

PARTIES: THE QUEEN
v
NAGAWALLI, CAROLINE

TITLE OF COURT: SUPREME COURT OF THE NORTHERN
TERRITORY

JURISDICTION: SUPREME COURT OF THE TERRITORY
EXERCISING TERRITORY JURISDICTION

FILE NO: (20814951)

DELIVERED: 18 June 2009

HEARING DATES: 12 and 13 May 2009

JUDGMENT OF: THOMAS J

CATCHWORDS:

CRIMINAL LAW -- EVIDENCE -- CONFESSIONS AND ADMISSIONS --
STATEMENTS -- DISCRETION TO EXCLUDE

Admissibility of conversations between accused and police officer at scene of crime – caution not administered prior to conversation – admissibility of taped conversation conducted pursuant to s 140 of the *Police Administration Act* (NT) – non-compliance with the *Anunga Rules* – accused had speech impairment – admission unclear on tape – further admission was a positive answer to a leading question – unreasonable in the circumstances to question accused – evidence held to be inadmissible.

Evidence Act (NT) s 26L; *Police Administration Act* (NT) ss 140, 142, 143.

Grimley v The Queen (1995) 121 FLR 282; *R v Charlie* (1995) 121 FLR 306, discussed.

Bunning v Cross (1978) 141 CLR 54; *Cleland v The Queen* (1983) 151 CLR 1; *Duke v The Queen* (1989) 180 CLR 508; *R v Lee* (1950) 82 CLR 133; *Van Der Meer v The Queen* (1988) 62 ALJR 656; *Williams v The Queen* (1986) 161 CLR 278, referred.

REPRESENTATION:

Counsel:

Crown: E Armitage
Defendant: J Lawrence

Solicitors:

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

Judgment category classification: C
Judgment ID Number: Tho200905
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

R v Nagawalli [2009] NTSC 25
No. (20814951)

BETWEEN:

THE QUEEN
Plaintiff

AND:

NAGAWALLI, CAROLINE
Defendant

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 18 June 2009)

- [1] Caroline Nagawalli has entered a plea of not guilty to a charge that on 29 May 2008 at Palmerston in the Northern Territory of Australia murdered Angus Barney.
- [2] A hearing pursuant to s 26L of the Evidence Act was conducted. This involved a challenge to the admissibility of certain conversations between the accused and a police officer at the scene of the alleged murder and a taped record of a conversation conducted pursuant to s 140 of the Police Administration Act a short time later. The defence challenge the admissibility of these conversations. The basis for the challenge is that the admissions were not made voluntarily. Alternately, Mr Lawrence, counsel

for the defendant, submits they should be excluded pursuant to a discretion to exclude this material on the basis of unfairness.

- [3] Ms Nagawalli, the accused, has a speech impediment. The Crown concede that in relation to the issue of fairness, the reliability of evidence given by police officers as to what they heard Ms Nagawalli say rests on the effect, if any, of the speech impediment.
- [4] Ms Nagawalli speaks both English and Galiwinku. The admissions the Crown seeks to lead are in English.

Background Facts

- [5] The event, which is the subject of the charge, took place on the afternoon of 29 May 2008 under the water tower at Palmerston Shopping Centre. There is video surveillance footage showing Ms Nagawalli and her partner, the deceased, who is also known as “Cowboy”, entering the Coles Palmerston store.
- [6] A short time later a number of eyewitnesses observed Ms Nagawalli approach the deceased where he was sitting on a rock under the Palmerston water tower. Some of these witnesses observed Ms Nagawalli carrying a plastic shopping bag. She was seen to swing the bag at Cowboy. The bag broke and the contents scattered on the ground. Certain items were found at the scene after the event. They included an apparently new Wiltshire paring knife which had blood stains. The new plastic packaging associated with that knife had been separated from the knife. Witnesses described how they

saw the deceased sitting on the rock and Ms Nagawalli kneeling or sitting directly in front of him. They observed scrabbling hand movements between the couple. None of the witnesses saw a knife or any specific individual blow that could be identified as the stabbing.

- [7] Witnesses observed Mr Barney slump to one side. Ms Nagawalli walked into the shopping centre. She dialled 000 and requested an ambulance. At her request security guards approached Angus Barney and commenced CPR.
- [8] The first police officers on the scene were two Aboriginal Community Police Officers. They were ACPO Tania Hogan and ACPO Joseph Russell. ACPO Hogan had previous dealings with Caroline Nagawalli and Angus Barney. Caroline Nagawalli and Angus Barney have been known to have altercations. ACPO Hogan gave evidence she was familiar with how Ms Nagawalli spoke. Upon seeing Angus Barney bleeding on the ground and Caroline Nagawalli standing nearby, ACPO Hogan said, “Caroline, what happened?” The evidence of ACPO Hogan is that Ms Nagawalli replied, “I stabbed him because he wanted to drink and I wanted to go”. The admissibility of this statement by Caroline Nagawalli is in dispute.
- [9] ACPO Hogan took Caroline Nagawalli into custody and escorted her to the caged police vehicle. As they walked to the vehicle, ACPO Hogan asked Ms Nagawalli how much Mr Barney had to drink. Ms Nagawalli replied, “one plus a stubby of VB”. In her previous dealing with Ms Nagawalli and

Mr Barney, ACPO Hogan knew Angus Barney to be a drinker. Caroline Nagawalli was known as a sober person.

[10] At the police vehicle, ACPO Hogan noticed blood on Ms Nagawalli's head. She asked what the blood was from. ACPO Hogan said Ms Nagawalli had replied, "He hit me first. So I stabbed him". This conversation is also the subject of dispute as to its admissibility. Ms Armitage, on behalf of the Crown, states that on the trial of the accused the Crown would lead evidence of this further statement by Caroline Nagawalli. ACPO Hogan examined Ms Nagawalli's head but could find no cuts. She did note a lump in the middle of Ms Nagawalli's forehead. After locking Ms Nagawalli in the police vehicle, ACPO Hogan returned to Mr Barney with a first aid kit. She made notes in her police notebook at the location and before she left the scene. ACPO Joseph Russell remained at all times with Mr Barney and did not overhear any conversations between ACPO Hogan and Caroline Nagawalli.

[11] Detective Acting Sergeant Crispen Gargan arrived at the scene. He was briefed by ACPO Hogan as to the first conversation she had with Caroline Nagawalli. Detective Sergeant Gargan stated that ACPO Hogan did not tell him about the second conversation she had with Caroline Nagawalli at the police vehicle.

[12] Detective Sergeant Gargan went to the caged police vehicle and conducted a s 140 conversation with Ms Nagawalli which was recorded on a hand held

tape recorder. During that conversation he cautioned Ms Nagawalli and asked her about the conversation she had had with ACPO Hogan. He asked, “Did you say ‘I stabbed him because he wanted to drink and I wanted to go’?” Ms Nagawalli replied, “Yeah”. The Crown seek to lead the contents of the s 140 tape recording before the jury. The defence challenge the admissibility of the s 140 tape recording.

- [13] Ms Nagawalli was taken to Royal Darwin Hospital to have any injuries she may have assessed and treated. While speaking to the doctor about the blood on her forehead, ACPO Russell heard Ms Nagawalli tell the doctor that Angus banged her head against a rock at the water tower. He also heard her tell the doctor the blood on her forehead was Angus Barney’s.
- [14] The medical evidence is there was some evidence of a closed head injury but no evidence of cuts or lacerations on Ms Nagawalli’s forehead.
- [15] Dr Sinton conducted the autopsy on Angus Barney. The cause of death was a single stab wound to the chest which entered the left side of the heart. At the committal hearing, Dr Sinton gave evidence that the force required to inflict the wound was in the moderate to severe range which could have been caused either by Ms Nagawalli thrusting the knife or Mr Barney moving towards the knife.
- [16] Angus Barney had a blood alcohol reading of 0.245 percent.

[17] The defence stress the unreliability of the evidence of ACPO Hogan as to what she says Caroline Nagawalli said to her. This is not because ACPO Hogan intentionally misinterpreted what was said to her, but because Caroline Nagawalli has a speech impediment which makes her difficult to understand. Mr Lawrence on behalf of the defendant referred to certain evidence given at the committal hearing in which witnesses gave evidence they could not understand what Caroline Nagawalli was saying. Mr Lawrence referred specifically to the evidence of Mr Page who was a friend of some years standing. Mr Page stated in evidence at the committal:

“The rest of the family can understand her quite well, but wearing hear aids (he had an affliction) doesn’t help me at all and I can’t understand her talking. I can’t understand anything she says and I always have to ask cowboy what she is saying. She writes very well and everything, but I just can’t understand her.”

[18] Other evidence given at the committal was given by Andrew Stuart on 19 December 2008. Mr Stuart is an interpreter accredited in the Baradha language but not the Galiwinku language. He gave the following answers in cross examination:

“When you did the work for the police during the interview, Caroline spoke in her language?---Yes.

And you tried to interpret?---Yes.

Was it difficult?---It was difficult.

Caroline has a speech problem?---Too hard to speak to her. I mean to understand her.

And was there some things you couldn’t understand?---Yes.

So you just tried your best to translate?---Yes.”

[19] At the continuation of the committal hearing on 22 December 2008, ACPO Russell was cross examined as to previous dealings he had with Caroline Nagawalli. He gave the following answers in cross examination:

“Do you know what her first language is?---No.

Are you aware that she suffers form a speech impediment?---Yes, I know she talks a lot different than other people that I talk to yes.

Do you find her difficult to understand when she speaks?---Yes.”

There is medical evidence that Caroline Nagawalli had suffered a stroke during childbirth and this had affected her speech.

Evidence on the voir dire

ACPO Tania Hogan

[20] Evidence was given on the voir dire by ACPO Hogan who stated she had known Caroline Nagawalli from the time ACPO Hogan started work at the Palmerston Police Station which was December 2007. She stated in evidence that every day she would see Caroline Nagawalli and Angus Barney when police were doing routine trips around the town. She had conversations with Caroline Nagawalli in English on a weekly basis. She stated Caroline’s speech was impaired in that it was not clear.

[21] It is ACPO Hogan’s evidence that she could understand Caroline who had told her a lot about her life. ACPO Hogan gave evidence that Caroline’s words were not precise like everybody else. Her evidence was that Caroline Nagawalli was a long grasser at Palmerston. At times ACPO Hogan had

difficulty understanding Caroline but her evidence is if this occurred she would ask her to repeat it. ACPO Hogan gave evidence, “She would say it again and then if I didn’t understand her she wouldn’t say anything else”.

[22] ACPO Hogan gave evidence that on the day Angus Barney was stabbed she had approached the water tower at Palmerston. ACPO Hogan and her partner walked up to Angus Barney who was lying on the ground. Caroline was standing beside him. ACPO Hogan asked Caroline, “What happened?” Caroline replied, “I stabbed him because he wanted to drink and I wanted to go”. ACPO Hogan gave evidence she had no difficulty hearing or understanding those words. ACPO Hogan then escorted Caroline to the police vehicle. She asked Caroline how much Angus had to drink that day. Caroline replied “one plus a stubby of VB”.

[23] At the back of the police vehicle ACPO Hogan noticed Caroline had blood on her forehead. She asked her what happened and Caroline had replied “He hit me so I stabbed him”. ACPO Hogan asked about the blood on Caroline’s forehead as she wanted to ascertain if Caroline had any injuries herself that needed medical attention.

[24] ACPO Hogan did not administer a caution, she placed Caroline in the back of the vehicle and returned to Angus Barney. She made a note of these conversations in her police notebook about 45 minutes later. This was after Angus Barney had been conveyed to hospital and ACPO Hogan was at the back of the police vehicle. A copy of the notebook notes is Exhibit P1.

[25] ACPO Hogan recalled telling Detective Sergeant Gargan about the initial conversation she had with Caroline at the water tower. She and ACPO Russell assisted in taking Ms Nagawalli to hospital. She was not present when Detective Sergeant Gargan conducted a s 140 conversation with Ms Nagawalli. At the hospital ACPO Hogan heard Caroline Nagawalli speaking to doctors and nursing staff. Caroline Nagawalli was asking about the welfare of Angus Barney. ACPO Hogan said she had no difficulty understanding Caroline when Caroline was asking these questions.

[26] ACPO Hogan gave evidence she then conveyed Caroline to Darwin Watchhouse.

[27] Under cross examination by Mr Lawrence, ACPO Hogan agreed that at the hospital she had assisted one of the nurses who could not understand what Caroline was saying. She agreed that sometimes when Caroline had spoken to her prior to this date she had difficulty understanding Caroline and had to ask for clarification.

[28] It is ACPO Hogan's evidence the deceased was a drinker but she had never seen Caroline drink. On previous occasions she had seen the couple arguing and on those occasions Angus Barney was under the influence of alcohol. ACPO Hogan stated that on the day of the stabbing she had received a call that there had been an incident at the water tower. She and ACPO Russell walked toward the water tower. ACPO Hogan states she saw the deceased lying on the ground in a pool of blood. ACPO Hogan agreed that he

appeared to have been seriously injured. There was a fair amount of blood. He was in a recovery position and being attended to by others. Caroline was standing next to Angus Barney. ACPO Hogan said she saw the blood and thought “what happened”. She had then asked Caroline that question. She agreed that she had thought possibly there was foul play. After Caroline had stated she had stabbed Angus Barney, ACPO Hogan considered Caroline was in her custody and she would not have released her. Mr Lawrence referred to certain questions he had asked ACPO Hogan at the committal proceedings. These questions and answers are on page 40 of the committal transcript and are referred to in the following questions and answers on the voir dire hearing:

“And while we’re going along this trail, could you be good enough to give me access to the relevant pages of your original notebook?--- Sure.

Thank you. All right, I’ll give you that back. It’s page 40, you might remember at the committal that I asked you these questions, and this is at page 145 of the committal transcript of 19 December last year, and I asked you this, and I’m talking about this notebook, so just have a look at that while I repeat what was asked and your answer:

And then the note goes on to say Caroline also stated that Angus had hit her first, then she stabbed?---Yep.

Do you remember that?---Yep.

And then I asked you:

When did she say that?---Vaguely, I remember – I vaguely remember the going into court last year.

All right, what I’m reading out is what I asked you and what your answer is?---Yep, okay.

Is your answer correct?---Sorry, can you just repeat the question again?

And then the note goes on to say Caroline also stated that Angus had hit her first, then she stabbed?---Yep. When did she say that?---That was at the rocks when we were standing there, the first instant.

All right?---Okay.

And then I asked you,

Which was what happened?---Yes. So if you go back to page 39 of your notes, would it be fair to say that ... I said, she said should be supplemented with Angus had hit her first, and then she stabbed him?---I asked her what happened, she said I stabbed him, that was the first words she said to me. You sure?---because he wanted to drink and I wanted to go and as we started to walk I said, she said that he hit me with a rock, which I later - - - So that really would you agree, sequentially, this is the only conversation you had with her as to what had happened?---Yes. And this is her only explanation?---Yes. And it all happened at the same time?---Yep.

Do you remember those questions and answers now? Basically, what I was doing, was welding the I said, she said at the beginning to the other bit which is just a bit later in your notebook?---Yep.

But you do agree that was all part of the one dialogue between you and her?---Yes.”

[29] In re-examination ACPO Hogan said this conversation started at the original location and continued to the police vehicle.

[30] ACPO Hogan gave evidence she was subsequently asked to listen to each of the three s 140 tapes and the Record of Interview. ACPO Hogan was asked questions about the first s 140 tape. A transcript of this tape is Exhibit P2.

This transcript shows the first question was:

“GARGAN: ... Can I just get you to tell me your full name please to identify for the tape?

NAGAWALLI: Um – Caroline Nagawalli.

GARGAN: Sorry.

NAGAWALLI: (Inaudible).”

[31] ACPO Hogan agreed that where the transcript reads inaudible she had heard the words, “Um I did it”.

[32] ACPO Hogan stated she also agreed that at the top of page 5 of the transcript the following was transcribed from the tape:

“GARGAN: Okay

NAGAWALLI: (Inaudible) I wanted to go (inaudible).”

[33] ACPO Hogan agreed that she had added the words as she heard them, “He said he wanted to go bush camp and I wanted to go buy the liquor”.

[34] ACPO Hogan agreed her understanding was Caroline Nagawalli did not drink.

[35] It is ACPO Hogan’s evidence that she was not aware that subsequent to her filling in what she heard on the s 140 tape, the Crown had obtained the services of an interpreter to do a similar exercise which was to listen to the tape and add what she heard to the transcript. Mr Lawrence put to ACPO Hogan the version heard by the interpreter which was as follows on page 1:

“GARGAN: ... Can I just get you to tell me your full name please to identify for the tape?

NAGAWALLI: Um – Caroline Nagawalli.

GARGAN: Sorry?

NAGAWALLI: **Caroline Nagawalli.**”

and at the top of page 5:

“GARGAN: Okay.

NAGAWALLI: **He wanted to go bush camp and I wanted to go to Marlow’s Lagoon**”.

[36] The transcript as heard by ACPO Hogan is Exhibit P2 and as heard by the interpreter Jackie Woolley is Exhibit P3. ACPO Hogan agreed that because Caroline Nagawalli has a speech impediment there is an increased possibility people would hear different things.

[37] The audio tape itself of this s 140 conversation was played and the tape tendered Exhibit P4.

Detective Sergeant Gargan

[38] Detective Sergeant Gargan gave evidence on the voir dire that he attended at the water tower at Palmerston on the day Angus Barney was stabbed. There were a number of other police and ambulance officers already in attendance. Shortly after Detective Sergeant Gargan arrived Angus Barney was conveyed to hospital. Detective Sergeant Gargan spoke with ACPO Hogan. He had made notes in his police notebook at the location. Detective Sergeant Gargan gave evidence that in his notebook he had written:

“... Arrested by Tanya ACPO Hogan; spontaneous admission. I stabbed him because he wanted to drink and I wanted to go”.

[39] Detective Sergeant Gargan referred to other notes being the name Caroline Nagawalli, her date of birth and the name of the deceased which ACPO Hogan had told him. Detective Sergeant Gargan noted a few other details as to what was occurring at the scene. He then stated that in his notebook at 1553 he recorded a s 140 conversation with Caroline Nagawalli. This occurred at the rear of the police vehicle and was recorded on a hand held audio tape. The entirety of the s 140 conversation is contained on the recording.

[40] Under cross examination Detective Sergeant Gargan stated he could not remember if ACPO Hogan had told him Caroline Nagawalli had a speech impediment. He had not recorded that in his notes. He had written in his notes offender arrested by ACPO Hogan. He assumed ACPO Hogan had told him this. He agreed that the purpose of the s 140 conversation was to comply with the provisions of the Police Administration Act in two ways which was to administer a caution and offer the suspect assistance in notifying any friends or relatives. He agreed he had also taken the opportunity to have her recall the spontaneous admission that she had made to ACPO Hogan.

[41] Detective Sergeant Gargan gave evidence that the following day he had conducted a Record of Interview with Caroline Nagawalli. For that purpose he had decided Caroline Nagawalli should have an interpreter to ensure she understood the caution.

[42] Detective Sergeant Gargan gave evidence that he did not seek adoption of the admission in the formal Record of Interview conducted the following day because he had forgotten to do so. He agreed that during the s 140 conversation Caroline Nagawalli had explained that she thought he could not understand her and that the reason she had difficulty speaking was because she had a stroke. It is his evidence that part of the reasons for arranging an interpreter with respect to conducting a formal Record of Interview the following day, was to assist him in understanding Caroline. He gave evidence it was also done, bearing in mind the Anunga guidelines to assist in administering the caution and ensuring Caroline Nagawalli understood the caution.

[43] Detective Sergeant Gargan agreed that at page 4 of the transcript of the s 140 audio tape he had asked Caroline Nagawalli about her earlier admission to ACPO Hogan. This transcript reads as follows:

“GARGAN: Okay. Do you remember saying something to her?

NAGAWALLI: I can't remember.

GARGAN: Did you say to her something about why you stabbed Angus?

NAGAWALLI: I said I didn't know what for I stabbed him. (Inaudible). [**I don't drink. I go back to bush camp.**] are the words heard by ACPO Hogan in Exhibit P2. The words heard by the interpreter are **'I thought the he was going bush camp.'**]

“GARGAN: Did you say, 'I stabbed him because he wanted to drink and I wanted to go'?

NAGAWALLI: Yeah”.

[44] Detective Sergeant Gargan stated that had he been aware at the time of the whole conversation between Caroline Nagawalli and ACPO Hogan in which Ms Nagawalli had said “he had hit her which is why she stabbed him” then he would have put the full conversation in its entirety to Caroline Nagawalli at the time of the s 140 interview.

Joseph Stephen Leigh Russell

[45] Joseph Russell gave evidence that he is a Senior Aboriginal Community Police Officer. He was present with ACPO Hogan at the water tower at Palmerston on the day that Angus Barney was stabbed. He did not speak with Caroline Nagawalli as his attention was focused on the welfare of Angus Barney. He was present when the ambulance officer came back to check on the bump on Caroline Nagawalli’s forehead. The ambulance officer stated they should take Caroline Nagawalli to hospital to have her assessed by a doctor. ACPO Russell said he did not have a conversation with Caroline Nagawalli before taking her to hospital. Caroline Nagawalli was being taken to hospital in the police vehicle. ACPO Russell was driving the police vehicle and did not converse with Caroline Nagawalli on the way to hospital. When they arrived at the hospital, medical staff came out to the police vehicle. After a period of time, Caroline Nagawalli was taken into the hospital for further assessment. At the police vehicle Caroline Nagawalli was asking about the well being of Angus Barney. ACPO Russell said he could understand these questions and had replied that he did not know. This conversation was repeated in the hospital. ACPO Russell said

he made a note of this in his notebook while he was still at the hospital. A copy of the notebook is Exhibit P5.

[46] ACPO Russell said he had had dealings with Caroline Nagawalli prior to this date. He did have difficulties understanding what she said but did not have a difficulty understanding what she had said to him when she asked about the well being of Angus Barney. He had no difficulties with understanding what he had heard her say to the doctor. He had recorded what she said to the doctor in his notebook.

[47] Under cross examination ACPO Russell agreed that when he arrived at the scene of the incident it was clear to him that Mr Barney was seriously injured. There was a large amount of blood around. From his wound there appeared to be organs visible. Within a short period of his arrival he concluded Angus Barney was in danger of dying. ACPO Russell attempted to resuscitate and revive him. There was blood on Angus Barney's chest and on the ground. ACPO Russell agreed there was also a noticeable injury to the forehead of Caroline Nagawalli. At the hospital he heard her tell the doctor that the deceased had banged her head against the rock at the water tower and then she had told the doctor the blood on her head was, in fact, the deceased's blood. He agreed he was aware Caroline Nagawalli suffered from a speech impediment and that he did have difficulty in understanding her when she spoke.

[48] Hospital records with respect to the treatment of Ms Nagawalli were tendered Exhibit P6.

[49] These records indicate the following diagnosis on 29 May 2009; “Mild head injury secondary to alleged assault. Low risk for intercerebral injury.” Caroline Nagawalli was kept in the Emergency Department at Royal Darwin Hospital for four hours for neurological observation and then released into police custody.

[50] The defence then called evidence from Jacqueline Wooley on the voir dire.

Jacqueline Wooley

[51] Jacqueline Wooley gave evidence she had previously worked for the Aboriginal Interpreter Service for five years. She interpreted in the Galiwinku language which involved going to court in criminal cases. She first met Caroline Nagawalli at the Magistrates Court when she assisted her by interpreting at the committal hearing. That was the last time she had seen Caroline Nagawalli. Ms Wooley gave evidence that after the committal the Director of Public Prosecutions had asked her to listen to some tapes. She had listened to the tapes and then translated them. She described how she had listened to the tapes. She found Caroline Nagawalli very difficult to understand both in English and in language because Caroline Nagawalli had a speech impediment. The transcript of the s 140 tape as heard by Jacqueline Wooley is Exhibit P3.

Medical Evidence

[52] There is evidence before the Court that Caroline Nagawalli had previously suffered a stroke. As a consequence she suffered diffuse cerebral damage which affects her speech.

Voluntariness of the Admissions

[53] I find that ACPO Hogan arrived at the water tower in Palmerston to find Angus Barney lying on the ground in a pool of blood and Caroline Nagawalli standing next to him. ACPO Hogan knew Caroline Nagawalli was the partner of Angus Barney. It was to be expected that Caroline Nagawalli would have been with Angus Barney. ACPO Hogan asked what had happened and Caroline Nagawalli replied. I accept that the response made by Caroline Nagawalli at the time was made voluntarily in the sense that she was not forced to say anything. However, it was a response to a direct question put to her before any caution was given. Whether Caroline Nagawalli made the response as heard by ACPO Hogan is another matter. ACPO Hogan asked her about the blood on Caroline's forehead. This was a reasonable question to ask in those circumstances and having regard to the welfare of Caroline Nagawalli. Whilst the circumstances in which the so called admission was made call into question the voluntariness of the admission, the gravamen of the defence submission is that it should be excluded on the basis of unfairness.

[54] Shortly afterward, Detective Sergeant Gargan conducted a conversation with Caroline Nagawalli which he recorded pursuant to s 140 of the Police Administration Act. Section 140 provides as follows:

“140 Person to be warned and given opportunity to inform friend or relative of person’s whereabouts

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,

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.”

[55] Prior to seeking an admission about a very significant matter it does not appear that Caroline Nagawalli was afforded “reasonable facilities to enable the person to make or attempt to make the communication” with a friend or relative.

[56] I agree with the Crown submission that this conversation complies with s 140 of the Police Administration Act with respect to the actual caution.

Section 142 provides as follows:

“142 Electronic recording of confessions and admissions

- (1) Subject to section 143, evidence of a confession or admission made to a member of the Police Force by a person suspected of having committed a relevant offence is not admissible as part of the prosecution case in proceedings for a relevant offence unless –
 - (a) where the confession or admission was made before the commencement of questioning, the substance of the confession or admission was confirmed by the person and the confirmation was electronically recorded; or
 - (b) where the confession or admission was made during questioning, the questioning and anything said by the person was electronically recorded,

and the electronic recording is available to be tendered in evidence.

- (2) If the questioning of a person is electronically recorded as required by this section, or the giving of information is recorded as required under section 141, the investigating member shall –
 - (a) inform the person that the person is entitled to a copy of the electronic recording on request; and
 - (ab) if the recording is in digitised format, issue a certificate stating that the recording has not been altered after being made and, if applicable, that the prescribed requirements in relation to the method of making the recording have been met; and
 - (b) if the recording is an audio recording only or a video recording only, cause the recording or a copy of it to be made available to the person or the person's legal representative, without charge, within 7 days after request; and

- (c) if both an audio recording and a video recording were made, cause the audio recording or copy of it to be made available to the person or the person's legal representative, without charge, within 7 days after request and cause the person or the person's legal representative to be notified that an opportunity will be provided, on request, for viewing the video recording; and
 - (d) if the transcript of the electronic recording is prepared by the police, cause a copy of the transcript to be made available on request to the person or the person's legal representative, without charge, within 7 days after the request.
- (3) Except as provided in this section, nothing in this section prevents the use of an electronic recording in proceedings for an offence against a law in force in the Territory.
 - (4) An electronic recording in digitised format used in proceedings must be accompanied by the certificate relating to the recording issued under subsection (2)(ab).”

[57] Whilst I accept the caution given by Detective Sergeant Gargan complies with the Police Administration Act, it does not comply with the Anunga Rules. This is because there was no attempt to explain or ascertain Caroline Nagawalli’s understanding of what would happen with respect to this conversation, in that it may later be used in court against her at her trial. I consider this was an important omission in view of the significance of the admissions that Caroline Nagawalli was being asked to confirm. There is no evidence Caroline Nagawalli had ever been given a caution before. The questions as to her understanding of the caution, were very scant. She was never asked to explain her understanding of the caution in her own words. In addition to this, it was not put to her the other statements she had made to ACPO Hogan, which were somewhat in conflict with the statement

Detective Sergeant Gargan was attempting to have confirmed on an electronic interview. The responses made by Caroline Nagawalli in the electronic interview were brief. With respect to the admission that is the pinnacle of the Crown case, Caroline Nagawalli responded, “Yeah”, to a leading question. This must be taken into consideration in assessing whether or not she understood the question or was in fact confirming an earlier admission.

[58] There was no need for Detective Sergeant Gargan to seek confirmation of the admission at that time. Caroline Nagawalli had not had an opportunity to have friends or relatives contacted, which appears to be a requirement under s 140 of the Police Administration Act. Detective Sergeant Gargan believed Caroline Nagawalli had suffered a head injury. He knew she was to be taken to hospital to have a medical check. It was not “reasonable in the circumstances” to question her about what Detective Sergeant Gargan believed was an admission. Ultimately, it appears the head injury was of a minor nature. However, that could not have been known to police at the time she was being conveyed to hospital. It was not appropriate to attempt to seek such an admission prior to her being medically assessed and found to be fit for interview. In addition to this, two persons with experience in interviewing people, namely ACPO Hogan and Jacqueline Wooley, have come to completely different conclusions on a vital aspect of the responses given by Caroline Nagawalli in the s 140 conversation.

[59] I have listened to the s 140 tape again. I found it difficult to hear and understand some of the responses made by Caroline Nagawalli.

[60] The Crown submission made by Ms Armitage is that the whole issue of reliability is one which is open for cross examination and open for clear directions. Ms Armitage also referred to the evidence that although Caroline Nagawalli had a lump on her forehead the blow to her head did not result in a laceration and the blood on her forehead was that of the deceased. However, the lump to her forehead also supports the other statement made by Caroline Nagawalli that the deceased banged her head against a rock. A statement ACPO Hogan says was made to her, that Caroline Nagawalli was never asked about in the s 140 recorded conversations.

[61] The Crown refer to the Court of Criminal Appeal decision in *Grimley v The Queen*¹ with reference to the discretion the Court has under s 143 of the Police Administration Act which provides as follows:

“143 Certain evidence may be admitted

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.”

¹ (1995) 121 FLR 282.

[62] In the matter of *Grimley v The Queen*² the Court of Criminal Appeal in the Northern Territory was considering the discretion to be exercised under s 143 with respect to a failure to electronically record confessions or admissions as required under s 142 of the Police Administration Act. The Court held that it was permissible to take into account whether the unrecorded confession was voluntary or was reliable in the exercise of the discretion under s 143. The Court reviewed a number of High Court authorities including; *Bunning v Cross*,³ *Cleland v The Queen*,⁴ *Williams v The Queen*,⁵ *Van der Meer v The Queen*,⁶ *Duke v The Queen*⁷ and *R v Lee*.⁸

[63] In *Grimley v The Queen*⁹ the Court said:

“It would seem that the High Court is embracing both an objective and subjective reliability test, but reliability on either basis is not determinative of the issue. His Honour has not erred in the exercise of his discretion to permit the confessional material to be admitted at trial by taking into account its reliability. There was nothing to show that anything occurred during the period of questioning which was not recorded which affected the reliability of the material.”

[64] In the matter before this Court I am satisfied there are a number of matters including those I have already addressed which affect the reliability of the so-called admissions.

² (1995) 121 FLR 282.

³ (1978) 141 CLR 54 at 78.

⁴ (1983) 151 CLR 1.

⁵ (1986) 161 CLR 278 at 286.

⁶ (1988) 62 ALJR 656 at 666.

⁷ (1989) 180 CLR 508 at 509 per Wilson and Dawson JJ and Brennan J at 511.

⁸ (1950) 82 CLR 133 at 153.

⁹ (1995) 121 FLR 282 at 305.

[65] The evidence of Detective Sergeant Gargan is that although he obtained confirmation of the “admission” in the s 140 conversation, he had forgotten to put the admission to the defendant when he conducted a full Record of Interview the following day. The s 140 interview is essentially for the purpose of administering the caution and seeking advice from the suspect whether they want to have a friend or relative advised of their arrest and their whereabouts.

[66] In seeking to confirm the admission in the s 140 conversation, Detective Sergeant Gargan appears to have proceeded with undue haste. He did not administer the caution in accordance with the Anunga Rules. He sought to obtain a vital admission by asking a leading question and he did not put to Caroline Nagawalli the other statements she had reportedly made to ACPO Hogan which were very relevant to her purported “admission”. Caroline Nagawalli was not afforded reasonable facilities to enable her to communicate or attempt to communicate with a friend or relative.

[67] The defendant is a full blood aboriginal woman who can speak both English and her own aboriginal language. She is one of the long grass people living in and around the township of Palmerston. There is no evidence as to her level of education. Detective Sergeant Gargan obviously thought it necessary to arrange for an interpreter for the formal Record of Interview conducted the following day. There is evidence that I have already referred to that she had a speech impediment and was difficult to understand.

[68] I do not consider there is any basis for finding the police acted improperly or illegally. I consider what occurred is really the result of inexperience by a number of police officers who were involved in the early part of the investigation. ACPO Hogan who arrived on the scene asked Caroline Nagawalli, "What happened?". This question was asked in a situation where Caroline Nagawalli was standing near Angus Barney. Angus Barney at that time was lying on the ground in a pool of blood. He had clearly been seriously injured. It would have been obvious to an experienced officer that there may have been foul play and that Caroline Nagawalli could be involved. Caroline Nagawalli made a number of statements to ACPO Hogan at the scene and as they walked to the police vehicle. Detective Sergeant Gargan initiated a s 140 conversation. He only put to Caroline Nagawalli the one incriminating admission, "I stabbed him because he wanted to drink and I wanted to go", he did not put to her the other statements she had made. He put the one admission to her by asking a leading question on a very significant piece of evidence to which she replied, "Yeah".

[69] Detective Sergeant Gargan did not follow the Anunga Rules. He sought to use the s 140 conversation for a purpose other than the purpose of s 140 of the Police Administration Act. Detective Sergeant Gargan subsequently forgot to confirm this admission when he conducted a full Record of Interview the following day. The evidence is that Caroline Nagawalli had suffered a blow to the forehead and had a lump on her forehead at the time of the s 140 conversation. At this time she had not been medically assessed.

At the committal hearing witnesses, including Mr Page, who is a personal friend of the accused and the deceased, and Mr Stott, who is an aboriginal from the same area as the accused, gave evidence they could not understand what Caroline Nagawalli said when she spoke. At the committal hearing the interpreter gave evidence that it was difficult interpreting because Caroline Nagawalli was too hard to understand. ACPO Hogan and the interpreter engaged by the Crown to listen to the s 140 tape, give differing versions as to what they heard on two significant aspects.

[70] I note in *R v Charlie*¹⁰ Mildren J said:

“As to the matters going to discretion, I was satisfied not only that the accused understood the caution, I was also satisfied that he understood that what he said was being recorded on a tape recorder and that the tape recording may later be used in court against him at his trial.”

[71] In the matter before this Court, I could not be so satisfied.

[72] Taking into account all of these matters, I consider the so called admissions as heard by ACPO Hogan and the subsequent s 140 conversation are so unreliable that to admit them on the trial of the accused would amount to an unfairness. I do not consider these are matters that could adequately be addressed by appropriate directions to the jury.

[73] Accordingly, I rule that the conversations between Caroline Nagawalli and ACPO Hogan on 29 May 2008 and the conversation pursuant to s 140 of the

¹⁰ (1995) 121 FLR 306 at 313.

Police Administration Act with Detective Sergeant Gargan are not admissible on the trial of Caroline Nagawalli.
