DB v The Queen [2010] NTSC 65

PARTIES:	DB
	v
	THE QUEEN
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	20916945
DELIVERED:	1 December 2010
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JUDGMENT OF:	BLOKLAND J

CATCHWORDS:

EVIDENCE - - Admissibility - - voluntariness of confession - - application to exclude evidence allowed.

Youth Justice Act (NT)

Bunning v Cross (1978) 141 CLR 54; *Carr v Western Australia* [2007] 232 CLR 138; *Collins v R* (1980) 31 ALR 257; *Dumoo v Garner* (1998) 7 NTLR 129 at 143; *Gudabi* (1984) 12 A Crim R 70; *LLH* (2002) 132 A Crim R 498; *Reg v Beere* 1965 Qld R, 370; *Regina v Smith* [1959] 2 QB 35; *R v Anunga* (1976) 11 ALR 412; *R v Butler* (No 1) (1991) 57 A Crim R 451 at 452; *R v Emily Jako* [1999] NTSC 46; *R v Gaykamanu* [2010] NTSC 12; *R v RR* (2009) 25 NTLR 92 at 103 – 105; *R v Warner* (1988) 48 SASR 79; *R v Weetra* (1993) 93 NTR 8; *Swaffield v Pavic* (1998) 192 CLR 159 considered.

Cross on Evidence Vol 1; A Discussion Paper To Seek Input From The Public – Review of the Juvenile Justice Act, March 2004; Second Reading Speech, Northern Territory Legislative Assembly, 29 June 2005, Attorney General at 66;"The Duty of A Responsible Person" Under Section 13 of The Children (Criminal Proceedings) Act 1987 (NSW) QUTLJJ, 21/05/05.

REPRESENTATION:

Counsel:

Applicant:	C Ingles
Respondent:	H Hills

Solicitors:

Applicant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecutions

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

DB v The Queen [2010] NTSC 65
No. 20916945

BETWEEN:

DB
Applicant

AND:

THE QUEEN
Respondent

CORAM: BLOKLAND J

RULING ON 26L *EVIDENCE ACT* (NT) APPLICATION

(Delivered 1 December 2010)

Introduction

[1] This ruling concerns an application on behalf of DB (the accused) to exclude a record of conversation he participated in with police on 19 May 2009. During that conversation the accused made admissions implicating himself in a robbery alleged to have occurred on 4 April 2009 in Alice Springs. On his version to police the extent of his involvement was as a less significant participant than the co-accused. At the relevant time the accused was a youth within the meaning of the *Youth Justice Act*.[1] Various protections

[1] Section 6 *Youth Justice Act*, under 18 years of age.

were applicable to the accused during the investigation[2]. These are the reasons for the ruling made to exclude the record of conversation.

[2] The primary ground relied on to form the basis of the exclusion was that the record of conversation was not voluntary because the accused participated in the conversation while under an inducement. Further grounds alleged non-compliance with the *Youth Justice Act* in particular in relation to a failure to inform the accused of his right to access legal advice;[3] lack of adequate explanation of the role of a support person and consequentially lack of support during the interview.[4] Exclusion was sought relying on s 59 *Youth Justice Act,* alternatively on the grounds of non-compliance with certain procedures being contrary to public policy[5] or unfair to this particular accused.

Evidence on the Voir Dire

[3] Five witnesses were called on the voir dire. Police Officers Michael Curtis, Sean Alia, Darren Cox, the accused and his mother RB.

[4] All police officers at the relevant time were working in the Property Crime Reduction Unit, a unit of the police force in Alice Springs that deals primarily with young offenders.

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[2] Division 2, *Youth Justice Act,* Police Powers and Obligations; s 59 *Youth Justice Act,* Exclusion of evidence unlawfully obtained.
[3] Section 15(2) *Youth Justice Act*; Point 12 Police General Order-Youth.
[4] Sections 18 & 35 *Youth Justice Act*.
[5] *Bunning v Cross* (1978) 141 CLR 54; *Swaffield v Pavic* (1998) 192 CLR 159.

[5] According to Officer Curtis there was no legal requirement for the accused to attend at the police station on the day in question. Nevertheless, the accused voluntarily attended with his mother on 19 May 2009 to speak about an incident (the Saltbush Street incident). The Saltbush Street incident was unrelated to the alleged robbery (the subject of the charge here). Officer Curtis did not consider the Saltbush Street incident to be a significantly serious matter. In his view however, the Saltbush Street incident needed to be investigated.

[6] Officer Curtis was not clear whether the request to attend the police station came from himself or Constable Cox who was investigating the robbery charge (the Warburton Street incident). Officer Cox told the Court he had made inquiries at some stage prior to 19 May 2009 with members of the accused's family including the accused's mother. The evidence on who it was that made significant contact with the accused's family was vague. The accused's mother clearly recalls her contact was with Officer Curtis. Officer Alia believed it was Officer Curtis who made the contact with the accused's family to arrange that he come to the police station. The accused's evidence was he was told by his sister that Michael Curtis was looking for him. Both Officer Curtis and the accused's mother's evidence was that it was Officer Curtis who they asked for when they attended the police station. On balance, I find the inquiries of Officer Curtis with the accused's family were the prime reason the accused and his mother attended

at the police station on 19 May 2009 to speak about the Saltbush Street incident.

[7] The accused's evidence suggests some confusion on whether he was attending as a witness rather than a suspect. In relation to the Saltbush Street interview, (the first interview) the accused gave evidence he was told he was a witness or that he was seen at the Saltbush incident; he thought he would just tell his story and tell the truth. The interview took place in the "soft" interview room.

[8] Officer Curtis was asked whether prior to the first interview he said something like "Look, we know you're involved, we've got the evidence against you and, you know, it doesn't – its your choice whether you give me your story or not" and whether he said or suggested to the accused it would be better for him to give his version. He answered as follows (T 21):

> "I generally do. I said if someone comes in – I'm generally honest with them and their mum. I'm not there to – I just say to them, "Look, if you're going to come in and tell me the truth, come in and tell me the truth, but if you're going to come in and lie, don't bother, because it doesn't help you, it doesn't help me, it doesn't help anything. If you don't want to talk to me, don't talk. That's your right. Its completely up to you what you want to do"".

[9] When asked whether prior to the interview he had said "it would be better for him if he did tell the truth?" Officer Curtis said:

> "Yeah – I'm yep, I'm honest". I just say to them - Look if you tell the truth – because they might not have done anything wrong at the end of the day".

[10] Officer Curtis said the welfare of the accused vis a vis other suspects was on his mind and in any event he was uncertain whether the accused would go to Court over the Saltbush Street incident.

[11] In answer to the question whether Officer Curtis said before the interview words to the effect that he was not necessarily going to charge the accused with anything if the accused told him what happened, Officer Curtis answered:

> "Yeah, look, I'd probably – to be honest – there's a good chance I probably did say that, that at the end of the day you're more likely to get summonsed than charged".

[12] He said that what he meant by that, was the accused was to be summonsed as an offender rather than as a witness. The accused was in fact summonsed as a defendant but the charge was withdrawn.

[13] Officer Curtis acknowledged he proceeded in the interview format with the accused so it appeared to the other suspects the accused was being treated as a suspect as well. (T 23-24). He said one reason was to give Constable Alia practice at interviewing in a straight forward interview, however he also acknowledged he "changed tack" halfway through as he knew or contemplated that if the accused had not left with a "little blue tag" and a disc to show he had been interviewed "it could get nasty". He said this was on his mind before the interview started. Halfway through the interview when mention was made of a meeting with a respected person who could

meet with relevant families, he said the interview became an "information session".

[14] The accused's evidence was that he understood he would not get a summons for Court; he thought he was a witness "or something" and he was told by Officer Curtis "it would be better for me just to tell the truth or say my part". (T 74).

[15] Officer Curtis said generally he does ask people if they want to speak to a lawyer but he could have forgotten on this occasion. The accused and his mother's evidence was they were not asked if they wanted to speak to a lawyer. Overall the rest of the evidence confirmed this.

[16] After the first interview the accused was to be interviewed over the Warburton Street incident (the second interview). Officer Curtis was unclear on whether he told the accused and the accused's mother that the accused would be arrested for the Warburton Street matter. He said:

> "I won't say I didn't say that, because it's two years ago and I don't know to tell you the truth, but I clearly would have told him that, I wouldn't have lied to him, I would have just told him straight out that the interview is going to happen, it's an important matter. I don't know if I knew what it – what – I don't know if I knew that in enough detail to tell him that, but I can't disagree because I can't remember basically".

[17] Both the accused and his mother gave evidence they were told he would be arrested. They both said they thought the accused could not leave. The accused said that when told by Officer Cox in the second interview he was

not under arrest and was free to leave, he thought that still meant free to leave the room, but not the police station. The accused said he chose to speak to Constable Cox to "tell him the truth, tell him why I shouldn't be in there" and in terms of what would happen "that it would be okay". He said he thought if he did not speak he would be remanded in custody.

[18] Officer Cox told the Court he made contact with the accused through his family. He understood the accused was also being sought by Officer Curtis. He was not told of the accused not being charged with anything arising from the first interview. Officer Cox conducted the second interview, having cautioned the accused. Officer Cox agreed the accused's mother was the support person for the second interview and he believed he explained the role of a support person to her. Officer Cox agreed he did not ask the accused if he wanted legal advice nor did he contact the Aboriginal Legal Service. Officer Cox was unaware at the time of the second interview of the obligation under s 15(2) *Youth Justice Act* to inform the youth of his ability to access legal advice. Officer Cox did not know of the content of the conversations between the accused and Officer Curtis.

Application of Relevant Legal Principles - Voluntariness

[19] A confession is not voluntary if it is made under an inducement from a person in authority. Mere exhortations to tell the truth do not amount to an inducement that will render a confession inadmissible.[6] A suggestion however by a person in authority that the outcome of a confession may have

[6] Cross on Evidence, Vol 1, Para [33640].

a beneficial result in relation to the prosecution will generally lead to exclusion of the confession. Suggestions that it would be beneficial to tell the truth have long been held to amount to an inducement.[7]

[20] In my view the impression was clearly conveyed in the first interview that there would be something to be gained by the accused telling his story. For sound welfare and altruistic reasons Officer Curtis had in mind an alternative disposition to that of Court proceedings in relation to the Saltbush Street matter. This may well have influenced his approach to the first interview.

[21] Nothing in the process between the first and second interviews was on the balance of probabilities capable of removing the inducement that there would be a benefit to the accused in giving his version to police. Officer Cox did not know of the discussion between Officer Curtis and the accused that has been found to clearly constitute an inducement. The surrounding confusion about what the purpose of the statement was (witness or suspect or on some interpretations, informer) did not help matters, despite a caution.

[22] Officer Cox proceeded with the recorded conversation having cautioned the accused who was present with his mother. Both the accused and his mother believed the accused could not leave the police station. As Officer Cox did not know of the conversation between Officer Curtis and the accused, he was not in a position to clearly advise that whatever Officer Curtis had said

[7] *Reg v Beere* 1965 Qld R, 370; *Regina v Smith* [1959] 2QB 35.

in relation to the first interview did not apply to the second interview. The "hope of advantage" as it has sometimes been called[8] was in my view still operative at the time of the second interview.

[23] This is not a case where the inducement may have become ineffective through lapse of time or some intervening cause. Here the accused and his mother were in the same police station; one interview immediately followed the other and involved police officers who were connected through the same unit. Some of the members of the groups of youths implicated were common to both incidents under investigation. Officer Curtis was the most senior officer. It is also relevant the accused was a youth. Had the accused been given legal advice the significance of the second interview could have been properly ascertained and explained. Had he participated after legal advice there may have been grounds for concluding any "hope of advantage" had been removed.

[24] In *Regina v Smith*[9] it was held the principle was (at 40):

> "that if the threat or promise under which the first statement was made still persists when the second statement is made, then it is inadmissible. Only if the time-limit between the two statements, the circumstances existing at the time and the caution are such that it can be said that the original threat or inducement has been dissipated can the second statement be admitted as a voluntary statement".

[25] In *R v Warner*[10] O'Loughlin J refused to exclude a record of interview on the basis of *R v Smith* (above) as it was held the threat or inducement had

[8] *Collins v R* (1980) 31 ALR 257, at 307, Brennan J.
[9] [1959] 2 QB 35.

dissipated or was spent after the intervening period. The time period there was two months. The distinction is obvious.

[26] It is plain there is no threat in this case. The accused in my view, given the close proximity of the two interviews and the circumstances surrounding them answered questions on the basis that if he gave his version nothing much more would happen to him. This is the impression conveyed prior to the first interview. The accused was also cautioned in the first interview, however underlying the interview was the thought he may have been a witness who was not to be charged but for welfare reasons was given the appearance of a suspect. As the outcome of the first interview appeared positive for him, that also contributes to the conclusion the belief or a likely advantage was operative in the second interview.

[27] Although the accused answered in the negative when asked in the second interview whether any inducement had been held out to him, it is clear from his evidence he does not know what "inducement" means. The inclusion of that question and answer in the interview does not in any real sense provide evidence of the cessation of the influence of the conversation between the accused and Officer Curtis at the commencement of the first interview.

[28] I have concluded on the basis of the continuing inducement the Crown are not in a position to prove the second conversation was voluntary.

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[10] (1988) 48 SASR 79.

Relevance of Youth Justice Act Provisions

[29] Contrary to the conceded usual practice by Alice Springs police, the Aboriginal Legal Aid Service were not contacted on the day the interviews were conducted. It was an ordinary business day.

[30] Section 15(2) and (3) *Youth Justice Act* (NT) provides:

> (2) Before a youth is interviewed or searched in connection with the investigation of an offence, a police officer must, unless impracticable, inform the youth of his or her ability to access legal advice and representation.
>
> (3) Any action taken is not unlawful, and any evidence obtained is not inadmissible, only because of a failure to comply with this section.

[31] As counsel for the Crown submitted, this provision represents the common law as recently described in *Carr v Western Australia*[11] (at 152): (footnotes omitted):

> "Secondly, there is no principle of the common law that persons suspected by police officers of having committed a crime must be advised that they are entitled to communicate with a legal practitioner before being interrogated, or that in default evidence of any confession is automatically inadmissible. If there were such a principle, it would not have been necessary for those jurisdictions which have done so to have enacted legislation imposing a duty so to advise".

[32] Putting the accused in touch with the legal service would have been of assistance to clarify the legal significance of the interviews. It was not impracticable to do so. The officers involved were often in touch with the

[11] [2007] 232 CLR 138.

legal aid services. Officer Cox was not aware at the time of the statutory provision, although he did think that with youths in custody he should apply the *Anunga Rules*[12] and arrange for legal advice on that basis.

[33] The lack of provision of legal advice to youths, when being interviewed by police, (as with the common law), would not generally lead to automatic exclusion of the record of interview. The statutory obligation to provide legal advice to youths was included in the *Youth Justice Act* after a review of the (former) *Juvenile Justice Act*. The review included community consultation.[13]

[34] By the enactment of s 15(2) and (3) the legislation makes it clear there is a community expectation and legal requirement that youths be offered legal advice when practicable.[14] Although failure to comply with the *Youth Justice Act* is not the reason for exclusion of the record of conversation in this instance, the failure to comply has not assisted the case in favour of admissibility in these circumstances. The same statutory obligation is included in Police General Order "Youth".[15]

[35] There was compliance with the requirement the youth be interviewed with a support person[16] as his mother was present. On behalf of the accused it was argued the accused's mother was not an appropriate support person as she

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[12] *R v Anunga* (1976) 11 ALR 412.
[13] "A Discussion Paper To Seek Input From The Public – Review of the Juvenile Justice Act", March 2004. See especially paragraph 12, page 16. Second Reading Speech, Northern Territory Legislative Assembly, 29 June 2005, Attorney General at 66.
[14] See above, second reading speech at 68.
[15] Promulgated 22 February 2007 and reference to *Youth Justice Act*, s 16.
[16] Section 18(2) *Youth Justice Act*.

did not fully understand her role. Section 35(1) and (5) *Youth Justice Act* relevantly provides:

> **35 Support person**
>
> (1) For this Part, a support person, in relation to a youth, is one of the following:
>
> (a) a responsible adult in respect of the youth;
>
> (b) a person nominated by the youth;
>
> (c) a legal practitioner acting for the youth;
>
> (d) a person called upon under subsection (5).
>
> (5) If a police officer has made reasonable attempts to have a person mentioned in subsection (1)(a), (b) or (c) present but it was not practicable for any such person to be present within 2 hours, the officer may call upon a person from the register maintained under section 14 to be the support person.

Section 18(2) provides:

> **18 Interview of youth**
>
> (2) The officer must not interview the youth in respect of the offence, or cause the youth to do anything in connection with the investigation of the offence, unless a support person is present while the officer interviews the youth or the youth does the act
>
> ***responsible adult***, in respect of a youth, means a person who exercises parental responsibility for the youth, whether the responsibility is exercised in accordance with contemporary social practice, Aboriginal customary law and Aboriginal tradition or in any other way.

[36] Counsel for the accused argued a support person or, perhaps more appropriately in this setting, a responsible adult should have the attributes and be given the explanations that are now regarded as appropriate for "prisoner's friends" as contemplated in the *Anunga Rules* context. The jurisprudence around the attributes of 'the prisoner's friend' is significant.[17] Considerations differ from case to case depending on the issue at the heart of the objection to admissibility or the particular difficulties otherwise associated with the interview. It is clear police need to explain the role of the prisoner's friend to them and record the explanation.[18] A number of cases make the point that it is important not to elevate the attributes of a prisoner's friend to rules of law. The significance of any breach may vary, however clearly the prisoner's friend is of limited value in supporting a case in favour of admissibility if they do not understand their role in the face of a challenge to admissibility.

[37] I would be hesitant to make any ruling implying there were a list of personal characteristics that ought to be met when a support person who is the responsible adult is chosen to be present when a youth is interviewed. Parents or guardians usually fulfil this role and are usually acceptable to both police and the young person. Beyond that relevant factors and circumstances will vary in each case. I agree there are some synergies with the role of the prisoner's friend. Clearly at one level RB was an appropriate

[17] *R v Anunga* (1976) 11 ALR 412; *R v Butler* (No 1) (1991) 57 A Crim R 451 at 452; *Dumoo v Garner* (1998) 7 NTLR 129 at 143; *R v RR* (2009) 25 NTLR 92 at 103 – 105; *Gudabi* (1984) 12 A Crim R 70; *R v Weetra* (1993) 93 NTR 8; *R v Gaykamanu* [2010] NTSC 12; *R v Emily Jako* [1999] NTSC 46; *LLH* (2002) 132 A Crim R 498.
[18] Police General Order O2, para 4.1.4.

support person given she was the accused's mother and he appeared to want her to be present.

[38] Her presence as a support person in the circumstances of this case cannot revive the admissibility of this particular record of conversation. From her evidence it appears her understanding of what was occurring at each state of the investigation was no greater than the accused. I mean no disrespect in stating that. She said she was shocked when she was told the accused would be interviewed and arrested for the Warburton Street incident. She did not appear to have the confidence to clarify the circumstances of the interview. Officer Cox gave evidence that he did explain the role to her and there are questions and answers at the commencement of the second record of interview where the accused's mother indicates she understands her role in terms of ensuring the accused understands the questions. She indicates she understands she can explain questions to the accused.

[39] Although RB was an appropriate support person for the very fact she is the accused's mother, her presence was no substitute for legal advice, particularly given the seriousness of the charge and the circumstances of the second interview. This is not the case to attempt to specify particular qualities or understandings a support person or legally responsible adult should possess. [19] In this particular case, the difficulties of the second interview would require a person with greater confidence in the legal or

[19] A number of suggestions are made in John Boersig, "The Duty of" A Responsible Person" Under Section 13 of The Children (Criminal Proceedings) Act 1987 (NSW)" QUTLJJ, 21/05/05.

police investigation setting to ensure the accused was not answering because of an impression created that it would be better for him to give his version. The point is in these circumstances, the presence of the support person was not sufficient to remove the inducement. In some cases a more detailed explanation of the role could assist.
