

R v Robinson [2010] NTSC 09

PARTIES: THE QUEEN

v

JASON ROBINSON

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
TERRITORY EXERCISING
TERRITORY JURISDICTION

FILE NO: 20831429

DELIVERED: 19 March 2010

HEARING DATES: 15 and 16 February 2010

JUDGMENT OF: KELLY J

CATCHWORDS:

CRIMINAL LAW – EVIDENCE – ADMISSIBILITY

Voir dire – admissibility of record of interview at trial – breach of Anunga Rules – does breach render record of interview inadmissible – was record of interview voluntary – is it unfair to admit record of interview – record of interview admitted.

Cleland v R (1976) 151 CLR 1; *R v Lee* (1950) 82 CLR 133; *R v PR* [2009] NTSC 44; *R v Weetra* (1993) 93 NTR 8, cited

McDermott v R (1948) 76 CLR 501, followed

REPRESENTATION:

Counsel:

Plaintiff: Dr Rogers SC with Mr McColm
Defendant: Mr Brustman SC

Solicitors:

Plaintiff: Director of Public Prosecutions
Defendant: Northern Territory Legal Aid
Commission

Judgment category classification: B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

R v Robinson [2010] NTSC 09
No. 20831429

BETWEEN:

THE QUEEN
Plaintiff

AND:

JASON ROBINSON
Defendant

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 19 March 2010)

- [1] On 15 November 2008 the accused Jason Robinson took part in an interview with police. That interview was recorded on DVD.
- [2] The Defence has objected to the admission of the record of that interview on two grounds. First they say the Crown has failed to prove that the record of interview was voluntary. In the alternative the Defence asserts that it would be unfair to admit it. On 17 February 2010, I admitted the record of interview into evidence for reasons to be published at a later date. Following are the reasons for that decision.
- [3] The onus is on the Crown to establish that the accused participated in the interview and made the admissions in that interview voluntarily. If they do

that the onus is on the Defence to prove that it would be unfair to admit the record of interview.¹

Voluntariness

[4] The following facts are established by the evidence.

[4.1] Mr Robinson's first language is Ngaanyatjarra.

[4.2] His deceased wife's language was Pitjantjatjara.

[4.3] Mr Robinson told police during the record of interview that he spoke Pitjantjatjara "a little bit".

[4.4] The interpreter during the interview, Mr Trew, said that Pitjantjatjara and Ngaanyatjarra are similar – "only a few words different". He said Pitjantjatjara speakers can understand Ngaanyatjarra and vice versa. He said that although he was employed primarily to interpret Pitjantjatjara and Luritja, he himself spoke Ngaanyatjarra fluently when he spoke it having grown up with people from that way.

[4.5] Mr Robinson appears, from the transcripts of the record of interview and other preliminary conversations with police, to have a reasonable grasp of English. Most of the record of interview, and all of the other conversations, were conducted in English, and Mr Robinson gave coherent and responsive answers to questions in English. He

¹ *Cleland v R* (1982) 151 CLR 1 at 19 - 20

also gave extended descriptions in English of what had happened on the day in question.

[4.6] I also note that while Mr Robinson was sitting in Court during the *voir dire*, he had available to him an interpreter and he made virtually no use of her services. I stopped proceedings several times to ensure that he could understand what was being said. The first time, he indicated that he understood what was being said in English. The second time, his solicitor explained to him through the interpreter that if he didn't understand something he should ask the interpreter and she would translate for him. He indicated that he understood this. He did not use her services thereafter.

[4.7] At some times during the record of interview, Mr Robinson was asked a question in Pitjantjatjara and answered in English. At other times he was asked a question in English and answered in language (presumably Ngaanyatjarra).

[5] Mr Robinson was told a number of times, in English, that he was not obliged to answer questions put to him by police and did not have to talk about what had happened with his wife.

[6] When Acting Sergeant James arrested Mr Robinson on the Mulga Bore Road, he said to him, "You are under arrest for murder. You don't have to do or say anything in relation to that matter."

[7] A little bit later Mr James had an audio taped conversation with Mr Robinson in which he told him he was under arrest for murder and the following exchange occurred.²

“JAMES: 1972. OKAY. I’M JUST GOING TO –

ROBINSON: YEAH.

JAMES: LET YOU KNOW THAT YOU’RE UNDER ARREST, OKAY? FOR MURDER OKAY? THAT’S WHAT YOU’RE UNDER ARREST FOR OKAY? NOW YOU DON’T HAVE TO TALK ABOUT THAT AT ALL OKAY? IT’S YOUR CHOICE, BUT IF YOU DO CHOOSE TO TALK ABOUT THAT, IT GETS RECORDED ON THIS TAPE. I CAN THEN TAKE THIS TAPE TO COURT AS EVIDENCE OKAY? DO YOU UNDERSTAND THAT OKAY? SO IF I ASK YOU A QUESTION, WHOSE CHOICE IS IT TO ANSWER THE QUESTION?

ROBINSON: HUH?

JAMES: IF I ASK YOU A QUESTION, DO YOU HAVE TO ANSWER MY QUESTION? YOU HAVE TO TALK UP.

ROBINSON: YEAH. NO.

JAMES: SO IT’S YOUR CHOICE TO ANSWER THE QUESTION OKAY?

ROBINSON: YEAH. [INAUDIBLE]

JAMES: YEAH, YOU CAN STAY QUIET OR YOU CAN TALK.

² EXHIBIT P2 page 2

ROBINSON: YEAH. YEAH.

JAMES: WHATEVER YOU WANT.

ROBINSON: YEAH.

JAMES: OKAY, BUT IT'S YOUR CHOICE. OKAY?

ROBINSON: YEAH.”

Mr James went on to explain again that if Mr Robinson did talk, it would be recorded on the tape and may be played in Court.

[8] At approximately 5:03 in the afternoon of 14 November 2008 Senior Constable Snigg and Constable Guascoine had a tape recorded conversation with Mr Robinson. After Mr Robinson said his name, the following conversation occurred.³

“SNIGG: OKAY. THANK YOU. JASON, WE'RE JUST HERE JUST TO LET YOU KNOW –AH- WHAT'S GOING TO HAPPEN NOW, OKAY? SO JUST LET YOU KNOW THE TAPE RECORDER IS RECORDING, ALRIGHT, AND YOU'RE NOT OBLIGED TO SAY ANYTHING, OKAY, BUT ANYTHING YOU DO SAY CAN BE GIVEN AS EVIDENCE. DO YOU UNDERSTAND THAT?

ROBINSON: YEH.

SNIGG: ALRIGHT. NOT GOING TO ASK YOU ANY QUESTIONS AT ALL. WE JUST WANT TO LET YOU KNOW WHAT'S HAPPENING, OKAY? ...”

³ EXHIBIT P3 page 11

She went on to explain what was going to happen that night and that there would be an interpreter available for an interview in the morning.

[9] At approximately 8:45 a.m. on 15 November 2008 Senior Constable Snigg and Constable Guascoine took Mr Robinson outside for a smoke and the following exchange occurred.⁴

“ROBINSON: SHE FINISH UP?

SNIGG: WHO’S THAT?

ROBINSON: (INAUDIBLE)

GUASCOINE: WE CAN’T TALK ABOUT NOTHING ABOUT THAT ONE HEY? ALRIGHT?”

[10] At about 2:02 p.m. on 15 November 2008, the following exchange was recorded on audio tape⁵.

“GUASCOINE: GOING TO GO AND DO THAT INTERVIEW IN A MINUTE HEY?

SNIGG: JASON I’LL JUST LET YOU KNOW THAT THE TAPE RECORDER IS RECORDING, OKAY? NOT GOING TO ASK YOU ANY QUESTIONS AT THE MOMENT, BUT ANYTHING YOU DO SAY IS BEING RECORDED AND CAN BE GIVEN AS EVIDENCE. YOU UNDERSTAND?

ROBINSON: YEH.”

⁴ EXHIBIT P4 page 15

⁵ EXHIBIT P5 page 20

[11] At approximately 2:18 p.m. on 15 November 2008, a formal interview was conducted between Senior Constable Janelle Snigg and Constable Guascoine and Mr Robinson. It was recorded on DVD. During that interview the following occurred⁶.

“SNIGG: YES? ALRIGHT. NOW YESTERDAY WHEN YOU WERE ARRESTED –AH- THEY STARTED ON THIS LITTLE TAPE AND THEY TOLD YOU THAT YOU WERE UNDER ARREST.

ROBINSON: YES.

SNIGG: AND THAT YOU DIDN’T HAVE TO ANSWER ANY QUESTIONS. THAT ANYTHING YOU SAID WAS GOING TO BE RECORDED ON THE TAPE. DO YOU REMEMBER THAT? ...”

...

“TREW: **YOU DON’T HAVE TO TALK, BUT IF YOU TALK THEN IT WILL RECORD WHAT YOU SAY.**⁷

ROBINSON: **OUT BUSH.**

TREW: OUT BUSH?

ROBINSON: MM.

SNIGG: YEP. SO YOU REMEMBER THAT OUT BUSH?

ROBINSON: YEAH.”

⁶ EXHIBIT P6 page 4

⁷ Words in bold were spoken in an Aboriginal language and have been “back translated” into English by a court accredited interpreter for the purpose of the transcript. The parties agreed that the translations were accurate.

It was at this point that Ms Snigg asked Mr Robinson if he wanted anyone to let his family know that he was there or get a friend to sit with him and he replied no to both questions.

[12] The interviewing police played to Mr Robinson a CD in the Pitjantjatjara language. Before doing so, they had the following exchange with him.⁸

“SNIGG: NO? OKAY. JUST EXPLAIN TO HIM THAT WE’RE GOING TO PLAY A CD WHICH WILL EXPLAIN IN HIS LANGUAGE IN PIT – WE ONLY HAVE IT IN PITJANTJATJARA ...

TREW: MMHUH.

SNIGG: ABOUT – ABOUT THE CAUTION AND WHY HE’S ARRESTED AND HE DOESN’T HAVE TO ANSWER QUESTIONS.

TREW: **YOU’RE GOING TO LISTEN TO A CD SO THAT YOU KNOW WHAT’S YOUR RIGHT AND THE ENGLISH WORD THEY USE IS CAUTION AND IF YOU WANT TO ASK ANY QUESTIONS. UNDERSTAND?**

ROBINSON: **YES.**

SNIGG: UNDERSTANDS NOW?

TREW: MMHUH.

SNIGG: OKAY.”

ROBINSON: YEAH.”

⁸ EXHIBIT P6 pages 5-6

[13] The Pitjantjatjara language CD lasted for about 16 minutes. According to the translation of that CD by a Court accredited interpreter, among the things said on the tape in the Pitjantjatjara language was the following⁹:

- “36. Now I am going to explain to you the last rule the fourth one, about the Policeman questioning you about the trouble.
37. What does this rule say to the Policeman?
38. The Policeman will ask you about the trouble and he/she will record on a tape recorder all that both you and the Policeman say. Maybe you will want to answer the questions about that trouble, or maybe you won't want to answer the questions and just remain silent. That's alright, you are allowed to remain silent. But even though you don't want to answer the questions the policeman will keep on asking you many things. You see on the Policeman's paper are lots of questions for them to ask you and the Policeman will go ahead and keep on asking all of those questions.
39. What does this rule say to you?
40. When the Policeman asks you about that trouble it is up to you to choose one from these two:
- a. If you want to you can remain silent and not answer him.
- b. Or if you want to you can tell him about the trouble.
41. The Policeman is not allowed to push you into telling him about the trouble. And the person who speaks and makes clear the message from two sides also must not push you to hurry up and speak. Rather you yourself must decide to talk to the Policeman or to not talk and remain silent. Or if you want to talk to your friend so that you can both discuss it first and then you can decide to either talk to the policeman about the trouble, or not to and remain silent without saying anything.

⁹ EXHIBIT P7 pages 4-5

42. If you decide not to talk and remain silent, then what happens?
43. Well, if you remain silent the Policeman will not think you are bad. And he won't get angry and speak harshly to you because you don't speak. And later that man who judges, the one who sits at the front of the court, will not get angry with you or say you are bad because of your refusing to speak to the Policeman.
44. However if you refuse to answer, the Policeman will keep on questioning you. You see there are many things on the Policeman's paper that he/she must ask you, and so he/she will ask you all those things without neglecting any. And if you do say anything he/she will record what you both say to each other on a tape recorder. But if you want to remain silent without saying anything tell the Policeman this, "I don't want to say anything!" And that's alright. You do not have to say anything.
45. But you may decide to talk to the Policeman about the trouble. What will happen then?
46. Yes, if you want to tell the Policeman about that trouble he/she will ask you many many questions and he/she will record what you each say to one another on the tape recorder. And then after he/she has finished asking you everything he/she will write down on paper everything from the tape that you two have said, and later he/she will take that paper to court so that everybody in the court will be able to hear your story. And that man who judges, who sits at the front of the court, will read everything from that paper and then having understood your story he will be able to correctly think/decide how to judge you."

[14] After the CD, at p12 of the transcript of the record of interview, Senior Constable Snigg told the accused again that he didn't have to answer any questions, and this was correctly interpreted by Trew:

“SNIGG: OKAY. I’M GOING TO ASK YOU SOME QUESTIONS. DO YOU WANT TO JUST INTERPRET THIS BIT?

TREW: **GOING TO ASK YOU SOME QUESTIONS.**

ROBINSON: HUH?

TREW: **GOING TO ASK YOU SOME QUESTIONS.**

ROBINSON: MMHUH.

SNIGG: YOU DON’T HAVE TO ANSWER THEM.

TREW: **YOU DON’T HAVE TO ANSWER.**

ROBINSON: (INAUDIBLE)

SNIGG: BUT ANYTHING YOU DO SAY, WE’RE GOING TO RECORD ON THE TAPE...

TREW: **ANYTHING YOU SAY WILL BE RECORDED.**

SNIGG: ...AND WE CAN USE AS EVIDENCE IN COURT.

TREW: **YOUR STORY WILL BE USED IN THE COURT.**

SNIGG: OKAY. YOU UNDERSTAND THAT?

TREW: **YOU UNDERSTAND?**

ROBINSON: MM.”

[15] Constable Guascoine again reminded Mr Robinson of his right to silence later in the interview¹⁰.

“GUASCOINE: THAT ONE – REMEMBER YOU’VE GOT TO REMEMBER WHAT THAT TAPE SAID. DON’T HAVE TO ANSWER ME IF YOU DON’T WANT TO. YOUR CHOICE. **YES? GOOD.** AJ – THROUGH THE GAP? THROUGH THAT BIG HILL?

ROBINSON: YEAH.”

[16] The Defence submits that the Crown has not satisfied the onus of establishing that the accused knew he had a choice and was not obliged to answer questions or tell his story to the police.

[17] The Defence submitted that four of the Anunga Guidelines had been breached and relied on that fact to support the submission that the record of interview had not been shown to be voluntary and also to support the submission that it would be unfair to admit the record of interview.

[18] First it was submitted that the requirement for the provision of an interpreter had been breached. It is not disputed that an interpreter was engaged for the record of interview. However, the Defence says that this wasn’t sufficient because the interpreter did not “fully speak” the accused’s language. I do not accept that this guideline was breached. The evidence of the interpreter, Mr Trew, was that he was employed by the Aboriginal Interpreter Service to interpret Pitjantjatjara and Luritja, but that he had been engaged a number of

¹⁰ EXHIBIT P6 page 30

times to interpret Ngaanyatjara. He also said that (when he spoke it) he was fluent in Ngaanyatjara and it was just a few words different from Pitjantjatjara.

- [19] Although there has been an enormous improvement in the provision of Aboriginal interpreter services over recent years, it must be recognised that it is not always possible to obtain the services of an accredited interpreter whose first language is also the first language of the suspect. The Anunga Guidelines do not require the interrogating police to do the impossible.
- [20] Secondly, it was submitted that the Guidelines were breached by a failure to obtain a prisoner's friend. At the beginning of the record of interview, Mr Robinson was asked in English through the interpreter, "You want to let your family know that you're here or get a friend to sit with you?" Mr Robinson replied, "No."
- [21] He was asked again (through the interpreter), "Do you want a friend to sit with you?" Mr Robinson again replied, "No."
- [22] After the explanation of the caution was played in Pitjantjatjara Mr Robinson was asked again if he wanted anyone in his family told and he said, "Yes." He indicated that he wanted his mother in Warburton to be told. There is an admission that she was not told.
- [23] He also asked for his father to be notified. There was a discussion between Mr Robinson and Constable Guascoine about the fact that the father was in

Alice Springs having dialysis and was sick. It seems to have been assumed by Constable Guascoine in particular that the fact that Mr Robinson's father was on dialysis automatically meant that he would be unable to attend. The police did not make enquiries to establish whether that was the case. Mr Robinson seemed to go along with that assumption. He was then asked if he wanted someone else and he indicated that he did not.

[24] Mr Donny Robinson, Mr Robinson's father, was called to give evidence on the *voir dire* and said that he would have been able and willing to attend the interview with police.

[25] There was not full compliance with this guideline. Enquiries could, and should, have been made as to whether Mr Robinson's father could attend. However, it was rightly conceded by the Defence that a failure to obtain a prisoner's friend would not necessarily render the record of interview inadmissible provided the court is satisfied that it had been made voluntarily in the requisite sense.

[26] Thirdly, it was submitted that Guideline 3.1.4 had been breached in that (it was said) there were many instances of leading questions being asked during the interview. I do not agree that the interview is tainted in this respect.

[27] As part of this submission, the Defence argued that repeating what a suspect had already volunteered in order to set the scene for following questions, amounted to improper leading on the part of the interrogator. I do not accept this submission. That would place an intolerable burden on

interrogators; make it more difficult for suspects to understand what was being asked of them (as no context could be established); and serve no useful purpose. As I understand it, the purposes to be served by refraining from asking leading questions are to guard against the phenomenon of gratuitous concurrence and, in effect, to ensure that the statement comes from the suspect, not the police, and that the police do not “put words into” the suspect’s mouth. None of these purposes are served by prohibiting an interrogator from restating matters that have already been volunteered by the suspect in response to non-leading questions. Also such a rule would often render the resulting record over lengthy and difficult to follow.

[28] The fourth, and according to the Defence, the most significant breach of the Guidelines was the failure of the police to ask Mr Robinson to tell them what he understood by the caution in his own words. The Crown rightly admitted that there had been a failure to comply with Guideline 3.1.3 which provides that the suspect should be asked to explain the caution, phrase by phrase.

[29] Both police witnesses, Ms Snigg and Mr Guascoine, said that they understood that there was no need to comply with this Guideline when the CD explaining the caution in the suspect’s own language was used, “because the tape explained it all to him”. Both said that they had been told this by a superior officer.

[30] The Anunga Guidelines, as embodied in Police General Order Q2¹¹, are expressed to apply to “any person being questioned as a suspect, if that person is not as fluent in English as the average white person of English descent”.

[31] The evident purpose of asking the suspect to explain in his own words what is meant by the caution, phrase by phrase, is to check that the suspect has in fact understood what had been said to him in what was (to him) a foreign language. The reason for having the suspect explain the meaning of the caution in his own words is less compelling if the caution has in fact been given to him in his own language. That is not to say that the Anunga Guidelines should not be complied with in those circumstances. Police are obliged to do so by virtue of General Order Q2. Indeed it would probably be desirable to use this technique for any suspect where there was the slightest possibility that the suspect might not fully comprehend the extent of his or her right to remain silent.

[32] There is also the fact that the tape played to Mr Robinson was in Pitjantjatjara, not Ngaanyatjara which the interviewing police knew to be Mr Robinson’s first language. This should have alerted those conducting the interview of the need to check Mr Robinson’s understanding by asking him to explain the caution in his own words.

¹¹ EXHIBIT D1

[33] However, failure to comply with this Guideline does not automatically render the record of interview inadmissible¹². The true test is that set out in *McDermott v R*¹³:

“At common law a confessional statement made out of court by an accused person may not be admitted in evidence against him upon his trial for the crime to which it relates unless it is shown to have been voluntarily made. This means substantially that it has been made in the exercise of his free choice. If he speaks because he is overborne, his confessional statement cannot be received in evidence and it does not matter by what means he has been overborne. If his statement is the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure, it cannot be voluntary. But it is also a definite rule of the common law that a confessional statement cannot be voluntary if it is preceded by an inducement held out by a person in authority and the inducement has not been removed before the statement is made.”

[34] I am satisfied, on the balance of probabilities, that Mr Robinson understood that he had a right to remain silent and that his participation in the record of interview was voluntary in the requisite sense.

[35] As suggested by both counsel, I have viewed the DVD of the record of interview again.

[36] Despite the breaches of the Anunga Guidelines I am satisfied that Mr Robinson was made aware that he did not have to talk to police about the matter in respect of which he was arrested, and did not have to answer their questions, and that he voluntarily participated in the record of interview by

¹² See for example, *R v Weetra* (1993) 93 NTR 8; *R v RR* [2009] NTSC 44

¹³ (1948) 76 CLR 501 at p 511

his own choice. I am satisfied that his will was not overborne by any means and that no inducements were offered to him.

[37] Mr Robinson was told again and again, both in English, in Pitjantjatjara on the CD, and in Ngaanyatjara by Mr Trew, that he did not have to answer questions and that it was his choice whether or not he did so. He indicated his understanding a number of times.

[38] I paid particular attention to his body language during the record of interview. He appeared relaxed and comfortable. At times he was leaning on the table leaning towards the interviewer. At other times he leaned back with his arms on the arm rests. From time to time he helped himself to glasses of water. He nodded along when Senior Constable Snigg was speaking apparently indicating his understanding and consent. He looked to the interpreter for explanation when needed and it was given.

[39] Towards the beginning of the record of interview when he was referred to the previous caution administered on the Mulga Bore Road, he nodded along. It was clear from his body language that he was indicating that he did understand. He said, "Out bush." This might have appeared out of context in the transcript. However, when one views the DVD, it is clear that he was referring to the place where the caution had been administered. This was confirmed when Senior Constable Snigg said, "Yep. So you remember that out bush?" and Mr Robinson replied, "Yeah."

[40] When Mr Robinson was asked (through the interpreter) whether he understood that he didn't have to answer the questions they were about to ask but that anything he said would be recorded on the tape and used in the court, the transcript records his responses as "Mmhuh" and "Mm".¹⁴

However the DVD shows him nodding in agreement as Senior Constable Snigg was speaking and it was very clear from his body language that he was indicating that he did understand what was being said to him.

[41] When he was asked whether he was happy for Brendan (the interpreter) to be there and whether he was comfortable with that he nodded agreement as he said, "Yeah. Yeah."¹⁵

[42] Again he nodded when he was asked whether he understood that this conversation would be recorded on the video – as he said, "Yes," in English.¹⁶

[43] Mr Robinson indeed seemed keen to talk about what had happened to his wife. He raised the topic of what had happened to her four times in the initial conversations before he was taken to the Alice Springs Watch House.

[44] He introduced the topic again as soon as the interview began. When he was being asked preliminary questions about where his family lives he said,

¹⁴ EXHIBIT P6 page 12

¹⁵ EXHIBIT P6 page 2

¹⁶ EXHIBIT P6 page 3

“Yeah. But I live in Watarrapa, I living in Watarrapa but now she’s gone.”¹⁷

Again, when asked about his family he said, “No. I – I have family in Watarrapa - she’s gone. Only have a daughter and son.”¹⁸

[45] Again, when he was asked how he wanted to refer to his deceased wife he seemed keen to launch into the story of what had occurred. He started, “She was drunk. She was talking and I was stopping her, stay quiet. She all keep on talking, talking, talking, talking.”¹⁹

[46] When Senior Constable Snigg asked, “Do you want to talk to me about what happened?” Mr Robinson replied, “Yes,” (in language) and (in English), “We was blind drunk travelling.” He rapidly told an abbreviated version of the entire assault leading to his wife’s death and his flight in the motor car.

[47] He then readily answered questions in English about the details of what had occurred. At pages 32 to 35 of the transcript he again readily volunteered the detail of what had occurred in response to brief non-leading questions by the police interviewers. He appeared eager for them to understand and at some point looked to police for confirmation. When he was asked what he had done with the bottle, he said, “I just put him in the car.” He then looked to Constable Guascoine and said, “Did you find that bottle?”

¹⁷ EXHIBIT P6 page 2 The transcript has Mr Robinson saying “Warburton”, and it is hard to make out on the DVD, but when Snigg said “Warburton”, Mr Robinson corrected her both at p 2 and at p 10.

¹⁸ EXHIBIT P6 page 10

¹⁹ EXHIBIT P6 page 13

[48] He also asked questions himself, for example what time he would be going to Court, and whether he would be going “like this” indicating the blanket that he had on.²⁰

[49] During the brief discussion beginning at 5:03 in the afternoon of 14 November 2008 the following exchange occurred.

“ROBINSON: WHEN I GO TO COURT?

GUASCOINE: -AW- WE'RE NOT GOING TO COURT YET.

SNIGG: NO. NO COURT YET. WE GOT TO DO INTERVIEW FIRST.

ROBINSON: YEP.

SNIGG: ALRIGHT? TOMORROW.

GUASCOINE: WE'LL TALK ABOUT THING TOMORROW.

SNIGG: YEAH.

GUASCOINE: OKAY?

ROBINSON: YEAH.

SNIGG: THEN AFTER TOMORROW, THEN WE'LL KNOW.

GUASCOINE: TALK ON THAT BIG TAPE, OKAY? YOU DONE THAT BEFORE?

ROBINSON: NO.

²⁰ EXHIBIT P6 page 49

GUASCOINE: NOTHING? OKAY IT'S ALRIGHT, IT'S NOT SCARY OR NOTHING.

ROBINSON: THIS IS MY FIRST – FIRST TIME.

SNIGG: FIRST TIME.

GUASCOINE: OKAY.

SNIGG: THAT'S ALRIGHT. WE'LL – WE'LL TELL YOU EVERYTHING THAT'S GOING TO HAPPEN, OKAY?

ROBINSON: MMM.

SNIGG: AND WE'LL GET INTERPRETER SO YOU CAN UNDERSTAND CLEARLY.

GUASCOINE: WE'LL TREAT YOU PROPER OKAY?

ROBINSON: YEAH.

SNIGG: JUST LETTING YOU KNOW, HAVE A SLEEP HERE TONIGHT.

ROBINSON: YEAH.

SNIGG: HAVE SOME FOOD SOON.

ROBINSON: YEAH.

SNIGG: AND THEN SEE YOU TOMORROW.

GUASCOINE: HAPPY?

ROBINSON: HAPPY.”

[50] It was suggested by Defence counsel that this exchange, notably the words, “Okay, it’s alright, it’s not scary or nothing,” were an inducement to Mr Robinson, effectively telling him that it was alright to talk. I do not accept that submission. Senior Constable Snigg was at pains to follow up that comment with an explanation to Mr Robinson that they would tell him everything that was going to happen the next day through an interpreter so he could understand clearly.

[51] If police efforts to treat a suspect humanely and decently were to be construed as an inducement to talk, that would be extremely unfortunate. In this instance, the police were at pains to tell Mr Robinson again and again that he was not obliged to talk or answer any of their questions.

Fairness

[52] The defence also contends that the record of interview should be rejected on discretionary grounds because it would be unfair to the accused. In relation to this submission, the question is not whether the accused was treated unfairly; it is whether the reception of evidence of the confession would be unfair to him.²¹

[53] I am not satisfied that so far as the bulk of the record of interview is concerned it would be unfair for it to be admitted.

²¹ *R. v. Lee* (1950) 82 CLR 133 at pp 150-151; *Cleland v R* (1982) 151 CLR 1 at 18

- (a) The accused voluntarily participated in the interview with full knowledge of his right to remain silent and refrain from answering questions.
- (b) He seemed keen to tell the story of what happened and the record of interview contains exculpatory matter as well as admissions. (For example, he emphasised the amount that both he and the deceased had been drinking on the day and when asked for details about the bottle used for a weapon indicated he was not sure, “I was too drunk.”)
- (c) The breaches of the Anunga Guidelines referred to above were inadvertent, and not of sufficient seriousness “as to warrant sacrificing the community’s interest in seeing the guilty convicted in order to express disapproval of, and to discourage, the use of unacceptable methods in achieving that end”.²²
- (d) The record of interview is not evidence which it would be unfair to use against the accused because its reliability has been affected by the methods used to procure it.²³ There is no reason to doubt the reliability of the admissions made by the accused in the record of interview in relation to the events which occurred on the day in question and which resulted in the death of the deceased. Apart from anything else, those admissions are broadly consistent with statements

²² *Cleland v R* per Dawson J at 34

²³ *Cleland v R* per Dawson J at 33

taken by police from various eye witnesses. This is not a case where the Crown has no evidence against the accused other than his own admissions.

[54] There are however some parts of the record of interview which I think it would be unfair to admit. When Mr Robinson was asked questions about what he meant to happen and what he thought might happen when he hit his wife with the bottle, it is not clear that he always understood the distinction (in English) between being asked what he thought at the time might happen and what in fact did happen.

[55] There is therefore a risk that his answers might be misunderstood or misused by the jury in a way which would be unfair to Mr Robinson and I consider it would be unfair to admit those parts of the record of interview where this potential problem is apparent, into evidence.

[56] Not all passages of this type are tainted with this ambiguity or potential unfairness. I have identified six such passages. In my view two of those passages are not so tainted and four are.

[57] The first passage is at page 36:

“SNIGG: ALRIGHT. WHAT DID YOU THINK WAS GOING TO HAPPEN?

ROBINSON: WHAT?

SNIGG: DID YOU – WHAT WERE YOU TRYING TO DO WHEN YOU HIT HER?

TREW: **WHAT WERE YOU TRYING TO DO WHEN YOU HIT HER?**

ROBINSON: **YEAH, I HIT HER, THE DEVIL MUST HAVE GOT IN MY HEAD.**

TREW: SO HEARD THAT SOMETHING WENT IN MY HEAD, LIKE A SPIRIT.

ROBINSON: YEAH WAS SOMETHING LIKE THAT.”

I do not consider that this passage is tainted with ambiguity or potential unfairness and I do not exclude it.

[58] The second passage is at page 43:

“SNIGG: YEAH. NOW WHEN YOU – WHEN YOU HIT HER, WHAT DID YOU – WHAT WERE YOU TRYING TO DO?

ROBINSON: I WAS ANGRY. SOMETHING WENT IN MY BRAINS.

SNIGG: YEAH?

ROBINSON: YEAH.

SNIGG: HAS THAT HAPPENED BEFORE?

ROBINSON: YEAH.

SNIGG: WHEN?

ROBINSON: THIS ONE HAPPENED AT ERLDUNDA.

SNIGG: SO THEN – THAT’S FIRST TIME?

ROBINSON: YEAH.

SNIGG: THAT'S THE FIRST TIME THAT HAPPENED?

ROBINSON: YEAH FIRST TIME. SOMETHING WENT INSIDE MY BRAINS AND"

I do not consider that this passage is tainted with ambiguity or potential unfairness and I do not exclude it.

[59] The third passage is at page 48:

“SNIGG: YEP. ALRIGHT. YOU KNOW WHEN – WHEN YOU HIT HER, WHERE DID YOU THINK SHE WOULD END UP?

TREW: AS IN?

SNIGG: AS IN THE INURIES, WHAT – WHAT DID HE THINK INJURIES IT WOULD CAUSE. CAN YOU ASK HIM THAT?

TREW: **WHEN YOU HIT HER, WHAT DID YOU THINK WOULD HAPPEN TO HER?**

ROBINSON: **I HIT HER, THEN I SEEN HER, SHE WAS DEAD, I GOT SCARED.**

TREW: I SAW SHE WAS DEAD, RAN AWAY SCARED, RUN AWAY SCARED I MEAN.

SNIGG: OKAY. DID YOU INTEND TO KILL HER?

TREW: **DID YOU WANT TO KILL HER?**

ROBINSON: **YEAH, SOMETHING TOLD ME TO.**

TREW: YES, SOMETHING WENT IN THE HEAD – IN THE MIND.

SNIGG: SOMETHING IN YOUR MIND?

ROBINSON: YEAH.

SNIGG: DID IT – DID IT TELL YOU TO KILL HER?

TREW: **DID IT TELL YOU TO KILL HER?**

ROBINSON: NO I DON'T KNOW. MAYBE SOMETHING WENT IN.

TREW: DON'T KNOW. SOMETHING WENT IN.”

I consider that it is not clear that Mr Robinson understood precisely what was being asked of him in this passage and I exclude it.

[60] The fourth passage is at page 53:

“SNIGG: YEAH? ALRIGHT. NOW WHEN YOU HIT HER, WHAT DID YOU THINK WOULD HAPPEN TO HER FACE?

ROBINSON: BLOOD WAS SHOOTING OUT.

SNIGG: BLOOD WOULD COME OUT?

ROBINSON: YEAH.

SNIGG: YEAH?

ROBINSON: YEAH AND I GOT FRIGHTENED OH.

SNIGG: FRIGHTENED? ...”

In this passage I consider Mr Robinson may not have properly made a distinction between what he thought would happen and what did happen. There is a danger that this evidence may be misused or misconstrued and I exclude it.

[61] The fifth passage goes from page 54 to 55:

“SNIGG: YEP ALRIGHT. WHEN YOU HIT HER IN THE FACE WITH THE BOTTLE AND THERE WAS BLOOD, WHERE DID YOU THINK SHE WOULD END UP?

TREW: **WHEN YOU SEEN THE BLOOD WHAT DID YOU THINK WOULD HAPPEN?**

ROBINSON: **SHE MUST BE DEAD.**

TREW: MIGHT HAVE DIED.

SNIGG: THOUGHT MIGHT HAVE DIED? OKAY. DID YOU THINK SHE MIGHT GO TO HOSPITAL?

ROBINSON: YEAH, WHEN I WENT – WHEN I DRIVE OFF, SHE WENT TO HOSPITAL.

SNIGG: AFTER YOU DROVE OFF?

ROBINSON: YEAH AFTER I DRIVE OFF.

SNIGG: YEAH. BUT WHEN YOU HIT HER AND THERE WAS BLOOD...

ROBINSON: YEAH.

SNIGG: ...YOU THOUGHT SHE MIGHT BE DEAD?

ROBINSON: YEAH. I DON'T KNOW SHE MIGHT BE DEAD.

SNIGG: DID YOU KNOW SHE WAS DEAD?

ROBINSON: YEAH.

SNIGG: YOU DID? CAN YOU ASK HIM THAT IN LANGUAGE?

TREW: **HOW DID YOU KNOW SHE WAS DEAD?**

ROBINSON: **SEEN TO MUCH BLOOD, TRULY LOTS OF BLOOD.**

TREW: SAW BLOOD, MIGHT BE TRUE DEAD. SAW BLOOD.

SNIGG: SAW BLOOD SO THOUGHT MIGHT BE DEAD?
..."

I consider that this passage is tainted with the same potential unfairness as the fourth passage and I exclude it.

[62] The sixth passage goes from page 59 to 60:

“SNIGG: DID YOU THINK IT WAS RIGHT OR WRONG TO HIT HER?

ROBINSON: MAYBE RIGHT OR WRONG. MAYBE RIGHT.

SNIGG: HOW DO YOU MEAN? CAN YOU ASK HIM IF HE THINKS IT WAS THE RIGHT WAY OR WRONG WAY?

TREW: **WAS IT WRONG THAT YOU HIT HER, OR WAS IT RIGHT FOR YOU TO HIT HER?**

ROBINSON: **I HIT HER ON THE HEAD THIS WAY.**

TREW: I HIT HIM ON HEAD AND HERE.

ROBINSON: MM.

SNIGG: CAN YOU ASK HE THINK HE WAS ALLOWED
TO DO THAT?

TREW: **WAS IT RIGHT FOR YOU TO HIT HER OR
NO?**

ROBINSON: **NO, I DID.**

TREW: NO. DON'T THINK SO."

Again, I consider that this passage is tainted with the same potential unfairness as the fourth and fifth passages and I exclude it.