CITATION:	*Paul Francis Tudorstack v J Chula & H Jinjair& M Cumaivi & D Cumaivi & E Tcherna & A Mamby & F Kurungaiyi & E Kurungaiyi* [2004] NTMC 013
PARTIES:	Paul Francis Tudor-Stack (Complainant and Informant) v Johnathon Chula Henry Jinjair Mark Phillip Cumaiyi Dominic Cumaiyi Edmund Tcherna Anthony Mamby Francis Kurungaiyi Eugenio Kurungaiy1 (Defendants)
TITLE OF COURT:	Court of Summary Jurisdiction
JURISDICTION:	Criminal
FILE NO(s):	20275776; 20212706; 20212704; 20212730; 20212711; 20212705
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JUDGMENT OF:	Jenny Blokland SM

CATCHWORDS:

EVIDENCE – CONFESSION – Voluntariness – Anunga Rules – whether particular style of caution complies with Anunga Rules
R v Maratabanga (1993) 3 NTLR 77; *McDermott v the Queen* (1948) 76 CLR 501 at 511-12; *Collins v The Queen* (1980) 31 ALR 255; *R v Azar* (1991) 56 A Crim R 414; *R v Nundhirribala* (1994) 120 FLR 125; *Dumoo v Garner* (1988) 143 FLR 245; *Gudabi v the Queen* (1983) 52 ALR 133; *Rostron v the Queen* (1991) 1 NTLR 191; *Coulthardt v Steer* (1981) 12 NTR 13; *R v Swaffield* (1998) 192 CLR 159
EVIDENCE – CONFESSION – INDUCEMENT – Person in authority – *R v Dixon* (1992) NSWLR 215 – appropriateness of prisoner's friend – manner of interpretation *R v Butler* No1 (1991) 57 A Crim R 451 – questioning in the face of an expressed desire not to answer questions – *R v Emily Jako, Theresa Marshall and Maris Robinson* [1999] NTSC 46; Jabarila (1984) 11 A Crim R 132; Justice Dean Mildren, *"Redressing the Imbalance Against Aboriginals in the Criminal Justice System"* (1997), 21 Criminal Law Journal 7; Police General Order (NT) Q2

REPRESENTATION:

Counsel:

Complainant and Informant:	Mr Duguid
Defendants:	Ms Roussos (for Johnathon Chula), followed by Mr Hill; Mr Woodroffe, Mr O'Brien, followed by Mr Barlow

Solicitors:

Complainant and Informant:	ODPP
Defendant:	North Australian Aboriginal Legal Aid Service; Northern Territory Legal Aid Commission.
Judgment category classification:	A
Judgment ID number:	[2004] NTMC 013
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IN THE COURT OF SUMMARY JURISDICTION
AT WADEYE IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20275776; 20212706, 20212704; 20212730; 20212711; 20212705

PAUL FRANCIS TUDOR-STACK
(Complainant and Informant)
v

JOHNATHON CHULA
HENRY JINJAIR
MARK PHILLIP CUMAIYI
DOMINIC CUMAIYI
EDMUND TCHERNA
ANTHONY MAMBY
FRANCIS KURUNGAIYI
EUGENIO KURUNGAIY1
(Defendants)

REASONS FOR DECISION ON THE VOIR DIRES

(Delivered March 1 2004)

Ms Blokland SM:

1. This decision concerns voir dire hearings on the admissibility of confessional evidence for seven out of eight defendants charged with *Dangerous Act s 154 Criminal Code)* and a number of associated offences including offences under the *Firearms Act (NT)* arising out of an incident on 22 August 2002 at Wadeye. It is alleged that the defendants, (in varying degrees of participation), fired off live ammunition in a number of areas around Wadeye, endangering the lives of a number of residents. As a result of this alleged activity, police and other members of the community apprehended the defendants and conducted records of conversation. The confessions are under challenge. I made rulings on six of the seven contested confessions prior to the hearing on the merits on 27 October 2003

and had previously given counsel a draft of my reasons. Francis Kuringaiyi's matter was not included in that draft as his matter was postponed due to a previous non-appearance. On 27 October 2003 I ruled that Francis Kurungaiyi's record of conversation be admitted into evidence and now publish my reasons. At the conclusion of the hearing on 15 February 2004 a further submission was made in relation to Anthony Manby's record of conversation and Mr Barlow asked me to revisit my previous ruling which I will now do.

Relevant Principles

2. Save for some particular considerations relating to some individual defendants, generally speaking, the objections are based on alleged breaches of the Anunga Rules or non-compliance on the part of police with the equivalent Police General Order Q2 – Questioning People Who Have Difficulties with the English Language. It is argued that the various alleged breaches should lead the court to exclude each of the confessions on the grounds of voluntariness, alternatively on an exercise of either the fairness discretion or the public policy discretion. Further, some of the evidence raises the issue of questionable interpreting of the caution and other parts of the confessions. I don't understand the arguments there to indicate an alleged failure of compliance on the part of police, but rather a systemic failure to ensure accurate and independent interpreting. The alleged breaches involve allegations, (not all being common to all defendants), of failure to ensure an appropriate interpreter: (Anunga Rules 1); failure to ensure the suspect understands the caution: (Anunga Rules 3); a change in the format of the caution; inappropriateness or lack of particular qualities on the part of a prisoner's friend (Anunga Rules); use of leading questions or cross examination; interviewing when the suspect is tired. It is common ground that all defendants are persons to whom the Anunga Rules apply. All are members of the Wadeye community, their first language is either Murin Patha or a related local language, their education levels vary but are generally low and their level of understanding English at any level of sophistication is variable but generally low.

3. As I understand the law, the extent of compliance with *Anunga* is a factor relevant to both voluntariness and the exercise of the discretion: *(R v Maratabanga (1993) 3 NTLR 77).* A breach or breaches of the *Anunga Rules* may lead to rejection of a statement if those breaches lead to the conclusion, on balance, that the confession was not "made in the exercise of [a person's] free choice", *McDermott v The Queen (1948) 76 CLR 501 at 511-12.* In assessing voluntariness, the court must focus not on the sources of duress, inducement and the like but on the *effect* of the conduct on a person's free choice. The *Anunga Rules* provide some guidance for this in the context of Aboriginal defendants. In *Collins v The Queen (1980) 31 ALR 257 at 305-311,* Brennan J discussed the necessity to focus on the will of the accused and to ask whether, in the specific circumstances of that particular accused, his or her will had been overborne. As part of this discussion, he said

> " [C]onfessions made by those whose wills are more easily overborne – whether because of social condition, environment, natural timidity or subservience – will find reciprocally greater difficulty in being admitted into evidence" and further, "[I]f the confessionalist overbears his will , so that he speaks because the interrogation obliges him to do and not because he freely chooses, the confession is inadmissible."

4. Since *R v Azar (1991) 56 A Crim R 414 @ 418* it is clear that the failure to caution cannot alone constitute an external overbearing of the will. I am not entirely sure that the impact of *R v Azar* on *Anunga* and the derived authorities has been fully realised. It would appear that lack of understanding of the caution in terms of understanding whether there is a right to speak or remain silent does not of itself render the confession involuntary, though it may be relevant in establishing lack of voluntariness: *R v Nundhirribala (1994) 120 FLR 125 at 132-3; Dumoo v Garner (1988) 143 FLR 245.* I do not see these authorities as excluding evaluation of voluntariness by reference to the *Anunga Guidelines.* I bear in mind that not every breach of the *Anunga Rules* will indicate lack of voluntariness, nor does a breach of the rules mean that a court will reject the confession. In that regard I am well aware of *Gudabi v The Queen (1983) 52 ALR 133; Rostron v The Queen (1991) 1 NTLR 191* and numerous trial judge rulings

where after voir dire examination, a confession made in technical breach of the rules was still accepted into evidence. I am also bound by such cases as *Coulthardt v Steer (1981) 12 NTR 13* where the Supreme Court reminded the lower courts of the need to comply with precedent, in that case, the emphasis being on *Anunga.*

5. A number of the alleged breaches may be relevant equally or additionally to the exercise of the *fairness* discretion and in some instances the *public policy discretion*. While the onus on the balance of probabilities lies with the prosecution to prove voluntariness, the onus is on the defendants to persuade the court to exercise either of the discretions.

6. Although some argument was developed in these proceedings on whether the reasoning in *R v Swaffield (1998) 192 CLR 159 at 204* was relevant to ruling on the various objections, in my view, in the circumstance of these proceedings the rationale of *R v Swaffield* adds little to the principles already under consideration. I turn now to consider the circumstances of the individual defendants.

Johnathon Chula

7. Although the general principles discussed already are relevant to the voir dire concerning this defendant's record of conversation, there are some additional considerations concerning him. A transcript of the Record of Conversation and the tape was tendered on the voir dire disclosing a record of conversation taking place at 4.16 pm on 23 August 2002 between the defendant, Sgt Dean McMaster, Constable Carmen Butcher, the interpreter Peter Bunduck and the prisoner's friend Peter Cumaiyi. This group of witnesses, both police officers and the interpreter and prisoner's friend were called a number of times on the various voir dires and I couldn't help but be impressed with their sincerity and the care that they took over their various tasks in difficult circumstances.

8. In the case of Johnathon Chula, his lawyer has sought exclusion on the basis of lack of voluntariness by an inducement by a person in authority, that his

will was overborne and that he did not understand the right to silence. Alternatively, discretionary exclusion is sought. Mr Cumaiyi, who was present as the prisoner's friend had also previously assisted police in locating the defendants and took them to Sgt McMaster. Mr Cumaiyi agreed with counsel in cross examination that he had made suggestions to the defendants along the lines of it was *better to fess-up*; his own desire was for the boys to tell police what had happened. A small part of the evidence is as follows: (*transcript 116):*

> "So all these young fellows here are in some way related to you? Yeah And most of them are either nephews or sons? Yeah
>
> And you brought them to the police station; is that right? Yeah
>
> And Mr Cumaiyi, they all consider you as someone important? Yeah
>
> All of them? Yeah
>
> Including Johnathon Chula? Yeah
>
> And you told them it was better to, 'Fess-up and go to the police station? Yeah
>
> Do you remember using those words, "its better to 'fess up"? Yeah
>
> Mr Cumaiyi, you put them all in your car? Yeah.
>
> And you went straight away to the police station?
>
> And do you remember going up to Sergeant Dean and telling Sergeant McMaster - .."Sergeant, here are the people responsible for last night? Yeah
>
> You also helped police by helping Dean McMaster find the gun; is that right? I don't remember.
>
> And Mr Cumaiyi, you wanted the boys to come clean? Yeah
>
> And the boys listened to you? Yeah
>
> Now, Mr Cumaiyi, do you remember telling Johnahon Chula to tell police what happened? No I can't remember.
>
> You can't remember?....."

9. Initially I was sceptical on whether Mr Cumaiyi could be considered a person in authority for these purposes. My impression of him in court was as a softly spoken and gentle person. I am also somewhat sceptical about cross-examination that relies on gratuitous concurrence, the very problem addressed in *Anunga.* and at the heart of some of the challenges. In this situation however, a substantial part of this Mr Cumaiyi's testimony can be confirmed in other evidence. Further, I note that he seemed content to say *no* when he couldn't remember or did not agree with a proposition.

10. There are two factors that persuade me that he is a person in authority. First there was the evidence given that the defendant's father calls Mr Cumaiyi *uncle*; that Mr Cumaiyi was on the Council and that Mr Cumaiyi worked closely with the police while he was on night patrol. He also gave evidence that on the night in question Constable Carmen Butcher came to get him from his home to assist police. On this occasion, he can be seen to be a person in authority. Second, I am persuaded by the authority of *R v Dixon (1992) 28 NSWLR 215*, a decision of the CCA(NSW) that these circumstances require exclusion of the confession. In *R v Dixon*, an Aboriginal liaison officer who attended to an Aboriginal person in custody said *tell the truth, just tell the truth. That's the only way you can help yourself.* I have concluded that I cannot be satisfied of voluntariness on the balance when this authority is properly considered and applied to the facts. Related to that conclusion is the evidence given before the court about the interpretation of Sgt McMaster's caution *(at page five of the transcript*). After Sgt McMaster said *Do you want to tell me that story?,* the evidence is that the interpretation by Richard Bunduck was along the lines of *You tell from your story.* That factor added to what has already occurred with Mr Cumaiyi makes it very hard to accept there was no inducement operative at the time of the confession. This leads to me conclude there was a continuum of conduct and circumstances amounting to an inducement. Alternatively, it tends to indicate that his will could be over borne, however I have not come to a firm view on that point. In terms of the exercise of the fairness discretion, I would be persuaded that it would be unfair to admit the Record

of Conversation because as well as the considerations concerning Mr Cumaiyi's capacity to induce the defendant, in these particular circumstances are the same factors make him wholly unsuitable as a prisoner's friend as explained by Kearney J in *R v Butler [No 1] (1991) 57 A Crim R 451*. I would also readily exclude that part of the record of conversation that lapses into cross-examination from about page 12 onwards as being clearly in breach of *Anunga Rule 4*. I have not considered fully the other grounds as I have decided that this confession is not admissible in any event. I exclude Johnathon Chula's confession.

Edmund Tcherna

11. A record of conversation took place in relation to Edmund Tcherna on 23 August 2003 at 5.19pm with Sgt McMaster and Constable Butcher; interpreter John Kingston Luckan and prisoner's friend Peter Cumaiyi. The tape of the conversation and the transcript was tendered at the hearing. Objection to this confession involves a consideration of the personal attributes of this defendant. He is 22 years of age, poor education and a very poor grasp of English. I gained the impression during the hearing that he was the most disadvantaged of all defendants.

12. Mr Luckin gave evidence on the voir dire. Like the other witnesses involved in these proceedings, I was impressed with his sincerity, honesty and application. He spent many hours listening to tapes of variable quality in the court and interpreting them as part of his evidence.

13. Mr Luckin gave evidence that Edmond Tcherna was born in Darwin and stayed all of life at Pt Keats; that he knows Edmond Tcherna; that Edmund calls him grandfather and his mother calls him uncle; Edmund always talk to him if he sees him; there are no problems between himself and Edmund Tcherna. He gave evidence that during the record of conversation Peter Cumayi and Edmond Tcherna were sitting to his left.

14. When asked in evidence how Edmund was feeling, Mr Luckin said he knew *he was a bit confusing what he was saying;* he said *he don't speak much;* his

family said he might have trouble with his hearing; he didn't answer me; what I was saying, he was saying; whispering; I was talking to him; he was whispering back; when asked how well Edmund was understanding things he said that during the part about the events – he sometimes understood, unless you spoke too much but if it's a short sentence he could understand; he said Edmund did not understand the caution, even when it was explained in Murin Patha; he said there was a problem with his hearing; he said he understood what was going to happen to the tapes; he thinks he understood, although sometimes he put his head down and that meant he couldn't hear; he described him as shy; at one point he said Edmund did understand his rights – he said he was repeating what he (Mr Luckin) had said; Mr Luckin said it was sometimes confusing what Edmund had said – Mr Luckin said he was not always sure what Edmund was saying; he said Edmund only speaks Murin Patha but even then he's got to be told again and again; in cross examination Mr Luckan said he may not have been saying everything the police were saying because they were talking fast; that he was sometimes confused; he said when he was trying to explain the caution, Edmund would say back, words like the police want to talk to me and I want them to talk to me; he told the court that Edmund didn't ever say he wanted to talk to police. That is evident from the Record of conversation itself. My observation is this defendant was incapable of explaining the caution back. Constable Curyer, who administered the s 140 conversation with Edmund Tcherna said in evidence, *In my opinion Edmund's understanding is fairly low. You've got to be very, very slow with him.* There is an issue raised about the form the caution took as well as whether the defendant understood. There is also a similar issue about inducement as with Johnathon Chula, however, I'm not even sure this defendant would have understood the significance of those comments. In my view this confession calls for the exercise of the fairness discretion to exclude it because it is probable that it contains unreliable material due to the problems experienced by the interpreter in interpreting police accurately *and* conveying that in a way this particular defendant could understand, and the lack of understanding of both English and Murin Patha on the part of the defendant. This is also evident in

his mono-syllabic answers given throughout the Record of Conversation. On the basis of unreliability and the probability of unfairness arising in admitting the confession against him, Edmund Tcherna's confession will be excluded.

Dominic Cumaiyi

15. Dominic Cumaiyi was interviewed by police after Edmund Tcherna at around 7.30 pm on Friday 23 August. The objections to his confession are that there is no demonstrated understanding of the caution in accordance with *Anunga Rules*; he expressed tiredness to police and the questioning continued; he sought to exercise his right in the early part of the record of interview and given his background this record of conversation was either involuntary or should be excluded in exercise of the discretion. The tape and a transcript of the Record of Conversation were tendered on the voir dire. Present at the record of conversation was Constable Carmen Butcher, Constable Wayne Curyer, Constable John Kingston Luckan and the prisoner's friend Camillus Kolumboort.

16. Throughout the preliminary matters Constable Butcher explains various parts of the procedures concerning the record of interview to this defendant. The conversation is interpreted by John Luckan.. The following exchange appears (page three of the transcript of the record of interview):

> "Butcher: You're not too tired?
>
> Cumaiyi: yeah
>
> Interpreter: Say again
>
> Cumaiyi: yes
>
> Interpreter: Say again
>
> Cumaiyi: Yeah pretty tired
>
> Butcher: Are you too tired to do this or you can do this and – or you'll be right to do this interview?

Interpreter: (Language)

Cumaiyi: Yeah all right

Butcher: You're all right. OKAY. Are you sober at the moment Dominic?

Cumaiyi: Yeah

After Constable Butcher explained the caution as follows:

Butcher: But before I get you to talk to me about that I'll explain to you that anything that I'm about to ask you, you do not have to answer if you don't want to. So if I ask you a question you got two choices. You can sit quiet or you can tell me your story. Your right to choose which one you want.

Interpreter: (language)

Cuumaiyi: (language)

Interpreter: (language)

Cumaiyi: (language)

Interpreter: Talk

Can you tell me what your two choices are though?

Interpreter: (language)

Butcher: What else can you do if you don't want to talk, what can you do?

Interpreter: (language) Sit quiet.

Butcher: Okay. And Dominic if you do say anything what you say is gonna' be recorded on these tapes as I explained before. One of these tapes can be used as evidence in Court. Who might listen to that in court? Who would listen to the tape?

Interpreter: (language)

Cumaiyi: Magistrate

Butcher: And what can a magistrate decide Dominic? What decisions can he make?

Cumaiyi: Gaol

Interpreter: (language)

Cumaiyi: Bail

Interpreter: (language)

Cumaiyi: Community Service

Interpreter: (language) Fine

Cumayai: Fine

Butcher: So you say gaol, bail, community service or fine. Yeah? So you understand that what you say to me now on this tape can be played in front of that magistrate that can make those decisions. Do you understand that?

Cumaiyi: Yeah

Butcher: So Dominic if I ask you a question about last night do you have to give me an answer?

Interpreter: (language)

Cumaiyi: (language)

Interpreter: (language)

Cumaiyi: (language)

Interpreter: Huh, don't wanna talk

Butcher: You don't want to talk. Okay. I understand that you don't want to talk to me Dominic but I'm gonna' put something to you, all right, and if you don't wanna' tell me you don't have to 'cos you've already told me you don't want to talk, so its your choice whether you answer what I put to you. Do you understand that?

Cumaiyi: No

Butcher: Can you just explain that to him John?

Interpreter: (Language)

Butcher: Do you understand that? I'm gonna' say something to you, if you don't want to talk to me you don't have to, okay. You've expressed you don't wanna' talk but I wanna put something to you. All right?

Cumaiyi: Yeah.

Butcher: Now Dominic last night we got a report in the Community and we heard it that there was gun shots being fired around the community off the back of a ute. Now we've been informed and we've seen that that ute was your ute and that you were driving it. Do you wanna' tell me about that?

Interpreter: (Language)

Butcher: Its your choice.

Interpreter: (Language)

Cumaiyi: (Language)

Interpreter: I'll talk

Butcher: You sure you want to talk?

Interpreter: (language)

Cumaiyi: (Language)

Interpreter: yeah

Cumaiyi: Yeah

Interpreter: I'll talk

Butcher: Okay Dominic you understand that by asking you that I'm not making you talk, okay. If you wanna' talk its gotta be your free choice, your own will.

Interpreter: Language

Cumaiyi: (Language)

Interpreter: (language)

Cumaiyi: (language)

Butcher: Okay. Dominic do you want to tell me your story about what happened last night? You tell me what happened."

(Discussion in language between the interpreter and the defendant)

17. From that point, this defendant gives his version through answers to questions on the events.

18. The interpreter Mr John Kingston Luckan was called as a witness on the voir dire. He told the court he knows Dominic Cumaiyi; they are related by family; Dominic would call him *grandfather*; according to Mr Luckan, Dominic would be senior to him; they respect one another; they are from different clan groups; his mother is from *fresh water (Moil);* on country they speak a different language; in English, Dominic doesn't understand much; he said he speaks Murin Patha *easily;* he hadn't heard Dominic speak English before that day; he said Dominic had trouble understanding the English; some things Mr Luckan spoke to him about he found a bit hard what was being said; he said Carmen was using long sentences; that he didn't catch the first bit of what she was saying; that he found himself confused still when she was using fast sentences.

19. Mr Luckan said the defendant was a bit tired and sleepy; he said he understood his choice; Mr Luckan said he told Dominic- *you wanna talk – that's up to you too;* he also said to Dominic - *You still gotta answer the questions.* In relation to the interpreting at page six of the transcript Mr Luckan says he said *still talk or sit quiet* - then the defendant didn't say anything. He then interpreted as follows:

> "I/S: You still gotta talk about that last night
>
> H/S: Talk
>
> I/S :Talk
>
> I/S: you can talk or sit quiet H/S I'll talk.
>
> I/S: I'm telling you I'm not forcing you to talk
>
> H/S I'll talk."

20. In relation to some discussion in language on page eight of the transcript Mr Luckan said he told the defendant: If you tell me that story – I'll speak Murin Patha and I'll translate; then Dominic said, yeah I'll talk; Mr Luckan

says he told Dominic, *use short sentences*; Dominic said he was going to go out bush – and the boys pulled him over and they taught him to drive around the town; he wanted me to tell the police; Mr Luckan said he wasn't sure if Dominic was comfortable or uncomfortable; that he was not happy to talk; that he was changing as the interview went on; that Sergeant Carmen asked him questions; that he had a little bit of trouble understanding him in Murin Patha.; that when Dominic changed his mind – to talk – not talk – he made his own decision to talk; Mr Luckan said he didn't force him to talk and Carmen didn't force him to talk.

21. In cross examination Mr Luckan said Dominic was in the chair and he was tired – just laying back; he said he has done interviews with Carmen; she uses big sentences – long sentences that are hard to translate that into language; she was doing those big sentences when cautioning; this was very confusing for Dominic; that Dominic was confusing himself when talking in English and in language; when he was getting more confused – he was upset – he was starting to fold him arms, that means he's worried; he (Dominic) didn't want to say something; Carmen was humbugging to talk; Carmen kept saying talk or sit quit, talk or sit quiet – he asked us *what do I do?* Mr Luckan said Dominic tried to say *I don't want to talk;* he was saying that in language; that she kept on humbugging and he was just going to talk to get it over and done with.

22. In re-examination Mr Luckan said Dominic was confused – it was confusing; that her talking in English – him in murin patha – Dominic was confusing himself; but that he was not confused when he made that decision to talk.

23. Constable Curyer gave evidence that he knew Dominic generally in the community and that Dominic had a medium command of English in the community; he was of average understanding; that there was ease of interaction during the record of conversation; that he thought Dominic understood the caution quite well. In cross examination he remembered Dominic said he was tired but that he didn't remember his posture;

Constable Curyer said he thought it a – *grey area* – when a person says they do not wish to speak; he said he still believed there was a right to put the allegation; he said he would be concerned if there was not a faithful translation. In re-examination he said he hadn't formed the view that Dominic was tired; he would have terminated the interview; Constable Curyer said he didn't know whether Dominic was misunderstood but he formed the impression he wanted to talk when he started to. Constable Butcher gave similar evidence in terms that she understood she could put the allegation to a suspect even if they said they did not want to answer questions. Constable Leon Schulz conducted the *s 140* tape; he knows the defendant and thinks he understands English better that the average person in Port Keats.

24. In my view Constable Butcher put a deal of effort into explaining procedures in a style consistent with what is expected under the Anunga Rules. She must have been effective in communicating through John Luckan as this defendant expressed that he did not want to answer questions. She did pursue the matter in any case. While that may not be fatal to a record of conversation when Anunga does not apply, (although even there courts fairly regularly exclude such confessions or excise cross examination), it is hard, in my view to justify inclusion of this record of conversation. This part of the Anunga Rules is expressed strongly. Firstly, it must be remembered that Anunga states:

> " Some Aboriginal people find the standard cautioning quite bewildering, even if they understand that they do not have to answer questions, because, if they do not have to answer questions, then why are the questions being asked ?"

There is then the further matter in guideline 8.

> "If an Aboriginal states he does not wish to answer further questions or any questions the interrogation should not continue."

25. Justice Mildren also emphasised this aspect in *R v Emily Jako, Theresa Marshall and Mavis Robinson* [1999] NTSC 46:

> "Mr Hartnett submitted that Ms Jako's decision to speak was not voluntary. Having indicated he wish, this should have been respected. By putting the allegations to her, and inviting comment, inappropriate pressure was utilised, given her status as a tribal Aboriginal. In his submission the statement was not voluntary; alternatively it should be excluded for breaking guideline eight of the Anunga Guidelines….
>
> The questioning clearly breached guideline eight of the Anunga guidelines, which recognises the particular vulnerability Aboriginal people have to subtle pressure by persons in authority who persist in questioning after the suspect has indicated his or her wish to remain silent: cf Jabarula (1984) 11 A Crim R 132 per Muirhead J at 133. It is the experience of this Court that few Aboriginal people would be able to resist answering questions in circumstances such as these, where the express with of the suspect *is ignored. The record of interview ..is therefor inadmissible."*

26. I am bound by authorities such as these and I cannot see any reason to distinguish this matter on the facts. This record of conversation will be excluded. Dominic Cumaiyi may well be above average in his understanding of English for a person from Wadeye, however, he is still very clearly under the same cultural and linguistic disadvantage that the *Anunga Rules* protect.

Mark Phillip Cumaiyi

27. As there is no transcript of this record of conversation, I have referred to my notes from listening to the tape played in court. On 23 August 2002 Constable Carmen Butcher conducted an interview with Mark Cumaiyi, also present was Constable Wayne Curyer , the interpreter John Lucken and the prisoner's friend Camillus Cumaiyi . The objections to this Record of Conversation are based on lack of voluntariness, in the alternative, it is submitted the court should exclude in the exercise of one of the two discretions.. The particular allegations are that the police caution was misapplied, the defendant did not understand the caution and the defendant's will was overborne by oppressive police questioning.

28. The record of conversation commenced with Constable Butcher asking the defendant if understood why he was at the police station; he was asked about his language and the procedures in relation to taping the record of

conversation were explained as well as discussion of the role of the prisoner's friend. Most of the challenge revolves around the caution and its alleged non-compliance with the *Anunga Rules.* The conversation was interpreted. My notes from the tape reveal the following summary of that matter:

29. Constable Butcher:

> "Anything I'm about to ask you, you do not have to answer if you don't want to. If I ask you a question, you've got two choices. You can choose to sit quiet or you can choose to tell me. Your right to tell me which one of those you want to do. Tell me what your two choices are ?"

(Language – it should be noted here that during the voir dire Mr Luckan told the court what was said in language on the tape)

30. Mr Luckan explained that the defendant said in language *sit quiet – talk.* Then Mr Luckin repeated that. The defendant then gives examples of what a judge can do: *lock me up, bail, yes.*

31. Mr Woodroffe argued that Constable Butcher *does not properly convey that the accused had an inalienable right to say nothing and to put a stop to the interrogation.* Throughout the course of all of the voir dires, it became apparent that a particular style of caution was being used at Pt Keats by police. Mr Woodruffe asserted the view that this style of caution waters down the right to silence and does not comply with *Anunga* .In particular, Mr Woodruffe says the words *talk or sit quiet* are ambiguous and at worst oppressive, for the following reasons: it presumes a continuation of the interrogation; it does not convey to the defendant that he can state to the questioner that he wishes to terminate the interview and not answer further questions; it is impossible to determine whether a person sitting quiet is exercising his or her right to silence or thinking about his response, confused, or not paying attention for example day-dreaming; it makes the whole of the interrogation unfair to the accused; to continue with questioning of a vulnerable defendant in such a situation is likely to lead to

an oppressive line of questioning.:(Defendant's written submissions at paragraph 16)

32. I agree this style of caution is not perfect. It is unclear why it has been adopted at Pt Keats. In my view, in the circumstances of this confession, the style of cautioning although not in total compliance with *Anunga*, still conveys, as a practical matter what the procedure will be and that the person has a choice. Although there may be some dangers, in my view, given the other evidence on the voir dire concerning this defendant, I don't have concerns about voluntariness or unreliability. In this matter I would note the breach but in the exercise of discretion I would admit the record of conversation. I would simply state that if the practice continues, records of interview may well in the future attract exclusion on the grounds Mr Woodroffe has suggested. Here however, the preponderance of evidence suggests a higher level of sophistication in terms of Mark Phillip Cumaiyi's grasp of English and importantly, Mr Luckan says he speaks Murin Patha well; there are no issues concerning the prisoner's friend compared to the other defendant's already considered, Mr Luckan is quite strong in his evidence that this defendant understood his choices. Notwithstanding the breach, I will admit this Record of Conversation.

Anthony Manby

33. The arguments in relation to the admissibility of Mr Manby's record of conversation are very similar to those raised on behalf of Mark Phillip Cumaiyi, namely the potential problems of the Pt Keat's style of cautioning. In my draft reasons I said the following:

> "As with Mark Phillip Cumaiyi's record of conversation, I will note the breach and still proceed to admit the record of conversation. Having reviewed the notes from the tape, I am satisfied this record of conversation is voluntary and there is nothing of substance to persuade me to exercise either of the discretions to exclude. I will simply state that having noted the breach, in the future, this style of administering the caution may result in exclusion. In this case, had it been coupled with other breaches of significance, I may have been persuaded to exclude it. In this record of conversation, Mr Luckan

was both the prisoner's friend and the interpreter, however, I am satisfied it was his choice. The evidence indicates he initially didn't want anyone to sit with him and then asked to have Mr Luckan. Present also were Constables Leon Sculz and Wayne Curyer."

34. My notes indicate the cautioning part of the record of conversation were as follows:

> "I want to talk to you about a motor vehicle and some gun shots being fired. Before I ask you any questions – you don't have to answer anything; if I ask you a question you have a choice, talk or sit quiet.
>
> Tell me what your choices are? If I ask you a question:
>
> I'll talk
>
> Other choice? No
>
> You do, as I explained –
>
> I asked you a question ..I'll talk or – that's your choice, that's your rights
>
> Whats your choices -
>
> Sit quiet….
>
> If you choose to talk to me – your voice will be recorded on these tapes- if tape goes to court, who do you think will listen to that tape?" Magistrate

35. As indicated above, Mr Barlow has asked me to reconsider this decision at the end of the case. He submitted it was evident that cross examination had taken place on the statement of a co-suspect whose record of interview had been rejected. It would now be unfair, according to Mr Barlow, to admit it. The police guidelines recommend cautioning again before a co-suspect's statement is put. I have listened to the tape of the record of conversation again since the conclusion of the hearing. I agree Officer Curyer has put questions to this defendant from two co-suspects records of interview. The questions are put in a open way. Officer Curyer suggests the alternative versions in an understated way. This defendant appears not to be particularly suspect to suggestion and gratuitous concurrence – he readily tells Officer

Curyer that he did not go with the group as suggested. In essence, he sticks to his version. I am not persuaded to exercise my discretion to exclude it. Given the changes in explanation by the suspect and the fact that some of the tape is simply impossible to understand, I am not going to place a great deal of weight on the answers. I note that there is very little in the way of admissions, aside from perhaps that this defendant was on the ute for a short time. Having listened to the caution again and the explanation of police procedures; I am impressed with the efforts made by Officer Curyer to comply with *Anunga* . The tone of the conversation is low key. I would still admit the record of conversation.

Henry Jinjair

36. Similar objections are taken to the admissibility of this record of conversation as those taken on behalf of Anthony Mamby and Mark Phillip Cumaiyi. It primarily involves the Pt Keats style of cautioning. In relation to this defendant I was intending on making a similar ruling as with Anthony Mamby and Mark Philli Cumaiyi, however, on review of my notes of the voir dire and submissions, there is another matter that puts this record of conversation in a different category. In Henry Jinjair's matter Constable Schulz conducted the record of conversation, John Luckan was the interpreter and Kelly Jinjair, (the defendant's father) was the prisoner's friend. The cautioning went something like this:

> "You don't have to answer any of my questions and anything you do say will be recorded on these tapes; you've got two choices – you can say nothing or sit quiet or you can talk to me and your voice will be recorded.
>
> Can you tell me what your choices are? You understand if I ask you a question, you don't have to answer…. Its your choice."

37. This part of the tape was played a number of times at the voir dire hearing and Mr Luckan's evidence was that Henry Jinjair used the Murin Patha word *wudda*, meaning *won't talk*. Mr Luckan explained that the Murin Patha words for I'll talk are *minmarin ordely* but Henry Jinjair used the opposite – *wudda*.

38. After the cautioning there is then discussion on the role of the court and testing his understanding on those.

39. There are varying observations from witnesses about the defendant's degree of comfort and apparent level of understanding.

40. When Mr Luckan was asked whether Henry Jinjair looked confused, he told the court:

> "I don't think he understood – he was putting his head down – he was looking down to the ground, he was shame and shy – he was shy and shame for that police man – he was confused when I was talking "

41. In the circumstances of there being an expression that the person *won't talk* and given the general vulnerability of this defendant and indications that he may not be comfortable with the process and all of this in the backdrop of the style of caution, .I am not satisfied this record of conversation is voluntary. This record of conversation will not be admitted.

Francis Kurungaiyi

42. The objections in relation to this Record of Conversation revolve primarily around the style of the caution. Officer Curyer advised this defendant as follows: ... *so do you understand that if I ask you a question you have the choice to answer the question, you can sit quiet or say I don't want to talk or you can tell me your story about what happened. That's your choice understand?* This was interpreted by Mr Luckan. Mr Luckan gave evidence indicating that it was he (Mr Luckan) who said the English words *talk or be quiet* that were heard on the tape but he also gave evidence that Francis Cumaiyi said the words *talk or sit quiet.* In my view the full caution has not been explained but the essence of the understanding of the choice is evident from the tape of the transcript and from the evidence given by police and Mr Luckin during the voir dire. I am satisfied the confession was voluntary. The alleged breaches of *Anunga Rules* are not substantial enough to satisfy me I should exercise either of the two discretions.

Conclusion

43. One matter that has arisen over and over during the voir dires is the fact that the caution often administered in Wadeye is not the traditional caution. This case has revealed a degree of tension between the need for police to convey difficult concepts to suspects and the need to guard against rendering the caution devoid of meaning. None of the police officers who gave evidence could remember why this particular form of the caution had developed in Wadeye. Submissions were made during the hearing about the potential problems of omitting references to a suspects "right" in the caution. If police had to explain the concept of a "right", that would, in my view, lead to further confusion. On the other hand, merely being told the choices are to *talk or sit quiet* may not convey what is necessary. His Honour Justice Mildren in *Redressing the Imbalance Against Aboriginals in the Criminal Justice System* suggests various ways to put the caution that recognises a middle path through these competing positions. For example, His Honour suggests the following:

> "Question: Australian law says you can speak to me about this trouble. Australian law says you can be quiet. You can sit and not talk. You have to think about this yourself. Now you tell me back, what did I say to you?
>
> Question: Maybe you want to be quiet and not talk about that trouble. That's all right. The magistrate won't make trouble from that. Now you tell me back, what did I say to you?
>
> Question: If you want to be quiet, Australian law says I must finish this talk with you now. Maybe you want to be quiet. Maybe you want to tell me about the trouble, then we talk together. Now, you tell me back, what did I say to you?"

44. The caution being administered at Wadeye could be improved by adopting one of the methods of questioning suggested by His Honour.

45. A further recurring theme in the voir dires was the quality of the interpretation between police and the suspect. The interpreters were very conscientious giving evidence before the Court. It must have been taxing, even exhausting for them to be questioned on their interpretation months

after the event. I appreciate their efforts greatly. I am concerned however that such an experience may result in them not being so keen on interpreting in the future. I hope that's not the case. I am also hopeful that interpreters from remote areas can be given further training about what is likely to happen if they are called as a witness in regard to a matter they have interpreted.

Dated this 1st day of March 2004

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JENNY BLOKLAND
STIPENDIARY MAGISTRATE