ROSTRON v. R.

In the Court of Criminal Appeal of the Northern Territory of Australia

Nader, Martin & Mildren JJ.

30 September, 1,2,3,4 October and 8 November 1991 at Darwin

CRIMINAL LAW - Appeal - Evidence - Confessions and Admissions - Aboriginal - taped record of interview - whether voluntary - whether understood caution - inordinate efforts by police to explain - no evidence to overrule trial judge's finding of voluntariness

CRIMINAL LAW - Appeal - Evidence - Confessions and Admissions - Aboriginal - taped record of interview - discretion to exclude - whether trial judge should have exercised - timing of caution - questions of general nature administered before caution

CRIMINAL LAW - Appeal - Evidence - Confessions and Admissions - Aboriginal - taped record of interview - discretion to exclude - prisoner's friend - whether particular friend was appropriate - no provision of second friend as suggested by standing orders - no explanation as to purpose of prisoner's friend - instructions as to prisoner's friend not recorded in accordance with general orders - "record" - no evidence of unfairness to Appellant

CRIMINAL LAW - Appeal - Evidence - Confessions and Admissions - Aboriginal - taped record of interview - discretion to exclude - location of interview - whether deprived of legal and other assistance - no evidence of unfairness to Appellant

CRIMINAL LAW - Appeal - Evidence - Confessions and Admissions - Aboriginal - taped record of interview - discretion to exclude - whether police implied that participation in interview would be helpful - no evidence

CRIMINAL LAW - Appeal - Evidence - Confessions and Admissions - Aboriginal - video re-enactment - whether voluntary - whether understood caution - evidence of explanation by prisoner's friend in own language - evidence of Appellant's eagerness to re-enact

CRIMINAL LAW - Appeal - Evidence - Confessions and Admissions - Aboriginal - video re-enactment - discretion to exclude - whether trial judge should have exercised -

whether undue pressure to participate - evidence of eagerness

CRIMINAL LAW - Appeal - Evidence - Confessions and Admissions - Aboriginal - video re-enactment - discretion to exclude - unlawful detention - not all relevant factual issues before trial judge - *Police Administration Act* s.137

CRIMINAL LAW - Appeal - procedure - whether witness wrongly permitted to be recalled - defence of diminished responsibility - onus on Appellant to prove - issue not properly raised in cross examination - beyond reasonable foreseeability of Crown - interests of fairness demanded recall of witness - *Criminal Code* s.6, 37

CRIMINAL LAW - Appeal - verdict - whether unsafe and unsatisfactory - question of fact - diminished responsibility - conflicting expert evidence - role of Appellate Court - leave rejected - *Criminal Code* s.6, 37

CRIMINAL LAW - Appeal - verdict - whether unsafe and unsatisfactory - question of fact - provocation - leave granted - ground dismissed - *Criminal Code* s.1, 34(2)

PRACTICE AND PROCEDURE - Criminal law - Appeal - application for leave - made at commencement of hearing - affidavits supporting application inadequate - must show arguable case - failure by Appellant to comply with rules of court - *Criminal Code* s.410, 417(2); *Supreme Court Rules* 84.12(2), 86.08, 86.10(2), 86.14

CASES APPLIED

Bender v. R. (Court of Criminal Appeal of the N.T., 17/8/90, unreported)
Chamberlin v. R. [No.2] (1984) 153 CLR 521
Chidiac v. R. (1991) 65 ALJR 207
Collins v. R. (1980) 31 ALR 257
D.P.P. v. Ping Lin [1976] AC 574
Gudabi v. R. (1983-4) 52 ALR 133
House v. R. (1936) 55 CLR 499
Jeffries v. R. (1916) 18 WALR 143
Kyriakou, D'Agosto & Lombardo (1987) 29 A.Crim.R. 50
Morris v. R. (1987) 163 CLR 454
O'Donoghue (1988) 34 A.Crim.R. 397
R. v. Anunga (1976) 11 ALR 412
R. v. Jennion [1962] 1 All ER 689
R. v. Matheson [1958] 2 All ER 87
R. v. Shearsmith [1967] Qd R 576
R. v. Spratt [1980] 2 All ER 269

Sinclair v. R. (1946) 73 CLR 316
Van der Meer v. R. (1988) 82 ALR 10
Volz v. R. (Court of Criminal Appeal of the N.T., 29/5/90, unreported)
Walton v. R. [1978] AC 788

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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. CA 1 of 1990

BETWEEN:

DENNIS ROSTRON
Appellant

AND:

THE QUEEN
Respondent

REASONS FOR JUDGMENT
(Delivered 8 November 1991)

NADER and MILDREN JJ.

On 19 January 1990, the Appellant was convicted of five counts of murder. Each count related to the homicide on 25 September 1988 of a member of his family at Molgawa Outstation in Arnhemland. His victims included his father in-law, his father in-law's wife, his own wife and his own two small infant children.

The Facts

The facts alleged by the Crown at the trial may be shortly summarised. The accused was an aboriginal in his mid twenties. His wife's name was Cecily. They had two children, Preston and Zarac aged two and one. The accused and his family usually lived at Maningrida, but sometimes they would live on one of the outstations nearby. Molgawa is such a place, and a short while before 25 September 1988, the Rostron family moved there, where Cecily's father, Dick Murrumurru, and Dick's wife, Dolly, were staying.

On about 16 September 1988, Cecily and the children went to Jabiru where they stayed for about a week. Whilst there, Cecily was supposed to have purchased for the accused some batteries for a tape recorder. She and the children returned to Molgawa on Friday 23 September 1988 *sans*

batteries, whereupon an argument between the accused and Cecily ensued. A number of witnesses were present when the argument took place, including Dick Murrumurru, who told the accused not to touch any of the food which had been provided for the evening meal. Apparently the accused did not have anything to eat, and on the following morning he asked Cecily to cook some food for him, but she refused, because Dick Murrumurru instructed her not to touch it. The accused claimed that there was then another discussion about the lack of the batteries, and also about a proposed visit to Gurragardaru, another outstation, during which Cecily claimed that the accused was not the father of the children. Following this conversation, the accused took a .308 rifle and went hunting. He returned later that day, having shot two emus, which were cooked to be eaten on Saturday night. The accused again did not eat, but apparently this was not due to any argument with his wife. On Sunday morning, 25 September 1988, the accused asked his wife to make pancakes for breakfast, but the accused claimed that Dick Murrumurru said to her: "Don't touch that food, just leave it," and not to cook for him. The accused then left the shelter at which they were staying and went outside to sit in the shade of a tree. Later, the accused could hear Dolly speaking to Cecily about him, suggesting that she should leave him, and come and live with them. Then there was a further discussion involving the accused, Dick and Cecily at which Cecily repeated that he was not the father of the two children. Dick Cecily and Dolly then said that Rumbunina people (of which tribe the accused belonged) were not welcome and should go to Korlobirrahda a place where members of that tribe lived. The accused then took a shotgun from Dick's place and also a .308 rifle and shot and killed Dick, Dolly, Cecily and the two children. This was at about midday. The accused then shot the outstation radio, and, after firing a few shots in the direction of other aboriginals at the outstation, went bush until due to hunger he surrendered to the police at

Maningrida on Tuesday 4 October 1988. He was arrested at about 9.15 p.m. and at 10 p.m. formally charged with one count of murder.

The following morning, shortly before 8.30 a.m., Detectives Harris and Hambleton from the Darwin C.I.B. arrived by police aircraft from Darwin. At about 8.30 a.m., Detectives Harris and Hambleton, after having a short conversation with the accused, arranged for him to be taken to the Maningrida Health Centre where he was examined by a health worker called Jimmy Singleton, and also by a doctor. After that, he was placed in the police cells and at about 9.30 a.m. he was spoken to by Detective Hambleton who asked him whom he would like to have sit with him whilst being interviewed. The accused nominated Singleton. A police aide was sent to fetch Mr Singleton, and Hambleton explained to him what his responsibilities were as a prisoner's friend. Immediately thereafter, the accused was taken from the cells to the Courthouse where Hambleton conducted a taped conversation in the form of a record of interview which lasted from 10.12 a.m. until 11.47 a.m. At the conclusion of the taped record of interview, Detective Hambleton asked the accused if he was prepared to go to Molgawa and take part in a video re-enactment. The accused indicated his willingness to do this to Hambleton, and he was then placed back in the cells. At 12.45 p.m., Hambleton again spoke to the accused, and asked him to show the place where the shotgun was. Shortly thereafter, the accused took Detectives Hambleton and Harris and Mr Singleton to a place near Maningrida where the shotgun was located. The accused was then taken back to the police cells where he remained until about 4 p.m., when he was taken to the airport and flown to Jabiru. He spent the rest of the day and that evening in the police cells at Jabiru. Early the following morning he was taken by a chartered aircraft to Molgawa. At about 9.20 a.m. on Thursday 6 October 1988 the accused participated in a video re-enactment of the killings. The

re-enactment was completed by 9.34 a.m. Thereafter, the accused was flown to Jabiru and then to Darwin. The accused appeared in the Darwin Magistrates Court for the first time on Friday 7 October 1988.

The Trial

The accused was tried before the Chief Justice and a jury in December 1989 and January 1990. The accused's counsel objected to the admissibility of the taped record of interview and the video re-enactment on the grounds that they were not voluntarily made in the exercise of a free choice to speak or to remain silent, and alternatively the accused's counsel submitted that this confessional material should be excluded by the trial judge in the exercise of his discretion. The Chief Justice ruled that both the taped record of interview and the video re-enactment were voluntarily made and admissible, and declined to exercise his discretion to exclude them on any discretionary grounds. At the trial, there was no issue that the accused had killed the five persons concerned. The accused claimed that by reason of provocation, he was not guilty of murder but guilty of manslaughter only; as well, the accused relied upon the defence of diminished responsibility.

The trial judge refused to leave provocation in relation to the two children to the jury. No complaint is now made about that. Provocation in relation to the three adult victims was left to the jury as was diminished responsibility.

The evidence in relation to diminished responsibility depended upon, firstly, the evidence of the accused and, secondly, the evidence of two psychiatrists, Drs Ridley and Bartholomew. Dr Ridley was called by the Crown and Dr Bartholomew by the accused. Both of these psychiatrists considered that the accused was acting in a state of abnormality of mind which amounted to diminished

responsibility at the time of the shootings. In addition, the Crown called a further psychiatrist, Dr Barclay, who was of the opinion that the accused was not suffering from any abnormality of mind at that time. Dr Ridley believed that the accused suffered from a depressive illness at the relevant time. Dr Bartholomew believed that, in addition to a depressive illness, the accused was in a state of disassociation, which is an abnormality of the mind. The Crown called its witnesses, Drs Ridley and Barclay, before the close of its case, but then sought and was granted leave to recall Dr Barclay in rebuttal after the close of the defence case in relation to the question of disassociation. This is a matter of complaint in the Notice of Appeal.

Although the Notice of Appeal raises one ground of alleged misdirection by the trial judge (ground 5) this ground was abandoned at the hearing of the appeal, and consequently none of the grounds of appeal relate to the Chief Justice's charge to the jury. Also ground 4 of the Notice of Appeal (which related to a failure by the trial judge to discharge the jury) was abandoned at the hearing.

Grounds of Appeal

The remaining grounds of appeal set forth in the Notice of Appeal were as follows:-

1.& 2. The trial judge 'wrongly' admitted the taped record of interview and the video re-enactment into evidence when they should have been excluded as being involuntary or alternatively in the exercise of the court's discretion.

3. The trial judge wrongly permitted the Crown to recall Dr Barclay in rebuttal.

6.& 7. The verdicts were unreasonable, cannot be

supported having regard to the evidence, and constituted a miscarriage of justice (the 'unsafe/unsatisfactory' ground).

8. The evidence of Dr Barclay was inadmissible. This ground was added during the hearing of the appeal.

The need for leave

The Appellant's Notice of Appeal claimed the right to appeal to the Court of Criminal Appeal as of right. However, the Respondent claimed that in relation to certain of the grounds of appeal to be agitated, the Appellant needed leave.

Section 410 of the *Criminal Code* provides for a right to appeal to the Court of Criminal Appeal against conviction on any ground that involves a question of law alone. An appeal against conviction on any ground that involves a question of fact alone or that involves a question of mixed law and fact, requires leave.

In addition, Rule 86.08 of the *Supreme Court Rules* provides that "... no decision in relation to the admission or rejection of evidence of the Judge of the court of trial shall, without leave of the Court of Criminal Appeal, be allowed as a ground for appeal, or for an application for leave to appeal, unless objection was taken at the trial to the ... decision by the party appealing or applying for leave to appeal." On behalf of the Respondent, it was submitted that in the case of at least one of the submissions made by the Appellant, leave was required pursuant to Rule 86.08 before applying for leave to appeal.

Further, as no application for leave had been made until the commencement of the hearing of the Notice of Appeal, the Appellant required an extension of time pursuant to

s.417(2) of the *Criminal Code*.

Accordingly, on the first day of the hearing, the Appellant filed in court applications for the necessary leave and extension of time. No order was made during the hearing granting leave or any extension of time, and those applications, together with the substantive appeals, were in effect heard together as if leave and the necessary extension of time had been granted.

Rule 86.10(2) of the *Supreme Court Rules* requires an application for leave to be accompanied by an affidavit showing the nature of the appeal, the questions involved and the reasons why leave should be given. Obviously prudence would suggest that the draftsman of the affidavit should have such an affidavit settled by the counsel who is briefed to argue the application. One purpose of the rule is to provide to the court sufficient information for the court to understand the issues of fact and/or fact and law involved, and to quickly form a view as to whether or not to grant leave. The other purpose of the rule is to provide the respondent with sufficient information so that it knows the case it is called upon to meet at the hearing of the application for leave and will not be taken by surprise.

If leave is granted, Rule 86.14 provides that where the Court of Criminal Appeal grants leave, it is not necessary for the appellant to give a Notice of Appeal, and the application for leave is taken to be a Notice of Appeal. It is not uncommon for this Court to hear the appeal immediately leave is granted, but this normally requires a formal order pursuant to Rule 84.12(2). An appellant cannot expect the court to embark on the appeal itself immediately after granting leave without such an order because often the appeal books will not have been prepared at that stage.

In the present case only some of the grounds of appeal required leave and the appeal books had been fully prepared. The affidavits filed in support of the application for leave did not comply with Rule 86.10(2), in that the affidavits did not advise the court as to what the questions were, nor as to the reasons why leave should be given. This made it difficult for the court to focus on the issues as to whether leave should be granted or not.

In our opinion, this state of affairs should not be tolerated in the future. Section 410 of the *Code* distinguishes between cases where leave is required and those cases where the appeal is as of right. The purpose of the distinction is to prevent appeals on questions of fact or mixed fact and law unless the appellant is able to demonstrate that he intends to argue a valid objection which, if upheld, would have some practical effect, e.g. either an order for a new trial, a substituted verdict of some lesser offence than that which the appellant was convicted, or a substituted verdict of acquittal. To be valid, the objection must be one of the recognised bases for granting relief. For example, in this case, where the trial judge held that the confessional material was voluntary and the Appellant does not complain that the trial judge applied wrong principles, the Appellant to succeed must show either that there was no evidence to support this finding, or that the evidence was all one way: *Kyriakou, D'Agosto & Lombardo* (1987) 29 A Crim R 50 at 57. As Hunt J. observed in *O'Donoghue* (1988) 34 A Crim R 397 at 401:

> "It is important to emphasise that, unlike appeals to the Court of Appeal in civil cases, an appeal to this Court is not by way of rehearing. An appeal which is not by way of rehearing is no more than the right to have a superior court interpose to redress the error of the court below: *A-G v. Sillem* (1864) 10 HLC 704 at 724; 11 ER 1200 at 1209; *Victorian Stevedoring & General Contracting Co Pty Ltd v. Dignan* (1931) 46 CLR 73 at 109. Error may be demonstrated if there is no evidence to support a particular finding, or if

> the evidence is all one way, or if the judge has misdirected himself. But this Court has no power to substitute its own findings for those of the trial judge. The members of this Court may individually disagree with the findings which were made, but the court cannot for that reason interfere with those findings. It is only where the very narrow basis upon which this Court can intervene in relation to a trial judge's findings of fact has been established that the conviction can be set aside, and then only if the error had led to a miscarriage of justice: see *Merritt and Roso* (1985) 19 A Crim R 360 at 372-373; *Kyriakou* (1987) 29 A Crim R at 60-61.

In order to obtain leave, therefore, the Appellant must show that he has at least an arguable case that he has a valid objection which if upheld would be of some practical benefit to the Appellant. No attempt was made by the Appellant to approach the matters upon which leave to appeal were required in this way, or to properly comply with the Rules of Court. Rather, the matter was argued as if the court would substitute its own findings for that of the trial judge, and as if the question of leave was unimportant. This could have had the effect of misleading the court in its approach to the resolution of this appeal.

<u>'Wrongly' admitted taped record of interview into evidence</u>

As mentioned above, the way this ground was argued involved no question as to whether the trial judge applied wrong legal principles. The submission was that the Crown had not shown that the Appellant had participated in the interview voluntarily in the sense that the accused had spoken in the free exercise of his choice to speak or to remain silent: *Collins v. R.* (1980) 31 ALR 257. This submission clearly involved only a question of fact: *D.P.P. v. Ping Lin* [1976] AC 574; *Collins v. R* at 267 per Muirhead J.; at 309 per Brennan J; *Sinclair v. R.* (1946) 73 CLR 316 at 325-6 per Rich J.

In our opinion the learned trial judge carefully considered the relevant evidence concerning the question of whether the participation by the accused in the tape recorded record of interview was voluntary, and it was not demonstrated that there was no evidence to support the trial judge's findings, or that the evidence was all one way, or that the trial judge misunderstood the evidence in any material particular. There is evidence upon which the trial judge might have concluded otherwise. It is apparent that the accused was having difficulty in understanding the caution. Consequently the police went to inordinate lengths to explain the caution to the accused. However, that is not the point. His Honour after reviewing the evidence in detail and with some care concluded both that the accused understood that he had a right to remain silent, and that the accused knew he had this right, but chose to talk to the police. We are unable to say that this conclusion was wrong. Accordingly, the trial judge's finding that the taped record of interview was admissible cannot be disturbed.

The second basis of attack was that the trial judge should have rejected the record of interview in the exercise of his discretion. This Court will interfere with a trial judge's discretion only in an exceptional case. As Dixon, Evatt and McTiernan JJ. said in *House v. The King* (1936) CLR 499 at 504-5:

> "The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges comprising the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide him or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court make exercise its own discretion

> in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discovered, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

(See also *Van Der Meer v. R.* (1988) ALR 10 at 18 per Mason C.J.)

The first matter of complaint alleged is that Detectives Hambleton and Harris proceeded to interview the accused before being satisfied that he understood the caution. The trial judge dealt with this submission very fully. He held that it was not wrong to enquire of the accused's health, to tell him that he might consult the prisoner's friend to clear up any confusion, to ask him about his general work record and educational background before administering the caution and before questioning the accused directly about the matters about which the accused had already been charged. His Honour said:

> "I don't consider that it was incorrect to ascertain the general background of the accused, to see from the general questions how capable the accused was of responding, his level of understanding of the English language and generally to ask a number of background questions before the interview moved on the questions relating to the alleged offences. When to give the caution, and appreciating that it should be given as soon as reasonably possible, remains a matter of discretion and although there must obviously be cases when a failure to give a caution within an appropriate time might well involve criticism, this is not, in my view, such a case."

Mr Hore-Lacey submitted that the Commissioner of Police's Standing Orders relating to the administration of the caution required a caution to be given to a person who was

already in custody or arrested before being questioned at all. To embark upon a formal record of interview, even though the questions related only to peripheral matters, was likely to confuse an unsophisticated accused if, after several minutes of questioning which was obviously being taped, the accused is suddenly cautioned. On the other hand, Mr Karczewski for the Crown submitted that the police must be able to establish the extent of a person's understanding of the English language, their general well-being and level of sophistication, before decisions can be made about the need for the police to comply with the guidelines in *R. v. Anunga* (1976) 11 ALR 412, especially the need for care to ensure that the accused has an apparent understanding of his right to remain silent (referred to in guideline (3) (1976) 11 ALR at 414-415). In our opinion the decision of the trial judge was correct. As long as the questioning does not bear upon matters which, if answered, could provide admissions by the accused which could be used against him, it is not wrong for a police officer to ask questions of the general nature asked in this case before administering the caution.

The Appellant also argued that the police proceeded to interview the appellant before being satisfied that he understood the caution. To a degree this has already been dealt with when considering the submission that the admissions were not voluntary. However, for the sake of completeness we should add that not only did Detective Hambleton go to considerable pains to explain to the accused his right of silence, but he himself gave evidence that he believed that the accused understood this right. The trial judge did not specifically find that Hambleton either had or had no such belief, but it is we think implicit in his finding that the record was made voluntarily that he accepted Hambleton's evidence on this point. We would not interfere with the discretion to admit the record on this ground.

Next it was submitted that Jimmy Singleton was inappropriate as a person to act in the role of prisoner's friend because he (a) played an active role in the appellant's attempted apprehension and (b) because he was the accused's brother-in-law, and the accused thereby was put in a position whereby he may not be able to speak as frankly as if he was a stranger. Both of these submissions are unmeritorious. Singleton was chosen by the accused, not by the police. As Woodward, Sheppard and Neaves JJ. said in *Gudabi v. R.* (1983-4) 52 ALR 133 at 146:

> "In our view the choice of prisoner's friend must be left entirely to the person about to be interviewed, once it has been explained to him that the purpose of the prisoner's friend is to give support or help. We think it would be useful if the person to be interviewed were told, before making his choice, that he will be free to talk to his friend, and ask advice, in the course of the interview.
>
> What we have said about police officers not trying to influence the choice of prisoner's friend does not mean that an investigating officer should not give such assistance as he is able to an Aboriginal suspect in securing the services of a prisoner's friend, provided that he gives that assistance at the express request of the suspect. The overriding consideration must always be that the prisoner's friend is a person selected by the Aboriginal suspect in the exercise of a free choice."

It was not shown that the accused's choice of prisoner's friend was so unfair to the accused that the general rule referred to in *Gudabi* should be displaced or that some other arrangements should have been made, for example, by the provision of a second prisoner's friend. The trial judge expressly referred to this in his reasons. It must be born in mind that the Anunga Guidelines are there to assist the police in conducting their inquiries in such a manner as to ensure fairness to the accused, whilst at the same time, not unduly inhibiting the investigative process: see *Gudabi* at 145. They are not rules of law, and are not drafted with the same precision as might be expected of a

statute - hence the word 'guidelines.' If fairness to the accused in the investigative process is the touchstone of the guidelines, in our opinion there was no material before the trial judge which would have warranted the conclusion that the accused's choice of prisoner's friend was likely to be productive of any unfairness to him.

The Appellant submitted, however, that the police should have provided the appellant with a second prisoner's friend. It is to be noted that this suggestion is not mentioned in *R. v. Anunga*. Rather, it stems from Rule 29.4 of Section Q1 of the Police Commissioner's Standing Orders, which is in these terms:

> "When the interview is in relation to a very serious matter, it would be prudent to have present also at the interview, a "stranger," well versed in the language used, to act as a "friend." This action could prevent the loss of a case through technicality."

In dealing with that submission, the trial judge found that whilst this Order had not been complied with, there was no unfairness to the accused, and therefore he declined to reject the confession on that ground. We do not think that His Honour erred in any way. In any event Rule 29.4 seems to be directed towards providing a second string to the bow should, for instance, the court decide that the first friend was somehow inappropriate. It seems to us that such considerations are misplaced. The purpose of having a prisoner's friend is to provide someone in whom the accused has confidence and by whom he will feel supported. We doubt if more is achieved by having a second friend unless the person chosen is also the accused's choice. On the contrary, we think it would be positively retrograde for there to be two friends, one chosen by the accused, and one by the police. There was in any event no evidence that the accused wished to have a second friend.

Next, the Appellant submitted that there was some unfairness to the accused in interviewing him at Maningrida instead of at Darwin because he was deprived of the reasonable possibility of legal advice or other assistance. The evidence was that there was a telephone enquiry by a Mr Iverson from North Australian Aboriginal Legal Aid Service. His Honour referred to Chief Inspector Charlwood's evidence concerning this call (which apparently happened just after the interview had commenced). The trial judge held that he was not persuaded that there was anything more the police should have done. The next step lay in the hands of the solicitors. If they were instructed to act for the accused, they could have requested the police not to proceed further with the record of interview until they had had a chance to communicate with the accused. They did not do so. The *Anunga Rules* do not require the police to advise legal aid agencies (or any other solicitor) that an arrest has been made or that the police intend to conduct a record of interview. Guideline (8) reads:

> "Should an Aboriginal seek legal assistance reasonable steps should be taken to obtain such assistance. If an Aboriginal states he does not wish to answer further questions or any questions the interrogation should not continue."

We repeat that the purpose of these rules is to ensure fairness to the accused without unduly inhibiting the investigative process. It was not shown that there was any unfairness to the accused in conducting the interview at Maningrida. The fact of the accused's arrest must have been widely known in Maningrida, which does not lack communications with Darwin. Obviously word got to NAALAS, and consequently Mr Iverson made the telephone call referred to. There is no evidence that it would have been impossible for a solicitor to attend at Maningrida if he wished to speak to the accused. Maningrida has an airstrip and aircraft no doubt can be chartered. On the other hand, there were some good reasons for conducting the interview at Maningrida, because (a) it was the place where the

accused surrendered, (b) it was relatively near the place where the killings occurred and (c) it is a large enough township to provide appropriate facilities to enable the interrogation and other enquiries to continue. We are unable to see that the trial judge's discretion miscarried on this ground.

It was also suggested that the call from Mr Iverson was unfairly kept from the Appellant. We do not accept this. The purpose of the call from Mr Iverson was to ask if the accused wanted a person by the name of Jimmy Grant to be his friend. This was a follow-up from a similar enquiry made previously. Chief Inspector Charlwood told Mr Iverson that the accused had been asked about Grant, but said that he did not know him and selected Jimmy Singleton instead. It does not appear that Mr Iverson asked to speak to the accused, or that there was any message to pass on to the accused. In our opinion this ground of objection is baseless.

Next it was suggested that "questions which could provide exculpatory answers were not asked of the appellant when they should have been. For example, questions concerning provocative acts directed towards the appellant." The trial judge considered this issue and in our opinion it is not shown that he erred in any way.

It was submitted that the purpose of the prisoner's friend was not explained to the accused. This submission was not commented upon by the Chief Justice in his oral *ex tempore* reasons. The evidence in chief concerning the role of the prisoner's friend was very limited, and consisted of the following conversation between Detective Hambleton and the accused:

Hambleton: I want to ask you about that trouble that happened out at Molgawa. Do you understand that?

Accused: Yes.

Hambleton: Would you like someone to sit with you while I'm asking you these questions?

Accused: I want Jimmy.

Hambleton: Who, Jimmy the health worker?

Accused: Yes, Jimmy Singleton.

Hambleton: The person that sits with you, he's there to help you if there's anything you don't understand when we ask you. Do you understand that?

Accused: Yes.

Hambleton: You can talk in-talk with this person in Aboriginal language if you wish. Do you understand that?

Accused: Yes, I want Jimmy.

The accused did not give evidence on the *voire dire*. No cross-examination was directed to Hambleton about this conversation, or whether the accused knew more about the role of the prisoner's friend other than what he might have gleaned from this conversation. Nevertheless the evidence was clear that Hambleton did properly explain to Singleton what was expected of him, and on this issue, the trial judge found that Singleton performed his task both as a prisoner's friend and as an interpreter adequately. In those circumstances, we do not think that the trial judge, in the proper exercise of his discretion, ought to have rejected the record of interview.

Then it was submitted that the instructions to the Appellant regarding the prisoner's friend were not recorded, contrary to Police General Orders. The relevant General Orders are in Part Q1 Nos.25 and 26 which read:

> "25. The conversation relating to the above points should be recorded and the "prisoner's friend" requested to read (if practicable) and sign the record."
>
> 26. If practicable, a statement should be taken from the "prisoner's friend" at the conclusion of the

> interview with the suspect, to clarify that the "friend" understood his/her role and was satisfied that Police conducted the interview in a fair and proper manner. If the "prisoner's friend" is unable to read, the statement should be read to him/her and suitable wording incorporated in the statement to describe the relevant circumstances."

This General Order, where it refers to "the above points" clearly refers to No.24, which requires the police to explain the role of the "friend" to the "friend" (not to the accused). It was clear that the police did explain this role adequately to Singleton, and there was evidence that the explanation was recorded in the form of a statement which Singleton signed and which was tendered as Exhibit 2 on the *voire dire*. This exhibit was not reproduced in the Appeal Books. It was submitted that the word "recorded" in the General Order 25 meant "tape recorded." The evidence was that the practice was to record that information in the form of a statement. In our opinion, whilst it is no doubt desirable for the police to record the instructions to prisoners' friends on tape, the word "record" in clause 25 does not mean "tape record," and any form of record will comply with that clause. Even if there were a technical breach of this General Order we are not satisfied that there was any unfairness to the accused or any other reason warranting the rejection of the confession on this ground.

Lastly, the accused suggested that the police implied to the accused that participation by him in the record of interview would be helpful to the accused - for example, the accused was told that the tapes would go to legal aid. Hambleton's evidence was that it was the accused who introduced the idea that the tapes would be heard by legal aid. Having considered the record of interview, we consider that Hambleton is correct:

Hambleton: Do you know what a court is?

Rostron: Court?

Hambleton: Yes.

Rostron: When you tell all the story; that's mean court.

Hambleton: Who do you tell the story to?

Rostron: To legal aid.

Hambleton: What do legal aid do with that story when you've told it to them?

Rostron: They say "guilty" or "not guilty."

At the beginning of the record of interview, Hambleton explained to the accused that he would be given a copy of the tape, but nothing was said about legal aid, or his legal advisers. That occurred, or something like that occurred, at the completion of the record of interview. In our opinion, the suggestion that the police inferred that participation in the record of interview would be helpful to the accused is fanciful.

In conclusion, we would grant leave to appeal on ground 1 but dismiss this ground of appeal.

Wrongly admitted into evidence the video re-enactment

Again, the attack on the re-enactment was two-pronged, (a) on the basis that the re-enactment was not voluntary and (b) on the basis that it should have been excluded on discretionary grounds.

As to voluntariness, the learned trial judge found that the accused's participation in the re-enactment was voluntary. That was a question of fact which we are satisfied was open to the trial judge to decide in the manner that he did. The crucial part occurs at the beginning of the record:

Q1: CAN YOU TELL ME YOUR FULL NAME?
A1: Dennis Rostron Dumbiri

Q2: OKAY NOW JUST KEEP YOUR VOICE UP A LITTLE BIT DENNIS O.K. NOW YOU'RE IN OUR CUSTODY, YOU'VE BEEN ARRESTED IN RELATION TO A SHOOTING AND KILLING OF 5 PEOPLE AT

THIS OUTSTATION ON THE 25TH SEPTEMBER 1988 ON A SUNDAY. DO YOU UNDERSTAND THAT?

A2: Yeah

Q3: OKAY DO YOU WANT TO JUST TELL ME WHAT YOU'RE IN CUSTODY FOR?

A3: Shooting all those people

Q5: THAT'S RIGHT. WHAT I LIKE YOU TO DO HERE TODAY DENNIS IS TO SHOW ME WHAT HAPPENED ON THAT DAY

A5: Yeah

Q6: JUST TELL ME IN YOUR OWN WORDS WHY WE'RE HERE. JUST TELL ME WHAT I WANT YOU TO DO?

A6: No answer

Q7: TELL ME WHAT I WANT YOU TO DO HERE, DENNIS?

A7: Walk around and show you, get gun

Q8: OKAY AND WHAT ARE YOU GOING TO SHOW ME?

A8: How to shoot the man

Q9: THAT'S RIGHT. YOU DON'T HAVE TO SHOW ME WHAT HAPPENED ON THAT DAY UNLESS YOU WANT TO. DO YOU UNDERSTAND THAT?

A9: No answer

Q10: WHAT DO YOU THINK THAT MEANS DENNIS? WHAT DOES THAT MEAN WHEN I SAY YOU DON'T HAVE TO UNLESS YOU WANT TO?

A10: No answer

Q11: DO YOU KNOW WHAT THAT MEANS?

A11: Nah

Q12: WHAT IT MEANS IS I'M NOT FORCING YOU TO SHOW ME, I ONLY WANT YOU TO SHOW ME IF IT'S, IF YOU'RE HAPPY TO DO IT, IF IT'S WHAT YOU WANT TO DO. OTHERWISE YOU DON'T HAVE TO SHOW ME. YOU UNDERSTAND THAT?

A12: Yeah, I'll do it, to show you

Q13: OKAY BUT YOU DON'T HAVE TO IF YOU DON'T WANT TO

TRANSLATION FROM JIMMY SINGLETON TO DENNIS ROSTRON

Q14: DO YOU UNDERSTAND WHAT JIMMY TOLD YOU THEN?

A14: Yeah

Q15: WHAT DID HE TELL YOU, WHAT DID JIMMY JUST SAY TO YOU?

A15: He told me to show you how I shoot all the people

Q16: DO YOU HAVE TO SHOW ME HOW YOU DID IT?

A16: Hmm (Dennis starts walking away)

Q17: NOW WAIT A MINUTE DENNIS, DON'T SHOW ME YET. I JUST WANT TO MAKE SURE THAT YOU KNOW THAT YOU DON'T HAVE TO SHOW ME, DO YOU UNDERSTAND THAT?

TRANSLATION FROM JIMMY SINGLETON TO DENNIS ROSTRON

Q18: ARE YOU HAPPY TO SHOW ME?
A18: Hmm

SINGLETON Q19: ARE YOU SURE?
A19: Hmm"

The important thing to notice is that Singleton spoke to the accused in his own language on two occasions prior to the interviewer asking the accused to re-enact the shooting. No translation of these conversations was made available to the Court by either party, but on the face of it there was evidence that the accused did ultimately understand the caution administered to him. Further, in viewing the tape, there was, as the Chief Justice observed, no hesitancy in his demonstration, and he appeared eager to demonstrate what occurred. Finally, there was the evidence of Mr Singleton as follows:

Mr Karczewski: At Molgawa, Detective Nick Hambleton was talking to Dennis Rostron at the beginning of the video? ... Yes

Did you talk to Dennis at that time, at the beginning, before Dennis showed anything? ... Yes

Why did you talk to Dennis? ... I just explained to Dennis that if Dennis doesn't want to make the video he didn't have to make the video

In which language did you talk to Dennis in? ... I talked to him with Gunwinggu and I talked to him with English

Did Dennis appear to understand what you were saying? ... Yes

What did Dennis say? ... Dennis said:"Yes, I'll do it."

Accordingly, we would uphold the trial judge's finding that the video re-enactment was voluntary.

The argument for suggesting that the video re-enactment should have been rejected on discretionary grounds had three main limbs. The first limb attacked the circumstances of a conversation between Detective Hambleton and the appellant at Maningrida on 5 October 1988 during which the appellant agreed to take part in the video re-enactment. The second limb attacked the circumstances under which the accused agreed to take part in the video re-enactment during a conversation between Detective Hambleton and the accused on 6 October 1988 at Molgawa Outstation immediately before the re-enactment. This latter conversation was itself recorded.

The third limb was based upon an argument that the police unlawfully detained the appellant after he had been interviewed at Maningrida on 5 October 1988.

The thrust of the attack on the conversation of 5 October 1988 was non-compliance with the *Anunga Rules*; but that issue is only one of any importance if the failure to comply with those guidelines at that stage had such an effect that in fairness to the accused, the video should not be admitted against him notwithstanding that there was subsequent compliance the following day and notwithstanding that no valid criticism can be laid against the police for the manner in which the re-enactment proceeded on the following day. The way in which Mr Hore-Lacey suggested such unfairness occurred, was that, the accused having committed himself to the re-enactment on 5 October 1988, he could hardly be expected to have changed his mind on the 6th, given all the trouble that the police had gone to, to bring him and the team of police necessary for the re-enactment to be video-taped at Molgawa. We do not consider that the circumstances placed any undue pressure on the accused to give his consent to participation in the re-enactment or otherwise unfairly placed any moral pressure upon him. The video shows, as the Chief Justice observed,

that the accused was very keen to show the police what he had done, and indeed, had to be prevented from commencing to show this to the police by Detective Hambleton who again put questions to him designed to ensure that he understood his rights. Further, the appellant failed to establish any breach of the *Anunga Rules* or any other basis upon which the trial judge in the exercise of his discretion should have excluded the videotaped re-enactment because of any act or omission by the police at Molgawa on 6 October 1988.

The final submission (unlawful detention) was not raised with the trial judge and therefore the Crown argued that leave was additionally required by Rule 86.08 of the Rules. We doubt whether that is so, but as leave is already required by s.410 of the *Code*, we do not consider that this matters. Obviously, the fact that a point was not raised by the trial judge is not fatal to an application for leave or for the granting of relief. Where the interests of justice require it, the court will grant leave and other relief. But in our opinion the court will not usually do so if the reason why the point was not raised in the court below was because counsel did not think the point was arguable, but has since changed his mind, which seems to be the case here. Particularly will this be so where there are findings of fact which would have to be made, and where the parties at the time of the *voire dire* did not have this issue in mind, with the consequence that not all of the relevant factual issues are likely to have been fully explored by counsel. Mr Hore-Lacey for the appellant submitted that the facts found by the trial judge were sufficient for this Court to find that the failure to bring the accused before a justice after the completion of the record of interview, was contrary to law notwithstanding s.137 of the *Police Administration Act* or at least that the participation of the accused in the re-enactment on 6 October 1988 was not voluntary. In our opinion, not all the facts were fully explored and it would be unfair to the Crown to permit this

issue now to be debated; and we would add to that that the trial judge made no findings of fact sufficient for this Court to confidently make any such ultimate findings as we were invited to contemplate. Given the already restricted nature of the basis upon which this Court can review the trial judge's finding of fact that the accused's participation in the re-enactment was voluntary or should be excluded on discretionary grounds, in our opinion this submission is hopeless and should not be entertained.

Accordingly, in our opinion there is no basis for interfering with the trial judge's discretion. So far as this ground is concerned therefore, we would grant leave to appeal on ground 2 of the appeal, but dismiss this ground of appeal.

Ground 8: Dr Barclay's opinion was based upon inadmissible evidence

It was submitted that Dr Barclay based his opinion that the accused was suffering from diminished responsibility upon what he saw and heard in the taped record of interview and the re-enactment, both of which the Appellant claimed were inadmissible or should have been excluded (see grounds 1 and 2). As the trial judge's decision not to exclude either the record of interview or the re-enactment was not shown to be incorrect, this ground necessarily fails as well.

Ground 3: Wrongly permitted the recalling of Dr Barclay at the close of the Defence case

Psychiatric evidence was admissible at the trial as relevant to the partial defence of diminished responsibility established by s.37 of the *Criminal Code*. Notwithstanding that the Appellant bore the onus of proving that the Appellant at the relevant time was in a state of abnormality of mind (*Criminal Code*, s.6), counsel for the Crown, being aware of the intention of the Appellant to raise it, anticipated and called evidence in his own case

to rebut the defence. It is not suggested that this was not proper. Whether, having elected to anticipate the defence, the Crown forfeited the right it would otherwise undoubtedly have had to call evidence in reply, need not, in our opinion, be considered here. In our opinion the course taken by the Appellant at the trial required, in the interests of fairness, that the Crown be allowed to recall Dr Barclay, the psychiatrist who had earlier given evidence about diminished responsibility in the Crown case.

The matter arose in the following way. Dr Barclay, in examination in chief in the Crown case, said that he had not detected in the Appellant any sign of abnormality of mind. He said that at the time he interviewed the Appellant the latter was quite depressed, but he did not see any evidence that he suffered any deficiencies that would impair his (mental) abilities. He observed nothing that would have deprived the prisoner of his capacity to understand what he was doing, or to control his actions, or to know that he ought not to have acted in the way he did at the time he shot the deceased persons. He was asked to comment upon evidence given by other medical experts, called earlier by the Crown, which may have had a bearing on the issue of diminished responsibility. Mr Hore-Lacy cross-examined Dr Barclay at length, and in the course of doing so, almost as if it were a passing afterthought, asked: "Lack of recall during an episode like this, can that be a sign of dissociation?" Dr Barclay said: "It can be but it could be due to many different things." Nothing else was asked by Mr Hore-Lacy about dissociation, and nothing else was asked by him of Dr Barclay or any other Crown witness in the Crown case that could have signalled to the Crown Prosecutor that it would be alleged by the defence that the Appellant was at the material time in a state of "dissociation", a state amounting to an abnormality of mind. If Mr Hore-Lacy when cross-examining Dr Barclay had in his possession a statement or proof of

evidence of Dr Bartholomew, who was later to contend that the prisoner suffered from dissociation at the time of the shooting, we consider the question he asked of Dr Barclay, quoted above, to have been a totally inadequate way of raising the issue. Did counsel, knowing what his own witness would say concerning dissociation, and preferring not to have Dr Barclay refute it, ask the question quoted above in order to avoid giving the Crown the right to recall Dr Barclay and, at the same time, to avoid clearly signalling the issue? To have clearly signalled the issue of dissociation would almost certainly have resulted in counsel for the Crown re-examining Dr Barclay about it. Mr Hore-Lacy was, upon his own assertion, well aware of the persuasive power of Dr Barclay whose answers might have been well calculated to persuade the jury against finding that the prisoner was at the material time in a state of dissociation. Perhaps we are being unduly suspicious, but we have been unable to think of any other reason why Mr Hore-Lacy would have so tentatively touched upon such a critical matter. He was well aware that the Appellant carried the onus of proving that at the relevant time he suffered from an abnormality of mind. The course taken by Mr Hore-Lacy was ill chosen in that the tentative question put by him was ineffective to signal the issue he intended to raise. Dr Bartholomew, when called in the defence case, said that he believed that at the time of the shootings the Appellant was in a dissociated state amounting to an abnormality of mind so as to impair substantially his capacity as specified in section 37 of the *Code*: a conclusion he had reached about a month before giving evidence. We think that Dr Barclay was properly recalled in reply to rebut an issue properly raised for the first time in the defence case, and which no reasonably alert Crown prosecutor ought to have been able to foresee either from the state of the case generally or as a result of the question asked by Mr Hore-Lacy referred to above. Therefore, we think this ground fails.

Grounds 4 & 5:

These were abandoned and nothing more need be said.

Grounds 6 & 7: The unsafe/unsatisfactory ground

As pleaded, grounds 6 and 7 of the Notice of Appeal read:

> "6. The verdicts of the jury were:
> (a) unreasonable; and
> (b) cannot be supported having regard to the evidence.
>
> 7. The said verdicts constituted a miscarriage of justice."

It is well settled that an appeal on these grounds is regarded as another way of saying that the verdict was unsafe and unsatisfactory. It is equally well-settled that a verdict may be set aside as unsafe and unsatisfactory notwithstanding that, as a matter of law, there was evidence upon which the accused could have been convicted: *Chamberlain v. R. [No.2]* (1984) 153 CLR 521; *Morris v. R.* (1987) 163 CLR 454.

This Court, in deciding whether a verdict was unsafe and unsatisfactory, is deciding a question of fact: *Morris v. R.* (1987) 163 CLR 454 at 462, 476; *Chidiac v. R.* (1991) 65 ALJR 207 at 214; *Volz v. R.* (Court of Criminal Appeal of the N.T., 29/5/90, unreported). Accordingly, leave is required, and the *Rules of Court* relating to the granting of leave should be either complied with or dispensed with.

We will not repeat our earlier remarks about what those *Rules* require, or the purpose of maintaining a distinction between appeals as of right and cases where leave is required. The Appellant did not comply with the *Rules* in this case.

The bases of the Appellant's submission were explained orally and in the Appellant's written submissions by counsel for the Appellant. These bases were:-

(a) that in respect of all the deceased, the accused was suffering from an abnormality of mind sufficient to reduce the crime from murder to manslaughter on the basis of diminished responsibility;

(b) that in respect of the deceased Dick, Cecily and Dolly, the accused should have been acquitted of murder on the ground of provocation.

Diminished responsibility

The substance of this argument was, in short, that the jury's verdicts reflected a lack of acceptance of the views of the psychiatrists, Drs Ridley and/or Batholomew, when no reasonable jury could have failed to find on the balance of probabilities based on the evidence of one or both of them that the accused was at the relevant time "in such a state of abnormality of mind as substantially to impair his capacity to understand what he was doing or his capacity to control his actions or his capacity to know that he ought not to do the act, make the omission or cause the event" which resulted in the deceased' deaths: see *Criminal Code*, s.37. Bearing in mind that the accused bore the burden of proving any abnormality of the mind (*Criminal Code*, s.6) and that the Crown called another psychiatrist, Dr Barclay, who disagreed with the views of Drs Ridley and Bartholomew, and whose opinion was that the accused was not so suffering from any such abnormality of the mind as would bring him within s.37 of the *Criminal Code* at the relevant time, the appellant undertook a considerable burden to establish that leave should be granted on this ground, given also that inherent in such a submission was the additional submission that the jury should accept the evidence of the accused in so far as that evidence was necessary for the opinion of the two psychiatrists concerned to arrive at their conclusions. If the evidence of Drs Ridley and Bartholomew had gone unchallenged, and the evidence of the accused had gone unchallenged, the appellant would have had a

sufficient basis for the grant of leave, as the appellant could show that there was something in the admitted facts which pointed to the jury's conclusion being an erroneous one: *Jeffries v. R.* (1916) 18 WALR 143; *R. v. Matheson* [1958] 2 All ER 87. In this case the evidence was not unchallenged, and in our view it behoved the appellant to point to some facts or circumstances which demonstrated not only the strong probability that Dr Barclay's opinion was wrong but also that the jury should have accepted the views of Drs Ridley and Bartholomew in all the circumstances. Given that appellate courts will not disturb a jury's verdict on an issue such as this where there are facts or opinions which would entitle the jury to reject or differ from the opinions of Drs Ridley and Bartholomew (see *R. v. Shearsmith* [1967] Qd R 576 at 589; *R. v. Jennion* [1962] 1 All ER 689; *Walton v. R.* [1978] AC 788; *R. v. Spratt* [1980] 2 All ER 269; *Bender v. R.* (N.T. Court of Criminal Appeal, 17/8/90, unreported)), this is no easy task.

In essence, the Appellant's counsel attempted to persuade the court of this by pointing to the following factors:

(a) Dr Ridley was the appellant's treating doctor over a relatively long period of time. Whilst this is so, we note that the first time she saw the Appellant was at Berrimah Gaol on 11 July 1989, some ten months after the shooting, and Dr Ridley at the time of the trial had neither heard the taped confession nor seen the video re-enactment.

(b) Dr Barclay had seen the Appellant once only for the purposes of reporting to the Crown his assessment of the Appellant's mental state and he was inexperienced in dealing with aboriginal people. Nevertheless, we observe that Dr Barclay had seen the video and heard the tape both of which were made within a fortnight of the shootings and he based his views substantially on

> that material (which the jury and this Court also saw and heard). Dr Barclay's evidence was that there was nothing in that material to suggest that the appellant had any abnormality of mind, and when one has regard to the circumstances of the killings (where, for instance, the accused shot the radio to make it difficult for help to be obtained and to enable him to elude capture), we are not persuaded that there is a case pointing to the proposition that no reasonable jury could have failed to make a finding on this issue in favour of the accused, bearing in mind that the burden of proof on this issue rested with the Appellant. We would therefore refuse leave to appeal on this line of argument.

Provocation

In this case, Mr Hore-Lacey referred the Court to two passages in the transcript in which the counsel for the Crown, in his address to the jury, said words which, so it was submitted, virtually conceded that the Crown had not discharged the burden upon the Crown to prove beyond reasonable doubt that the killings of Dick, Cecily and Dolly were unprovoked. Further, the Court was referred to the following passage in the trial judge's summing up:

> "Now, I think it's fair to say that Mr Crown has already drawn your attention to some distinction which might or might not be made there. He would put it to you that Cecily and Dick might have been involved in provocation and I think he goes further than that and almost suggests to you that there is a real situation of provocation there which you may well accept and which may well reduce the crime of murder to manslaughter. Again, that's a matter for you, but I think that's the Crown putting the matter very fairly indeed."

Nevertheless, the jury convicted the Appellant of murder in respect of each of the deceased. The Appellant submits that in the light of these concessions, the verdict was unsafe

and unsatisfactory.

Whilst we are of the view that the concessions made and the remarks of the trial judge are such as to sufficiently excite the interest of this Court so as to grant leave on this ground, in our view the appeal on this ground should nevertheless be dismissed.

The relevant provision of the *Criminal Code* is s.34(2) which is in these terms:-

> " (2) When a person who has unlawfully killed another under circumstances that, but for this subsection, would have constituted murder, did the act that caused death because of provocation and to the person who gave him that provocation, he is excused from criminal responsibility for murder and is guilty of manslaughter only provided -
>
> (a) he had not incited the provocation;
>
> (b) he was deprived by the provocation of the power of self-control;
>
> (c) he acted on the sudden and before there was time for his passion to cool; and
>
> (d) an ordinary person similarly circumstanced would have acted in the same or a similar way."

Further, s.1 of the *Code* defines "provocation" to mean:-

> "any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person, to deprive him of the power of self-control;"

As to "wrongful act," s.1 of the *Code* provides:-

> ""wrongful act" and like terms mean an act that is wrong by the ordinary standards of the community; a lawful act may be a wrongful act, but any act expressly declared to be lawful cannot be a wrongful act."

The Crown would discharge its onus of proof that the accused was not provoked if it established beyond

reasonable doubt either that the circumstances did not amount to provocation as so defined, or if it established the absence of any one of (a) (b) (c) or (d) of s.34(2).

In this case the chief difficulty for the Appellant lies in showing that a reasonable jury must have held a reasonable doubt as to whether an ordinary person similarly circumstanced to the accused would have acted in the same or a similar way to the way in which the accused acted. That question is, *par excellance*, a jury question. An "ordinary person" for the purposes of s.34(2)(d) of the *Code* and for the purposes of the definition of "provocation" means, in the circumstances of this case, an ordinary Aboriginal male person living at the time of the offences in the environment and culture of a fairly remote Aboriginal settlement, such as Maningrida. As Kearney J. observed in *Tabarula v. Poore* (1990) 68 NTR 26 at 34:

> "He is neither drunk not affected by intoxicating liquor, does not possess a particularly bad temper, is not unusually excitable or pugnacious, and possesses such powers of self-control as everyone is entitled to expect an ordinary person of that culture and environment to have."

Having undertaken an independent examination of the relevant evidence (see *Morris v. The Queen* (1987) 163 CLR 454 at 473) we are unable to conclude that a jury which decided that question adversely to the Appellant was acting unreasonably, no matter what concessions were made by the Crown prosecutor. The acts said to amount to provocation consisted of (a) the refusal by Cecily to obey the accused's instructions as her husband to prepare his food (b) the conduct of Dick in instructing his daughter Cecily not to touch the food (c) the statement by Cecily to the accused that he was not the father of her children (d) the conduct of Dolly in suggesting to Cecily that she should leave the accused and come and live with Dick and Dolly and (e) the remarks made by Cecily and Dolly that persons of the accused's tribe were not welcome at Molgawa Outstation.

In our opinion, the jury was perfectly entitled to say that they were in no doubt that none of these acts collectively or individually warranted a finding that an ordinary Aboriginal similarly circumstanced to the accused would have acted in the same or a similar way to the way he did. Accordingly the appeal on this ground should be dismissed.

Conclusions.

In conclusion, we would grant leave to appeal in relation to grounds 1, 2 and 8 and in relation to the issue of provocation raised by grounds 6 and 7 and would refuse leave in relation to the issue of diminished responsibility (grounds 6 and 7) and in relation to the issues concerning s.137 of the *Police Administration Act*, and would dismiss the appeal.

Martin J.

I agree and have nothing to add.