CITATION: *Police v Gerard Jawrarla* [2006] NTMC 043

PARTIES:	POLICE
	v
	GERARD JAWRARLA
TITLE OF COURT:	COURT OF SUMMARY JURISDICTION
JURISDICTION:	Criminal
FILE NO(s):	20531778
DELIVERED ON:	16 May 2006
DELIVERED AT:	Darwin
HEARING DATE(s):	3 May 2006
DECISION OF:	DAVID LOADMAN

CATCHWORDS:

Electronic record of interview – Voir dire – objection to Adduction - Anunga Rules - Police General Orders

REPRESENTATION:

Counsel:

Complainant:	Ian McMinn
Defendant:	Payal Saraf

Solicitors:

Complainant:	Summary Prosecutions/DPP
Defendant:	NAAJA

Judgment category classification:	B
Judgment ID number:	[2006] NTMC 043
Number of paragraphs:	28

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20531778

BETWEEN:

POLICE
Complainant

AND:

GERARD JAWRARLA
Defendant

REASONS FOR DECISION

(Delivered 16 May 2006)

Mr David LOADMAN SM:

1. The Defendant before the Court was charged with two offences;

   1. Unlawfully possessed cannabis plant material, a dangerous drug specified in Schedule 2, and the said Gerard JAWRARLA was in possession of the dangerous drug in public in a public place:

      Contrary to Section 9(1) and (2)f (i) of the Misuse of Drugs

      AND FURTHER On the 24 December 2005

      at Maningrida in the Northern Territory of Australia

   2. Unlawful supplied cannabis plant material, a dangerous drug specified in Schedule 2, to another person, namely, Lyn BALABUMA:

      Contrary to Section 5(1) of the Misuse of Drugs Act.

2. The Defendant through Counsel has indicated a willingness to plead to count one, but in relation to count two has pleaded not guilty. The Prosecution

has sought to adduce into evidence an electronic record of interview conducted between Joelene McKeown a police constable stationed at Maningrida. Defence Counsel object to the adduction of the record of interview. The interview was, subject to the objection played in Court. There is now at the Court's behest a transcript of that record of interview.

3. The objection to the adduction to the record of interview is based on two bases namely, That there has been a breach:-

I. of one or more of the relevant rules enunciated in the case of *R v Anunga and others* and *R v Wheeler and others* a decision of the Supreme Court of the Northern Territory reported at 11 ALR 412 ("the Anunga rules") and or

II. of the corresponding provisions to the relevant rules contained in police general order Q2 and or general order Q1.

4. Counsel for the Defendant contends:-

(a) that it is apparent from a reading of the record of interview that it is not established the Defendant understood the meaning and effect of the caution and that the Court ought to conclude that it was not clear that the Defendant understood he had a right to remain silent.

(b)That the absence of a prisoner's friend is the second ground upon which there is non compliance as contended.

(c) That the absence of an interpreter ought to further preclude the adduction of the record of interview.

(d) That in furtherance of the proposition that an interpreter should have been provided and the interview should not have proceeded in the absence of or otherwise than through the medium of an interpreter there are passages that will shortly be referred to which are indicative of a lack of understanding of both the English language and the concepts of the relevant philosophies or as expressed by Counsel the "conceptual

comprehension" of the rights relating to the caution, the prisoner's friend and the interpreter.

5. Relevant firstly to the issue of a prisoner's friend it is contended what passed between Constable McKeown and the Defendant nevertheless constitutes a breach of the Anunga rules and the general orders referred to . The relevant passage appears at page two of a transcript of a record of interview ordered by the Court. The Court also places on record that the tape was played in the presence of the Prosecutor, Defence Counsel, the Defendant and the presiding judicial officer. References will be to the transcript and the first is at page 2;

> "Now I just asked you before if you were happy to sit, just you and me, in this interview. Are you still happy to sit, just you and me, in this interview?...Mmmm.
>
> Pardon?...Yeah.
>
> Are you sure, if you change your mind you let me know and we can get someone else to sit with you, ok?...
>
> Yeah".

6. The relevant Anunga rule states the following;

> (2) When an Aboriginal is being interrogated it is desirable where practicable that a "Prisoner's friend" (who may also be the interpreter) be present. The "Prisoner's friend" should be someone in whom the Aboriginal has apparent confidence. It may be a mission or settlement superintendent or a member of the staff of one of these institutions who knows and is known by the Aboriginal. He may be a station owner, manager or overseer or an officer from the Department of Aboriginal Affairs. The combinations of persons and situations are variable and the categories of persons I have mentioned are not exclusive. The important thing is that "Prisoner's friend" be someone in whom the Aboriginal has confidence, by whom he will feel supported.

7. General order Q2 has several provisions related to the issue of the Prisoner's friend, but in broad compass they relate to requirements concerning the

actual involvement of the Prisoner's friend once such a person has been located and introduced into the exercise.

8. Section 140 of the *Police Administration Act* is canvassed in general order Q1 which order relevantly requires the person taken into custody to be given the opportunity to have a relative, friend or someone who is likely to take an interest in the person's welfare informed of the detention with the stated exceptions which do not apply in this matter. In the decision *Dumoo v Garner* [(1998) 143 FLR 245] ("Dumoo") this was the subject of commentary by his Honour Mr Justice Kearney. In respect of the interview which was the subject of his Honour's decision Police Officer Lyndsay had addressed the Defendant in the following terms;

> "Ok. Basil – ah- before we start with this talk I asked you if you wanted someone to sit with you. Is that right?
>
> Dumoo: (Inaudible.)
>
> Lyndsay: And what did you tell me?
>
> Dumoo: No
>
> Lyndsay: Are you happy to sit here by yourself?
>
> Dumoo: Yes

9. His Honour said;

> "The matter of having a Prisoner's friend "present" was never explicitly raised by Lyndsay with the Appellant in those terms; he asked the Appellant at (246) if he "wanted someone to sit with him" and he said that he did not. There is nothing to suggest that the role of the Prisoner's friend was explained to the Appellant as required by Police General Order Q2.7.4.1. (Which this Court assumes was still existent at the time of this interview with this Defendant.)"

10. Police General Order Q2.5.2 is quoted by his Honour providing where practicable, "a Prisoners friend" should be present. This may be the same

person as the interpreter but the friend should be someone with whom the suspect has confidence, and by whom the suspect will feel supported.

11. His Honour then said "I consider that the term "Prisoner's friend" is intended to serve a useful purpose at a Police interview and is not simply a piece of "appropriate furniture" in the room, as Muirhead J graphically put it in "*Rockman v Stevens*"(1981) 1 ABOR LawBull 6."

12. In an article (1997) 21 CRIM LJ 7, Mildren J was the author of an article "Redressing the balance Against Aborginals in the Criminal Justice System" ("Mildren's article") which commences at page seven and ends at page 22 of that authority. Extracted are the following comments of his Honour Mr Justice Mildren;

> "The accused should be told that the function of the friend is to act in an advisory role to the accused and to assist him or her to understand the matters which the Police wish to speak about, that preferably the friend should be someone that is able to speak the same language, and someone who is also reasonably fluent in English. The suspect should be told that the Prisoner's friend should be someone that he or she trusts and has confidence in, and will feel supported by. The suspect should also be told that he or she will be afforded the chance to speak privately to the friend before any formal record of interview takes place, that the suspect should choose someone who is aware of the rights of a suspect and the rights and duties of the Police when interviewing suspects, that the friend should be someone independent of the Police, someone not likely to be afraid of the Police and someone not involved in the investigation either as a suspect or as a witness (citation is then given) clearly this explanation should be recorded in the most common Aboriginal languages as should the explanation of the friend's role by the Police to the friend…"

13. Clearly that explanation was not given by Constable McKeown. The passage quoted in the record of interview speaks for itself.

14. The next issue raised by Counsel for the Defendant concerned the absence of any interpreter at the interview.

15. The relevant Anunga rule is in the following terms;

(1) When an Aboriginal person is being interrogated as a suspect, unless he is as fluent in English as the average white man of English descent, an interpreter able to interpret in and from the Aboriginal person's should be present, and his assistant should be utilised whenever is necessary to ensure complete and mutual understanding.

16. The concomitant provision contained in general order Q2 provides:

(2) **"Persons entitled to the Benefit of the Anunga Guidelines.**

The Guidelines apply to any person being questioned as a suspect, if that person is not as fluent as the average white person of English descent…"

(3) **The Guidelines**

3.1.1Not withstanding that the suspect must speak some English, an interpreter should be present, and the interpreter's assistance utilised whenever necessary, in order to ensure complete and mutual understanding.

17. The relevant exchanges which touch on the issue as to the Defendant's linguistic ability or fluency in the English language (although there are other examples which are less significant):- are as follows;

"And what school did you go to Gerard?...Oh, I been at school at post primary when I was – when school start up here.

And how high did you go in school? Post Primary.

And have you done any study or any courses,---No, no.

And do you read at all Gerard? Sometimes I read, sometimes I don't.

Is there something on that ticket that you can read to me?...Just my name and this Darwin…

Do you understand me ok?...Sometimes I understand.

How did it make you feel bringing that ganga?....Um, I was just, you know feeling myself to bring…

> Okay, Okay. And have you answered my questions today of your free will? No (this is part of an exchange which will be the subject of further commentary in respect of the issue of voluntariness).

18. Clearly it was never within contemplation and certainly no utterance was made concerning the presence of an interpreter. There was no evidence given by Constable McKeown as to whether an interpreter was available or not and there was certainly no offer to the Defendant concerning the provision of an interpreter.

19. The Court is not satisfied that this Defendant could ever be said to have been as "fluent in English as the average white man of English descent." After the Court listened to the record of interview and read the transcript it clearly concluded the Defendant was not a person who reached that standard, not even remotely. At least in Dumoo there was an offer for Perdjert an Aboriginal Community Police Officer ("ACPO") to interpret in the Defendant's language. "ACPO" Perdjert certainly has a counterpart in Ben Pascoe at Maningrida, but not even that was the subject of an offer and had it been, in accordance with the decision in Dumoo it would not have been sufficient. This Court finds there is a clear breach of the first rule of the Anunga rules and the concomitant provision of general order Q2. If as was found in Dumoo the offer to make Perdjert available and to use him would have been action fraught with peril for the Prosecution,not to offer the services of an interpreter at all must be and is an express breach of Anunga rule number 1.

20. The Court then turns to the third issue raised by Defence Counsel namely to shorthand the issue "The Caution".

21. In that respect the relevant Anunga rule is (3) which is in the following terms;

> (4) Great care should be taken in administering the caution when it is appropriate to do so. It is simply not adequate to administer it in the usual terms and say, "Do you understand that?".. "Do you

understand, you do not have to answer questions?". Interrogating Police Officers, having explained the caution in simple terms, should ask the Aboriginal to tell them what is meant by the caution, phrase by phrase, and should not proceed with their interrogation until it is clear the Aboriginal has apparent understanding of his right to remain silent. Most experienced Police Officers in the Territory already do this. The problem of the caution is a difficult one but the presence of a "Prisoner's friend" or interpreter and adequate and simple questioning about the caution should go a long way to solving it.

In this general order Q2 provides as follows;

"3.1.3 Great care should be taken in administering the caution when the stage has been reached that it is appropriate to do so. The suspect should be asked to explain what is meant by the caution, phrase by phrase. Questioning should not proceed until it is apparent that the suspect understands the right to remain silent."

22. The relevant "caution" before the interview, taken from the transcript, whichs turn on this issue is as follows;

"…But before we do that I need to make sure that you understand your right as a person, ok, very important, alright. Now first of all do you know we have three cassette tapes in this machine?...mmm.

……

That means it's taping our voices so everything you say and everything that I say is being taped on those three tapes. Do you understand that?....Yep.

And when we finish the interview, the talking, you get one tape, I get one tape and one tape is for the Court for the Magistrate. Do you know what a magistrate is?...Yeah.

What's a magistrate?....Uh, a judge.

……

Also I need to make sure, this is really important Gerard, this is the important bit, your rights. That you understand you don't have to talk to me about this ganga, you don't have to say anything, that's ok, alright? If you do say anything or say anything about this ganga

> it's going to get recorded, like I said, and then the judge, the magistrate might listen to it. Okay…..Yes.
>
> So you don't need to say anything to me or to any other police officer, alright, but if you do, if you do answer my questions it's going to be recorded and it will be evidence. Do you know what evidence is?...Mmmm.
>
> Evidence is like when something goes to Court, it's the proof, you can prove it, do you know what I mean?....Yeah.
>
> So this will be evidence on this tape, so that's why it's okay for you to stay quiet if you just don't want to talk about that ganga, that's okay, alright?....Mmmm.
>
> So if I ask you a question about this ganga we found this morning, do you have to answer my question?....Nuh.
>
> That's right? And what will you do if I ask you a question and you don't want to answer it?....I won't say anything.

23. It is obviously quite plain that whether or not the caution was ever properly explained in simple terms to qualify in complying with the relevant Police General Order and the relevant Anunga rule there was never a request for the Defendant to tell Constable McKeown "what is meant by the caution, phrase by phrase." Comparison with those questions relating to this issue in Dumoo show quite remarkable similarity in the process as his Honour Mr Justice Kearney said in Dumoo

> "I consider it is the fundamental purpose of Police General Order Q2.53 and Anunga Guideline (3). For a police officer to continue an interrogation in the absence of such an objectively established "apparent understanding" is to run the risk that admissions there by obtained will be excluded as was made clear in *R v Anunga* at (415). Whilst the relevant police general orders may or may not be in the same terms as they were the time of the decision in *R v Anunga* was handed down does not matter in this Court's perception. It was always the case in any event that was simply an ancillary matter and the question of whether there is a breach of the Anunga rules as postulated in the relevant full court decision is the only criterion that any court ought to be concerned with."

24. In Mildren's Article he deals quite clearly with the problems concerning the third rule and his commentary in relation to that issue and the practice to be adopted to avoid contravening the rule is lucidly and simply set out. It is a matter of some amazement to the Court that the Police do not embrace in compliance with the general order and the Anunga rules the specific resolution advocated by his Honour. The relevant commentary is in the following terms:-

> "The third rule, which deals with the administration of the caution, is the one which causes the police the most practical difficulty. Notwithstanding that the rule states that "it is simply not adequate to administer it in the usual terms and say 'Do you understand that?" , police officers invariably create difficulties for themselves which could be avoided if this rule was strictly observed.
>
> The main difficulties seem to be as follows:
>
> 1. It is common practice for the police to break up the caution, usually into three segments, and at the end of each segment to ask the suspect "Do you understand that?", to which the subject will usually reply "yes". In most cases the value of that answer is nil. It would be better to avoid the question "Do you understand that?" completely, and instead to ask the suspect to repeat what has just been said in his or her own words.
>
> 2. There is a problem with the question "you are not obliged to answer any questions" which is often explained by police as "you do not have to answer any questions". Most Aboriginals have difficulty with the expression "have to" and will frequently answer "yes" if asked the question "Do you have to answer my questions?" The reason for this may be because the suspect uses the expression "have to" to mean "want to". Alternatively, the suspect may be answering the question "yes" out of politeness, or "gratuitous concurrence"[9] or may be using the expression "have to" correctly. There may be cultural reasons why the suspect "has to" answer the question; pressure may have been brought to bear by relatives who do not wish to suffer "payback" if he or she is not dealt with by the police. It would be better to avoid the expression "have to" altogether. A similar problem arises with "forced to" The expression "make you" seems to create few difficulties. It would also be preferable to avoid

[9] See D Eadesm *Aboriginal English and the Law* (Continuing Legal Education Department, Queensland Law Society Inc, 1992), p53.

questions starting with parts of the verb " to be". Many Aboriginals do not frame questions this way, but ask questions by making statements using rising intonation or using "eh" or "hey" at the end of the sentence,[10] or by sentences beginning with "wh-" words (who, what, where, etc).

3. There is also a difficulty in the order in which the ideas and concepts are contained in the caution. Usually the first idea conveyed is that the suspect does not have to answer any questions. If a suspect is told that he or she can remain silent an din fact does so when invited to repeat back the caution, it may not be clear whether the suspect is exercising a right of silence or whether he or she is simply unable to repeat the caution. It is inherently contradictory to tell a suspect that he or she does not have to answer your questions and then insist upon an answer to the very question which the suspect has been told he or she does not have to answer. This could be avoided by rearranging the ideas contained in the caution in a logical way.

   In most cases when a record of interview is rejected by the court, it is because the trial judge is not satisfied that the suspect understood the right of silence or alternatively the trial judge forms the view that the suspect was attempting to exercise it by saying nothing but eventually made a confession due to police insistence to answer their questions. In most cases there is a reluctance by police to use as an interpreter, to explain the caution. Aboriginal suspects are often shy and it takes a fair while for them to gain the confidence needed to answer questions except in monosyllabic "yes" or "no" answers. The use of the friend as an interpreter could enhance understanding about the meaning of the caution whenever these difficulties arise. Police need more training and practice in dealing with this difficult part of an interview.

   Clearly the preferred method must be to use properly trained interpreters whenever possible. As even partly trained interpreters are not always available, I suggest that the caution be translated into the common languages spoken, and tape recordings made available to every police station, so that the caution will be understood, if it is necessary to proceed to question the suspect in English.

   I doubt if there is anything more difficult than trying to explain the caution in simple English. Obviously there is no easy solution to this. Much will depend upon the circumstances of the individual case. If the caution is to be administered in English to an Aboriginal

[10] Ibid, pp 33-43.

who speaks English as a second language, I suggest that something like this might be effective:

> "Question: I have been told about that trouble last night about Amy Smith. Amy says she was hit on the head with a nulla nulla. I want to talk to you about that trouble. Now you tell me back, what do I want to talk you about?
>
> Question: When I talk to you and you talk to me, your words and my words go onto this tape, and this video. Now you tell me back, what did I say to you?
>
> Question: Maybe later I will play this tape to the magistrate. The magistrate will listen to your words and then maybe he will send you to gaol. Maybe the magistrate will listen to your words and he will be happy with your story, I don't know what he will think. Now you tell me back, what did I say to you?
>
> 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?
>
> Question: What do you want to do now? Do you want to talk with me about the trouble or do you want to stop now and not talk. You tell me."[11]

25. Quite why a clear breach such as this Court finds has occurred is not ipso facto intrinsically sufficient to reject the tendering of the record of interview is at least in the mind of this Court a matter for some conjecture. In the

[11] I am very grateful for the assistance of Mr Michael Cooke, School of Community Studies, Batchelor College, for his assistance in preparing this form of questioning.

event clearly as indicated in Dumoo the Australian Courts seem to feel inclined to go on and justify the exclusion where there is a breach by a one or more of the legal rules which apply, by philosophies of voluntariness, unfairness the "public policy" discretion and the overall discretion. Of course there is now introduced into the arena a further discretionary exclusionary philosophy namely that referred to as the "overall discretion" referred to in *R v Swaffield* the citation of which is given in Dumoo.

26. It seems to this Court there is little purpose in simply traversing the conclusions of his Honour in Dumoo as that would serve simply to repeat the law without making any novel finding in relation to those relevant issues.

27. In summary whether as a consequence of not knowing at the time of admissions that he had the right to remain silent and thus the Defendant's responses were involuntary or whether they were unfair or whether public or overall policy justifies their exclusion, in a practical sense does not matter, since one or more if not all of those reasons to exclude the confession exist in this Court's finding in relation to this matter.

28. For reason of the non compliance with the Anunga rules and or Police general orders specified in respect of those areas of non compliance the adduction into evidence of the electronic record of interview by Constable McKeown is refused.

Dated: 9 May 2006

DAVID LOADMAN
STIPENDIARY MAGISTRATE