R v Scotty [2007] NTSC 43

PARTIES:	THE QUEEN
	v
	SCOTTY, HILDA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING ORIGINAL CRIMINAL JURISDICTION
FILE NO:	20606296
DELIVERED:	23 August 2007
HEARING DATES:	14-18 & 21-22 May; 18-22 & 28 June 2007
JUDGMENT OF:	MILDREN J

CATCHWORDS:
EVIDENCE – Admissions – Aboriginal of low intelligence and brain damage – whether suspected of commission of an offence – whether caution required to be given – whether statement should have been required to be taped – whether admissible

EVIDENCE – admissions – Aboriginal of low intelligence and brain damage suspected of murder – formal record of interview conducted without prisoner's friend – Anunga guidelines not complied with – record of interview conducted after suspect had previously exercised the right to remain silent – whether voluntary or should be excluded in the exercise of discretion

EVIDENCE – alleged lies – whether admissible as evidence of guilt

Statutes:
Criminal Code
Evidence Act, s 26L
Police Administration Act, s 142, s 142(1), s 143

Police Commissioner's General Orders, General Order Q2, General Order Q2 3.1.8, General Order Q2 5
Summary Offences Act 1953 (SA), s 74C, s 74D, s 74D(1), s 74E, s 74E(1)

Citations
Followed:
Alexander v The Queen (1981) 145 CLR 395
R v Parker (1989) 19 NSWLR 177
R v Pfitzner (1996) 66 SASR 161
Sinclair v The King (1946) 73 CLR 316

Referred to:
Duke v The Queen (1989) 180 CLR 508
Grimley v The Queen (1995) 121 FLR 282
R v Azar (1991) 56 A Crim R 414
R v Dolan (1992) 58 SASR 501
R v Grimley (1994) 121 FLR 236
R v Harris (1995) 64 SASR 85
R v Joyce [2002] NTSC 70
R v Lee (1950) 82 CLR 133 at 134
R v Murphy (1996) 66 SASR 406
R v Nundhirribala (1994) 120 FLR 125
R v Stokes [2000] NTSC 12
R v Swaffield (1997) 192 CLR 159
R v Weiss (2004) 145 A Crim R 478
Rostron v The Queen (1991) 1 NTLR 191
Van de Meer v The Queen (1988) 62 ALJR 656

REPRESENTATION:

Counsel:

Crown:	Dr N Rogers
Accused:	R Davey & T Aickin

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Accused:	Central Australian Aboriginal Legal Aid Service Inc

Judgment category classification:	B
Number of pages:	54

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

R v Scotty [2007] NTSC 43
No. 20606296

BETWEEN:

THE QUEEN
Plaintiff

AND:

HILDA SCOTTY
Defendant

CORAM: MILDREN J

REASONS FOR RULINGS

(Delivered 23 August 2007)

[1] The accused, Hilda Scotty, is charged with having murdered Russell Moonlight at Alice Springs on 7 August 2005.

[2] An application pursuant to s 26L of the Evidence Act was made by counsel for the accused who sought rulings on the admissibility of certain evidence proposed to be called by the Crown at the accused's trial.

[3] At the conclusion of the hearing of that application on 22 June 2007, I reserved my decision. On Thursday 28 June 2007 I made the following rulings on the admissibility of the evidence concerning:

1. The evidence of conversations allegedly between the accused and Daryl Muir and Constable Ray Wilson and between Detective Acting Sergeant

Leith Philips and Detective Senior Constable Alan Milner are admissible. I declined to reject them in the exercise of my discretion.

2. The evidence that the accused allegedly gave to Daryl Muir and Constable Ray Wilson a false name is not admissible as a lie indicative of guilt.

3. The evidence that the accused allegedly told Detective Acting Sergeant Leith Philips and Detective Senior Constable Alan Milner that she did not know the deceased is not admissible as a lie indicative of guilt.

4. The photographic identification of the accused by Constable Ray Wilson was rejected in the exercise of my discretion.

5. I noted that the Crown does not intend to lead from Dennis Cleven opinion evidence that the DNA left on the deceased's clothing was more probably than not from primary contact with the jacket by the accused (TR p 511). Subject to that, the evidence of Dennis Cleven and the DNA evidence generally are admissible. I declined to exclude it in the exercise of my discretion.

6. The audio tape P22 is irrelevant and inadmissible.

7. The audio tape P11 is irrelevant and inadmissible.

8. The conversations between the accused and Detective Sergeant Isobel Cummins and Senior Constable Troy Stephens at Armata, including the statement P17 and the subsequent conversation between the accused and

Senior Constable Stephens up to the time that the accused was formally cautioned, are admissible. I declined to reject them in the exercise of my discretion.

9. The formal record of interview between the accused and Detective Sergeant Isobel Cummins and Constable Barry Bahnert constituted by exhibits P20 and P26 was rejected in the exercise of my discretion.

[4] Following those rulings, I indicated that I would publish written reasons for these rulings in due course. These are those reasons.

[5] The Crown case as it proposed to be led at trial is contained in an outline which was provided by Dr Rogers. At the commencement of the voir dire hearing there was some vacillation by Dr Rogers as to which matters contained in the outline were still to be relied upon. Some matters were identified as being irrelevant to the voir dire hearing, but as it became apparent that these matters were going to be pressed at trial I consider that they are part of the necessary background for my consideration.

Factual outline

[6] Russell Moonlight, the deceased, usually lived with his father, Cecil Moonlight, at Old Timers Town Camp south of The Gap at Alice Springs. He was a drinker and had a history of taking fits. On the day of 7 August 2005, he was drinking alcohol with a group of Aboriginal people near the railway line and opposite Telegraph Terrace. He was wearing a baseball cap which he had a few days earlier taken out of his sister's motor vehicle. He

was also seen drinking alcohol in the river with some Aboriginal people, including the accused. They were drinking in the vicinity of the public toilet near The Gap. The deceased was seen later at the toilet block looking for cigarette butts. It was still in the afternoon.

[7] In the evening he was seen sitting in the vicinity of The Gap View Motel near The Gap. He appeared to be drunk.

[8] Sometime during the evening, Jonathan Wayne was walking in a northerly direction from Little Sisters Town Camp, where he lived, through The Gap when he saw the accused walking away from the toilet block. The accused is the sister of Jonathan Wayne's mother. He asked her where she was going and she said, "Little Sisters".

[9] Jonathan Wayne continued to some flats near the Piggly Wiggly shops and purchased some marijuana. He smoked it. He then proceeded to walk back towards The Gap.

[10] An employee at the Heavitree Gap Outback Lodge was heading for a shower from her van at about 10:00 pm and heard screaming and yelling coming from the river area. She was unable to identify whether the voice was male or female (Heavitree Gap Outback Lodge is just through The Gap on the eastern side of the river).

[11] When Jonathan Wayne got to The Gap he walked into the toilet block and saw blood. When he walked out he saw a man lying on his back with

clothing and leaves over his face and leaves on his body. He had on a shirt, but it was open. He saw the initials F M scratched into the torso. He lifted up the clothing but did not recognise the face. There were injuries to the face. There were two thongs near the body and a rock. The rock had blood on it. He saw Hilda Scotty standing nearby drinking grog. She was drunk and called out to him.

[12] At some point on this second occasion that Jonathan Wayne was at The Gap, he also saw a cousin, Yambula Wayne (now deceased) outside the toilet. They spoke briefly and then Yambula left, heading in a southerly direction. Yambula was drunk.

[13] Jonathan Wayne then left the toilet block area and proceeded to walk in a southerly direction through The Gap. At the same time Sean Collins, Lemiah Woods, Ralph Collins, Bruce Leo, Brendan Woods and Jason Woods were walking through The Gap in a northerly direction. They had just come from Little Sisters Town Camp.

[14] At some point there was a middle aged Aboriginal man walking in a southerly direction through The Gap. This man was seen by several of the young men from Little Sisters.

[15] Jonathan Wayne told the young men about the body and they all went back to the toilet block. They then all walked to the public telephone near the Piggly Wiggly's shop. Lemiah Woods rang 000 for an ambulance. They all remained at the telephone box except for Jonathan, who walked off.

[16] Ian McKie was the communications operator at St Johns Ambulance at the time. He received the 000 call at 2155 hours. The caller was ringing from the public telephone at Piggly Wiggly's, identified himself as being Isaac Woods and said there was a dead body. McKie contacted the police and then an ambulance crew. The ambulance crew was dispatched at 10:00 pm from the Alice Springs Hospital.

[17] The ambulance crew comprised Andrew Naden and Anthony Wood. When the ambulance arrived at Piggly Wiggly's, Sean Collins jumped on board to show them where the body was situated. The remaining young men walked back to the toilet block. Before the ambulance left Piggly Wiggly's, two uniformed police officers arrived in a police car, Constables Smith and Magner. They followed the ambulance to The Gap.

[18] When the ambulance arrived near the toilet block, the lights were left on to illuminate the scene. Both ambulance officers approached the body. Naden stood away from the body while Wood examined the body for signs of life. Wood touched the body – listened for chest sounds, touched the right arm, checked the eyes and established that the body was deceased. Constable Magner was standing near the body at this stage. The ambulance officers told Magner that the body was deceased. The ambulance officers observed a lot of blood on the head and face and saltbush leaves and twigs on the abdomen.

[19] Magner contacted the police station by police radio and spoke with the watch commander about the deceased. About this time the five Aboriginal young men (Jonathan Wayne being absent) arrived on foot from Piggly Wiggly's. Their names were taken by police.

[20] The two ambulance officers then walked into the toilet and with the aid of a torch, they noticed a large blood pool near the urinal and blood smears near the doorway. They went back to the ambulance.

[21] A crime scene at the area was established and a crime scene log commenced at 10:10 pm. Detectives and other police arrived later, including a member from the crime scene examination unit. There was a drag mark extending from the toilet to where the body was located. A large blood stain was visible on the ground adjacent to the head of the deceased. Extensive injuries were visible to his forehead. The groin area of the deceased was covered with a piece of saltbush and the saltbush was covered by a brown chequered jacket. There were a number of blood stained rocks near the toilet entrance, adjacent to the head and between the right arm and torso of the deceased. Some photographs were taken that night.

[22] That night and the next day, police patrols were commenced along the river in an attempt to identify who was camping there and their movements for the Sunday 7 August 2005. There were a number of people and groups located. Police officers Ray Wilson and Daryl Muir found one group of Aboriginal people in the river near the Ross River Bridge. The names of this group were

noted at the time by police. One of the people in that group gave her name to police as being Vera Scotty. Wilson later identified a photograph of the accused as being the same person as Vera Scotty.

[23] On 8 August 2005 more photographs were taken of the crime scene by police. Video footage was taken also. The clothing of the deceased was collected from the body and the body of the deceased was removed from the scene. An examination of inside the toilet block revealed blood stains on the step of the toilet, a puddle of blood on the floor next to the urinal, blood spatter extending from the puddle of blood onto the wall, and blood stains from the puddle of blood on the floor extending out to where the body was located. The toilet had been cleaned on Sunday morning 7 August 2005 by an Alice Springs Town Council cleaner and there had been no blood in the toilet.

[24] On 8 and 9 August 2005, a South Australian police officer with experience in blood pattern analysis examined the crime scene, the deceased's clothing and the deceased. He took a number of photographs. He concluded that:

- there was blood stain evidence to indicate that the assault on the victim began outside the toilet block;

- medium velocity impact blood spatter patterns located outside the toilet block indicate that the deceased was hit with a blunt object at least three times near the urinal. Two of these blows were delivered while

the head of the deceased was either on or very near the toilet floor and immediately in front of the urinal step;

- blood patterns located along the trail of blood leading out of the toilet indicated that the deceased was dragged by his feet. His head, arms and hands were in contact with the toilet floor and these parts of his body produced the majority of blood patterns observed on the trail;

- the pool of dried blood located in the dirt outside the toilet block indicated the position of the head of the deceased at the time of the final assault. Blood stains located around this pooled blood indicated an indeterminable number of blows were delivered to the head of the deceased at this location.

[25] An autopsy of the deceased was carried out by a forensic pathologist. The findings were: there were severe fractures of the skull; extensive bruising to the brain; lacerations, abrasions and bruising to the face, scalp and neck; a lost tooth from the lower jaw; and numerous incisions to the chest seemingly forming the letters F and M. These incisions were consistent with having been inflicted post mortem.

[26] The jacket was examined at the Crime Scene Examination Unit Alice Springs. A button was found to be missing. Further examination of the crime scene was done and a tooth and two buttons were located near the blood stain that was adjacent to the head of the deceased.

[27] Police chased up statements from those people who had been camping in the river on the night of 7 August 2005 and took authorised buccal swabs from them. Many statements and buccal swabs were taken by police from Aboriginal people, both in the Northern Territory and in South Australia. No interpreters were used by police. A number of Aboriginal people said that they saw the accused on the morning of 8 August 2005 in the river at their camp.

[28] Two Aboriginal women in the investigation were identified as having the initials FM – these women were Filomena Marshall and Fiona Mervin. Buccal swabs were obtained from these women. Police took photos of the letters FM on a house at Little Sisters Town Camp.

[29] Various items located at the crime scene, including the jacket found on the deceased, were sent for analysis to the forensic laboratory. Amongst other results, the DNA testing by a forensic biologist revealed that:

(1) a mixed DNA profile from at least four individuals was obtained from a sample of the outside shoulder regions of the jacket. The major DNA components (i.e. a full profile) were identical to those DNA components attributed to the accused. The major DNA profile identified is at least 28 million times more likely to have occurred if it came from the accused than some unrelated person selected at random from the population represented by the NT Aboriginal database.

(2) a mixed DNA profile from at least four individuals was obtained from a tape lift from the left panel of the jacket. The major DNA components (i.e. a full profile) were identical to the DNA components attributed to the accused. The major DNA profile identified is at least 200 million times more likely to have occurred if it came from the accused than from some unrelated person selected at random from the population represented by the NT Aboriginal database.

(3) DNA from blood samples found on a besser brick and two rocks near the body was identical to the DNA profile attributed to the deceased.

(4) A partial DNA sample was obtained from blood staining on a piece of glass found near the body. The DNA components were identical to those DNA components attributed to the deceased.

[30] A statement from the forensic biologist was obtained on 14 June 2006.

[31] Detectives Cummins and Stephens travelled to Armata. A South Australian police officer, Constable Sanchez, who was at Armata, located the accused and said to her that NT police wished to speak to her. She accompanied him to the Armata police house. She was not under arrest.

[32] A statement was taken from the accused by Cummins. In the statement the accused said that she was camping in the river on the night of the killing of the deceased, got drunk and went to sleep. She was shown a photograph of

the jacket found on the deceased and said that she had never seen it before. There was no interpreter used by Cummins when this statement was taken.

[33] At the conclusion of the statement, Detective Stephens had a conversation with the accused regarding her knowledge of how her DNA came to be on the jacket. The accused then told Stephens that she had been drinking with two boys who were petrol sniffers from Imampa, that she asked the deceased for money, he had a fit and she hit him with a stone. This conversation was recorded in note form by Detective Cummins, who was present when the conversation took place. Police then utilised their tape recorder and cautioned the accused. The accused did not adopt the previous conversation with Stephens and declined to comment further. No charges were laid at the time.

[34] On 28 February 2006 the accused was located at the Royal Flying Doctor Lawns, Alice Springs. She was transported to Alice Springs police station. She participated in an electronic record of interview. An interpreter was present. During the course of this interview the accused admitted striking the deceased once to the back of the head with a stick. She stated that she had done this after two sniffers from Imampa had already struck him several times on the face with a rock and after he had already fallen down on the ground. When asked why she struck the deceased, the accused replied, “Two petrol sniffers made trouble, wouldn’t give them any money”. The accused denied hitting the deceased with a rock at any time, but stated that she was present throughout the incident.

[35] The accused was subsequently arrested and charged with murder.

[36] Three buccal swabs were taken from the accused. They were all authorised by police superintendents. The first was taken in Alice Springs on 5 October 2005 by Detective Isobel Cummins in the company of Detective Milner. The second was taken at Armata on 3 January 2006 by Detective Troy Stephens. The second NISK (Non-Intimate Sample Kit) was taken because the NISK taken in October 2005 returned an incomplete result from the DNA analysis. The third was taken after the accused had been formally charged with murder in Alice Springs on 28 February 2006 by Cummins at the Alice Springs watch house.

Issues

[37] The accused applied for orders excluding the following evidence at her trial:

(1) the evidence of Ray Wilson of the alleged conversation of 7 August 2005 with the accused and his subsequent identification of a photograph of the accused;

(2) the evidence of Leith Philips of the alleged conversations of 24 and 28 August 2005 with “Hilda Marion Scotty”;

(3) evidence of the alleged statement given by the accused to Isobel Cummins and conversations with police and the accused on 3 January 2006 and 28 February 2006;

(4) evidence of the buccal swabs allegedly obtained from the accused on 5 October 2005, 3 January 2006 and 28 February 2006;

(5) the evidence of Dennis Cleven.

[38] In the end result the Crown indicated that it was not relying upon the buccal swabs obtained from the accused on 5 October 2005 and 3 January 2006, but intended to rely on the swab obtained on 28 February 2006. As it was clear on the evidence that this swab was taken lawfully the defence no longer pressed for rulings in relation to the admissibility of the evidence of the buccal swabs.

[39] So far as the evidence of Dennis Cleven was concerned, the objection to the evidence was that its probative value was outweighed by its prejudicial effect.

The accused's mental state

[40] A significant issue during the hearing of the voir dire related to the accused's mental state at the time she was interviewed at Armata on 3 January 2006 and at the time of the record of interview conducted at the Alice Springs police station on 28 February 2006. Expert evidence was given by three witnesses namely Dr Jennifer Delima, a legally qualified medical practitioner who was employed at the Alice Springs Correctional Facility and who saw the accused on a number of occasions, the first occasion being on 3 March 2006; a consultant clinical psychologist Dr Gary Banks, who conducted certain psychological tests on the accused at the

Alice Springs Correctional Facility on 29 March 2007; and Dr Susan Pulman, a clinical neuropsychiatrist who also conducted certain clinical tests at the Alice Springs Correctional Facility on 3 and 4 May 2007. Dr Delima and Dr Banks were witnesses called by the accused. Dr Pulman was called by the Crown.

[41] Dr Delima was a very impressive witness. She has a Bachelor of Medicine and a Bachelor of Surgery from the University of Sydney conferred in 1983; a Master in Health Administration conferred by the University of NSW in 1997; she has been an Associate Fellow of the Australasian College of Health Services Executives since 1998; she is a Fellow of the Australian College of Rural and Remote Medicine and has been since 2004; and also a Fellow of the Royal Australian College of General Practitioners since 2004. She is a member of a number of other professional bodies, including being a member of the Medical Board of the Northern Territory. She is very experienced in dealing with traditional Aboriginal people including women and has lived in a remote community, namely Kintore in the Western Desert, for about two and half years and also in Nhulunbuy in East Arnhem Land for 18 months. During those periods she practised her profession and she was primarily working with indigenous Australians. Dr Delima also speaks a little Pitjantjatjara and Pintubi. She does not profess to be proficient in those languages, but she understands enough to further clarify information offered by Aboriginal patients who speak those languages.

[42] Dr Delima first saw the accused on 3 March 2006 shortly after her arrest on 28 February. At that time the accused was chronically ill with a number of diseases: (1) diabetes; (2) hypothyroidism; (3) hypo pressure; (4) hyperlipidemia (which is a condition where there is a high level of blood fats in the blood); and (5) what Dr Delima described as "chronic organic brain syndrome". According to Dr Delima, the accused was not on her medication for diabetes and that her conditions affected her cerebral function especially the cognitive and fine tuning of the brain. Her hypothyroidism, in her opinion, affected her ability to think and resulted in slow 'mentation' or thinking. She was blind in the right eye and the left eye was also affected as a consequence of her diabetes. Dr Delima considered that though the accused spoke English well enough to carry on a basic conversation, Dr Delima needed to modify her language to the level of a six-year old in order to carry out a conversation with the accused in English. She considered that the accused was cognitively impaired to the extent that Dr Delima was not sure that the accused could consent to an operative procedure. In her opinion the accused was easily distracted, had no ability to make complex decisions, had problems of communication not due to language difficulties and had an IQ, in her opinion, of approximately 70. Her opinion was that the accused could do things which were routine, but needed a guardian in order to manage her affairs. The cause of these complaints was a combination of chronic disease, alcoholism and past multiple head injuries. Dr Delima's assessment of her mental functioning

was based upon her experience as a general practitioner and her regular contact with the accused whilst in prison. She is not a trained psychologist and did not perform any psychological tests.

[43] Dr Banks is a psychologist with extensive experience in testing many Aboriginal people including people from remote Aboriginal communities. He has practised as a neuropsychologist for 20 years although he has not formally trained as such. Nevertheless, neuropsychology was covered in his formal training, but at the time he was trained there was no specialist training in neuropsychology. He conducted tests which revealed, in his opinion, an IQ range of between 60 and 70 placing her below the first percentile. His evidence was that, in general terms, she could be described as "in the borderline category of mental retardation".

[44] There were some problems associated with the tests conducted by Dr Banks. This is partly due to the fact that there are no reliable psychological tests for Aboriginal people. Nevertheless I accept the general conclusions which Dr Banks has reached. I accept his evidence that the accused's memory is grossly impaired particularly with short-term memory and that her problem solving and organisational ability is also affected. Dr Banks accepted the possibility that because the tests which he conducted were compressed over a short period of three hours and in one session only, with only small breaks for a few minutes, that he may have got a low result, nevertheless, making allowance for that, he was still of the opinion that her IQ level was in the borderline category of mental retardation and within the range of 60-70.

Dr Banks also gave evidence that the accused has features of alcoholic dementia, features of severe or traumatic brain injury and that the results of his tests indicated that there was a possibility that her mental functioning would result in confabulation, although on his assessment he had no doubt that the accused was capable of appreciating the reality around her at the time he was testing her. The relevance of confabulation was explained in this way:

> "It is a feature that is seen in alcoholic organicity and brain damage associated with alcohol. And progressing along with alcohol related brain damage you then see dementing processes and that is obviously characterised by failure of memory and then failure of more higher level fragile cognitive functions one of which is your ability to remember things. One of the features we see in alcoholic patients is not only is there a deterioration in memory, there is the, if you like, an effort by the individual to patch up their own gaps in memory by confabulation. They generally don't realise it as confabulation but it is seen clinically as somebody's effort to, if you like, fill up memory gaps between islands of recall – between pieces of recall that they have, they then have a void and they just fill it up with something".

[45] Dr Banks had examined the Alice Springs Hospital files in which were recorded a number of head injuries one of which involved the penetration of the scalp fragments into the brain tissue with features of haemorrhage and oedema. In his opinion that would be rated as a severe to extremely severe brain injury.

[46] Dr Banks was of the view that the accused was still capable of lying.

[47] Dr Pulman gave evidence that she is a neuropsychiatrist practising as a psychiatrist since 1989 and as a neuropsychiatrist since 1993. She had a

Master of Clinical Neuropsychology at Macquarie University and is a member of the College of Clinical Neuropsychologists. She is also a member of the Australian Psychological Society as well as a number of other professional bodies. Dr Pulman was also an impressive witness. She conducted her assessment of the accused at the Alice Springs Correctional Facility on 3 and 4 May 2007. The first part of the assessment on 3 May lasted for two hours and the second session for one and half hours on 4 May. Dr Pulman has also assessed many indigenous people in NSW including people from country areas, but she has not previously assessed Aboriginal people from remote Aboriginal communities.

[48] In her opinion there is no evidence of alcoholic dementia. I accept that assessment, as the results of the tests which she administered were inconsistent with such a finding, and there was no evidence on the Alice Springs Hospital file to confirm such a diagnosis. In her opinion as a result of the tests which she conducted, the accused has a mild intellectual disability with an IQ range of between 61-72 and working memory which is low/average. She also noted that her speed was slow. The tests results that she conducted were inconsistent with traumatic brain injury or alcoholic dementia. There was no evidence of visio-spatial impairment. She considered that the accused was possibly not putting forward her best effort. The accused had indicated to her at the start that she did not wish to undertake the testing. She subsequently became aware of the contents of the Alice Springs Hospital file on the head injuries which are recorded in the

file. Based on the information in the hospital files, she opined the view that the severity of the injuries was most likely to be mild to moderate, but that given the fact that she had had a depressed skull fracture she would have expected there to be some degree of memory impairment.

[49] Dr Pulman was of the opinion that based on the tests which she conducted the accused was capable of understanding the caution, although it is to be noted that the accused's condition had improved according to Dr Delima by the end of 2006. Dr Pulman accepted that the effects of the accused's diabetes and hypothyroidism could affect cognitive functioning and may result in sluggishness, lack of concentration and memory disturbances. In her opinion, the accused's intellectual disability was borderline, but she could work in areas which were intellectually undemanding. I accept her evidence.

[50] I note that when the police cautioned the accused at Armata on 3 January the accused exercised her right of silence. I note also that during the formal record of interview, the accused appeared to understand the she did not have to answer questions. I accept the evidence of Dr Pulman that the accused is capable of understanding the caution. In my opinion, the level of her impairment is not such as to indicate an incapacity to understand the caution on any view of the evidence given by Dr Delima, Dr Banks or Dr Pulman.

[51] I note also that the police witnesses were able to communicate with her in English, albeit slowly and by using relatively simple language.

[52] The first question is whether the accused's mental state was such that any confession which she may have made is inadmissible.

[53] In *R v Parker* (1989) 19 NSWLR 177 at 183, Gleeson CJ distilled the principles relevant to the admissibility of a confession made by an accused person suffering from some form of mental disability as follows:

> "1. The fact that an accused person who has allegedly confessed to committing a crime was, at the time of the alleged confession, suffering from some form of unsoundness of mind or psychiatric disorder may, depending upon the circumstances, be of importance in considering the evidentiary value of the confession, and may in some circumstances deprive it of all evidentiary value: *Jackson v The Queen* (1962) 108 CLR 591. It does not, however, necessarily make evidence of the confession inadmissible: *Sinclair v The King* (1946) 73 CLR 316 and *R v Starecki* [1960] VR 141. As Dixon J observed in *Sinclair*, an insane person is not necessarily an incompetent witness. Persons who are intellectually handicapped or who suffer from disease or disorder of the mind are by no means necessarily incapable of telling, or admitting, the truth…
>
> 3. The intellectual capacity of the accused, or the existence of some disease or disorder of the mind, may go to the issue of whether the confession was voluntary and may in that respect bear upon the admissibility of the evidence. It may be relevant to the question whether the confession was made in the exercise of free choice, as for example, where an accused is incapable of making such a free choice, or of understanding his right to choose between speaking and remaining silent. Depending upon the circumstances, it may have an important bearing upon whether the statement was made as the result of duress, intimidation or undue insistence or pressure. The circumstances in which such a fact may be relevant to an issue as to the voluntariness of a confession are multifarious: *c.f. R v Lee* (1950) 82 CLR 133 and *Van der Meer v The Queen* (1988) 62 ALJR 656; 82 ALR 10.
>
> 4. Further, even if the confessional evidence is admissible, the intellectual or mental state of the accused may, in a number of

possible ways, go to the exercise of a trial judge's discretion to reject the evidence: *c.f. McDermott v The King* (1948) 76 CLR 501; *R v Lee*. It may, for example, touch upon the propriety of the means by which the confessional statement was obtained, the reliability of the statement itself, and the fairness involved in permitting the statement to be used against the accused.

5. A person's vocabulary and standard of comprehension may also be of relevance in determining an issue as to whether such a person in fact made or intended the admissions attributed to him: *Murphy v The Queen* (1989) 167 CLR 94."

[54] In *Sinclair v The King* (1946) 73 CLR 316 it was held that a confession is not necessarily inadmissible because of a mental condition which exposed the accused to the liability of confusing fact with fantasy. In that case Latham CJ said at 324:

> "… [the] evidence did not go further than to show that there was a real risk, recognized by psychiatrists, that on a particular occasion such a man as Sinclair might fail to distinguish fact from fantasy and that he might construct and relate an imaginative account of something that had really never happened. This evidence showed, as I think Dr McGeorge agreed, that it would be very wise, and indeed necessary, to check such evidence carefully by reference to independently proved facts and by any other available means. But it did not show that Sinclair had a mind so disordered and irresponsible that it would be dangerous to pay any attention whatever to what he said."

[55] At 328, Starke J said:

> "But then it was contended that the mere possibility that the confessions were the result of a disordered mental condition was sufficient to exclude them from evidence. Again I am unable to agree. A judge is not bound to exclude a confession from evidence because of such a possibility. He is entitled and bound to consider the probability of the mental condition affecting the truth of a confession in all the circumstances of the case and to decide whether there is prima facie reason for presenting it to the jury."

[56] At 336, Dixon J said:

> "This testimony was not rendered inadmissible by the mental condition of the defendant. The medical evidence falls far short of proving that the mental infirmities of the defendant deprived him of the faculty of consciousness of the physical acts performed by him, of the power to retain them in his memory, and of the capacity to make a statement of those acts with reasonable accuracy. An insane person is not necessarily an incompetent witness: *Kendall v May*; *District of Columbia v Armes*."

[57] It is plain from the authorities that a tendency towards confabulation is not enough. I am unable to say that the evidence establishes that any confession made by the accused is a product of her imagination. There is no evidence that the record of interview or the conversation which the accused had with the police at Armata was the result of duress, intimidation or undue insistence or pressure. Clearly the accused's intellectual incapacity did not deprive her of the ability to exercise a free choice to speak or to remain silent at the time she was interviewed at Armata because when given the required caution, she exercised her right of silence. I am also satisfied that the evidence does not establish that the accused was deprived of the ability to be conscious of her physical acts or to remember them later with reasonable accuracy. There are sufficient similarities between what she told the police at Armata and what she said in the record of interview to suggest otherwise.

[58] In *R v Pfitzner* (1996) 66 SASR 161 at 177 Doyle CJ said:

> "In my opinion it is clear enough from this that the presence of a mental disorder which makes it possible that a confession is

> unreliable, in the sense that the mental disorder is such that one cannot accept it as intrinsically likely to be true, is not sufficient to render a confession inadmissible. That is a matter which goes to weight, and obviously involves a consideration of the terms of the confession and, most importantly, the extent to which the contents of the confession are confirmed by independent proof of the events to which it relates.
>
> At the other extreme a person may be incapable of understanding questions, and of making rational answers to them. The judgments suggest, without it being clear, that a confession will not be excluded unless the judge is satisfied, having heard evidence, that the mental condition of the person was such that the confession was attributable to a disorder which was such that no reliance could be placed upon the admissions made. In expressing the matter this way I have deliberately avoided any question of onus, the correct placing of which does not arise here.
>
> It also seems to me that the tenor of the judgments is that it will only be in an exceptional case that the confessional statement will be excluded, and that ordinarily one would expect issues of unreliability to be dealt with by the jury in deciding the weight to be given to the confession, rather than by the judge in making a decision to exclude the confession.
>
> …
>
> That suggests, to my mind, a test for exclusion along the lines suggested by me above. That is, a test based upon affirmative satisfaction that the admissions are inherently unreliable, as distinct from possibly unreliable."

[59] A number of submissions were made by counsel for the accused that the record of interview was unreliable because of the accused's mental state. However, in my opinion, accepting that accused is capable of lying, there are features in the record of interview which arguably indicate that she was aware of facts which indicated that she was present at the time the deceased met his death. Dr Rogers pointed out that there were the following matters

referred to by the accused in her record of interview which were unlikely to have been within the knowledge of the accused unless she had indeed been the person who killed the deceased. Specifically these were that the deceased was hit with a rock, indeed with two large rocks. The evidence of Dennis Cleven regarding the blood staining to three rocks found at the vicinity of the crime scene is capable of enabling the jury to infer that the rocks were used to kill the deceased and may have occurred at the time of the deceased's death. During the record of interview the accused indicated that she touched the deceased at the toilets. She also knew that the deceased was meant to be taking medication for fits and had said at Armata that the deceased had a fit at the time he was attacked by the two petrol sniffers from Imampa. Admittedly these matters do not prove positively that the account given by the accused to the police is truthful, but it is sufficient to show that the confession was not so unreliable that it ought to be rejected entirely on the ground of the accused's mental capacity alone.

[60] The conclusion that I have reached is that neither the admissions made at Armata nor the record of interview itself is shown to be inadmissible on the basis of the accused's mental state but nevertheless the accused's mental state is a relevant matter to be considered in relation to the exercise of a discretion to exclude the evidence.

Admissions made at Armata

[61] Counsel for the accused submitted that the circumstances under which the accused was asked to attend the police station by Senior Constable Sanchez were such that I should draw the inference that the accused felt that she was obliged to attend the police station. The evidence is that at the time when the Northern Territory police arrived in Armata, the accused was sitting in a house virtually across the road from the Armata police house which served as the police station. Sanchez gave evidence that he went to the house. There was nobody outside so he walked through the back of the house and found a number of people there. He said that he told these people that he needed to speak to Hilda Scotty. Hilda was in the room and he asked her is she could come back to the house with him to speak to two police officers from the Northern Territory who would like to speak to her. She then stood up and followed him out of the house. He walked straight back to the police house about 100 metres away with the accused following him a few steps behind him the whole way. When they got to the house he asked her to come in, opened the back door and she walked through into the lounge room where Detective Cummins and Constable Stephens were and introduced them to the accused.

[62] The accused did not give evidence so there is no evidence from her that she felt obliged to attend at the Armata police station. Whilst it is true that Constable Sanchez did not tell the accused that she did not have to go to the police station, the evidence is that the accused followed Sanchez. She was

clearly not under arrest. Whilst at the police house, the accused was spoken to by Detective Cummins who asked her to provide a buccal swab. She then took her into a room which was made available to them for the purpose of interviewing the accused. A statement was obtained which became Exhibit P17 on the voir dire in which the accused indicated that she did not know the deceased, although she had seen him around but did not know his name. She also gave an account of her movements on the night of the deceased's death in which she admitted that she had been camping in the river with the "Mandy mob from Imampa". She said that on the following day she was told by others that "some bloke had been killed by toilet block, I didn't know anything about who did that. I never hear any story about who did that. I never see that bloke, nothing." During the course of the interview, the accused was shown a photograph of the deceased and a photograph of the deceased's jacket. She said that she had never seen the jacket before. At that stage the evidence of Detective Cummins was that the accused was spoken to without an interpreter; the accused was not under arrest and appeared to understand what was said. She was not cautioned and there were no physical restraints upon her which would have prevented her from leaving the police station if she had chosen to do so.

[63] It was submitted that the police ought not to have interviewed the accused without the use of an interpreter or a prisoner's friend; that she was a suspect and that she ought to have been cautioned.

[64] Section 142(1) of the Police Administration Act provides that, subject to a discretion to admit the evidence which the Court has pursuant to s 143, evidence of a confession or admission made "by a person suspected of having committed a relevant offence" to a member of the Police Force is not admissible unless the confession or admission is electronically recorded or confirmed in an electronic recording. The test, in s 142(1), is whether the person who made the confession or admission was actually suspected of the crime by the police and is, therefore, entirely subjective. Nevertheless it is relevant to consider whether the police ought reasonably to have suspected the accused, as this bears upon the truthfulness of any evidence given by a police officer that the person was not a suspect.

[65] In *R v Grimley* (1994) 121 FLR 236 at 258-259, Kearney J held that in order for an accused person to be "a person suspected" the suspicion need not be a reasonable suspicion. "The question is, did the officer honestly suspect the accused of having committed the offence". His Honour went on to observe that the police officer did not have to believe that the accused was probably guilty of the offence.

> "Suspicion in general lies somewhere between mere speculation that the person committed the offence, without any factual foundation – a mere idle wondering – and a belief based on reasonable grounds that the committed it. It is a state of mind that arises from the consideration of known facts less than those required for a belief, resulting in an apprehension that the person might possibly have committed the offence. It requires a degree of conviction which is beyond mere speculation, and based upon some factual foundation."

[66] There is no evidence in this case as I have said before that the accused was "in custody". In *Grimley v The Queen* (1995) 121 FLR 282 at 295 the Court of Criminal Appeal said:

> "A person is in custody, say, in a police vehicle or on police premises when the police by their words or conduct give him reasonable grounds for believing, and cause him to believe, that he would not be allowed to go should he try to do so: *R v Amad* [1962] VR 545 at 546 per Smith J. There is also a brief reference to the same principle in *R v O'Donaghue* (at 401). In *R v Trotter* (1992) 58 SASR 223 at 234-235, Perry J adopted the words of King CJ in *R v Conley* (1982) 30 SASR 226 at 239-240:
>
> > 'Frequently a police officer invites or requests of a suspect to accompany him to a police station or some other place for the purpose of pursuing police enquiries and the subject voluntarily complies. Such an invitation or request does not amount to deprivation of liberty… even though the police officer would have made an arrest if the suspect did not comply and even though the suspect believed that that would be the result of non-compliance. If, however, the circumstances are such that the words uttered, although in the form of an invitation or request, would in the circumstances convey to a reasonable person that he had no genuine choice as to whether to accompany the police officer, it becomes incumbent upon the police officer to make it clear that the suspect is not under arrest and is free to refuse to accompany him, and in the absence of such an intimation the apparent invitation or request may constitute an apprehension.'"

[67] In my opinion, the evidence does not show that the accused was "in custody" or that she was a "suspect". Certainly the police wanted to interview the accused to see if the accused could offer some explanation for the accused's DNA on the jacket. It may have been that the accused had come into contact with the jacket either before or after the deceased's death. It is also quite common for Aboriginal people to share clothing. The police

were also unable to prove that the accused's DNA came onto the jacket on the night of the deceased's death. Certainly the mere presence of her DNA on the jacket did not give rise to a degree of conviction beyond that of mere speculation. There is therefore no reason why I should reject the evidence of Detective Cummins that in her mind the accused was not a suspect at that stage.

[68] That being so, there was no need for an interpreter at that stage of the police enquiries. The accused had a sufficient understanding of English to answer simple questions. This was not a long interview. And in my opinion there was no need for her to have been cautioned.

[69] It was submitted by Ms Davey that the accused was so close to being a suspect she should have been cautioned. Reference was made to the case of *R v Dolan* (1992) 58 SASR 501. However there nothing in that decision which supports that proposition. King CJ at 505 (Mulligan J concurring) said:

> "… where a police officer has reached a stage in his investigations at which he has reasonable grounds for suspecting a particular person, he ought not to interrogate that person without (giving a caution)."

[70] Olsson J at 512 said that the appellant was a prime suspect and it was almost inevitable that the accused would be charged unless he was able to exonerate himself in some way.

[71] That was clearly not the case here.

[72] There is some support for Ms Davey's submission in the case of *R v Murphy* (1996) 66 SASR 406. At 411 Doyle CJ said:

> "… it was argued that the evidence should be excluded because the police officers did not inform Mr Murphy that the questions to him were directed towards his possible involvement in the murders, or because they did not inform him that they were investigating his possible involvement. It was argued that in each interview the police were engaged in the systematic questioning of a suspect or possible suspect, that they were not, as they claimed, undertaking routine investigation."

[73] After referring to *Duke v The Queen* (1989) 180 CLR 508 and *Van de Meer v The Queen* (1988) 62 ALJR 656 and *R v Dolan* (supra), Doyle CJ said at 412:

> "Because the ultimate question is one of unfairness, in the sense of unfairness arising from the use of answers in evidence, one cannot be dogmatic in the statement of relevant principles. On the other hand, as the passages cited indicate, courts must establish reasonably clear principles or guidelines which can be applied in practice by police officers. The passages cited indicate that the commencement of the accusatory stage marks a point at which a caution must be given. The presence of reasonable grounds to suspect a person indicates that that stage has been reached, even if the police have decided not to charge the suspect... There may be, of course, other indications.
>
> I am prepared to accept, as counsel argued, that these principles also should not be regarded as exhausting the requirement of fairness. Accordingly, it was argued that in this case the police should at least have told Mr Murphy that his possible involvement was being investigated, even if a caution was not called for. I accept that there may be cases in which a person being questioned should be told that he or she is a suspect or possible suspect. The question is whether this is one of those cases."

[74] At 413 Doyle CJ said:

> "In my opinion it could not be said that, on 17 August, the police officers had reasonable grounds to suspect Mr Murphy. Clearly, he was a person in whose movements the police were interested, but on the limited information which they had it would not have been reasonable to regard him as a suspect, particularly before an attempt was made to check aspects of what he said. It was, as it seems to me, sensible for the police to advance their inquiries with Mr Murphy as far as they could, and this included the collection of scientific evidence."

[75] At 414 Doyle CJ said:

> "I accept that the requirements of fairness are not to be turned into fixed categories, and that what was said by Mason CJ in *Van der Meer* (1988) 162 ALJR 657 and by King CJ in *R v Dolan* (1992) 58 SASR 501 does not state exhaustively what may be required if fairness is to be observed. In a particular case it might be necessary for a police officer who is questioning a person, not a suspect, to bring to that person's attention the fact that his or her possible involvement is under consideration. That might be necessary if, for some reason, the person is at a disadvantage because his or her attention has been diverted from the significance of the matter under consideration (for example, by shock or by grief or because of an injury), if the person is not aware of the significance of the occasion (for example, if the person thought that the inquiries related to a minor matter only when in fact they related to a serious matter), or if the person is under the impression that the police are making casual inquiries only, or if the person thinks for some reason that there is no need to give careful consideration to his or her answers. In such a case fairness might well require the police, in one way or another, to alert the person to the fact that the questions being put relate to a serious matter and that they will include matters relevant to the possible involvement of the person questioned."

[76] Having regard to those matters I am satisfied that there was no need for the police to administer a caution to the accused at this stage. The accused well knew that the police were investigating a murder and she must have known that the police were interested in her possible involvement in it. So much is

evident from the evidence of Detective Cummins as to the reasons that were explained to the accused for the taking of a second buccal swab on that occasion. The accused could hardly have thought that the police would have taken the trouble to fly to Armata in South Australia from Alice Springs in the Northern Territory for the purposes of making only casual enquiries or that the enquiries related only to a minor matter.

[77] I am therefore satisfied that there was no need for a caution and no need to electronically record the accused's statement at that stage because of s 142 of the Police Administration Act.

[78] After the taking of the statement, Detective Cummins left the accused in the room and spoke to Constable Stephens in another room. Stephens was told the substance of what the accused had told Cummins. At that stage, it was decided by Stephens that he would also speak to the accused to see if he could clarify the reason for the accused's DNA being on the jacket.

[79] This was, so it was put, another stage at which a caution should have been administered. I have given careful consideration to this submission because there some force in the submission that an uneducated person of Aboriginal descent and of limited intellectual ability might have difficulty in understanding the implications of what the questions were being directed to, particularly as it may well be accepted that the accused would have little understanding of what DNA evidence is all about. The evidence of the police, which I accept, is that they were not aware of the accused's medical

history or limited intellectual ability. According to the evidence of Detective Sergeant Cummins, she explained during the taking of the buccal swab to the accused that DNA was "similar to fingerprints which she (the accused) seemed to understand slightly". In the light of that explanation it might be expected that the accused would have understood the presence of her DNA on the jacket indicated to the police that she had somehow come into contact with the jacket. No explanation was given by either police officer to the accused suggesting that DNA evidence does not necessarily mean that the contact with the jacket happened on the night in question. Stephens' evidence was that, in the presence of Cummins, he asked the accused, pointing to the photo of the deceased, "Are you saying that you don't know this fellow?" There was no response to that question and he then asked the accused words to the effect, "How was your DNA located on the deceased's jacket if you don't know him?" There was no response to that question and he then asked the accused what she could tell him about what had happened to the deceased on the night he was killed.

[80] At that stage the accused spoke about two sniffers being responsible for the deceased dying and she gave the names of two persons whose last name was Smith and who came from Imampa Community. It was at that stage that the conversation between Constable Stephens and the accused was recorded by Detective Cummins in the form of handwritten notes which are as follows:

> "ACCUSED: It was them two boys – Imampa – petrol sniffers
>
> STEPHENS: Who are they?

ACCUSED: Don't know them, skinny boys like me, sniffing petrol (indicates hand to nose)

STEPHENS: What are their names?

ACCUSED: Dunno, Marlene Smith's boys, sons.

STEPHENS: Marlene who?

ACCUSED: Pauline Smith, Pauline lives at Imampa.

STEPHENS: What did they do?

ACCUSED: I was drinking with them, I asked that bloke (pointing to the picture of the deceased) for money, silver.

STEPHENS: Sorry?

ACCUSED: He have fit (indicates shaking). I look for silver in jacket he fall over.

STEPHENS: You look for silver? (long pause)

ACCUSED: I hit him with stone.

STEPHENS: You hit him with stone?

ACCUSED: Once with rock (indicating size hands approximately 20 cm apart).

STEPHENS: Who did you hit with rock?

ACCUSED: That bloke (pointing to the picture of the deceased)."

[81] At that stage the conversation was terminated. A formal caution was administered which was recorded on audio tape as a result of which the accused exercised her right of silence.

[82] In my opinion, it was not necessary up until that point for the accused to be cautioned. Both Detective Cummins and Detective Stephens maintained in their evidence that the accused was not a suspect until she told them that she had hit the deceased with a rock. I accept their evidence which in my

opinion was truthful. There was nothing improper in the police questioning. There is no reason in fairness for the accused to have been cautioned at an earlier stage.

[83] I have considered a number of other matters. First, the statement Exhibit P17 is in narrative form. The evidence is that it was taken by Detective Cummins who was alone in the room with the accused. The interview was conducted in English, which is clearly not the accused's first language, without the aid of an interpreter. Detective Cummins had been a serving member of the NT Police for 10 years and had vast experience in dealing with Aboriginal people whose first language was not English. Her evidence was that she was able to effectively communicate with the accused in English for the purpose of taking the statement. Detective Cummins said in cross-examination that the taking of the statement was a very slow process; that she made sure that she understood what the accused said before writing it down; and that there were some things which she had to go over several times. She conceded that she would not have interviewed her as a suspect without the aid of an interpreter. The statement is in a simple form. I consider that it accurately reflects the substance of the interview. The statement contains denials of any knowledge of the murder; of seeing the deceased that night; of seeing the deceased's jacket before; of 'knowing' the deceased or his family, although she admits to seeing "that man around at Old Timer's Camp and walking around there".

[84] I have considered also the circumstances of the second part of the interview conducted by Detective Stephens and whether there was anything unfair in Stephens' asking the accused "How was your DNA located on the deceased's jacket if you did not know him?" This was something that has apparently not been clarified or even asked by Detective Cummins when she took the statement Exhibit P17. As the accused did not give evidence I do not know what was going through her mind when that question was asked. It drew no response. She may or may not have understood the question, but clearly that was something the police were justified in seeking some clarification of. A similar question was put by police to a suspect in the case of *R v Weiss* (2004) 145 A Crim R 478. In that case the suspect was asked how his DNA came to be found on the murder weapon. In that case the suspect's DNA was not found on the murder weapon at all and the question considered by the Victorian Court of Appeal was whether the question was likely to induce an untrue confession, it being found as a fact that the question contained an innocent misrepresentation. The circumstances here are quite different, but there was no suggestion that the question would have been improper if the deceased's DNA had in fact been so found.

[85] The next question was along the lines of "What can you tell me about what happened to that fellow that got killed at the roundabout that night?" This was responded to in a way which indicated that the accused knew that two petrol sniffers from Imampa were responsible and led in the end to an admission that she had hit the deceased with a rock.

[86] There is nothing improper in any of this questioning. There is no evidence that the accused's will was overborne by duress, intimidation or pressure; or by an inducement; *c.f. R v Lee* (1950) 82 CLR 133 at 134; *R v Swaffield* (1997) 192 CLR 159 at 168-169. The methods used by the police were not unfair or improper or otherwise likely to induce an unreliable confession. I therefore declined to reject this part of the evidence on the basis that the Crown had not shown it to be voluntary nor in the exercise of my discretion.

[87] At the commencement of the trial, notwithstanding my earlier ruling, counsel for the accused, Ms Davey, raised two further arguments in support of her submission that I should reject the Armata conversations and statement in the exercise of my discretion.

[88] The first was based upon the fact that at the relevant time the conversation and the statement were taken, the accused and the police were physically in the state of South Australia.

[89] Section 74D of the Summary Offences Act 1953 (SA) (1) requires "an investigating officer who suspects or who has reasonable grounds to suspect, a person (the suspect) of having committed an indictable offence and who proposes to interview the suspect must ensure the following requirements are complied with …". Essentially the relevant requirement is that, for these purposes, there ought to have been an audio tape recording of the interview made. Section 74E(1) provides that in proceedings for indictable offences evidence of an interview between an investigating officer and the defendant

is inadmissible unless the investigating officer has complied with this requirement or the Court is satisfied that the interests of justice require the admission of the evidence despite the investigating officer's non-compliance.

[90] It was not suggested that the Detective Cummins or Detective Stephens were compelled to comply with the provisions of the Summary Offences Act 1953. Clearly the provisions of that Act refer to offences against the laws of South Australia. Further "investigating officer" is defined by s 74C to mean either a police officer or a person authorised under an Act to investigate offences and arrest suspected offenders. There is no evidence that either Detective Cummins or Detective Stephens are police officers in the state of South Australia or had any authority to investigate offences and arrest suspected offenders in that state.

[91] The significant difference between s 74D(1) of the Summary Offences Act 1953 and s 142(1) of the Police Administration Act (NT) is that under the former Act the test is met if the investigating officer either actually suspects or has reasonable grounds to suspect; in other words there is both a subjective as well as an objective test. Under Northern Territory law only a subjective test is required.

[92] Ms Davey's argument was that, in effect, the Northern Territory police ought to have done their best to comply with South Australian law and that

the fact that they did not do so is a matter which I can take into account in the exercise of my discretion.

[93] There is no evidence that either Detectives Cummins or Stephens was aware of the terms of s 74D of the Summary Offences Act (1953) and if they did what response they have made if questions had been asked about that subject. The matter was simply not raised in evidence.

[94] Furthermore, although non-compliance of s 74D results in the evidence being inadmissible, the Court has a discretion to admit the evidence despite non-compliance. Once again that subject was not canvassed in the evidence or indeed in submissions to any significant extent.

[95] In any event, s 74E is a provision relating to the admissibility of evidence in another jurisdiction; it does not apply to proceedings in the Northern Territory.

[96] I do not consider that the Northern Territory police were obliged to consider the provisions of the Summary Offences Act 1953. The express terms of that Act did not, in fact, apply to them. They had no more authority to interview the accused than other member of the public and no power to affect an arrest in South Australia.

[97] In any event, I do not consider that the objective facts provide reasonable grounds to suspect that the accused had committed the murder.

[98] The next argument which was put was that there unfairness in allowing the Armata statements to be admitted because I had ruled out the record of interview. The unfairness which is suggested is that the jury will not have the opportunity of seeing the accused and making an assessment as to her ability to understand English. I do not consider that this is a sufficient reason to reject evidence which is otherwise admissible. In any event it is open to the accused to give evidence or if that course is considered undesirable it is open for witnesses to be called who know of her ability to speak English. There is no disadvantage if the accused calls evidence; recent amendments to the Criminal Code preserve the right of counsel for the accused to address the jury last even if evidence of the facts is called by the accused. There is no substance to this submission and I reject it as well.

The formal record of interview

[99] By this time there is no doubt that the accused had reached the stage where she was a suspect. After the caution had been administered the accused was not arrested. She was allowed to leave the police station. She was given a card by Detective Cummins and asked to contact her next time she was in Alice Springs as she would like to speak to her further about the matter. The accused then left the house. That essentially completed the police enquiries at Armata.

[100] Police carried out further enquiries between 3 January and 28 February 2006 including following up with Marlene Smith, Pauline Smith and their sons the

information which the police had obtained from the accused at Armata, but were unable to come up with any further relevant information.

[101] The next stage was that on 28 February 2006, the police received information that the accused was in Alice Springs and Detective Cummins and Detective Barnett went to a number of locations in Alice Springs in order to see if they could locate the accused. Eventually they located the accused sitting on the lawns outside of the Royal Flying Doctor Service at the back of the hospital on Stuart Terrace. Detective Cummins introduced herself to the accused and reminded her that she was the police officer who had spoken to her at Armata. The accused acknowledged her and recalled that she had given a statement to her previously. Detective Cummins said to the accused, "You remember I said that I wanted to speak to you, I might want to speak to you again about it." The accused acknowledged that. At this stage she was sitting down next to another lady, Emma Young, who was in the process of eating some food. Detective Cummins said to the accused that she wanted to speak to her in relation to the death of Moonlight again and that she wanted to conduct a formal record of interview, a taped interview with her. Cummins said:

> "CUMMINS: She, from what I can remember, she sort of nodded or said yes I can't remember exactly, and I asked her if she was OK to do that, at which point she said yes. I explained to her that she could somebody sit with her as a friend or family to support her and she said – pointed to a person I know to be Emma Young and said that she'd like her to sit with her. That was the lady sitting next to her. …I said to Emma, 'Do you want to come and sit with her in the interview? Emma

shook her head indicating no… I then explained to Emma she was there – if she came to sit with her, she was there to help Hilda and not to help us. She was there as a friend and family Hilda and to help her understand'.

DR ROGERS: Then what happened? – And then she said no she didn't want to.

And then what's the next thing that happened? – Around that same time, there was a mini bus across the road and Hilda sort of waved or directed to somebody across the road.

What's the situation in relation to the Royal Flying Doctor lawns and the road? – The Royal Flying Doctor lawns is a fairly big area, lawned area. It's got a toilet block on it and a number of little trees and bushes around and then the road runs around the length of the lawns pretty much. So vehicles going up and down that way – There's a car park at the end of the lawns and then there is another road which is Gap Road which goes across the other way.

And what happened in relation to the mini bus? – There was a male person who had – I'm not sure if he was getting on or off the bus – I think he got off the bus and I asked her who it was and she said Glen Andrew. I knew from previous dealings with him that that was her ex-husband and I asked her if she wanted to have him sit with her and she said 'No'…

So after Glen Andrew and the mini bus, what then happened? – I had a further conversation with Emma and she indicated that she definitely didn't want to come back to the police station. I asked Hilda if she had any other family or friend that she wanted to come and sit with her and she said 'No'. I then asked her if she wanted an interpreter and she indicated that she wanted an interpreter.

Did she nominate anybody? – I don't believe she did…

> And what happened after the interpreter being flagged? – I asked her if she was happy to do the interview again and she said 'Yes' and I said 'I'll take you to the police station and get the interpreter then'. So we went to the vehicle. She sat in the rear of the vehicle and we went to the police station, drove to the police station."

[102] After that occurred Detective Cummins arranged to have an interpreter obtained from the court house, a Mr Brendan Trew, whilst the accused was left waiting in a soft interview room at the police station. After Mr Trew arrived the formal record of interview commenced in an interview room. That formal record of interview was recorded both by audio and video tape.

[103] It is to be noted that the discussions on the lawns were not recorded in any form other than in very brief notes made by Detective Cummins some time later. The notes did not purport to accurately record everything that was said on the lawns. General Order Q2 of the Police Commissioner's General Orders provides instructions or guidelines which ought to be adopted in relation to a discussion between police and the prisoner's friend nominated by the accused. Paragraph 5 provides as follows:

> "5. **The Role of a "Prisoner's Friend"**
>
> 5.1 The "prisoner's friend" must understand his/her role – the following procedures will ensure that this point is not overlooked.
>
> 5.2 Prior to commencing an interview in the presence of a "prisoner's friend", Police are to explain to the chosen "friend" in simple terms:
>
> 5.2.1 the reason for the interview;
>
> 5.2.2 the form the interview will take;

5.2.3 brief particulars of the alleged offence;

5.2.4 that the "friend" has been chosen by the suspect to sit with the suspect in a supporting role;

5.2.5 the right of "friend" to assist or support the suspect with help or clarification if at any time it appears necessary;

5.2.6 the right of "friend" to talk to, or otherwise communicate with the suspect at any time he/she is acting as a "friend"; and

5.2.7 the right of the suspect to communicate with the "friend" at any time for advice or for any reason.

5.3 The above points, and any other conversation with a "prisoner's friend", are to be recorded, generally by the same means as the interview with the suspect."

[104] What is clear is that the accused was not told that she was a suspect and the prisoner's friend was not told that the police intended to interview the accused as a suspect for the murder of the deceased. In my opinion the police ought to have made this clear both to the accused and to Emma Young and ought to have recorded whatever conversation they had with Emma Young. It may well be, for example, that if Emma Young had been made aware that the accused was suspected of the murder of the deceased that she may have taken a different view of whether or not she wanted to assist the accused in the role of a prisoner's friend. This was particularly important because as events turned out the accused was not able to nominate anyone else whom she wanted to act as her friend. There was no suggestion that Emma Young was not a suitable person to act in that capacity. The second point to be noted is that no new information had come to hand to the police in between the time the accused had declined to answer questions on

3 January and the time when the police formal record of interview took place on 28 February. General Order Q2 3.1.8 provides that:

> "As a general rule, if a suspect states that he/she does not wish to answer any, or any further questions, the interrogation should not continue past that point."

[105] In my opinion there was no justification for conducting a further record of interview with the accused after she had previously indicated that she did not wish to answer any further questions: see for example *R v Harris* (1995) 64 SASR 85 at 95-96. It may be that there are circumstances which arise which may justify an exception to this general rule, but it is difficult to see how any such circumstances arose in this case particularly as the accused had not been told that she was a suspect for the murder and the accused had not indicated to the police prior to the police speaking to her on the lawns that she had changed her mind and wished to speak to the police about the matter. Furthermore, when the caution was administered to the accused in the formal record of interview, the police did not comply with the Anunga guidelines by ensuring that the accused explained back the caution to the police in her own words. This gives rise to the possibility that the accused did not then fully understand the nature of the caution. The caution was administered with the aid of Mr Trew acting as an interpreter and included the following (words spoken in Pitjantjatjara are in bold).

> "CUMMINS: All right. Hilda before you go any further I need to make sure you understand you don't have to tell me that story…

SCOTTY: Yeah (nods).

CUMMINS: …if you don't want to, your choice all right.

INTERPRETER: **You got to understand (inaudible language).**

SCOTTY: Mmm.

INTERPRETER: **She's asking you if don't want to talk, or to can talk**. I'm just explaining what you said.

CUMMINS: Yeah, yep.

INTERPRETER: **(inaudible language).**

CUMMINS: Anything you do say is gonna be recorded on tapes.

SCOTTY: Yeah.

INTERPRETER: **When you talk its gonna get your story.**

CUMMINS: It might be used for evidence in Court.

INTERPRETER: **And heard in Court, hear your story.**

CUMMINS: Can you say just that? Don't tell me that story yet, but can you say that back to me so that I know you understand?

INTERPRETER: **What did that woman say just now say that?**

CUMMINS: Do you have to talk to me?

INTERPRETER: **Do you have to talk?**

SCOTTY: Hey?

INTERPRETER: **Do you have to talk?**

SCOTTY: **No.**

INTERPRETER: No.

CUMMINS: Whose choice is it, yours or mine?

INTERPRETER: **Whose choice to talk your or hers?**

SCOTTY: **Hers (indicating with a gesture towards Cummins).**

INTERPRETER: Hers.

CUMMINS: Yep. So it's your choice you understand that.

SCOTTY: (No audible response)"

[106] It is reasonably clear that when the accused was asked whose choice it was to speak that she indicated that it was the police officer's choice and not her own choice. It is apparent from looking at the video tape that Cummins did not realise that the accused answered the question in that way as she probably did not see the gesture which the accused made when she answered the question in that manner and I am also satisfied that Detective Bahnert did not notice it either. Cummins may well have understood the interpreter's reference to "hers" as meaning the accused's. It is therefore not entirely clear that the accused understood the caution although that does not necessarily mean that the record of interview should be rejected: see *Rostron v The Queen* (1991) 1 NTLR 191 at 199-200; *R v Azar* (1991) 56 A Crim R 414; and *R v Nundhirribala* (1994) 120 FLR 125 at 132-133.

[107] However, the accused's mental capacity is relevant to the question of whether or not I should exclude the evidence in the exercise of my discretion: see *Parker v The Queen* (supra) at 183. In my opinion there is more than a distinct possibility in this case that the accused's mental capacity affected her ability to understand, even with the aid of the interpreter, that she was not required to answer any further questions and affected her ability to make a free choice as to whether or not she decided to speak further to the police on this occasion.

[108] The combination of these circumstances, the absence of the prisoner's friend in the circumstances which I have outlined, the failure of the police to advise her that she was a suspect in the murder case, the persistence in questioning the accused further after she had earlier declined to speak to them in relation to the matter, the failure of the police to have any satisfactory reason for interviewing the accused again, the accused's limited mental capacity and the effect that this may have had on her ability to exercise her free choice in all of the circumstances to speak or remain silent led me to the conclusion that it would be unfair to admit the record of interview and I therefore rejected it in the exercise of my discretion. On further reflection since my ruling was published I consider that I should also have found that it has not been proved on the balance of probabilities that the record of interview was voluntary.

The DNA evidence

[109] So far as the DNA evidence is concerned, it was submitted that it should be excluded in the exercise of my discretion because its prejudicial effect outweighs its probative value.

[110] I accept that the DNA evidence does not prove that Hilda Scotty was the person responsible for the deceased's death. I accept that the DNA sample found on the deceased's clothes may have got there at a time either prior to or subsequent to the deceased's death and perhaps by secondary transfer.

[111] I was referred by counsel for the accused to my own ruling in the case of *R v Stokes* [2000] NTSC 12. In that case a DNA sample was found on an empty cigarette packet in the vicinity of the deceased. On the facts of that case either the accused or the principal Crown witness who was a person travelling with the accused must have committed the murder. The DNA found on the cigarette packet did not match that of the principal Crown witness. The DNA sample did not exclude the accused, but it did not prove, even on the balance of probabilities, that the accused was the person who touched the cigarette packet. There was no evidence to prove that the cigarette packet belonged to the deceased and it may well have been left there by somebody unconnected with the murder. In those circumstances, I was of the opinion that the cigarette packet was of almost no evidentiary value and its probative value was clearly outweighed by its prejudicial effect. Similarly in *R v Joyce* [2002] NTSC 70 Angel J excluded DNA evidence because there was a real possibility of secondary transfer and no evidence to show that secondary transfer was less probable than direct transfer and therefore the evidence was of no evidentiary value.

[112] In my opinion, the DNA evidence in this case does have evidentiary value, particularly in the light of the evidence that the accused denied any knowledge of the jacket. In those circumstances it is a piece of circumstantial evidence which, together with other evidence, might lead a jury to draw a conclusion adverse to the accused. Although the evidence by itself proves very little, it has probative value as a piece of circumstantial

evidence and in my opinion its prejudicial effect does not outweigh its probative value and it therefore should be admitted and I so ruled.

The evidence of conversations allegedly between the accused and Daryl Muir and Constable Ray Wilson

[113] Mr Muir was at the relevant time a constable in the Northern Territory police and in the early hours of the morning of 8 August 2005 he and Constable Wilson were tasked to patrol the Todd River to identify persons who were camping in that area and "obtain their bona fides". Amongst the persons that they spoke to were a group of Aboriginal people camped in the river near the John Blakeman Bridge. Amongst the persons to whom they spoke was a female Aboriginal who gave the name of Vera Scotty, 31 years of age from Docker River, who arrived the previous day or the day before that on a bush bus with a number of other people. This conversation occurred in the early hours of the morning and details were recorded by Mr Muir. Constable Wilson assisted by holding a torch. The evidence was that all of the persons spoken to (and there were a number of others) were examined for anything suspicious on their hands, clothing and general appearance, but nothing of a suspicious nature was detected. Constable Wilson recalled the person who gave the name of Vera Scotty as seeming to be "a little edgy" about their enquiries, but nothing else of significance came from these witnesses.

[114] The submission of the Crown was there was evidence from which the jury might infer the person who gave the name Vera Scotty was the accused.

Having regard to the fact that the accused is an Aboriginal person who does not speak English as a first language, it is not improbable that the police misheard the name Vera for the name Hilda. There is also evidence from the accused in her statement to the police (Exhibit P17) that she was in the company of a number of Aboriginal people from Docker River and went to sleep in the river near the bridge on the town side of Old Timers Camp that night. The evidence helps to place the accused in the Todd River relatively close to the scene of the murder within a few hours after the body had been discovered. The evidence is of some probative value and I see no reason to exclude it in the exercise of my discretion.

[115] So far as the subsequent identification by Constable Wilson is concerned of the person who identified herself as Vera Scotty, that identification came as a result of Constable Wilson viewing a photo of the accused kept on the police computer system. This occurred on 6 April 2006 and came about as a result of a request from Detective Cummins to view the photo in the PROMIS system. At that stage the accused had already been arrested and was in remand at the Alice Springs Correctional Centre. No attempt was made to arrange a line up or a proper photo board for the purposes of this identification. Clearly the identification is so unsatisfactory that it ought to be excluded and I ruled accordingly: see *Alexander v The Queen* (1981) 145 CLR 395.

[116] The Crown also indicated that it sought to rely on this evidence as evidence that the accused gave a false name to the police, which was a lie from which

an inference of guilt could be drawn. I do not think that the evidence is able to be proven to be a lie. I think it is equally possible that the police simply misheard the name Vera for the name Hilda. In my opinion the evidence could not be relied upon as evidence from which an inference of guilt can be drawn. I reject it as being inadmissible for that purpose.

The evidence of conversations between Detective Acting Sergeant Luke Philips and Detective Senior Constable Alan Milner

[117] The evidence of these police witnesses was that on 24 August 2005, after making enquiries, they attended at the Gap View Hotel at 1345 hours and spoke to an Aboriginal lady. Detective Acting Sergeant Philips said that he thought that the lady gave the name Elder Scotty, but he was not sure whether he heard her name properly and so he asked her to write her name down as well as her age on a piece of paper. The person concerned wrote down the name Hilda Scotty and the numbers 31. Subsequently the person was asked if she had a middle name and she said that her middle name was Marion and that she was born at Jay Creek. She was also asked whether she knew the deceased or the deceased's father, Cecil Moonlight, and she said that she did not know either of these persons. She was asked the name of her husband and she said that his name was Glenn Andrew and that he came from Docker River and also she provided some information about the names of other people which is not particularly relevant.

[118] In my opinion, this evidence is admissible although it is of little weight. The principle reason the Crown seeks to rely on the evidence is to submit that

the statement, if this was made by the accused, that she did not know the deceased or Cecil Moonlight was a lie indicative of guilt. In my opinion the word “know” has many shades of meaning. It may mean for example that a person has no knowledge at all of the person concerned; or it may also mean that although the person could recognise such a person they do not know them in the sense of knowing them very well. In my opinion, particularly in circumstance such as this, where an Aboriginal woman who is speaking a second language in which she is not completely fluent is asked such a question it is not capable of being proven to be a lie indicative of guilt and, accordingly, I have ruled that it cannot be led for that purpose.
