CITATION:	*The Queen v Bonson* [2019] NTSC 22
PARTIES:	THE QUEEN
	v
	BONSON, Zebide
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	21731325
DELIVERED:	5 April 2019
HEARING DATES:	13 June, 5 October, 11 December 2018 and 7 February 2019
JUDGMENT OF:	Hiley J

CATCHWORDS:

CRIMINAL LAW – EVIDENCE – CONFESSIONS AND ADMISSIONS - whether evidence of admissions made by the accused at his residence admissible – accused an Aboriginal person to whom the Anunga Rules and related Police General Orders Q2 [3.1.3] applied - requirement for caution pursuant to s 140(a) of the *Police Administration Act* (NT) – whether caution still operative and understood by the accused at the time when he made the admissions – s 140(a) of the *Police Administration Act* (NT) not complied with – admissions obtained "improperly or in contravention of an Australian law" and/or "in consequence of [such] an impropriety or contravention" within the meaning of s 138 of the *Evidence (National Uniform Legislation) Act*.

CRIMINAL LAW – EVIDENCE – CONFESSIONS AND ADMISSIONS - whether evidence of admissions made by accused at his residence admissible – accused an Aboriginal person to whom the Anunga Rules and related

Police General Orders Q2 [3.1.3] applied - requirement in s 140(b) of the *Police Administration Act* (NT) for a person in custody to be informed that he may communicate with or attempt to communicate with a friend or relative – s 140(b) of the *Police Administration Act* (NT) not complied with – admissions obtained "improperly or in contravention of an Australian law" and/or "in consequence of [such] an impropriety or contravention" within the meaning of s 138 of the *Evidence (National Uniform Legislation) Act*.

CRIMINAL LAW – EVIDENCE – CONFESSIONS AND ADMISSIONS – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE - evidence of admissions obtained improperly and or in contravention of s 140 of the *Police Administration Act* (NT) excluded pursuant to s 138(1) of the *Evidence (National Uniform Legislation) Act* (NT) - matters set out in s 138(3) considered - desirability of admitting the evidence does not outweigh the undesirability of admitting the evidence obtained in the way in which it was obtained - the conduct in question was inconsistent with the minimum standards which a society such as ours should expect and require.

Evidence (National Uniform Legislation) Act (NT) s 85, s 90, s 135, s 137, s 138, s 139
Misuse of Drugs Act (NT) s 5, s 8
Police Administration Act (NT) s 137, s 140, s 141, s 142, s 143

Bunning v Cross [1978] HCA 22; 141 CLR 54; *Cleland v The Queen* [1982] HCA 67; 151 CLR 1; *Dumoo v Garner* (1998) 7 NTLR 129; 143 FLR 245; *Gudabi v The Queen* (1984) 1 FCR 187; *R v Anunga* (1975) 11 ALR 412; *R v Deng* [2001] NSWCCA 153; *R v Jabarula* (1984) 11 A Crim R 131; *R v Lawrence* [2016] NTSC 65; *R v Layt* [2018] NTSC 36; *R v Nundhirribala* (1994) 120 FLR 125; *R v Swaffield* [1998] HCA 1; 192 CLR 159; *Robinson v Woolworths Ltd* [2005] NSWCCA 426; 64 NSWLR 612; *The Queen v BM* [2015] NTSC 73; 255 A Crim R 301, referred to.

REPRESENTATION:

Counsel:

Crown:	S Ledek
Accused:	B Wild

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Accused:	North Australian Aboriginal Justice Agency

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

The Queen v Bonson [2019] NTSC 22
No. 21731325

BETWEEN:

THE QUEEN

AND:

ZEBIDE BONSON

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 5 April 2019)

Introduction

[1] Mr Zebide Bonson, the accused, has been charged on indictment with (i) intentionally supplying less than a commercial quantity of cannabis plant material in an indigenous community between 24 June 2017 and 30 June 2017, contrary to s 5D(1) of the *Misuse of Drugs Act*, and (ii) intentionally receiving or possessing property, namely $9540.45, on 29 June 2017, knowing that the property was obtained from the commission of an offence against Subdivision 1 of the *Misuse of Drugs Act*, namely the supply of a dangerous drug in an indigenous community, contrary to s 8(1) of the *Misuse of Drugs Act*. The offending is said to have occurred at Maningrida, in the Northern

Territory. The offences carry potential penalties of nine years and 25 years imprisonment respectively.

[2] Shortly before 3 pm on Thursday, 29 June 2017 Senior Constables Leighton Arnott and Timothy Lyness and Constable Shane Walker attended Lot 881 Maningrida with a search warrant after receiving information that cannabis was being sold there and that Mr Bonson was involved. Mr Bonson lived at that address. There they located a tin containing 29 grams of cannabis and a 'bum bag' containing the $9540.45. At the house the police spoke to the accused and some other people. The accused made some admissions. The accused was taken back to the Maningrida police station where an electronic record of interview (the EROI) was conducted by Senior Constables Arnott and Lyness, from 5.20 pm. Mr Bonson made some admissions in the course of that interview.

[3] It would appear that apart from the fact that the cannabis and money was found at the residence of the accused, the only evidence as to the accused's involvement in the offences was admissions that he had made during the course of one or both of those discussions with the police.

[4] Evidence was adduced from the two police officers, Senior Constables Arnott and Lyness, and Mr Horace Wala Wala. The police had arranged for Mr Wala Wala, a qualified Burarra interpreter, to attend

the police station when the EROI was conducted. Mr Wala Wala was also Mr Bonson's grandfather. Mr Bonson did not give evidence on the voir dire.

[5] Various matters occurred in the course of the voir dire which resulted in adjournments, and a concession by the Crown that it would not be relying upon the admissions contained in the EROI. Amongst other things there was some uncertainty as to Mr Bonson's familiarity with English and Burarra, the language used by the police when they administered the caution. It is common ground that English is not Mr Bonson's first language. Rather it is Kunwinjku, a language related to but not the same as Burarra. It was also necessary for a back translation of the original transcript of the EROI to be carried out by another interpreter. Also, although the police had administered the caution in Burarra by playing a video recorded version on their iPad, they did not confirm that Mr Bonson understood it by asking him what he understood the caution to mean. It also transpired that shortly before the commencement of the EROI a conversation occurred between Mr Wala Wala and Mr Bonson which may have led to an inference that Mr Bonson's will had been overborne or his voluntariness impugned.

[6] Accordingly, the Crown's concession that it could not rely upon admissions during the EROI was properly and fairly made once all of these matters emerged. However, the Crown continued to rely upon

things said and done by the accused during the EROI as evidence of his apparent understanding of the English language and his ability to answer questions that were put to him in English.

[7] The issue for determination on the voir dire is whether, and to what extent, the Crown can adduce evidence of admissions made by the accused when the police attended his house at Lot 881 and found the drugs and money.

Admissions made during the search at Lot 881 Maningrida

[8] Most of the events that occurred when the police attended Lot 881 were video recorded on a handheld iPad. I was able to view the recording (Ex VD7) and I was provided with a rough transcript of much of the conversation (Ex VD8).

[9] At the house the police found Mr Bonson (ZB), his wife and another lady and took them to the backyard. Senior Constable Arnott presented the search warrant and told them that police would be searching the house and that they could search everybody present. He told them that they were in custody for the time during which the warrant was being executed. He said the following to the three of them:

> You don't have to answer any questions and anything you say might be written down and used in evidence.

This is the "caution" the subject of this voir dire.

[10] Then occurred the following conversation:

Arnott: Do you guys have any gunja on you?

Female: No

Arnott: Zebide is there any gunja on you? Zebide is there any gunja in there?

ZB: No

Arnott: Then how come we got told that story?

Female: We don't have it

ZB: Yeah we don't have it

Arnott: We are going to have a quick look mate. If there is nothing there is nothing, and will be on our way. No worries, have you got somewhere to sit down?

Lyness: You guys happy to sit out here? Have a smoke or whatever?

[11] Senior Constable Arnott and Constable Walker proceeded to search the house at about 2.55 pm. Senior Constable Lyness remained outside with Zebide Bonson and the two females. In a bedroom that Mr Bonson said he was using police located a powdered milk container which contained about 29 small clip seal bags of cannabis, which was later weighed and measured as 25 grams in total.

[12] The video footage then shows another man, Stephen Bonson, arrive at the property and approach Senior Constable Arnott. Senior Constable Arnott told him they were executing a search warrant and were looking for gunja. Senior Constable Arnott told him that he was in custody for the duration of the search and cautioned him. Senior Constable Arnott showed him the powdered milk container and asked him what was in it. Stephen Bonson said that it contained drugs and that Gordon Cooper had given it to him. He said it was not his gunja, nor did it belong to

Zebide. He was told to go outside and sit with Zebide while police continued their search.

[13] Senior Constable Arnott and Constable Walker continued their search and found a black bum bag in a cupboard. One part of it contained a large quantity of $50 notes and another part cash and coins.

[14] The two police officers then went back outside and spoke to the accused and the three others who were still there in custody. Then occurred the following conversation (and the admissions the subject of this voir dire):

> S/C Arnott: Who's bum bag?
>
> Male: (inaudible)
>
> S/C Arnott: Hey. Who's bum bag is it?
>
> Male: (inaudible)
>
> ZB: It's mine.
>
> S/C Arnott: It's your bum bag, Zebide? What's in it?
>
> ZB: Um, gunja … gunja money
>
> S/C Arnott: This gunja money? Okay. How much money is in there Zebide?
>
> ZB: Nine thousand dollars. I was going to get my new hundred [series] … (Inaudible)
>
> …
>
> S/C Arnott: Nine thousand dollars? Is this all your gunja money?
>
> ZB: All gunja money?
>
> S/C Arnott: How did you come about this money, mate?
>
> ZB: Um, like everyone else
>
> S/C Arnott: We are going to take this money Zebide, okay?

[15] Senior Constable Arnott arrested Mr Bonson and took him to the Maningrida police station, where the EROI was carried out.

Submissions

[16] The admissions to police are admissible unless excluded by express statutory provisions such as s 142 of the *Police Administration Act* (**PAA**) or Part 3.4 and s 137 of the *Evidence (National Uniform Legislation) Act* (**ENULA**), or pursuant to exercises of judicial discretion conferred by provisions such as s 143 of the PAA and ss 90, 135 and 138 of the ENULA.

[17] Ms Wild, counsel for the accused, had originally mounted several arguments, including submissions in relation to s 85(2) ENULA, but refined them to the following three issues:

(a) non-compliance with s 140(a) and/or s 140(b) of the PAA;

(b) applicability of and exclusion under s 138 ENULA; and

(c) exclusion under s 90 of the ENULA.

[18] The submissions in relation to all three issues included consideration of compliance or otherwise with the Anunga Rules and Police General Orders (PGO), and whether any failure to comply amounted or contributed to "impropriety" for the purposes of s 138 of the ENULA, "unfairness" within the meaning of s 90 of the ENULA or a basis for exclusion having regard to ss 140 - 143 of the PAA.

[19] It is common ground that the accused was not a person who was "as fluent in English as the average white man of English descent" and that the Anunga Rules and the related Police General Orders Q2 [3.1.3] applied to him. It is also common ground that by the time the accused made the admissions he was a person in custody for the purposes of Divisions 6 and 6A of Part VII of the PAA.[1]

Police Administration Act

[20] Divisions 6 and 6A of Part VII of the PAA, in particular s 137(2), contemplate that a person in custody for offending which may be punishable by imprisonment may be questioned before being taken before a court.

[21] Section 140 provides as follows:

> Before any questioning or investigation under section 137(2) commences, the investigating member must inform the person in custody that the person:
>
> (a) does not have to say anything but that anything the person does say or do may be given in evidence; and
>
> (b) may communicate with or attempt to communicate with a friend or relative to inform the friend or relative of the person's whereabouts,
>
> and, unless the investigating member believes on reasonable grounds that:
>
> (c) the communication would result in the escape of an accomplice or the fabrication or destruction of evidence; or
>
> (d) the questioning or investigation is so urgent, having regard to the safety of other people, that it should not be delayed,

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1 See discussion about the meaning of the word "custody" in the context of the PAA in *R v Layt* [2018] NTSC 36 (***Layt***) at [12] – [16] and [20].

> the investigating member must defer any questioning or investigation that involves the direct participation of the person for a time that is reasonable in the circumstances and afford the person reasonable facilities to enable the person to make or attempt to make the communication.

[22] Sections 141 and 142 impose requirements including the recording of the caution and information provided pursuant to s 140(a) and (b), the electronic recording of confessions and admissions, and the provision of copies and other documents to the suspect or his lawyer.[2]

[23] Section 142(1) provides, inter-alia that, subject to s 143, evidence of a confession or admission made to a member of the police force by a suspect is not admissible unless the questioning and anything said by the suspect was electronically recorded and the electronic recording is available to be tendered in evidence. This provision was satisfied in the present matter and therefore does not operate to render the admissions inadmissible.

[24] Ms Wild also contended that none of the provisions in s 142(2) of the PAA regarding the furnishing of copies of transcripts were complied with. However, unlike the matters referred to in s 142(1), there is no express provision to the effect that non-compliance with these provisions would render the admissions inadmissible.

[25] Section 143 provides as follows:

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2 See discussion in *Layt* at [23] – [38].

> A court may admit evidence to which this Division applies even if the requirements of this Division have not been complied with, or there is insufficient evidence of compliance with those requirements, if, having regard to the nature of and the reasons for the non-compliance or insufficiency of evidence and any other relevant matters, the court is satisfied that, in the circumstances of the case, admission of the evidence would not be contrary to the interests of justice.

[26] Consequently, even if the police officers in the present matter did not comply with the requirements of s 140 or s 142(2) the Court may admit evidence of admissions so obtained if having regard to the matters stated in s 143 the Court is satisfied that admission of the evidence would not be contrary to the interests of justice.[3]

Application of s 140 in the present matter

[27] Neither of the exceptions referred to in s 140(c) and (d) were applicable. Accordingly the police were required to:

(a) administered the caution referred to in s 140(a);

(b) provide Mr Bonson with the information referred to in s 140(b); and

(c) defer any questioning that involved the direct participation of Mr Bonson for a time that was reasonable in the circumstances and to afford him reasonable facilities to enable him to make an attempt to make the communication referred to in s 140(b).

3 See discussion in *Layt* at [40] – [51].

[28] On their face the words spoken by Senior Constable Arnott appear to satisfy the requirements of s 140(a). In my opinion the purpose and intent of that provision is to ensure that the suspect is made aware that he or she is not obliged to say anything and that whatever he or she does say may be given in evidence. For that provision to be properly complied with it is necessary that those words be spoken in such a way that they are understood by the suspect. As the New South Wales Court of Criminal Appeal observed in *R v Deng* provisions requiring the administration of a caution are "purposive."[4] The caution is meant to convey to the relevant person that he or she has the right to choose to speak or remain silent and that if the person does speak what he or she says may be given in evidence. The purpose of a provision requiring the administration of a caution would not be met if, for example, the suspect did not understand English or, even if the suspect did have some understanding of English, the suspect did not understand that he or she had this important right. Hence the additional requirements in the Anunga Rules and the Police General Orders Q2 3.1.3.

[29] In the present matter Senior Constable Arnott gave evidence to the effect that he considered that Mr Bonson did understand the caution. He had known Mr Bonson for some time and had spoken to him on several occasions in social settings. Unfortunately I do not have the

4 [2001] NSWCCA 153 at [17].

benefit of any evidence from Mr Bonson as to whether or not he understood the caution. However, even if he did understand the caution at the time it was given, I consider it likely that by the time he made the admissions it would no longer have been operative in his mind.

[30] A number of things occurred between the time when Senior Constable Arnott administered the caution to the accused and the two females and the time when the accused made the admissions. This included Senior Constable Arnott asking the accused whether he had any gunja on him or in the house, the accused answering "no", Senior Constable Arnott then challenging that answer by saying "then how come we got told a story?" and the accused and the females repeating their denials. They were then told to sit down while the police searched the premises. Then followed the search inside the house when the police found the milk container containing the cannabis, the arrival and questioning of Stephen Bonson, and him being placed in custody and sent outside to sit with the accused, and then the discovery of the black bum bag containing the cash.

[31] After the police completed the search and went back outside they confronted the accused and others with the bum bag, following which Mr Bonson made the admissions. Some time had elapsed, and important discoveries were made by police, between the time of the initial caution and the time when the accused was presented with the

bum bag and was asked questions about it. During that time Mr Bonson may have thought, particularly following Stephen Bonson's arrival, that he may have originally lied to or misled the police and forgotten, if he ever knew, that he was not obliged to answer any further questions. He may have been keen to deflect any blame from his wife and the other woman.

[32] I consider that, at the least, he should have been reminded of the caution, in a meaningful way that complied with the Anunga Rules and the Police General Orders Q2 [3.1.3], before being asked these important questions. I do not consider that there was sufficient compliance with requirements of s 140(a).

[33] There is also some doubt about compliance with s 140(b). It is clear that the police did not provide the information referred to in that provision. Mr Ledek for the Crown contended that this was not necessary as the accused was already at his home with his friends and family. On the other hand Ms Wild pointed out that his friends and family were also under suspicion. Indeed Mr Bonson's wife, the other female and Stephen Bonson had all been questioned and told that they were in custody while the search was being carried out. Ms Wild submitted that the intent of s 140(b) is so the suspect has the opportunity to contact someone else not so closely involved in the particular matter.

[34] I consider that a primary purpose of s 140(b) is to ensure that a friend or relative of a person in custody is aware that that person is in custody, and where the person is being held. I consider that another important purpose of s 140(b), read with the requirement in the last part of s 140 that questioning be deferred for a reasonable time to enable such communication to take place, is to give the suspect an opportunity to receive initial advice from such a friend or relative before being requested to answer questions or participate in an investigation. This purpose is not likely to be served if the person or persons who are already aware that the suspect is in custody are themselves in custody. At the time the caution was administered it is likely that all of the people present at the house were potential suspects, if not in relation to the supply of the cannabis, in relation to using it there.

[35] Again, particularly in relation to an aboriginal person to whom the Anunga Rules might apply, compliance with s 140(b) would involve and require an ability to communicate with a person who could function as a "prisoner's friend" as contemplated by Police General Orders Q2 3.1.2. That order states:

> Where practicable, a "prisoner's friend" should be present. This may be the same person as the interpreter. The friend should be someone in whom the suspect has confidence and by whom the suspect will feel supported.

[36] We do know that there were family members, other than the other three suspects, who might have been contacted had Mr Bonson been informed of this important right. One such person would have been his grandfather, Mr Wala Wala. He also referred to his mother (and Stephen) when he was asked at the start of the EROI whether he would like someone to come in and sit with him. His mother was at an outstation and he could not provide her telephone number. However Senior Constable Lyness did have a telephone number for the outstation where Mr Bonson's parents were living.

[37] I do not consider that there was sufficient compliance with s 140(b) of the PAA.

[38] Notwithstanding my conclusions about non-compliance with both of these important parts of s 140 and non-compliance with the more technical requirements in s 142(2), s 143 enables the Court to admit the evidence if in the circumstances described in s 143 "admission of the evidence would not be contrary to the interests of justice." I shall return to this point later.

[39] I add that none of my conclusions are intended to be overly critical of the conduct of the police officers. Whilst I am not condoning the way in which they operated, I suspect they considered it likely that the admissions would be repeated and expanded in the more formal setting of an electronic record of interview. They would have been anxious to

rule out the likely involvement of any of the other people present at the house.

Anunga Rules and Police General Orders Q2 3.1.3

[40] A considerable amount of the evidence that was adduced during the voir dire, and that was yet to be adduced, focused upon Mr Bonson's understanding of English, and also Burarra, and therefore his understanding of the cautions administered both at the house and later at the police station at the commencement of the EROI. Both of the police witnesses had previously interacted with Mr Bonson, including in social settings and, testified that they considered his level of English was such that he would have understood what he was being told and asked on both of those occasions. Notwithstanding that, and properly, they arranged to have Mr Wala Wala attend the police station as an interpreter. They administered the caution at the police station in Burarra language. I do consider that Mr Bonson did have a reasonable understanding of English such that he understood many of the questions that he was asked, particularly during the EROI. However I have the impression that there was some degree of gratuitous concurrence and other cultural factors that should be taken into account before accepting some of what he said at face value. As matters transpired and in light of the concessions that have now been made, it has not been necessary for me to make findings on these particular aspects. In particular it is accepted that Kunwinjku is his primary

language and that the Anunga Rules and the related Police General Orders applied to him.

[41] Relevant parts of the Anunga Rules are reflected in Police General Orders Q2, 3.1.2 quoted above and 3.1.3, which states:

> Great care should be taken in administering the caution when the stage has been reached that it is appropriate to do so. The suspect should be asked to explain what is meant by the caution, phrase by phrase. Questioning should not proceed until it is apparent that the suspect understands the right to remain silent.

[42] There is a long line of authorities in the Northern Territory where confessions have been excluded for non-compliance with the Anunga Rules and the Police General Orders. The reasons for exclusion have been variously based on fairness, public policy, reliability and, prior to the ENULA, voluntariness. No distinction is to be drawn as between a formal record of interview, roadside questioning or a field interview. Per Muirhead J in *R v Jabarula*:[5]

> In case there is any doubt I observe that the steps and precautions to be taken in the questioning of unsophisticated Aboriginal suspects and referred to in *Anunga* do not only apply to the situation where such an Aboriginal is being interviewed in a CIB "interview room". They apply to all situations if the police wish a conversation upon interview to be admitted into evidence. … A departure from the guidelines does not necessarily impugn a confession. Here the defects or omissions were too significant to support a finding of admissibility. The evidence fell far short of the standard required to satisfy the court that the appellant's admissions were made in true understanding of his right to speak or remain silent.

5 (1984) 11 A Crim R 131 at 139.

[43] Kearney J considered the Anunga Rules and Police General Orders Q2, 2.5.3, the then equivalent of Police General Orders Q2, 3.1.3 in *Dumoo v Garner*.[6] Amongst other things His Honour referred to pre ENULA cases such as *Bunning v Cross*[7] and *Cleland v The Queen*[8] and the discussion about the balance between the public interest in bringing a wrongdoer to justice on the one hand and the appearance of giving curial support to police illegality or impropriety on the other. His Honour said, at 138:

> Failure to comply with Q 2.5.3 did not involve illegality, but impropriety. Although it does not seem to have been explicitly referred to in this case, illegality in the police questioning lay in the failure to comply with the requirements of par (b) of s 140 of the *Police Administration Act* 1979 (NT); this required Constable Lindsay, before questioning the appellant, to inform him that he could communicate with a friend or relative, and to defer questioning him for a reasonable time while affording him reasonable facilities to enable him to seek that communication.[9]

[44] His Honour also considered that although the relevant Police General Orders were directed at "Questioning people who have difficulties with the English language – the *Anunga* guidelines" "the raison d'etre for the *Anunga* guidelines as regards Aboriginals, is *not* limited to language difficulties."[10] By way of example his Honour referred to the well-known phenomenon of "gratuitous concurrence." He agreed with

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6 (1998) 7 NTLR 129.

7 (1978) 141 CLR 54.

8 (1982) 151 CLR 1.

9 (1998) 7 NTLR 129 at 138.

10 (1998) 7 NTLR 129 at 141.

conclusions expressed by Mildren J in *R v Nundhirribala*[11] about the importance of Anunga guideline (3) which states that "interrogation should not proceed until the Aboriginal [being questioned] had an apparent understanding of his right to remain silent." Kearney J considered that "that is the fundamental purpose of Police General Order Q2 2.5.3 and Anunga guideline (3)."[12]

[45] Kearney J expressed the following conclusions, at p 148:

> The twofold rationale for the application of the guidelines set out in *R v Anunga* (supra) at 413 and 414, clearly applied in this case. First, even if Aboriginals understand English, they may not understand the concepts which English phrases and sentences express, because "their concepts of certain things and the terms in which they are expressed may be wholly different to white people". Secondly, as in *R v Anunga* (supra) at 414:
>
> > "…most Aboriginal people… will answer questions by white people in the way in which they think the questioner wants…there is the same reaction when they are dealing with an authority figure such as a policeman…Some Aboriginal people find the standard caution quite bewildering, even if they understand that they do not have to answer questions, because, if they do not have to answer questions, then why are the questions being asked?"
>
> The appellant clearly fell to be questioned in accordance with the Anunga guidelines. As Police General Order Q2.5.10 makes clear, police are to interpret those guidelines broadly, and apply them "at every stage of the investigation".
>
> Speaking generally, the purpose of the Anunga guidelines and Police General Order Q2 is to ensure that Aboriginals are not intimidated when questioned by police, are properly treated when arrested, fully understand that they do not have to answer questions by police, have access *in every case* to a "prisoners' friend", and access to an interpreter where appropriate. In *R v Anunga* (supra) at 415, the court warned that "police officers who

11 (1994) 120 FLR 125.

12 (1998) 7 NTLR 129 at 141.

> depart from [the Anunga guidelines] without reason may find statements are excluded". The question in this case is whether "reason" has been shown for the departures from the guidelines which occurred. His Worship clearly believed (p 137) that sufficient reason has been shown. I respectfully disagree; I consider that no substantial reason for the departures from the guidelines appears.

[46] Kearney J also considered s 143 of the PAA, referring to it as what was formerly the "public policy" discretion referred to in cases such as *R v Swaffield*[13]. In that case Toohey, Gaudron and Gummow J referred to:

> an overall discretion which might take account of all the circumstances of the case to determine whether the admission of the evidence or the obtaining of a conviction on the basis of the evidence is bought at a price which is unacceptable, having regard to contemporary community standards.[14]

[47] Kearney J said, at p 150:

> A weighing process is necessarily involved both in the application of s 143 and in the exercise of the "overall discretion" referred to in *R v Swaffield*. On the one hand, the public interest against sanctioning unlawful or improper conduct by police; on the other, the public interest in ensuring that relevant evidence is received and guilty criminals are punished. Have the convictions here being bought at too high a price?

[48] His Honour , at p 150:

> In all the circumstances, bearing in mind the nature of the charges involved, I consider that the public interest that the Anunga guidelines and the matters in Police General Order Q2 be observed in the investigation of crime (an essential safeguard for the protection of Aboriginal persons) in this case outweighs the goal of bringing this particular wrongdoer to conviction and punishment.

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13 (1998) 192 CLR 159.

14 Ibid at [69].

[49] More recently, in the *The Queen v BM*[15] Blokland J made the following observations when discussing a caution purportedly given under s 140(a) of the PAA, at [66]:

> It is a fair point that Police General Orders and the Anunga Guidelines are guidelines, and are not rules of law.[16] However, the accused clearly fell into the category of persons for whom the Anunga Guidelines applied and usually in these circumstances police take steps to apply them. The guidelines apply to any person being questioned as a suspect unless "that person is as fluent in English as the average white man of English descent".[17] Professor McCrimmon, with respect, correctly analyses the current status of the Anunga guidelines is continuing to apply as guidelines for the conduct of police in the interrogation of Indigenous persons, notwithstanding the rules of admissibility of evidence are governed by the *Evidence (National Uniform Legislation) Act*.[18]

Her Honour concluded that in that case the accused should have been asked in accordance with Anunga Guidelines to explain the caution in his own words, phrase by phrase.[19]

[50] With respect I agree with all of those views expressed about the importance of the Anunga rules and the relevant Police General Orders, and ultimately the need to consider whether in the circumstances of a particular case the admissions obtained following non-compliance with those rules or orders should be admitted into evidence.

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15 (2015) 255 A Crim R 301.

16 *Gudabi v The Queen* (1984) 1 FCR 187.

17 *R v Anunga* (1975) 11 ALR 412.

18 Les McCrimmon, *The Uniform Evidence Act and the Anunga Guidelines: Accommodation or Annihilation?* [2011] 2 NTLJ 91.

19 (2015) 255 A Crim R 301 at [68].

Findings.

[51] In my opinion neither of the requirements of s 140 of the PAA were complied with. Nor were the Anunga rules as reflected in Police General Orders 3.1.3 complied with. In particular the police:

(a) failed to adequately caution the accused; and

(b) proceeded to question the accused before and without telling him of his right to contact a friend or relative.

[52] Further, he was not informed of his right to a "prisoner's friend". And, the formal requirements of s 142(2) were not satisfied.

Exclusion under s 138 of the Uniform Evidence Act

[53] Section 138(1) provides that:

> (1) Evidence that was obtained:
>
> (a) improperly or in contravention of an Australian law; or
>
> (b) in consequence of an impropriety or of a contravention of an Australian law;
>
> is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

[54] Section 139(1) provides that evidence of a statement made by a person during questioning is taken to have been obtained improperly if the person was under arrest for an offence at the time and before starting the questioning the investigating official did not caution that person.

By force of s 139(5) Mr Bonson was a person under arrest at the relevant time. Accordingly s 139(1) applied to him.

[55] Further, s 139(3) requires that the caution be "given in, or translated into, a language in which the person is able to communicate with reasonable fluency." I have already expressed some reservations about Mr Bonson's capacity to understand the caution when it was first administered but I do not, and do not need to, go so far as to express an opinion as to whether or not s 139(3) was complied with.

[56] Following my findings, set out above, I conclude that the admissions are evidence that was obtained improperly or in contravention of an Australian law and/or in consequence of such an impropriety or contravention.

[57] Accordingly the onus shifts to the Crown to satisfy the Court that the desirability of admitting that evidence outweighs the undesirability of admitting it. Section 138(3) lists a number of matters that the Court is to take into account.

[58] These include the probative value of the evidence, the nature of the evidence in the proceeding, the nature of the relevant offence and the difficulty if any of obtaining the evidence without impropriety or contravention of an Australian law. There can be no doubt that the supplying of cannabis into an aboriginal community is serious offending. However the evidence did not seem to suggest a

sophisticated long-standing operation involving the supply of large quantities of cannabis. In my opinion the admissions constituted important evidence against the accused, particularly in light of the accepted inadmissibility of similar and further admissions that he made later in the course of the EROI. I agree that the probative value of his admissions would be high, unless the evidence suggested that the drugs and money may have belonged to someone else and that he was simply making the admissions to avoid implicating someone else and/or that for some reason he felt under pressure to gratuitously concur with the propositions put to him. However a successful prosecution of the accused would not, unlike some offences, depend solely upon his admissions. In addition to showing that the cannabis was found in the room occupied by the accused the prosecution could presumably have sought other evidence that might, or might not, implicate him. This would include statements from the other people present when the police conducted the search, statements from people as to the use of the bum bag by the accused or someone else, and evidence from purchasers of the cannabis.

[59] I am not aware of any suggestion that the improprieties or contraventions fall within the scope of s 138(3)(f) or (g). I do not consider that the improprieties or contraventions were deliberate or reckless within the meaning of s 138(3)(e). There is no suggestion that the police attempted to trick or mislead him into making the admission.

However I do consider that the police officers were, understandably, anxious to identify who was responsible for the incriminating evidence that they had just found and to endeavour to take in the right person for more formal questioning. In their enthusiasm they failed to adhere to the clear requirements of s 140 and the Police General Orders. These being fundamental rights conferred, particularly upon Aboriginal people living in a community such as Maningrida and whose first language is not English, I do regard the failure to comply with them as serious breaches of those provisions.

[60] In *R v Lawrence*[20] Grant CJ said:

> In the context of s 138 of the ENULA, the ultimate focus of the inquiry concerning impropriety is not whether there was a breach of the Anunga Guidelines or General Order Q2, but whether the conduct in question was inconsistent with the minimum standards which a society such as ours should expect and require of those entrusted with powers of law enforcement.

[61] In the present case I consider that the conduct in question was inconsistent with the minimum standards which a society such as ours should expect and require. I do not consider that "the desirability of admitting the evidence outweighs the undesirability of admitting [the] evidence" that was obtained in the way it was.

[62] Accordingly I rule that the admissions are not admissible.

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20 [2016] NTSC 65 at [99]. See *Robinson v Woolworths Ltd* (2005) 158 A Crim R 546 at [23] per Basten JA applied and discussed in *Layt* at [73] – [75].

Exclusion under s 90 of the Evidence Act

[63] In light of that conclusion that is not necessary for me to give detailed consideration to the arguments advanced by reference to s 90 of the ENULA or s 143 of the PAA.

[64] It follows from what I have already said that I consider it would be unfair to permit the prosecution to use the evidence against the accused having regard to the circumstances in which he made those admissions.

[65] In this regard I again adopt the following as expressed by Grant CJ in *R v Lawrence*, at [121]:

> When considering the exercise of the "fairness" discretion, the relevant focus in this inquiry is not whether the police have acted unfairly or unlawfully. It is whether it would be unfair to the accused to admit the statement. Secondly, that assessment will depend upon the particular circumstances of the case and in which the admission was made, and is guided ultimately by the question whether the admission of the evidence would be unacceptable having regard to contemporary community standards of fairness.
>
> These observations reflect the fact that voluntariness, reliability, unfairness to the accused and public policy considerations concerning the minimum standards expected of law enforcement authorities are not discrete issues. They tend to overlap both in factual circumstances that may be considered in determining whether to exercise a particular discretion to exclude evidence, and in the rationales underlying each ground of exclusion. [21]

[66] I agree with Ms Wild's submission that s 90 acts as a safety net such that the court can consider the fairness that ought to extend to the accused as well as the public policy considerations. The Court can take into account the circumstances of the admissions where there was no

21 [2016] NTSC 65 at [121]. See too *Layt* at [57] – [64].

meaningful caution, no interpreter and no occasion for a prisoner's friend such that it would be unfair to rely upon such admissions, in conjunction with public policy considerations where police officers should adhere to minimum standards of police questioning of suspects on all occasions. The combination of these factors should lead to the exclusion of the admissions.

Application of s 143 PAA

[67] It follows from what I said that I am not "satisfied that in the circumstances of the case, admission of the evidence would not be contrary to the interests of justice." Accordingly I do not consider it appropriate to exercise the discretion conferred by s 143 of the PAA.

Conclusions

[68] Accordingly I rule that the admissions cannot be used in evidence against the accused.
