PARTIES:	THE QUEEN v CHARLIE BARA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
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CATCHWORDS:

CRIMINAL LAW – EVIDENCE

Whether admissions during record of interview made voluntarily – whether should be excluded in exercise of discretion – failure to comply with *Anunga* guidelines, *Police Administration Act* and *Police General Orders* – incomplete caution administered – whether admission of evidence contrary to interests of justice – admissions not rendered unreliable or untrustworthy – application of 'public policy' discretion – observations on amendment to Police General Order Q 2.7.4

Police Administration Act ss140, 143
Police General Orders, Q 2.5.2, Q 2.7.4, Q 2.8, Q 2.9, Q 2.16
Anunga Guidelines (2), (3), (4), (6), (7), (9)

R v W [1988] 2 Qd R 308, followed
R v Anunga (1976) 11 ALR 412, discussed
R v Sharp (1983) 33 SASR 366, distinguished
R v Grimley (1994) 121 FLR 236, followed
Grimley v The Queen (1995) 121 FLR 236, followed

R v Swaffield (1998) 151 ALR 98, applied
Dumoo v Garner (1998) 7 NTLR 129, followed
R v Butler [No. 1] (1991) 57 A Crim R 451, referred to
R v Martin (1991) 105 FLR 22, referred to
Cleland v The Queen (1982) 151 CLR 1, applied
Van de Meer v The Queen (1988) 82 ALR 10, referred to

CRIMINAL LAW – EVIDENCE –

"Relationship" evidence – nature of – evidence of threat made four years before commission of offence – whether too remote

Wilson v The Queen (1970) 123 CLR 334, referred to
Harrison v The Queen (1989) 167 CLR 590, referred to
Shane Andrews (1992) 60 A Crim R 132, referred to
Shaw v The Queen (1952) 85 CLR 305, applied

CRIMINAL LAW – EVIDENCE –

Photoboard identification – failure to comply with Police Standing Orders – no positive identification of the accused – prejudicial effect outweighed probative weight

R v Dawson (unreported, Supreme Court (NT) Mildren J, 8 November 1994), followed
R v Hissey (1973) 685 SASR 280, distinguished

REPRESENTATION:

Counsel:

	M. Carey; with him A. Fraser
Defendant:	P. Loftus

Solicitors:

:	Office of the Director of Public Prosecutions
Defendant:	NAALAS

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

No. 970987

BETWEEN:

THE QUEEN

AND:

CHARLIE BARA
Defendant

CORAM: KEARNEY J

REASONS FOR RULINGS

(Delivered 5 October 1998)

I ruled on Wednesday last on 3 issues the subject of the voir dire proceedings held last Monday and Tuesday, in the trial of Charlie Bara for the murder of his wife Anne Yunupingu. These are the reasons for those rulings.

The subject matter of the voir dire

(1) Admission of incriminating admissions

The first issue raised was whether the accused's admissions recorded on an audio tape Exhibit P2 and later in a formal interview recorded on video tape Exhibit P3, should be excluded from the evidence. Mr Loftus, of counsel for

the accused, sought the voir dire on the basis that what was recorded on those tapes was inadmissible, in that admissions made by the accused therein were not made voluntarily. Second, that if they were voluntary, they should nevertheless be excluded from the evidence at trial, in the exercise of the Court's discretion.

It was common ground that the Crown bears the onus of proving, on the balance of probabilities, that any admissions made by the accused were made voluntarily, and that the accused bears that onus on the question of discretionary exclusion of voluntary admissions. See generally on the inter-relationship between these concepts, *R v W* [1988] 2 Qd R 308 at 312-4.

Mr Loftus' case was that the questioning police officers had failed to comply with the Anunga guidelines - see *R v Anunga* (1976) 11 ALR 412 at 414-5, the accused being an Aboriginal man; that the accused had not been told why he had been arrested; that the police had never cautioned him fully, in the sense that they had not covered all the elements of the caution; that they had failed to inform him that he could have a 'prisoner's friend' to sit with him while he was questioned; that they had never told him the nature of the offence about which they were questioning him; that they made no attempt to ascertain whether he understood that he had the right to decline to answer their questions; that no 'prisoner's friend' was present at any part of the questioning; and that no interpreter was used during the questioning.

(2) The admission of certain 'relationship' evidence

The second issue raised on the voir dire was whether certain evidence described as 'relationship evidence' was admissible at trial.

(3) The admission of 'photoboard' evidence of identification

The third issue raised on the voir dire was whether evidence stemming from the use of a board of photographs of 12 men, Exhibit P1, from which a witness Ms Bach was said to have made an identification of the accused as the man she had seen on the beach assaulting a woman, should be admitted into evidence.

Oral evidence was taken on the voir dire from Police Officers Garard and Hodge; this related mainly to the questioning in Exhibits P2 and P3. The question of the 'relationship' evidence, and the use of the photoboard, was dealt with on the depositions taken at the committal proceedings.

I turn first to the question of the admissibility of the incriminating admissions, posed at pp1-2.

The incriminating admissions in Exhibits P2 and P3

(1) How they occurred

Senior Constable Garard was the officer in charge of the investigation into the death of Anne Yunupingu. It was his first investigation of a death which led to a charge of murder. The body of Anne Yunupingu was discovered on 28 April 1997, apparently soon after her death on the beach near

what used to be called Lims hotel. Senior Constable Garard was involved in the investigation immediately, assisted by Detective Hodge.

The accused was located by police at the Groote Eylandt Trust Office in Darwin shortly after 9.35am on 28 April 1997, according to the evidence of ACPO Wapau at the committal. According to ACPO Wapau, when he approached the accused the latter said: "Is it about my wife? I was just about to go to see CIB". ACPO Wapau took the accused to Berrimah Police Centre.

He was interviewed by the police there, at 10.25am. Over the next 24 hours S/C Garard had a number of conversations with the accused. He said that they were all recorded.

Clearly enough, S/C Garard was familiar with the s140 of the *Police Administration Act,* which requires that *before* any questioning of a person in custody, the investigating police officer must caution that person, by informing him that he does not have to say anything, but that anything he does say may be given in evidence. The investigating officer *must* also inform that person that he may communicate or try to communicate with a friend or relative to inform that person where he is being held. Section 140 also provides that, in the circumstances which clearly obtained in this case, the investigating police officer *must* defer any questioning for some reasonable time so as to enable the person to make that communication, or to try to make it; and the officer must afford that person reasonable facilities to enable him to make that communication, or to try to make it.

It is clear that none of these requirements of s140 of the Act were formally met, except that the accused was sufficiently informed that he did not have to say anything in response to the police questions.

I also note the provisions of s143 of the Act which allows evidence to be admitted at trial despite a failure to comply with s140 provided that, having regard to the *nature* of the non-compliance, and the *reasons* for it, the court is satisfied that in the circumstances the admission of the evidence would *not* be contrary to the interests of justice; see generally on s143 *R v Grimley* (1994) 121 FLR 236 at 257, 277-280, in the light of *Grimley v The Queen* (1995) 121 FLR 282 at 301 and 303.

The audio tape Exhibit P2 records various conversations between police officers and the accused on 28 April 1997, commencing at 10.27am with Detective Hodge. At that time Detective Hodge told the accused that he was not under arrest; I accept that that was what Detective Hodge believed at the time. He told the accused that the accused's wife had passed away; the accused said that that was what he had been told by the police, and proceeded to ask what was wrong with her, saying that he did not know what had happened to her, had not been with her, and had not seen her for about a week. Some of these exculpatory statements were inconsistent with what he said later (pp8, 9, 11).

That conversation appears to have lasted about 10 minutes. Detective Hodge said that he then left the interview room. Senior Constable Garard then arrived from the crime scene, and questioned the accused for several minutes. He told the accused that he was under arrest. S/C Garard explained on the voir dire that having come direct from the crime scene, he had by then more information than Detective Hodge had had, and that was why he treated the accused as being under arrest. He said that by then he had sufficient information to detain the accused. He told the accused that the accused did not have to speak to him if he did not want to, and that anything he said would be recorded; he did *not* tell the accused that anything he said might be given in evidence. This was a partial failure to comply with s140(a) of the Act. He did not follow the procedures set out in Anunga guideline (3) – see *R v Anunga* (supra) at 414-5 - when administering this caution. He asked the accused if he wanted anyone to be informed that the accused was with the police, or whether he wanted anyone "to sit with you while I speak to you". This was clearly an attempt to meet the requirements of s140(b) of the Act, and to meet the Anunga guideline (2) as to a 'prisoner's friend'. The accused said "no" to the first of these questions and gave an equivocal answer to the second.
S/C Garard did not follow the provisions of Anunga guideline (2), or Police General Order Q2.5.2., in relation to a 'prisoner's friend'. He was aware at the time that the accused had been "involved with the Police on many prior occasions", and had "been interviewed, and … dealt with through the courts".

There was then a break for 34 minutes until 11.03am. S/C Garard then obtained the accused's consent to take part in an identification parade. That

conversation lasted about 1 minute; there was then a break of about 47 minutes, until 11.51am. By then they had gone to the watchhouse area, preparing for an identification parade. The accused was put in a cell. This exchange on the tape lasted about 1 minute.

Some time then passed. During this time the accused apparently declined to take part in the proposed identification parade, after going down to another room for it. Questioning resumed, with S/C Garard questioning the accused as to why he had declined to take part. The accused gave some reasons which are difficult to follow; he appeared to say that he had thought that he was going to see "my witnesses". This is the first time in the taped exchanges which give rise to concern as to the accused's comprehension of the English language.

S/C Garard then said that he would ask the accused "to take part in a record of interview". He also observed that he had "asked you 2 times before" but "for the record" was asking "you again, would you like someone to sit with you in the record of interview." There is no record of S/C Garard having asked the accused "2 times before"; in so far as this was an attempt to meet Anunga guideline (2) as to a 'prisoner's friend', it did not tell the accused what he should have been told – see p16. The accused's response is difficult to understand, but he appears eventually to have indicated that during the interview he would prefer to "sit by myself". This exchange clearly lasted only a few minutes, and concluded at 3.50pm.

Some 56 minutes then passed. At 4.46pm the questioning re-commenced. S/C Garard informed the accused that the police were "not going to do the interview now", and instead would ask the accused to show them "where you slept last night". He told the accused that "you don't have to do that if you don't want to". The accused agreed to show the police where he had slept, and went off with them in a vehicle. That exchange took only about 1 minute. Clearly then, they drove off.

Sixteen minutes later, at 5.03pm, they were at a park in Westralia Street, Stuart Park. On tape S/C Garard reminded the accused that "you don't have to speak to me if you don't want to", and proceeded to question him as to when he had been at the park. The accused said that he had been there from about 1am on 28 April; that he was there by himself, sleeping on a chair, until about daybreak. He then said that before going to the park he had been at the beach with his wife (the deceased), at Lims; this was contrary to what he had earlier told Detective Hodge – see p5. That exchange lasted about 2 minutes.

There was then a break for about 1 minute. The questioning resumed on tape at 5.06pm. The accused said that he had walked from the beach to the park at Westralia Street, alone, and drunk. He had been drinking methylated spirits. This exchange lasted about 2 minutes.

There was then a break of about 16 minutes. Meanwhile, they had clearly driven to the beach area, near the hotel which used to be known as 'Lims'. The questioning recommenced there at 5.24pm. S/C Garard secured the

accused's agreement that they had driven from the park in Westralia Street to Lims, by following the accused's directions as to the way he said that he had walked at 1am that morning from Lims to the park.

Detective Hodge left the vehicle to go to the beach. In response to questions by S/C Garard the accused volunteered that his "wife was just lay – laying down there" on the beach, and had hit him on the head, with the result that he "just got crazy", and they had then had "this fight". These were his first inculpating admissions, and were contrary to his earlier account (p5). S/C Garard clearly recognized the significance of what the accused had said, and immediately warned him:

> "Remember I said to you time and time again today, you only talk to me if you want to. You got – you've gotta decide, okay".

The accused said that he was too drunk to remember what had happened. It was only a "short fight". He admitted that he had hit his wife with "a stick or something", and nothing else. He had then walked away, leaving his wife "sitting down". He said that the 2 of them had been there from about 5 o'clock in the afternoon of 27 April, "to 12".

S/C Garard then asked some leading questions which amounted to cross-examination, but the accused stayed with the account which he had given. I note that it is said in Anunga guideline (4) that "anything in the nature of cross-examination should be scrupulously avoided, as answers to it have no probative value." This guideline was not observed, but no consequences

flowed from that. This important period of questioning had taken about 7 minutes; it ended at 5.31pm.

They then drove back to the Berrimah Police Centre. There a formal interview was conducted about 1½ hours later; it is the subject of the video tape Exhibit P3. That interview commenced at 7.04pm; it apparently concluded at about 8.18pm, lasting about 1 hour and 14 minutes. I do not consider that that was "an unreasonably long time", in terms of Anunga guideline (7).

It is clear that before this interview commenced the accused was given something to eat and drink; this accorded with Anunga guideline (6). His shirt and trousers had been taken away, and he had been given a pair of trousers and a blanket as replacements. I accept S/G Garard's explanation as to why the accused was not given a replacement shirt, while noting the requirement in Anunga guideline (9) that in such a situation "steps must be taken forthwith to supply substitute clothing."

In the formal interview S/C Garard did nearly all of the questioning. Detective Hodge was present throughout, and asked some questions. There is no record of a caution having been given until several minutes of questioning had occurred; the caution then administered was incomplete in that the accused was not told that anything he said could be given in evidence in court. There

is no record that the accused was told that he could have a ‘prisoner’s friend’ to sit with him, until some further period of questioning had elapsed; he rejected this offer. There is no record that the prisoner was told why he was being questioned. The accused clearly initially had trouble in understanding the caution given to him, but eventually he appeared to be clear that if he was asked questions which he did not want to answer “I don’t talk”.

The accused was then asked by S/C Garard to “tell me as much as you want to about what happened last night”. The accused then gave an account of he and his wife (the deceased) drinking methylated spirits, of both of them getting drunk; of her hitting him on the head; of his hitting her with a stick on the back, once, and once on the arm; of his then walking away to Stuart Park, leaving her sitting there, smoking.

Later it became difficult to understand what the accused was saying. He may have indicated that some people had ‘cursed’ him to hit his wife.

Later in the interview, having been shown some rocks which had been brought from the crime scene, he said that he had used a rock to hit his wife once on her back, and once “underneath side”; and that a rock with blood on it was “the one she hit me with”. He said that he had used another rock to hit his wife on her right side, while another he said he used to hit her on the head, once. He said that he had thrown these rocks at her, as she sat.

Later on, his account becomes somewhat puzzling, again; S/C Garard thought that he was talking about a "curse in your head". Still later the accused said that he had hit his wife 3 times, and kicked her once in the ribs, but "I never take [her] clothes off".

The video interview was then followed by a 2 minute audio-recorded conversation, concluding at 8.20pm. After some 6 minutes there was a further audio-recorded questioning for about 4 minutes, commencing at 8.26pm. This related to the accused's shirt, and to his agreeing to give some body samples.

After some 32 minutes there was a further 4 minute conversation, commencing at 9.02pm, in which S/C Garard read out a form relating to the taking of body samples, and to the accused's consent to giving them. He explained to the accused what the results of giving the body samples could be. There is no clear indication that the accused understood this explanation.

In evidence on the voir dire there was also a further video tape and audio tape, Exhibit P4, which relate to what is commonly known as a "re-enactment", carried out by the accused at the beach on the next day, 29 April. It is common ground that whether or not these tapes might be adduced in evidence at the trial, depended on whether the contents of Exhibits P2 and P3 were received into evidence.

(2) The submissions

It was necessary in this questioning that the police had regard to the guidelines in *R v Anunga* (supra) at 414-5. As indicated, there were breaches of these guidelines which Mr Loftus rightly stressed.

The thrust of his submissions was that the combined effect of all the breaches of the guidelines meant that it could not be said that the accused spoke in the exercise of a free choice to speak or to remain silent; that is to say, his admissions were not made voluntarily. Mr Loftus submitted, alternatively, that if the admissions were made voluntarily the breaches of the Anunga guidelines were such that those admissions should be excluded in the exercise of the Court's discretion, as being of dubious reliability. He referred in support to *R v Swaffield* (1998) 151 ALR 98 and *Dumoo v Garner* (1998) 7 NTLR 129.

Mr Carey, the Crown prosecutor, submitted that the accused's answers to S/C Garard's questions were responsive; he referred in some detail to the contents of Exhibits P2, P3 and P4. I accept that the accused's answers were responsive. I am satisfied that the accused had a reasonable understanding of the questions put to him, including the questions which led to his admissions, though on occasions he did not understand some other questions. I am satisfied that eventually he understood that he was not required to answer the

Police Officers' questions. I am also satisfied that his admissions were not instances of 'gratuitous concurrence', in the sense explained in *Dumoo v Garner* (supra) at 142. It is clear that at times during the questioning the accused sought to exculpate himself; I consider that this is a further indication that he understood the questioning and was aware of its direction.

(3) Conclusions

(a) Were the admissions voluntary?

In the circumstances I do not consider that the absence of a 'prisoner's friend' was a factor going to the voluntariness of the admissions. No duress, intimidation, undue pressure or trickery was present during the questioning.

There is no doubt to my mind that the accused's answers to the questioning in Exhibits P2 and P3 were voluntary in the sense that they were made in the exercise of his free choice, and not because his will to speak or not to speak was overborne in any way. The conduct of the Police officers in the circumstances of the case did not have that effect upon the accused. I consider after listening to Exhibit P2 and viewing Exhibit P3 that the accused understood very well the greater part of the questions directed to him. He demonstrated a very good comprehension of English at that level of questioning, indicated generally by his immediate and responsive answers.

(b) If made voluntarily, should the admissions nevertheless be excluded from the evidence at trial?

As to the discharge of the onus on the accused to show that the discretion to exclude voluntary admissions should be exercised, Mr Carey laid some weight on the fact that the accused had not testified on the voir dire, citing *R v Sharp* (1983) 33 SASR 366 at 371-2. However, the matters in issue in this voir dire were such that the accused's failure to testify was not a relevant factor; it would be different where, for example, a relevant issue was the accused's state of mind, as it was in *R v Sharp* (supra).

I accept that the admission by S/C Garard that he had *not* put part of the caution to the accused – that what the accused said could be tendered in evidence – was done inadvertently and not deliberately. This is relevant to the exercise of the 'public policy' discretion, as to which see generally *R v Swaffield* (supra) at pp108-111 and 114 per Brennan CJ, and 117, 120, 122-3 and 128 per Toohey, Gummow and Gaudron JJ.

As regards Anunga guideline (3) involving the use of "great care … in administering the caution", as noted (pp13-14), I consider that eventually the accused had an "apparent understanding of his right to remain silent". It is clear that nowhere did S/C Garard inform the accused that he had been arrested on a charge of murder; nevertheless I consider that the accused was made very well aware by the police that he had been arrested on 28 April, and was thereafter held in custody, in relation to his possible involvement in the

death of his wife, that death having occurred in circumstances such that S/C Garard believed on reasonable grounds that it may have arisen from an assault on her which involved the accused.

The recital in the form signed by the accused consenting to give medical samples, to the effect that he had been informed that he had been arrested on a charge of murder, is clearly incorrect; he was not formally charged until the interviewing was completed shortly afterwards. I am satisfied that no deliberate trickery was involved in S/C Garard's non-use hitherto in his questioning, of the word 'murder'.

On the question of a 'prisoner's friend', I note the provisions of Anunga guideline (2), Police General Orders Q2.5.2, 2.8, 2.9 and 2.16, and the observations of Brennan J (as he then was) in *Collins v The Queen* (1980) 31 ALR 257 at 322 on the purpose which a 'prisoner's friend' is intended to serve. The qualities required of a 'prisoner's friend' are set out by Mildren J in his article 'Redressing the Imbalance Against Aboriginals in the Criminal Justice System' (1997) 21 Crim LJ 7 at 10; see also *R v Butler [No.1]* (1991) 57 A Crim R 451 at 453. In *R v Weetra* (1993) 93 NTR 8 at 11-12, Mildren J details what the Police should tell an accused about a 'prisoner's friend'. I respectfully suggest that what Mildren J there indicates, should be considered for inclusion in an amended Police General Order Q2.7.4.

These matters were not fully observed by S/C Garard. Nevertheless, I consider that the accused was made sufficiently aware by S/C Garard that he could have a 'prisoner's friend' to sit with him during the questioning. I am also satisfied (as noted at p14) that his will to speak or not, was *not* overborne by the absence of a 'prisoner's friend'. I am satisfied that any non-compliance with the *Police Administration Act* in this regard was, in the circumstances, such that the admission of the evidence in question would not be contrary to the interests of justice, in terms of s143 of that Act.

As to the question of the use of an interpreter during the questioning, I note the provisions of Anunga guideline (1) and Police General Order Q2.5.1; see also the observations in *R v Martin* (1991) 105 FLR 22 at 23. In the circumstances of this case while I do not consider that it was necessary for the police to have had an interpreter present, to interpret during the questioning, I consider that such a course would have been preferable "to ensure complete and mutual understanding", as it was put in *R v Anunga* (supra) at 414.

As to the discretion to exclude for "unfairness" in the sense of that word in *R v Lee* (1950) 82 CLR 133, bearing in mind the analysis of this discretion by Brennan CJ in *R v Swaffield* (supra) at 104, I do not consider that it has been shown that the admissions in question were rendered unreliable or untrustworthy by the cumulative effect of the various breaches of the Anunga guidelines identified by Mr Loftus. I do not consider that it can be said that

the accused's trial would be unfair, because of some inherent unreliability in those admissions attributable to the "means by which, or the circumstances in which, [they were] procured", as Dawson J put it in *Cleland v The Queen* (1982) 151 CLR 1 at 36. Nor can it be said that the breaches were such that had they not occurred the admissions – though reliable – would not have been made, or would have been materially affected, if this discretion is to be approached in the way suggested by Mason CJ in *Van der Meer v The Queen* (1988) 82 ALR 10 at 20. Reception into evidence of these admissions does not in my opinion involve the risk of an improper conviction thereby.

As to the overlapping 'public policy' exclusionary discretion first outlined in *R v Ireland* (1970) 126 CLR 321 at 334-5, I accept Mr Carey's submission that one of the relevant factors is the seriousness of the offence charged; cf. the much less serious offence charged in *Dumoo v Garner* (supra) and see *R v Swaffield* (supra) at 111, per Brennan CJ. This exclusionary ground is discussed in *Dumoo v Garner* (supra) at 149-50. Taking into account the failures to abide by the Anunga guidelines referred to by Mr Loftus, in all the circumstances of the case, I do not consider that the admission into evidence of the accused's admissions, which are not of dubious reliability (or a conviction based on those admissions) would be "obtained at a price which is unacceptable, having regard to prevalent community standards", as the test was put by the majority in *R v Swaffield* (supra) at 127. I do not consider that S/C Garard in his approach to his questioning evinced a

deliberate or reckless disregard for the provisions of the Act or of the Anunga guidelines.

I turn next to the question whether certain 'relationship' evidence should be admitted, as posed at p3.

The 'relationship' evidence

At the committal Fiona Marika deposed that she was the daughter of the deceased Anne Yunupingu, but had never seen her mother until she went to Groote Eylandt in 1992 at age 13 to take part in the 'Gulf games'. There she spoke to her mother until the accused came up and pulled her mother away. Two days later she spoke to her mother by telephone; in the course of that conversation she says she heard a person she identifies as the accused tell the deceased to "hang up the phone or I'll kill you"; the deceased then terminated the telephone conversation. It is Ms Marika's evidence of hearing those words, which the Crown seeks to adduce in evidence at the trial as 'relationship' evidence.

Mr Loftus submitted that this evidence, upon which the Crown sought to rely as 'relationship' evidence, was too remote in time to be admitted.

Mr Carey submitted that it was not too remote. He referred to other 'relationship' evidence upon which the Crown would rely, the admission of

which had not been challenged on the voir dire. This included medical evidence derived from the post mortem, of prior injuries suffered by the deceased; the Crown proposed to establish that the accused was involved in the infliction of these injuries. There would be evidence that the accused had perpetrated actual physical violence on the deceased. The purpose of adducing the evidence in question was to seek to establish that the relationship between the accused and the deceased was a violent one. Mr Carey submitted that the other 'relationship' evidence would extend back to 1992; accordingly, he submitted, Ms Marika's evidence of what she had heard in 1992 was not too remote, and was relevant in that it also went to prove the violent nature of the relationship between the accused and the deceased, and was admissible as such. He relied on *Wilson v The Queen* (1970) 123 CLR 334, a case where 'relationship' evidence was held to be relevant, the issue there being whether a shooting involved a deliberate discharge or an accidental discharge of a shotgun; evidence of their spiteful relationship made the defence of accidental shooting unlikely. In that case the evidence in question was of 2 quarrels between the accused and the deceased, one 2 years before her death, the other 1 year before.

Evidence of a relationship of enmity (or affection) between a man and his spouse, with whose murder he is charged, is admissible on his trial if it tends as a matter of human experience to explain his motive, or intent, or the act alleged against him. It is admissible because it is probative of that issue, and

hence relevant. Threats made in quarrels between such persons, for example, are admissible to show the terms on which they were living. See, for example, *Shane Andrews* (1992) 60 A Crim R 137 where evidence of the pattern of a number of threats of violence made by the appellant were held to be relevant and admissible to show his attitude and state of mind to the deceased and the appellant's ex-wife; and note the examination of the authorities by Matheson J at 142, and by Olsson J at 161-2. Generally, see *Harrison v The Queen* (1989) 167 CLR 590 at 630-1, per McHugh J.

In the present case, however, I do not consider that the evidence of Ms Fiona Marika relating to what was said in 1992 may reasonably be treated as explanatory of the alleged conduct of the accused in 1997; it is not some integral part of the history of the alleged crime for which the accused is standing his trial. That is to say, I do not consider that proof that the accused said the words alleged to the deceased in 1992, in their context, is relevant to what the accused is alleged to have done in April of 1997. It is not evidence from which a relevant inference may logically and reasonably be drawn as to what he is alleged to have done at that time. This is because what was said in 1992 is too remote in time. Lapse of time is an important matter in this regard; see *Shaw v The Queen* (1952) 85 CLR 365 at 367. See, for example, *R v Tsingopoulos* [1964] VR 676, where evidence of what had been said 4 and 6 years before a homicide, was held to have been wrongly admitted. To be admissible, threats must be sufficiently proximate in time; here they must

have had a direct bearing on the alleged crime of April 1997, to be admissible. In my opinion, they did not.

If this evidence were admissible, as not being too remote, I consider its prejudicial effect would be out of all proportion to its probative value - its only real effect would be to prejudice the accused in the minds of the jury – and it should be excluded from the evidence at trial, in the exercise of the Court's discretion.

The photoboard evidence

S/C Garard said that he had prepared the photoboard, and shown it to several witnesses, after they had given their statements. He agreed that he had not complied with Police Standing Orders in relation to the use of the photoboard, because of "haste and ignorance".

His evidence was that the accused had first agreed and then later declined to take part in the identification parade which he had proposed. As a result, and after the accused had been interviewed and charged, and witnesses interviewed, he decided to have the photoboard prepared. The photograph of the accused's face appeared on it with those of 11 other Aboriginal men. Thereafter, as and when he had the opportunity, S/C Garard showed the photoboard to 3 witnesses in the case. He testified that none of them identified the accused from the photoboard, but 1 of them – Miss Bach –

believed that the man whom she had seen on the beach could have been, or most closely resembled, the face on the photoboard which in fact was that of the accused.

The quality of Miss Bach's identification evidence was so poor that S/C Garard agreed that he could never have relied upon it as identification evidence.

At the committal proceedings Miss Bach said that at a time between 6.30pm and 7pm on Sunday 27 April she had seen a man assaulting a woman on the beach; she had seen his face, briefly. She said that she told the police that she "didn't know if I would recognize him". About a week later, after making her statement, S/C Garard had shown her the photoboard. She said that she told him that she "wouldn't be a 100% certain", and that she would "try to basically exclude people [on the photoboard] that didn't fit my impression of the man and my memory, and that's what I did." As a result of this process she ended up with 1 photograph, as the person who "most resembles" the man she had seen on the beach. That was in fact the photograph of the accused's face. She had told the police that it "would be extremely difficult for me" to pick out the person she had seen.

Mr Loftus submitted that any evidence of identification of the accused should have been by way of an identification parade. No such parade had been

carried out. In any event Ms Bach had not made a positive identification of the accused from the photoboard, and hence the prejudicial effect of her identification exceeded its probative weight. He noted that in the use of the photoboard S/C Garard had failed to comply with Police Standing Orders and with the law as stated by Mildren J in *R v Dawson* (unreported, 8 November 1994) at pp8-16.

Mr Loftus relied on the failure by the police to observe their own Standing Orders in relation to photoboards, and the fact that there was no positive identification of the accused meant that Miss Bach's identification was more prejudicial than probative, to support his submission that the evidence of her identification by photoboards should be excluded as a matter of discretion. That is to say, he relied in part on the *Christie* discretion, referred to by Gibbs J in *Driscoll v The Queen* (1977) 137 CLR 517 at 541.

Mr Carey submitted that the evidence should be admitted. He conceded that the quality of the identification evidence by Miss Bach was 'equivocal', but submitted that it was bolstered by other evidence in the case. He relied on *R v Hissey* (1973) 68 SASR 280 at 290-1. I note that that case involved a quite different factual situation; equally, the situation in *Pfennig v The Queen* (1994-5) 127 ALR 99 at 103, on which Mr Carey also relied, was different. I accept that "[A] question of disputed identity can be resolved by

circumstantial evidence like any other question", as it was put in *R v Hissey* (supra) at 291.

However I do not consider that the other evidence in the committal (to which I was referred only generally) supports Miss Bach's identification of the accused as the man she saw on the beach.

I consider that Mr Loftus' submissions should be upheld, and the photoboard evidence excluded from the evidence to be placed before the jury.

Conclusions

On 30 September I ruled that the content of tapes Exhibits P2 and P3 should be admitted into evidence at the trial, while the 'relationship' evidence of Ms Fiona Marika and the 'photoboard' evidence of Miss Bach should be excluded from that evidence. These are the reasons for that ruling.

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