tendered to the jury which might be favourable to an accused person, for example of a man having lived with his wife on terms of affection and harmony over a long period of years; and we think that such evidence would clearly be relevant and indeed important. When evidence of this kind is admissible it is admissible not only to prove the intent of the accused, but also the fact of the crime: R v Ball (1911) AC 47, per Lord Atkinson at p68; Wilson v The Queen, per Barwick CJ at p339. So here the evidence was admissible not only to prove malice aforethought, but also to prove that the appellant was responsible for the death of the deceased.”

Mr Davies relied upon the judgment of Derrington J in R v Mill (1986) 1 Qd R 77 in which his Honour seems to have treated relationship evidence as a class of similar fact evidence; see pps 90-92. However, I consider that this involved a misreading of his Honour’s judgment. Clearly at p95 of the report his Honour dealt with the admissibility of the evidence as relationship evidence on an independent basis from that of similar fact evidence. The other members of the Court of Criminal Appeal, Andrews SPJ and McPherson J also considered the admissibility of the evidence in that case both on principles relevant to similar facts as well as on the separate ground of relationship evidence: see pps85 *f.f.* It was submitted by Mr Davies that the majority in R v Mills required, as a touchstone of admissibility proof that the relationship was to some extent unexpected or unusual, that is to say, a relationship which ordinary human experience suggests is not commonly encountered between two such individuals (see p85). To my mind that seems to fly in the face of the observations of the majority in Wilson v The Queen that any jury called upon to decide whether they were convinced beyond reasonable doubt that the accused had murdered his wife was required to know what the relationship was between them i.e. were they an ordinary married couple with a good relationship despite differences and disagreements or was their relationship one of enmity and distrust: see p344. It seems to me that if evidence of good relationship is admissible on behalf of the accused then evidence of a violent relationship is admissible on behalf of the Crown. Mr Davies submitted that domestic violence was not something that was uncommonly encountered between individual couples at Borroloola. Even if that by so, I do not consider that the evidence is on that account inadmissible. The nature of the evidence proposed to be lead in this case is no different from that approved by the Full Court in R v Hissey and indeed may reasonably be said to have been far more compelling than the evidence admitted in that case.

After receiving my initial ruling, counsel for the accused Mr Davies offered to make certain admissions, namely, that the accused stabbed the deceased and that the stabbing was not the result of self-defence, provocation or accident. In my opinion these admissions did not go so far as to require a ruling from me that the Crown ought not admit that evidence in accordance with the practice referred to by Gibbs J in Longford (1970) 17 FLR 37, for the simple reason that the admissions did not go far enough.

Mr Davies submitted finally that I should reject the evidence in the exercise of my discretion on the basis that the evidence had little probative value which was outweighed by its prejudicial effect. There is no doubt that relationship evidence may be rejected on this basis: see Wilson, supra at p340. Of course the evidence of the previous assaults was most damaging to the accused but in my opinion it was not merely prejudicial and I considered that it had significant probity. Accordingly I rejected Mr Davies' application to exclude the evidence in the exercise of my discretion.