The Queen v RR [2009] NTSC 44

PARTIES:	THE QUEEN
	v
	RR
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	20820393
DELIVERED:	16 September 2009
HEARING DATES:	31 August 2009 to 4 September 2009
JUDGMENT OF:	RILEY J

CATCHWORDS:

CRIMINAL LAW – EVIDENCE
Voir dire – evidentiary matters relating to accused person – admissibility of record of interview – Anunga Rules – prisoner's friend – interpreter able to fulfil role of prisoner's friend in certain circumstances

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE
Information, indictment or presentment – ex officio indictment containing count of murder joined with count of sexual intercourse without consent – charges for more than one offence including the offence of murder can be joined if those charges are founded on the same facts or are, or form part of, a series of offences of the same or similar character or are a series of offences committed in the prosecution of a single purpose

Criminal Code s 305(4), s 309, s 339
Evidence Act s 26L
Sentencing Act s 53A, s 53A(3)(b)
Police Administration Act s 140

Gudabi (1984) 12 A Crim R 70; *R v Swingler* [1996] 1 VR 257, applied

R v Anunga (1976) 11 ALR 412; *R v Basha* (1989) 39 A Crim R 337; *R v Butler* (No 1) (1991) 102 FLR 341; *Langtree v Trenerry* (1999) 9 NTLR 46; *Maxwell v The Queen* (1995) 184 CLR 501; *Pearce v The Queen* (1998) 72 ALJR 1416, referred to

Collins v R (1980) 31 ALR 257; *Director of Public Prosecutions (SA) v B* (1998) 72 ALJR 1175; *The Queen v Hofschuster* (1992) 110 FLR 385; *Kingswell v The Queen* (1985) 159 CLR 264, followed

REPRESENTATION:

Counsel:

Crown:	R Coates with E Armitage
Defendant:	S Corish

Solicitors:

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

Judgment category classification:	B
Judgment ID Number:	Ril0912
Number of pages:	27

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

The Queen v RR [2009] NTSC 44
No 20820393

BETWEEN:

THE QUEEN
Crown

AND:

RR
Defendant

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 16 September 2009)

[1] This matter comes before the court pursuant to s 26L of the *Evidence Act* to determine preliminary issues relating to the conduct of the trial.

[2] The accused is charged with having murdered his wife Melicia Manggurra on 28 July 2008. At the commencement of the hearing the Director of Public Prosecutions presented a fresh indictment which included the additional charge that, on the same occasion, the accused had sexual intercourse with his wife without her consent.

The Crown case

[3] The Crown case is that the accused and the deceased were traditionally married and had been in a domestic relationship for a number of years. On 27 July 2008 they had been drinking wine with others at Mindil Beach and then together in the Botanical Gardens. They were both intoxicated.

[4] The Crown alleges that during the night the accused returned to the camp at Mindil Beach and informed a witness that he had broken his wife's arm. He sought assistance from the witness but she refused to accompany him back to the Botanical Gardens. The following morning he approached other people seeking assistance. They went with the accused to the Botanical Gardens where they saw a female lying with her head on a bag. The accused sat with her and hugged her. He told a witness that he had hit his wife once. He said to others present words suggesting he had punched “the lady” and that she was his wife. There were other remarks made by the accused to similar effect. An ambulance was called and police also attended. The accused said to a police officer that he had punched his wife and "she didn't get up".

[5] The autopsy revealed the cause of death as being a bilateral subdural haematoma caused by blunt head trauma.

[6] The autopsy also revealed evidence that the anus, rectum and sigmoid colon of the deceased had been penetrated resulting in haemorrhaging which appeared to be fresh and most probably suffered prior to, but around the

time of death. The length of the haemorrhaging was in the order of 25 cm and, in the opinion of one medical expert, was likely to be longer than could be inflicted by a male penis. The expert expressed the view that the injury was caused by a blunt object of a length of at least 25 cm.

[7] It is the prosecution case that these injuries were suffered by the deceased in the course of a sustained violent beating which caused a number of other injuries including the bilateral subdural haematoma which took her life. The prosecution alleges that the accused inserted an implement into the deceased's anus and rectum as part of a course of conduct intended to cause the deceased serious harm.

[8] On the day following the death the accused was interviewed by police with the assistance of an interpreter from the Aboriginal Interpreting Service. The language involved was Kriol. There are challenges on behalf of the accused to the whole of the record of interview and to specific parts of it.

The indictment

[9] Whilst a series of issues has been raised for determination, the first issue to be addressed is whether, in the circumstances, I should:

(a) quash the indictment; or

(b) order a stay of the indictment until such time as the prosecutor elects to sever the indictment and, in relation to the allegation of

> sexual assault, remit the proceedings to the Court of Summary Jurisdiction for a committal hearing.

[10] Section 339 of the *Criminal Code* permits the court to quash the indictment, order the indictment be amended or stay proceedings where the indictment is calculated to prejudice or embarrass the accused in his defence or where the proceedings are vexatious or harassing.

[11] The nature of indictments is dealt with under Div 2 of Pt IX of the *Criminal Code*. Except as otherwise expressly provided, s 303 of the Code requires that an indictment must charge one offence against one person. However, s 309 then permits charges for more than one offence to be joined in the same indictment against the same person "if those charges are founded on the same facts or are, or form part of, a series of offences of the same or similar character or are a series of offences committed in the prosecution of a single purpose."

[12] In *The Queen v Hofschuster*[1] Mildren J considered the application of these provisions. His Honour concluded that the provisions of the Code did not preclude the joinder of counts permitted to be joined by s 309 to a count of murder in an indictment. That conclusion is not challenged in these proceedings. Mildren J observed that:

> There is no practice that has grown up in the Northern Territory that counts, other than for murder, are never charged in the same

[1] (1992) 110 FLR 385 at 387.

indictment containing a charge of murder, although instances of this occurring in the past are relatively rare.

[13] The Crown submits that, on its case, the two charges in the indictment are founded on the same facts and, more importantly, were committed in the prosecution of a single purpose. It is said that the assaults occurred at about the same time and the insertion of the implement (whatever it may have been) into the anus and rectum of the deceased at that time was in the prosecution of the single purpose of causing her serious harm.

[14] It was submitted on behalf of the accused that great care should be taken in considering information provided by the accused in the course of his record of interview. However, the information contained in the record of interview, along with the medical evidence available at the time of the hearing of the voir dire, provides an evidentiary basis for the submissions made on behalf of the prosecution.

[15] Given the way in which the Crown presents its case and based upon the information presently available to me, the separate charges in the indictment may be regarded as being founded upon the same facts. The allegations relating to count 1, the alleged sexual offence, constitute an integral part of the conduct that the Crown argues led to the death of the deceased and to the allegation of murder against the accused. The two charges are said by the Crown to have a common factual origin. The conduct alleged to constitute the sexual assault, if proven, was part of the violent attack upon the deceased immediately preceding her death. The evidence may be probative

of the intensity of the attack and the state of mind of the accused at the relevant time.

[16] This evidence is also relevant to the Crown case against the accused that he inserted the implement into the anus and rectum of the deceased as part of a course of conduct intended to cause her serious harm and which ultimately lead to her death.

[17] In my view the joinder of the charges in the same indictment against the accused is justified by reference to s 309 of the *Criminal Code*. I do not consider there to be an unacceptable risk of prejudice to the accused by allowing both counts to remain given that much the same evidence will be adduced whether or not the counts are severed. The evidence regarding the injuries to the deceased's anus and rectum is relevant and admissible in relation to the charge of murder.

[18] Whilst the directions to be provided to the jury will necessarily be more complex as a consequence of the joinder I do not see this as leading to undue complexity. Any matters of concern that do arise during the course of the trial should be able to be dealt with by appropriate direction.

[19] There is an additional matter to be taken into account. Following the introduction of s 53A into the *Sentencing Act*, a sentencing court is required to consider the fixing of a non-parole period in respect of any sentence for the crime of murder. The court must fix a standard non-parole period of 20 years or, if any of the aggravating circumstances identified in the section

apply, a non-parole period of 25 years. One of the circumstances applicable to determining the appropriate non-parole period is whether:

> ... the act or omission that caused the victim's death was part of a course of conduct by the offender that included conduct, either before or after the victim's death, that would have constituted a sexual offence against the victim.[2]

[20] It is apparent that a finding of the presence of conduct that would have constituted a sexual offence against the victim before or after the death must result in an increase in the minimum term of imprisonment to be served by the offender. A "circumstance of aggravation" is defined in the *Criminal Code* to mean "any circumstance by reason of which an offender is liable to a greater punishment than that to which he would be liable if the offence were committed without the existence of that circumstance". Whilst in this case the maximum penalty remains the same, the offender is liable to a longer minimum term. He is, therefore, subject to greater punishment. The increased penalty amounts to a circumstance of aggravation.

[21] Section 305(4) of the *Criminal Code*, which deals with the form of indictments under the Code, requires that any circumstance of aggravation which is intended to be relied upon shall be charged in the indictment. The Crown intends to rely upon the allegation that the conduct of the accused in this case constituted a sexual offence against the victim and, in my opinion, is required to plead that aggravating circumstance in the indictment. It may do so by pleading the circumstance of aggravation as part of the murder

[2] s 53A(3)(b) *Sentencing Act*.

charge or include it as an additional count in the indictment. In the present case the Crown has chosen the latter alternative.

[22] The legislative regime contemplates that there will be consideration by the court of any allegation by the prosecution that a sexual offence has occurred. The consideration will, logically, take place at the same time as, and in the same proceedings as, the charge of murder is determined. It is a fundamental principle that "questions of fact affecting the liability of the accused to punishment should be decided by the jury when the trial is on indictment."[3] In my view the interests of justice require that a jury determine the existence or otherwise of facts which could require the accused to serve an additional five years on the otherwise applicable minimum term.

[23] While s 53A(3)(b) of the *Sentencing* Act (as amended) does not provide the mechanism for including more than one charge in the indictment, s 309 of the *Criminal* Code does. As I have discussed, the Crown case is that the charges are founded on the same facts and are offences committed in the prosecution of a single purpose. There is an evidentiary basis for the case as presented by the Crown.

[24] In all cases, including the present, there remains the discretion vested in a trial judge to make rulings, including as to severance, to ensure the accused receives a fair trial. However, in my opinion, the inclusion of a second

[3] *Kingswell v The Queen* (1985) 159 CLR 264 at 280.

count in the present indictment does not lead to any relevant unfairness in the circumstances of this case. I see no reason to interfere.

Proceedings must fail

[25] It was submitted on behalf of the accused that the allegation of sexual intercourse without consent should not be permitted to be included in the indictment as the allegation "must fail". It was submitted that admissions contained in the record of interview were unreliable, there was no evidence that the accused had inserted any object into his wife's anus, the timing of the event was uncertain and the presence of injury did not mean that the deceased did not consent to any such penetration.

[26] I do not consider it appropriate to provide a detailed consideration of the foreshadowed available evidence. With respect to the submission there is, in my view, evidence upon which a jury properly instructed could find beyond reasonable doubt that the accused was guilty of the offence. I do not see the charge as being foredoomed to fail and I reject this submission.

Improper purpose or ulterior motive

[27] It was submitted on behalf of the accused that the inclusion of the sexual assault count by the Crown was for an ulterior motive or improper purpose. The first indication that a sexual assault count would be included in the indictment was provided to the accused on 29 August 2009 shortly prior to the commencement of these proceedings. The accused asserts that the change in the indictment was in response to an indication made on his behalf

that objection would be taken to the admission of evidence of sexual assault as being irrelevant to the charge of murder. It was submitted that the inclusion of the sexual count was a tactical response to the challenge by the accused as to the admissibility of this evidence.

[28] In the present case, the decision to prosecute for the offence of rape is one for the Director of Public Prosecutions. In *Director of Public Prosecutions (SA) v B*[4] Gaudron, Gummow and Hayne JJ observed:

> The line between, on the one hand, the decisions whether to institute or continue criminal proceedings (which are decisions the province of the Executive) and on the other, decisions directed to ensuring a fair trial of an accused and the prevention of abuse of the court's processes (which are the province of the courts) is of fundamental importance.

[29] Similar observations were made in *Pearce v The Queen*[5] where, in a joint judgment, McHugh, Hayne and Callinan JJ noted that "ordinarily, prosecuting authorities will seek to ensure that all offences that are to be charged as arising out of one event or series of events are preferred and dealt with at the one time."

[30] The circumstances that will lead a court to exercise the jurisdiction to stay proceedings have been variously described as "exceptional", "rare" and as a power which should be used "sparingly and with the utmost caution"[6]. It is

[4] (1998) 72 ALJR 1175 at [21].
[5] (1998) 72 ALJR 1416 at [30].
[6] *R v Swingler* [1996] 1 VR 257 at 265 and see *Maxwell v The Queen* (1995) 184 CLR 501 at 513-514 per Dawson and McHugh JJ.

a jurisdiction which will only be exercised where it is readily apparent that it should be exercised to prevent prosecutorial oppression.[7]

[31] The submissions on behalf of the Crown placed the decision to add the additional charge in context. It was asserted, and I accept, that at all times the prosecution intended to rely upon the evidence led at the committal hearing as to the injury to the anus, rectum and sigmoid colon in the proceedings. The Crown sought advice from the solicitors for the accused as to the matters which were being placed in issue in the trial. On 21 August 2009 the prosecution received advice that there would be an objection to the admission of evidence concerning the anal injury. At about that time, and for the first time, counsel for the Crown gave consideration to the implications of the amendments to the *Sentencing Act* to which I have referred and determined that it was required to include reference to the alleged sexual offence in the indictment.

[32] It is unfortunate that counsel for the prosecution did not consider this aspect of the matter at an earlier time. However, in light of the explanation provided, I accept that the prosecution included the additional charge of sexual intercourse without consent for the purpose of meeting its perceived obligations. In my opinion the inclusion of the additional charge is an appropriate response to the requirements of the amended provisions of the *Sentencing Act*.

[7] *Langtree v Trenerry* (1999) 9 NTLR 46.

Admissibility of the Record of Interview

[33] The accused was arrested at the scene and remained in custody until he was interviewed by police. There were three preliminary interviews conducted pursuant to s 140 of the *Police Administration Act* and then a formal record of interview was conducted on 29 July 2008.

[34] The record of interview was conducted by two police officers assisted by Ms Parry of the Aboriginal Interpreter Service who acted as an interpreter in the Kriol language.

[35] It was the submission of the accused that the record of interview should be excluded on the basis that the prosecution could not demonstrate that the confessional statements were voluntarily made. Alternatively, it was submitted that the court should exclude the record of interview in the exercise of its discretion.

(a) The prisoner's friend

[36] The accused made various complaints regarding the need for a prisoner's friend. He complained that, at the time of the record of interview:

(a) there was no prisoner's friend present;

(b) the right to a prisoner's friend and the role of the prisoner's friend was not properly explained; and that

(c) the accused was under the misapprehension that the interpreter could act as a prisoner's friend.

[37] Under s 140 of the *Police Administration Act* an investigating police officer must inform a person in custody that the person does not have to say anything but that anything the person does say or do may be given in evidence. The person is also to be informed that he or she may communicate with, or attempt to communicate with, a friend or relative to inform the friend or relative of the person's whereabouts. The evidence on the voir dire revealed that there was one early failed attempt to comply with that provision in relation to the accused and then three recorded conversations in which the issues were addressed.

[38] The attempt occurred at the scene at about 9.00 am on Monday 28 July 2008 when the officer in charge of the investigation, Detective Sergeant Richardson, endeavoured to talk to the accused. He was unable to obtain any response from the accused and he, therefore, abandoned the attempt. As he was involved in other aspects of the investigation he requested Detective Sergeant Day to conduct the appropriate conversation with the accused and Sergeant Day did so at about 2.45 pm on that day. This conversation was held in the absence of an interpreter and was conducted in English. In the course of the conversation the accused identified his mother, Jenny Lalara, and his uncle, Roger Lalara, as people he wished to sit with him during any formal interview. He said his mother lived at Tomaris Court but that he did not know the number. He thought his uncle was living at the same place but was due to go back to Groote Eylandt that day. In the course of the

interview the accused advised in English that he was comfortable speaking Kriol.

[39] Sergeant Day arranged for a Kriol interpreter to be available later in the day. Enquiries were made during the course of the day in an effort to locate the identified people but the enquiries were unsuccessful. At 5.34 pm Sergeant Richardson conducted a further recorded interview with the accused pursuant to s 140 of the Code. The interpreter, Ms Parry, was present and the accused indicated he was happy for her to be the interpreter. The accused was advised by Sergeant Richardson that he had been arrested in relation to the death of his wife. He was cautioned and he indicated he understood the caution. The accused was informed that efforts to contact his mother and his uncle had been unsuccessful and he was asked whether anyone else could fulfil the role. He indicated that any member of his family from Groote Eylandt would be suitable. He thought some family members may be at Bagot or at Mindil Beach. He named his “grandmother” Frances as a possible prisoner's friend. He was asked if his mother had a telephone and was told that she did but that he did not know the number. Subsequently, the telephone number was identified through police resources however it was not answered when called. The accused also identified "Elizabeth and Harry" as possible prisoner’s friends. They were subsequently ruled out as they were potential witnesses in the proceedings. The s 140 interview was terminated to enable further efforts to obtain a suitable prisoner's friend to be pursued.

[40] Sergeant Richardson had been prepared to commence the record of interview with the accused on the Monday evening however he deferred the interview in order to endeavour to locate someone to act as the prisoner's friend. The following morning further enquiries were conducted and eventually Jennifer Lalara was located. She advised police she was aware of the incident and informed them that she would not assist the accused. The grandmother, Frances, was also located and she advised she was "a family member for the deceased" and she did not want to be involved. Fresh efforts were made to identify and speak with appropriate people from Groote Eylandt but these were unsuccessful.

[41] A further recorded conversation took place at 9.01 am on Tuesday 29 July 2008 in the presence of the same interpreter. The accused asked that the concept of a prisoner's friend be explained to him and he was advised that a member of his family or a friend could sit with him during the interview to make him feel comfortable. He was informed that neither Jennifer Lalara nor his identified grandmother would agree to be involved. He was also informed that the people from Groote Eylandt to whom the police had spoken could not be involved because they were potential witnesses. In the course of the conversation the interpreter informed the police that the accused was "saying that he wants to tell the story what happened of that girl" but the interpreter had informed the accused that he could not do so at that time.

[42] In the course of further discussion the accused said he was happy for the interpreter, Ms Parry, to be both an interpreter and his friend during the course of the interview. The interpreter explained to him that she was "not allowed to like take sides. I am only here to take messages from you back to the policeman." She advised the accused that she could sit there to make him feel comfortable and he agreed. In her evidence on the voir dire the interpreter said that during the interview she continued to regard her primary function as being that of an interpreter.

[43] The accused indicated that he was "happy" with the arrangement and, in relation to the interpreter he said he was "very happy" that she was there.

[44] On the Monday evening, when it appeared that it would be difficult to obtain an appropriate prisoner's friend, Sergeant Richardson referred to the General Orders issued by the Commissioner of Police for guidance and found the following information which is extracted from the decision of Forster J in *R v Anunga*[8]:

> When an Aboriginal is being interrogated it is desirable where practicable that a "prisoner's friend" (who may also be the interpreter) be present. The "prisoner's friend" should be someone in whom the Aboriginal has apparent confidence.

In light of that information when, on the following morning, the accused advised that he was happy for the interpreter to sit with him, Sergeant Richardson expressed himself to be comfortable with the arrangement. He

[8] (1976) 11 ALR 412 at 414.

did not pursue other avenues, if any were in fact available, to obtain a suitable prisoner's friend.

[45] The record of interview commenced at 9.45 am on Tuesday 29 July 2008 with Ms Parry acting as the interpreter. In the course of the interview Detective Sergeant Richardson indicated that those participating would "talk about a prisoner's friend in a minute" but he did not ever return to the topic. In his evidence he acknowledged that at no time did he explain in detail to the interpreter or the accused the role of a prisoner's friend.

[46] In *R v Butler* (No 1)[9] Kearney J expressed the view that the Commissioner's General Orders provide suitable instructions to interrogating police officers in relation to the provision of a "prisoner's friend". It was recognized in that case that there will often be practical difficulties in obtaining the services of people with the desirable attributes to fulfil the role of prisoner's friend. Notwithstanding the passage of time those observations remain accurate.

[47] The choice of the friend is for the accused alone[10] and in the present case the accused chose to rely upon Ms Parry to sit with him even though, as he plainly understood, she was there to fulfil the role of interpreter.

[48] Sergeant Richardson acknowledged that he did not explain to the accused or to Ms Parry that the role of the prisoner's friend included assisting or

[9] (1991) 102 FLR 341 at 344.
[10] *Gudabi* (1984) 12 A Crim R 70 at 82.

supporting the person being interviewed with help or clarification, nor did he inform them of the right of the prisoner's friend and the person to communicate with each other for the obtaining of advice or for any reason. He had intended to do so but failed to do so. Whilst it has been observed that "it would be useful if the person to be interviewed were told, before making his choice, that he will be free to talk to his friend, and ask advice, in the course of the interview"[11] this is not a requirement. As was observed by the Court in *Gudabi*[12]:

> The guidelines, which have as their object the assistance of investigating officers in conducting their inquiries in such a manner as to be fair to the person being interviewed while at the same time serving the public interest by not unduly inhibiting the investigating process, are not rules of law. It would be wrong to treat what is said in *Anunga* as laying down principles or rules the breach of which in any respect will result in confessional material being rejected as inadmissible. Equally it cannot properly be said that evidence of a confessional statement will always be admissible if it can be shown that the investigating officers did not in any respect contravene those guidelines. The legal question will always be whether the confessional statement was voluntary in the sense in which that expression is used in the relevant authorities.

[49] Prior to the interview the interpreter had been appraised of the reason for the interview, the form of the interview and had been given some idea of the alleged offence. She was not told by the interviewing officers that her role included assisting or supporting the accused with help or clarification, communicating with him or advising him at any time as a friend. She did

[11] *Gudabi* (1984) 12 A Crim R 70 at 82.
[12] *Gudabi* (1984) 12 A Crim R 70 at 81.

not take on any advisory function. In the course of the interview she did, at times, seek clarification, however that was in her role as interpreter.

[50] The interpreter had an understanding of the role of prisoner's friend and conveyed her understanding to the accused. She told the accused that she could "sit with" him and that "as a friend I can be here to make you feel comfortable". She made it clear to the accused that her obligations as an interpreter placed restrictions upon what she could do in her capacity as a friend. The accused expressed himself to be happy with the arrangement. He gained a sense of support and comfort from her presence.

[51] It was apparent from the earlier recorded discussions that the accused was anxious to "tell the story what happened of that girl". He made it clear that he wished to provide the officers with his version of events. When the interview commenced and following the caution he told his story in detail. At p 12 of the transcript it is recorded that he was asked, "What would you like, it's up to you, but what would you like to tell us?" The accused then gave his version of events over the following six pages in free flowing detail and without prompting. He finished by asking for another cup of coffee. Having heard the evidence and seen the recorded interview I find that he was speaking in the exercise of his own free will and in accordance with his desire to explain what had happened at the time of the death of his wife.

[52] In my view, the role filled by Ms Parry provided support and comfort to the accused in circumstances where he clearly wished to tell his story. There

was an adequate response to the requirement to provide an appropriate prisoner's friend. The arrangement accepted by the accused did not lead to any relevant unfairness.

[53] It is to be noted that the guidelines which appear in the General Orders and which were extracted from the Anunga Rules were written in 1976. Since that time and subsequent to the observations of Kearney J in *R v Butler* (No 1)[13] in 1991, the delivery of interpreter services in the Northern Territory has improved significantly. A professional service is now provided by the Aboriginal Interpreter Service. The availability of interpreters is not as it was in 1976. The Aboriginal Interpreter Service is now run on a professional basis in circumstances where appropriately qualified interpreters are bound by a code of ethics. Part of the code requires them to maintain impartiality and objectivity which are obligations that can not be fulfilled if the interpreter is also to fulfil the role the prisoner's friend. Further, interpreters are required not to provide advice and this, again, is inconsistent with the role of a prisoner's friend. In my view, it is now preferable for an interpreter, and particularly an interpreter bound by the code of ethics, to avoid being appointed as a prisoner's friend. That is not to say that an interpreter cannot fill the role at least partially where no other suitable person is available. In the circumstances which continue to prevail in some parts of the Northern Territory there may be no

[13] (1991) 102 FLR 341.

other alternative. However, it is preferable that, wherever possible, a person other than the interpreter should fulfil the role of prisoner's friend.

(b) Voluntariness

[54] In *Collins v R*[14] Brennan J said:

> "The ultimate question is whether the will of the person making the confession has been overborne, or whether he has confessed in the exercise of his free choice. If the will has been overborne by pressure or by inducement of the relevant kind it does not matter that the police have not consciously sought to overbear the will. … So the admissibility of the confessions as a matter of law (as distinct from discretion, later to be considered) is not determined by reference to the propriety or otherwise of the conduct of the police officers in the case, but by reference to the effect of their conduct in all the circumstances upon the will of the confessionalist. The conduct of police before and during an interrogation fashions the circumstances in which confessions are made and it is necessary to refer to those circumstances in determining whether a confession is voluntary. The principle, focusing upon the will of the person confessing, must be applied according to the age, background and psychological condition of each confessionalist and the circumstances in which the confession is made."

[55] It was submitted on behalf of the accused that the prosecution could not demonstrate that the confessional statements found in the record of interview were voluntarily made. In particular, it was contended that there was no demonstrated understanding by the accused of the caution administered to him. It was also submitted that he was encouraged or induced to speak by the interpreter. Further, it was contended that the accused "apparently" indicated that he wished not speak and his wish was ignored. The accused again raised the issue of a prisoner's friend (dealt with

[14] (1980) 31 ALR 257 at 307.

above) and complained that he was not given the opportunity to seek legal advice whilst in custody.

[56] Whilst the accused identified his preferred language as Kriol he does have some English. In the course of evidence placed before me it was revealed that he had attended St John's College in Darwin to either year 9 or year 11. In the s 140 interview conducted at 2:45 pm on 28 July 2008 the whole of the interview was in English. In the interview the accused identified himself and responded appropriately in English to questions asked of him in English. He said the language in which he usually talks is Kriol which he described as "broken English". Further, I heard evidence from Mr Kirk, his parole officer, who described having conducted his interviews with the accused in English and without apparent difficulty. In addition, I heard two taped interviews with the accused from other proceedings which were both conducted in English. There was some difficulty with one interview due to the attitude of the accused. However, both interviews revealed that the accused had an understanding of English sufficient for the purposes of the interview. He answered questions in a way that revealed that he understood the questions and was able to provide appropriate answers. I find that the accused has a basic understanding of English although he is more comfortable speaking in Kriol.

[57] The caution was delivered in a lengthy exchange between the detective, the interpreter and the accused. In her evidence the interpreter advised that she only spoke with the accused in Kriol although English words were used at

times, particularly where there was no appropriate Kriol word. Care must be taken in considering the written word as found in the transcript of the interviews because many words in Kriol appear to be the same as, or similar to, words in English. On occasions, and depending upon the context, those words may have a quite different meaning in Kriol.

[58] The record of interview has been the subject of a back interpretation by Raymond McGuiness. Both Mr McGinness and Ms Parry are National Accreditation Authority for Translators and Interpreters (NAATI) qualified Kriol interpreters employed by the Aboriginal Interpreter Service. The interpretation by Ms Parry was conducted "on the run" and at the police station. Mr McGinness had the opportunity to listen to the tapes of the relevant conversations at his leisure and he provided a considered opinion as to the accuracy of the interpretation. Mr McGinness gave evidence that he did not see any part of the interview as demonstrating that the accused did not understand Ms Parry and he noted that the accused "has acknowledged all the way along that he does understand." In cross-examination Mr McGinness went on to say of the accused that "he is understanding that he has a choice".

[59] I have had the benefit of hearing from both Ms Parry and Mr McGinness. Ms Parry had a much broader view of what may be described as Kriol than did Mr McGinness. Mr McGinness emphasised that the interpreter must consider not just the words spoken but also "finger talk actually and expressions". Mr McGinness was critical of the use of a mixture of English

and Kriol by Ms Parry in some of the discussion and he thought one answer was incorrectly interpreted. He also thought the use of English would make it difficult for the accused to understand. However, he also indicated that the use of "broken English", which was not really Kriol, was something the accused would understand, particularly in light of his acknowledgement of his understanding in the course of the interview. In the interview the accused acknowledged that he spoke Kriol which he described as a kind of “broken English”. As I have observed he also had a basic understanding of English. Notwithstanding the identified concerns expressed by Mr McGinness his evidence was confirmatory of the opinion of Ms Parry that the accused expressed his understanding of the caution.

[60] In the course of her evidence Ms Parry was taken through the record of interview in a detailed and painstaking manner. I do not need to revisit that evidence. Accepting that some errors occurred in the process of interpretation I remain satisfied that her interpretation of the interview was both accurate and fair. I am satisfied that the accused understood the caution and exercised a free choice to speak with the interviewing officers.

[61] It was submitted on behalf of the accused that in the course of the caution he had declined to answer further questions but that the interviewer pressed on notwithstanding. The surrounding circumstances were that Sergeant Richardson in seeking to ensure a that the accused understood the caution posed the question:

> If he doesn't want to answer my questions or tell me any story, what, what can he do?

There was then discussion between the interpreter and the accused and the conversation proceeded as follows:

> PARRY: He said that he's not going to say anything.
> RICHARDSON: He's what sorry?
> PARRY: He's not going to say anything.
> RICHARDSON: Ok, and that's his choice.
> PARRY: Yes.
> RICHARDSON: That's your choice.
> PARRY: That your choice, there.
> RICHARDSON: Nothing that we can do can force you to tell us that story.
> PARRY: They can't force 'im you like telling 'im all you 'dat story.
> RR: Yeah.

[62] It was the submission on behalf of the accused that he was, at that point, refusing to answer questions. I reject the submission. It is plain from hearing the whole of the recorded discussion and taking the answer in context that the accused was simply informing the interviewing officer that in circumstances where he did not want to answer questions or tell his story he was not going to say anything. In effect, he was confirming that he understood that he had a choice whether to speak or not speak. This was the understanding of the interpreter Ms Parry and of Sergeant Richardson, who were both present at the time, and also of Mr McGinness who conducted the back translation. Having reviewed and considered the matter carefully I am

of the same opinion. There was nothing to require the interviewing officer to query whether the accused was in fact exercising his right to silence. He was not doing so.

[63] The content of the record of interview supported that view. Shortly after that exchange the following was said:

PARRY:	Yeah, he's, he understands that it's, it's his choice to speak.
RR:	(native language) talk (native language).
PARRY:	Hey?
RR:	(native language) talk (native language).
PARRY:	He said that he, he would like to tell the story, speak.
RICHARDSON:	You would like? Ok.
PARRY:	Yes.

[64] Shortly thereafter he said words to the effect that he wanted to "tell my story". The accused then went on to recount his version of events without prompting. He did so in a free-flowing manner. He wanted to tell his story and he did so.

[65] This view is consistent with the earlier conduct of the accused. Prior to the interview commencing the accused made it clear that he wished to tell the officers what had happened and provide his version of events. He had to be stopped from doing so at the time of the s 140 conversation at 9.01 am on 29 July 2008.

[66] In my opinion the accused understood the caution. He was keen to tell his story and he did so in the exercise of his intention to explain what had

happened. I do not accept the submissions that the interpreter encouraged or induced the accused to speak. Those submissions were based upon a process of taking passages of the record of interview in isolation, without regard to the context and, in some instances, without reference to the Kriol meaning of words that may also have a meaning in English. It was an artificial exercise which did not reflect the impact of the interview. In her evidence the interpreter denied the suggestions and I accept her explanation.

[67] It was also submitted that the investigating officers failed to facilitate communication by the accused with a friend or relative or some other person who may be a prisoner's friend. In my view, in the circumstances described above, the officers did what was reasonable to assist the accused. They fulfilled their obligations to him. I reject the submission.

Conclusions

[68] The Crown will be permitted to lead evidence of the record of interview. There will be a Basha Inquiry[15] in relation to the evidence not addressed at the committal hearing. The application to quash and/or stay the indictment is dismissed.

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[15] (1989) 39 A Crim R 337.