R v JIMMY BUTLER (NO.1)

Supreme Court of the Northern Territory of Australia

Kearney J

4 November 1991, at Darwin

CRIMINAL LAW - evidence - admissibility of confession by Aboriginal - voluntariness, Anunga guidelines and right to silence

EVIDENCE - criminal law - admissibility of confession - voluntariness requires exercise of free choice to speak - proof required of confessionalist's awareness of right to silence - significance of right to silence

CRIMINAL LAW - evidence - voluntary confession by Aboriginal - discretionary exclusion - Anunga guidelines - desirable qualities of "prisoner's friend" - onus of proof of exclusion - effect of Commissioner's General Orders

EVIDENCE - criminal law - voluntary confession by Aboriginal - discretionary exclusion - nature and purpose of Anunga guidelines as to right to silence

EVIDENCE - criminal law - voluntary confession by Aboriginal - discretionary exclusion - Anunga guidelines - function of "prisoner's friend" - qualities desirable in "prisoner's friend"

EVIDENCE - criminal law - voluntary confession - discretionary exclusion - relevance of Commissioner's General Orders on questioning

EVIDENCE - criminal law - voluntary confession by Aboriginal - discretionary exclusion - onus of proof - whether affected by Anunga guidelines - Commissioner's General Order Q2.7.2

POLICE - criminal law - questioning of Aboriginals - Anunga guidelines - relevance of Commissioner's General Orders on questioning

Cases applied:

Cleland v The Queen (1982) 151 CLR 1
Collins v The Queen (1980) 31 ALR 257
Coulthard v Steer (1981) 12 NTR 13
Fry v Jennings (1983) 25 NTR 19
Furnell v Betts (1978) 29 SASR 300
Gudabi v The Queen (1983-84) 52 ALR 133
MacPherson v The Queen (1981) 37 ALR 81
R v Anunga (1975-76) 11 ALR 412
R v Beljajev (1984) VR 657

R v Grassby (1988) 15 NSWLR 109
R v Lee (1950) 82 CLR 133
R v Williams (1976) 14 SASR 1
Stevens v Lewis (unreported, Muirhead J, 31 October 1979)

Cases distinguished:

R v Mungatopi (unreported, Asche CJ, 16 August 1990)
R v Warrabadlumba (unreported, Martin J, 24 August 1990)

Cases referred to:

Rockman v Stevens (1981) 1 Aboriginal Law Bulletin 6
R v Collins (1975-76) 12 SASR 501
R v Gardner (1915) 11 Cr. App. R. 265
R v Mark Gallagher Jungala (unreported, Forster CJ, 21 March 1980)
R v Westlake (1979) Crim.L.R. 652

Counsel for the Crown:	R.J. Wallace
Solicitor for the Crown:	Office of the Director of Public Prosecutions
Counsel for the Accused:	G. Bauman
Solicitor for the Accused:	NAALAS

kea91121

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. SCC 24 of 1991

THE QUEEN

against

JIMMY BUTLER
(NO.1)

CORAM: KEARNEY J

REASONS FOR RULING ON THE VOIR DIRE

(Delivered 4 November, 1991)

The ruling of 24 October 1991

The Crown case was that at about 1.30 am on Friday 17 August 1990 at Wattie Creek (Dagaragu) one Andy Williams died as a result of violence applied to him by one Joe Reynolds, now deceased, and the accused. On 23 October the accused was arraigned on a charge of murder. After the jury had been empanelled and before the Crown had opened its case, Mr Bauman of counsel for the accused sought and was granted a voir dire to decide whether two items of evidence upon which the Crown proposed to rely were either not legally admissible, or (if admissible) should not be admitted into evidence on the trial - that is, they should be excluded as a matter of discretion. After receiving

evidence on the voir dire and hearing submissions of counsel, I ruled on 24 October that one contested item was admissible as a matter of law and would not be excluded as a matter of discretion from the evidence to be placed before the jury; and that the other item was excluded from the evidence, as a matter of discretion. I said that reasons for the rulings would be given at the end of the trial; the jury returned its verdict on 30 October and the prisoner appears for sentence today; I now publish those reasons.

The submissions seeking exclusion

The first item in question was the written record of an interview of the accused by Detective Senior Constable Nixon at Wave Hill Police Station on 17 and 18 August 1990. Mr Bauman submitted first that it was not admissible in evidence because the incriminating admissions in it had not been made voluntarily. The basis of the submission was that the accused did not properly understand, when making those admissions, that he had a right not to answer the questions asked of him by Nixon; in other words, he was not aware of his right to silence. I consider that for admissions to be voluntary, it must be shown on the probabilities that they were made in the exercise of a free choice to speak or to be silent. This is a question of fact. If there is no proof that the suspect was aware that he was not obliged to speak, that he had a free choice, voluntariness is not established and the admissions are inadmissible in evidence, as a matter

of law; see *Collins v The Queen* (1980) 31 ALR 257 at p.322, per Brennan J; and at p.275, per Muirhead J.

Alternatively, if the admissions were found to have been made voluntarily, Mr Bauman submitted that the record of the interview should nevertheless be excluded from the evidence in the proper exercise of the Court's discretion. The basis of this submission was that the Anunga guidelines had not been properly observed during the interview in that, in effect, the accused had been denied in any meaningful way having a "prisoner's friend" with him. Although Teddy Barry was present throughout in the capacity of the "prisoner's friend", his difficulty in hearing, it was submitted, was such that his physical presence as "prisoner's friend" paid lip-service only to Anunga guideline No.2, viz:-

> "When an Aboriginal is being interrogated it is desirable where practicable that a "prisoner's friend" (who may also be the interpreter) be present. The "prisoner's friend" should be someone in whom the Aboriginal has apparent confidence. He may be a mission or settlement superintendent or a member of the staff of one of these institutions who knows and is known by the Aboriginal. He may be a station owner, manager or overseer or an officer from the Department of Aboriginal Affairs. The combinations of persons and situations are variable and the categories of persons I have mentioned are not exclusive. The important thing is that the "prisoner's friend" be someone in whom the Aboriginal has confidence, by whom he will feel supported." (emphasis mine) *R v Anunga* (1975-76) 11 ALR 412 at p.414, per Forster J.

I consider that it is desirable that a "prisoner's friend" should possess other qualities as well as those emphasized

above. He should be aware of the respective rights and duties of the police and of the suspect in that interview, so that he can ensure that the suspect is aware of the possible consequences of the answers he gives. He should be seen to be independent of the Police and have a temperament such that he is not himself intimidated by the interviewing environment. He should be able to speak the suspect's principal language. There will usually be practical difficulties in obtaining the services of people with all the desirable attributes. In any event, the choice of the "friend" is for the suspect alone, not the police, though the police may assist in securing the services of a "prisoner's friend", if expressly requested to do so by the suspect; see *Gudabi v The Queen* (1983-84) 52 ALR 133 at p.146. The Commissioner's General Orders Q2.8, 2.9 and 2.16 provide suitable instructions to interrogating police officers in relation to the "prisoner's friend".

The second item in question was evidence of a brief conversation between Detective Sergeant Hayes and the accused in the cells at the Wave Hill Police Station, at about 12.33 pm on 17 August 1990, some 7 hours prior to the interview of the accused by Nixon. Mr Bauman submitted that it should be excluded from the evidence to be placed before the jury, in the exercise of the Court's discretion. The basis of the submission was that the incriminating admission by the accused in that exchange had been unfairly obtained, in that no prior caution had been given by Hayes although

the circumstances were such that Commissioner's General Order No. Q.1.20 required it. General Order Q.1.20, as far as is relevant, is as follows:-

> "20 Whilst in custody or arrested for an offence and before being charged with that offence, a person <u>should not be questioned</u> without a caution being administered - - -" (emphasis mine)

The issue was whether what Hayes said was, in substance, a "question".

[His Honour then set out the circumstances of the cells conversation and the police interview. In discussing the police evidence on the voir dire he said:]

As to the conversation in the Police cells Nixon agreed that when Hayes said to the accused: "Joe [Reynolds] say he never hit that man [Andy Williams]" this was in substance a question. Nixon said that he assumed that Hayes spoke the 7 words in issue for the purpose of clearing in his own mind whether the accused was a suspect or someone who should immediately be released; this justification is reminiscent of that relied on by the Crown in a somewhat similar situation in *R v Gardner* (1915) 11 Cr.App.R 265 at p.267; Avory J condemned the practice at p.269, as a form of cross-examination after arrest. I do not see how the words used could possibly have the effect for which Nixon contended, or be intended to have such an effect. Nixon said that he himself would not have cautioned the accused first, in that situation, because the information which led

to the words being spoken by Hayes had come from a co-suspect, and such information is "not always the most reliable". It is however irrelevant that the co-suspect Joe Reynolds was the source of the information. Again, it must be remembered that the accused was in custody under arrest; and it is wrong to put questions to such a suspect without a caution, and admissions thereby secured will usually be excluded. Further, what Hayes said clearly was in substance a most important question. As a literal statement of what Reynolds had said, it was quite inaccurate; Reynolds had <u>not</u> told Hayes that he himself had "never hit" Williams. [Reynolds had said:-

> "You better see him (pointing to the accused). He is the one who killed that old man, hit him and hit me with that nulla nulla, look here."]

Hayes' words represented a conclusion he had drawn from what Reynolds had said. It was improper to put to the accused as a statement by the co-suspect Reynolds, something which Reynolds had never in fact said; see the salutary advice in Commissioner's General Order Q.1.6. It is not suggested that there was any intentional impropriety by Hayes in doing so; the matter arose in a sudden, unstructured and informal way due to the unexpected accusatory statement by Reynolds, which could not have been reasonably anticipated. Nevertheless, what Hayes said, in substance a question, in its context amounted to a form of the well-known "play one against another" technique of interrogation, as to which see

R v Gardner (supra). Fairness to the accused in the sense explained by Deane J in *Cleland v The Queen* (1982) 151 C.L.R.1 at p.19 dictates that, as a matter of discretion, his incriminating admission in response to what Hayes said not be admitted into evidence, since no prior caution as required by Commissioner's General Order Q.1.20 was given.

[His Honour then discussed the police evidence relating to the interview, and continued:]

General Order Q2.5.3, following Anunga guideline No. (3), provides, inter alia: "The suspect should be asked to explain what is meant by the caution, phrase by phrase"; it is clear that Nixon did not observe this requirement, and that is a relevant and weighty matter going to both proof of voluntariness and the exercise of the discretion to exclude. It is important that a suspect demonstrates that he understands he has a right to remain silent, because interrogation in the absence of such an understanding is akin to extracting admissions compulsorily. On the other hand, as Nixon pointed out, he had asked 136 questions before he started to talk about the incident in question. I consider that by then, in terms of Anunga guideline No.(3), "it [was] clear the Aboriginal [had] apparent understanding of his right to remain silent".

[His Honour then discussed the evidence on the voir dire of the "prisoner's friend" and the accused, and concluded:]

I accept Mr Wallace's submission that there was no overbearing by the police of the accused's will to remain silent during the interview. I am satisfied that the accused has a good working knowledge of English; that is to say, when questions are framed in short sentences and expressed in fairly simple language, he is fully able to comprehend them and respond meaningfully in the English language. As to Anunga guideline No 1, I am satisfied that in all relevant matters which arose during the interview there was there was the necessary "complete and mutual understanding" between Nixon and the accused, and an interpreter was not necessary. In reaching that conclusion I am well aware that Dagaragu is a remote Aboriginal community, with all that that entails. But the accused is a man with a lifetime of work and contact with persons speaking English as a first language. He is not a tribal man, unsophisticated in modern ways, by any means. I do not mean to suggest that the Anunga guidelines should be observed only when a suspect falls into that category. But here the accused has, as far as concerns simple concepts expressed in uncomplicated English, as was the case throughout the record of interview, as good a practical understanding of English as the "average white man of English descent", in terms of Anunga guideline No. 1. Bearing in mind his lack of formal education and his level of understanding of English, the manner in which the interview was conducted meant that he was not at a

disadvantage in respect of the investigation, in comparison with members of the general Australian community. That is what the Anunga guidelines were designed to achieve, thus overcoming a particular vulnerability of Aboriginals to police interrogation, and in the exercise of their right to silence.

I consider, despite the accused's varying answers in cross-examination on the voir dire, that during the interview by Nixon he well understood that he did not have to talk to the police. That is, he spoke in his free choice to speak or remain silent. Nixon very fairly drew many relevant matters to his attention, relevant to the informed exercise by him of his right to silence. This case is distinguishable on the facts from *Warrabadlumba* (unreported, Martin J, July 1990); and it is very different to *Mungatopi* (unreported, Asche CJ, 16 August 1990) where the major issue was the effect of the accused's lack of sleep, an issue on which his Honour had the undoubted advantage of a videoed record of the interview. I also note that here the accused declined to take part in a video re-enactment, later proposed by the Police; this is indicative of his consciousness of his rights.

A "prisoner's friend" is present during an interview for the purpose emphasized in Anunga guideline No.2, (p.3). Further, I respectfully agree with Brennan J that -

> "A prisoner's friend is intended to enhance the suspect's ability to choose freely whether to speak or to be silent" *Collins v The Queen* (1980) 31 ALR 257 at p.322.

The right of a suspect to remain silent is a right, not a privilege, and is to be protected as such; proof that a suspect understands that he has that right lies at the heart of the requirement that any admissions he made must have been made voluntarily before they are admissible in evidence. I note that in *R v Mark Gallagher Jungala and anor.* (unreported, Forster CJ, 21 March 1980) his Honour, in dealing with a case of non-observance of the Anunga guidelines, said:-

> "It is absolutely vital that persons being interrogated understand and are accorded the right to remain silent."

In *R v Beljajev* (1984) V.R. 657 at p.662 Starke J said:-

> "- - the right to silence is a fundamental principle of the criminal law and is not to be overridden by any other so-called doctrine or other principle."

I respectfully agree. The right to silence is a statement about how our culture values the individual, and limits the power of the state.

I consider that Barry sufficiently and effectively fulfilled the proper role of prisoner's friend, in the

circumstances, despite his hearing difficulties. He was not, in Muirhead J's graphic phrase in *Rockman v Stevens* (1981) 1 Aboriginal Law Bulletin 6, "a piece of appropriate furniture" at the interview. That was a very different case, where the "prisoner's friend" aged between 12 and 14 years, was selected by the Police and was allegedly involved in the offence about which the 18-year old suspect was being interviewed. Barry's presence there was not merely the paying of lip-service to the Anunga guidelines; he was not an inappropriate choice, in the circumstances of the time and place. I do not consider that it is true to say that Barry did not understand much of what was going on during the interview. His responses to questions put to him during the interview showed that, at least after he had a replacement battery in his hearing aid, he comprehended very well what was said to him. He was available for private consultation by the accused and they availed themselves of that right; see Questions 109, 110. There can be no suggestion that he was bewildered or overborne in any way during the interview.

The accused is clearly not overawed by the Police; he has had many dealings with them in the past. There is no question here of that fear of authority which can lead a suspect, particularly an Aboriginal suspect, to make the response he thinks the interrogator seeks.

In the result I do not accept that the accused should be regarded as having been "on his own" for practical purposes during the interview. There is nothing to suggest that tiredness played any part in his answering or that his earlier undoubted state of intoxication had not dissipated by the time the interview commenced. I consider the admissions in the interview were made voluntarily and there is no reason why the record of that interview should be excluded from the evidence, in the exercise of the Court's discretion. The reception of that evidence would not be unfair to him. I consider that the evidence of the cells conversation should be excluded as a matter of discretion, because a prior caution should have been administered in the circumstances, in accordance with the Commissioner's General Order Q.1.20 (p.5), and the omission to do so rendered it unfair to use the accused's answer against him.

These are the reasons for the rulings of 24 October on the voir dire.

Addendum - the onus on discretionary exclusion

There is a further matter I should mention, relating to the Commissioner's General Order Q2.7.2. The common law of Australia is clear, as I understand it, that an accused bears the onus of establishing the facts which would justify the court in exercising its discretion to exclude from the evidence incriminating admissions he made voluntarily, on the basis that it would be unfair to the

accused to admit them; see *R v Lee* (1950) 82 CLR 133 at pp.152-3. As the High Court there said:-

> "The discretion rule represents an exception to a rule of law, and we think that it is for the accused to bring himself within the exception."

The standard of proof is the balance of probabilities. I note in passing that in briefly reviewing the authorities in *R v Collins* (1975-76) 12 SASR 501 at pp.508-9, Bray CJ expressed "some regrets that the law has developed in this way." I also note that in England the onus in relation to discretionary exclusion lies on the Crown: see *R v Westlake* (1979) Crim.L.R. 652 at p.654. However, the law is clear that in Australia the onus is on the accused.

The fact that an accused relies on an alleged non-compliance with the Anunga guidelines to found his application that the evidence be excluded as a matter of discretion, would not appear to be relevant to the onus he bears on discretionary exclusion. But the Commissioner's General Order Q2.7.2 reads:-

> "A voluntary confession is prima facie admissible. The ordinary rule is that if a defendant asks a Court to exercise its discretion to exclude a voluntary confession, then the defendant bears the onus of providing the grounds upon which the discretion is based, ie - the defendant calls his/her witnesses first on the voir dire. HOWEVER the Northern Territory Supreme Court has ruled that in cases where ANUNGA applies, or is alleged to apply, the above general rule does not operate. The special rule in ANUNGA-type cases is

> that the prosecution bears the onus of satisfying the Court that there are no grounds for excluding the evidence." (emphasis in the original)

This Order could be wholly recast to make it clearer, but for the present I am concerned only with the last sentence.

I am not aware of any decision of this Court which has established the "special rule" referred to, which would be akin to the onus in England. I have not been referred to any such decision. I am unable to locate any reported decision in Australia in which the Anunga guidelines are referred to, where any such rule is laid down or referred to. Mr Wallace, the Crown Prosecutor, albeit with no time for research, submits that there is no such "special rule"; Mr Bauman tends to agree. There was no reference to any such rule in *Collins v The Queen* (supra), a case involving inter alia, an application to exclude evidence for non-observance of the Anunga guidelines; rather, it seems clear that Muirhead and Brennan JJ considered that the discretion to exclude was enlivened when it was shown there had been a non-observance of the guidelines. In general terms, the discretion to exclude arises when a court is of opinion that the admissions were obtained in circumstances which render it unfair to use them against the accused; see generally *MacPherson v The Queen* (1981) 37 ALR 81 at p.85-6, per Gibbs CJ and Wilson J. The onus lies on the accused to establish these circumstances; see *R v Grassby* (1988) 15 NSWLR 109 at 119, and the relevant questions as formulated

by Wells J in *Furnell v Betts* (1978) 20 SASR 300 at p.301. I consider that there is no such "special rule" in this jurisdiction "in Anunga-type cases" as is referred to in the Commissioner's General Order Q2.7.2. In *Stevens v Lewis* (unreported, No. 872 of 1979, Muirhead J, 31 October 1979) his Honour said in passing, when dealing generally with the Anunga guidelines:-

> "The court had at that time experienced many cases where the apparent admissions of Aborigines obtained in routine fashion, in a fashion fair by Australian standards, was shown not to express the true thoughts of the Aborigines. Thus the interests of justice and the effectiveness of investigation was suffering and it was thought to be important to all concerned for this court to make comment which might prove of value to all concerned. The individual matters dealt with there are not necessarily criteria for admissibility. They are matters which will in some cases - not all - be of interest to the court in deciding the question of admissibility, and it was felt that they would be of some assistance to the police.
>
> My experience is that following this case the police generally speaking attempted to give them practical consideration where circumstances permitted.
>
> The primary questions, it seems to me, for the court in considering admissibility of admissions allegedly made by Aborigines or, indeed, by any other person in our community are three. There are three primary considerations - relevance, voluntariness, and then perhaps the question of fairness. Each case must be assessed on the circumstances with regard to the individuals involved. The court, in considering the issues, should take into account the guidelines. The case goes no further than that. <u>The guidelines do not alter the general law relating to the admissibility of confessions</u> or the matters to be taken into account in the exercise of the court's discretion. Slavish or unnecessary adherence to the guidelines, technical adherence for the sake of form or compliance, was never, in my opinion, intended - - -" (emphasis mine)

In *Coulthard v Steer* (1981) 12 NTR 13 at p.16 Muirhead J observed that -

> "- - the Anunga Rules - - were directed to police officers, not to stifle or impede the police function, but to promote efficiency of investigation."

I respectfully agree. I would add that the basic reason for the Anunga guidelines is this: as long as the right to silence is seen as a fundamental right, the system of criminal justice must provide the practical conditions which ensure that the right is freely enjoyed and exercised and any waiver of the right is by a free and genuine choice in the absence of conditions which might vitiate that choice.

I consider that the Crown does not bear an onus when the question is the discretionary exclusion of voluntary admissions. Though in general Crown witnesses testify first on the voir dire, this has nothing to do with onus; it is within the Court's discretion as to who begins, based upon convenience - see the analysis by Wells J in *R v Williams* (1976) 14 SASR 1 at p.3, and in *Furnell v Betts* (supra) at p.302. There is no statutory provision in the Territory regulating the order in which evidence may be called on the voir dire; cf. s.391B of the Crimes Act 1958 (Vic.). It is possible that the Commissioner's General Order Q2.7.2 flows from a misunderstanding of what Muirhead J said in *Fry v Jennings* (1983) 25 NTR 19 at p.26; his

Honour there indicated that especially in areas where the Anunga guidelines apply "it is a sound and fair rule of practice where a challenge to voluntariness is made that the Crown "should begin"". I respectfully agree.
