

R v Wurrawilya [2011] NTSC 68

PARTIES: THE QUEEN

v

CHERELLE ROSEMARY
WURRAWILYA

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING TERRITORY
JURISDICTION

FILE NO: 21020992

DELIVERED: 2 SEPTEMBER 2011

HEARING DATES: 28 & 29 JULY 2011

JUDGMENT OF: MILDREN J

REPRESENTATION:

Counsel:

Plaintiff: M Nathan
Defendant: J Brock & G Lewer

Solicitors:

Plaintiff: Office of the Director of Public
Prosecutions
Defendant: North Australian Aboriginal Justice
Agency

Judgment category classification: C

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

R v Wurrawilya [2011] NTSC 68
No 21020992

BETWEEN:

THE QUEEN
Plaintiff

AND:

**CHERRELLE ROSEMARY
WURRAWILYA**
Defendant

CORAM: MILDREN J

REASONS FOR JUDGEMENT

(Delivered 2 September 2011)

- [1] This is an application under s26L of the *Evidence Act (NT)* challenging the admissibility of confessional evidence which the Crown intends to lead at the accused's trial.

Background facts

- [2] The accused is charged with one count of unlawfully supplying a dangerous drug, namely cannabis plant material, to another person or persons, unknown, contrary to s5(i) and 2(a)(iv) of the *Misuse of Drugs Act (NT)*. To this charge, the accused has pleaded not guilty.

- [3] The Crown case is that at about 3pm on Friday 18th June 2010 police attended at the Vincent Air Terminal on Lancaster Road, Darwin Airport in order to screen passengers about to board a flight to Groote Eylandt for drugs. This was a routine operation. Altogether four officers attended, including Detective Senior Constable Barton and Detective Sergeant Craig Windebank. Accompanying the police was a drug detection dog. Initially the dog was taken to the luggage area, whilst Detective Senior Constable Barton and Detective Sergeant Craig Windebank remained outside of the terminal building. The dog did not react. Detective Senior Constable Barton and Detective Sergeant Craig Windebank then entered the terminal. The awaiting passengers were asked to all stand in a line. The dog then was employed to detect drugs in the hand luggage and on the person of the passengers. The dog reacted positively to the person of the accused, who was waiting with her nine year old daughter to board the aeroplane.
- [4] At about 3.15pm Detective Senior Constable Barton escorted the accused and her daughter into a conference room to the side of the waiting room in order to conduct a search of the accused's person. At this stage the accused was not told that she was under arrest. It is not in contention that the power to conduct the search and to detain the accused for that purpose was authorised under s120C(c) and s120E(a) of the *Police Administration Act (NT)*.

The first conversation

- [5] After entering the conference room Detective Senior Constable Barton shut the door and then told the accused that as the dog had reacted to her, she would have to search her person and clothing for drugs. Detective Senior Constable Barton could not remember the exact words she used. Her evidence was that she cautioned her before the search began. She said that she told the accused that because the dog had reacted, she would have to search her. She said to the accused, “Do you have anything on you? You don’t have to tell me if you don’t want to but the dog has reacted. That is why we have brought you into this room. We’re going to conduct a search but is there anything on you that I should know about?” The accused replied “No.” At this time, Detective Sergeant Craig Windebank remained outside of the conference room. The accused was asked to remove her long sleeved chequered shirt, underneath which was a t-shirt or tank top. The accused was non-responsive, and the request was repeated, and she removed her shirt and gave it to Detective Senior Constable Barton who found nothing hidden in it. Detective Senior Constable Barton then asked the accused to place her arms on the wall in order to conduct a “pat-down.” The accused went to raise her arms, but instead, removed a package from her brassiere. The package was like a cryovac plastic bag inside which were deal bags of what looked like, and was later found to be, cannabis plant material. Detective Senior Constable Barton placed the package on a table and then conducted a physical search of the accused which was uneventful.

- [6] Immediately after the accused handed over the package, Detective Senior Constable Barton's evidence was that the accused told Detective Senior Constable Barton that the package was not hers, that a person whom she named had given it to her to give to another person, whom she named, in Groote, that this first person often gets people to take things to Groote, that the person in Groote 'sells or does whatever they do in Groote, that she had done it before and would probably go to gaol, and could Detective Senior Constable Barton help her.' Detective Senior Constable Barton stopped her and said words to the effect: 'Look, we will talk about it later, but right now we have to deal with what we have right now, so we can get you and your daughter on the plane,' and 'we can speak about this later on.' None of this conversation was electronically recorded.
- [7] In cross-examination it was put to Detective Senior Constable Barton that she had mentioned to the accused getting on the plane earlier in the conversation. Detective Senior Constable Barton conceded that at the time of explaining to the accused that she would have to be searched, that she said, in a friendly manner, 'if we get this over and done with then you can go on your flight.'
- [8] The accused's evidence in chief concerning the initial stages of being taken to the conference room was not markedly different from Detective Senior Constable Barton's, except that she was wearing a jumper rather than a shirt. She agreed that she was told by Detective Senior Constable Barton that she was to be searched because the dog has reacted, and that at first 'I just stood

there not saying anything to her, I just stood there and after that I took my jumper I was wearing myself and I took the stuff out and gave it to her.’ She said that she was nervous and ashamed that she was going to be asked to remove her clothes. Before she removed her jumper, Detective Senior Constable Barton told her ‘the quicker we do it, the quicker we finish this and just board the plane.’ Whilst in the room, her daughter was crying. She said that Detective Senior Constable Barton said that ‘if she didn’t cooperate she would be taken to the Watch House and she would find someone to look after her daughter.’ After she handed over the package, she said that Detective Senior Constable Barton asked her where she got the package from. She said that she decided to cooperate because she really wanted to travel that day, and if she did not do so, she would be taken to the Watch House and separated from her daughter.

- [9] In cross-examination she said that the conversation concerning co-operation occurred in the waiting room as they were walking towards the conference room. Almost immediately afterwards, she changed her evidence saying that it occurred after entering that room, and immediately before she took her jumper off. In cross-examination she agreed that she was concerned that she might go to gaol, she knew she had done this before, that she decided to tell the police about where the drugs came from hoping to stay out of gaol and that she was the one who raised it with Detective Senior Constable Barton. However this is not necessarily inconsistent with the tenor of her evidence in chief.

Was the first conversation voluntary?

- [10] The burden of proving that the confession made by the accused is voluntary rests with the Crown upon the balance of probabilities: *Wendo v The Queen*¹ The Crown must show the confession was made in the exercise of a free choice, and not because the will of the accused has been overborne.² A confession which has been obtained from fear of prejudice or hope of advantage exercised or held out by a person in authority is not voluntary, and will be excluded.³
- [11] Mr Brock's submission was that in all the circumstances the accused was led to believe by a person in authority, Detective Senior Constable Barton, that if she did not cooperate during the search and answer her questions about the source of the drugs, she would be arrested, taken to the Watch House, and separated from her daughter, whereas if she cooperated she would be allowed to catch the plane.
- [12] In considering the submission, I must have regard to all of the circumstances. I find that, at the time the accused was taken into the conference room, she was a suspect, and not free to go. Although she was not formally arrested, she was clearly under arrest. Detective Senior Constable Barton's evidence was that she was not free to leave. Plainly this must be so because otherwise the search could not have been conducted. The impression on the accused's mind must have been the same. She and her

¹ (1963) 109 CLR 559.

² *R v Lee* (1950) 82 CLR 133 at 134.

³ *MacPherson v The Queen* (1981) 147 CLR 512 at 519, 532.

daughter were taken into the room, the door was closed and she was told that she was to be searched.

[13] The evidence concerning the caution which was administered is that the accused was told that she did not have to answer Detective Senior Constable Barton's questions before any part of the search process had commenced. The accused was not asked about this topic by counsel from either side. I have no reason to doubt Detective Senior Constable Barton's evidence, but it is plain that the caution given was grossly inadequate. It did not, for instance, advise the accused that anything she might say could be taken down and given in evidence against her. Furthermore, the caution was not electronically recorded. Detective Senior Constable Barton conceded that the caution was not in "exact technical words." Her purpose in asking the accused "if there was anything you had on you that I should know about?" was primarily to protect herself from anything which might hurt her when carrying out the search, such as needles, but whatever was in her mind was not communicated to the accused.

[14] I find that the accused was told words to the effect that if she cooperated with Detective Senior Constable Barton, she and her daughter would be allowed to board the plane. The question whether or not Detective Senior Constable Barton went on to threaten her with being taken to the Watch House if she did not cooperate, is not clear cut. Detective Senior Constable Barton denied making any such suggestion, but the accused maintains she did. Clearly, on Detective Senior Constable Barton's evidence, that was a

possibility in her mind which she was anxious to avoid, particularly as it would mean having to find a carer for the accused's child.⁴ The accused is an Aboriginal woman, probably in her mid thirties. She spoke reasonable conversational English when giving her evidence. She was originally from Groote Eylandt. My impression was that English was a second language, mainly because of her sentence structures and word usage. I have no doubt that she was anxious to board the plane, fearful of arrest and separation from her daughter who was plainly distressed. In those circumstances it would have taken little to encourage her to tell police what she did about the source of the drugs. The possibility of being taken to the Watch House and being separated from her daughter was likely to be in her mind as well. I am unable to reach a firm conclusion as to whether or not Detective Senior Constable Barton actually said she might have to go to the Watch House if she did not cooperate. If she did this was clearly an inducement. The burden of proving there was no inducement is on the Crown. I am not satisfied that the Crown has discharged its onus of proof.

[15] Be that as it may, even if those words were not said, both parties had it in their minds. The fact that Detective Senior Constable Barton told the accused that if she cooperated she could still catch the plane must be seen in that light. The invitation to tell Detective Senior Constable Barton 'if there is anything I should know,' I find was the trigger which caused the accused to tell Detective Senior Constable Barton about the source and intended destination of the drugs. It is quite likely that if the caution had been

⁴ See Tr p16.

administered properly, and the appropriate procedure followed as required by the *Anunga Guidelines* and the *Commissioner's Guidelines*, the accused may have exercised her right of silence. I am not satisfied that the Crown has established that this confession was voluntary in the exercise of a free choice to speak or to remain silent. I reject Mr Nathan's submission that the accused volunteered the information. The conversation between the accused and Detective Senior Constable Barton is therefore inadmissible on common law grounds.

The second interview

- [16] After the conclusion of the search, Detective Sergeant Craig Windebank entered the conference room and was shown the package containing the drugs. He was not told anything about the conversation between Detective Senior Constable Barton and the accused. He decided not to formally arrest the accused but to conduct a "field interview." The interview was conducted in the conference room using a hand-held tape recorder, which was physically in his possession. Detective Senior Constable Barton was also present. The accused was properly cautioned in English. Having heard the tape I am satisfied that she understood it and that she knew it was her choice to speak or remain silent. The interview was very brief. It lasted only 5 minutes. It contained some admissions relevant to the charge.
- [17] At no stage was the accused told that she was not under arrest. It was submitted that her continued detention after the search was unlawful. *The*

Queen v Lavery,⁵ where King J said, when referring to a request by police to accompany a suspect to the police station:

The suspect's liberty is not under restraint simply because the police officer would or might arrest him if he were to exercise his right to depart or to refuse to accompany the police officer. If, however, the circumstances are such as to convey, notwithstanding the use of words of invitation or request, that the suspect has no real choice, his freedom is under restraint and he cannot be regarded as accompanying the police officer voluntarily. If such a situation comes into existence, and the police officer does not wish to make an arrest, it is incumbent upon him to make it clear by words or actions that the suspect is free to refuse the invitation and is free to depart. I am satisfied in this case that the words of request were a mere formality and were understood as such, and that the accused had no real choice. In my view, he was under restraint from the time Conway placed his hand on his shoulder. The restraint on his liberty was not legally justifiable because he was not told that he was under arrest and was not told the substance of the allegation against him: *Christie v Leachinsky*⁶.

[18] I do not accept this submission. The police has power to further detain the accused under s137(2) of the *Police Administration Act*. But once this occurred, s140 of the *Police Administration Act* must be complied with. Even though Winderbank did comply with s140(a), he did not comply with s140(b). The result is that the evidence of the second interview is inadmissible unless I exercise my discretion to admit it under s143.

[19] However, before coming to consider that question it is necessary to decide whether the confession in the second interview was voluntary. In my opinion it was not, because it was tainted by the involuntary admissions made in the first interview only a few minutes before. It is in this context that what fell

⁵ (1978) 19 SASR 515 at 516.

⁶ [1947] A.C. 573.

from King J in the *Queen v Lavery*⁷ has relevance. If Detective Sergeant Craig Windebank had told the accused she was not under arrest and was free to go, any inducement operating on her mind would probably have evaporated. She would have known that no further “cooperation” was necessary in order for her and her child to catch the plane. In the result the second interview is not admissible and must be excluded.

⁷ (1978) 19 SASR 515.