

CITATION: *Police v DM & Police v SKL* [2008] NTMC 067

PARTIES: DAVID STEVEN MOORE

v

DM

DAVID STEVEN MOORE

v

SKL

TITLE OF COURT: YOUTH JUSTICE COURT

JURISDICTION: Criminal

FILE NO(s): 20809826 and 20809501

DELIVERED ON: 16 October 2008 (in Chambers)

DELIVERED AT: Darwin

HEARING DATE(s): 21-24 July 2008 and 1-4 September 2008

JUDGMENT OF: Ms Sue Oliver SM

CATCHWORDS:

CRIMINAL LAW – Evidence – Admissibility of Records of Interviews - Support Person
– Legal Advice and Representation

Youth Justice Act ss15, 18, 22 and 35, Division 2 of Part 2 “Police powers and obligations”.

REPRESENTATION:

Counsel:

Informant: Mr Usher and Ms Nobbs
Defendant: Mr Powell for DM
Mr Johnson for SKL

Solicitors:

Informant: ODPP
Defendants: NTLAC

Judgment category classification: A
Judgment ID number: [2008] NTMC 067
Number of paragraphs: 66

IN THE YOUTH JUSTICE COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

Nos 20809826, 20809501

[2008] NTMC 067

BETWEEN:

DAVID STEVEN MOORE
Informant

AND:

DM
1st Defendant
&
SKL
2nd Defendant

REASONS FOR DECISION

(Delivered 16 October 2008)

Ms Sue Oliver SM:

1. The defendants are two of seven youths charged with various violence offences whose matters have been heard together. The offences allegedly arise out of an incident at the Hibiscus Tavern and Shopping Centre car park on 29 March 2008, in which a large group of youths and young adults are alleged to have assaulted a group of older patrons from the Tavern.
2. The admissibility of recorded interviews by Police with the defendants SKL and DM was challenged and evidence on the *voire dire* given in respect of those challenges. DM gave two interviews with Police, both taking place on the same day prior to DM being charged, while SKL participated only in a single interview. In the course of the hearing I ruled each of the interviews as inadmissible. I now provide my reasons for those rulings.

3. The prosecution must show on the balance of probabilities that the statements were made voluntarily. Voluntary does not mean volunteered, it means made in the exercise of a free choice to speak or be silent (*R v Lee* (1950) 82 CLR 133 at 149). Essentially the rule expresses and protects the privilege against self incrimination. If voluntariness is established then the onus shifts to the defence to show exclusion is required on grounds of unfairness or within the broader public policy discretion. Unfairness requires a showing, not that the evidence was unfairly obtained, but that it would be unfair to use the evidence against the defendant. The fairness discretion focuses on whether the impropriety has affected the particular accused person. It is a question of whether a fair trial process can be based on evidence improperly or unlawfully obtained because a statement obtained in those circumstances may not be reliable. (*R v Swaffield; R v Pavic* (1998) 192 CLR 159 at 189).
4. In circumstances where unfairness is said to arise out of procedural impropriety, i.e. that there has been unlawfulness or improper conduct associated with obtaining the evidence or the evidence arises out of that conduct, there is an overlap with the discretion commonly referred to as the *Bunning v Cross* discretion to exclude the evidence on public policy grounds, that is whether in order to preserve the administration of justice as a whole, the evidence should be excluded. Exercise of the discretion may be undertaken not as a punishment for the impropriety but so that Courts are not seen to condone improper or unlawful conduct by law enforcement officers. The focus of this discretion is on the public interest not on the individual defendant (*R v Swaffield; R v Pavic* above).
5. Each defendant is 17 years of age although SKL was 16 at the time of the alleged offences and interview. The *Youth Justice Act* has application to each of them.

6. In my view the following issues are raised, although in different ways, with respect to each of the defendants. These issues primarily concern compliance with the provisions of the *Youth Justice Act* that deal with the apprehension of youths with, in particular:

- The suitability of the “support person” who attended on the interviews and/or conduct in relation to ensuring that person fulfilled the role of support person.
- Compliance with the requirement that a youth must be advised of the ability to access legal advice and representation.
- Whether it was appropriate to hold the youths at the conclusion of the interviews to charge them rather than to release and proceed by way of summons?
- Whether in general terms each interview was conducted in a fair and appropriate manner given the age and background of the defendants?

In relation to DM there is an additional issue:

- Whether an inducement was held out to him by Police at the conclusion of his first interview as a result of which he gave a second interview in which some confession of involvement in the fracas at Hibiscus was made.

7. Before considering the interviews themselves, I turn to the relevant provisions of the *Youth Justice Act*.

The requirement for a “support person”

8. Section 18 of the Act deals with the interview of a youth by a Police Officer. A Police Officer must not interview a youth in respect of an offence or cause a youth to do anything in connection with the investigation

of an offence, unless a “support person” is present while the Officer interviews the youth or does the act (s18(2)). Support persons are also required for any search of a youth. Section 35 provides that a support person 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.

9. A Police Officer, a Probation Officer or a person employed at a Detention Centre cannot be a support person, unless they are there in their capacity as a responsible adult. Another youth is disqualified from being a support person. A “responsible adult” is defined in s 5 as 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.
10. In Ligertwood, *Australian Evidence* (2004, 4th Edition) at page 661, following discussion of statutory provisions and Police guidelines requiring the presence of a third person at an interview by Police, the learned author suggests that the presence of a third person at an interrogation serves two purposes. First it guards against Police impropriety by ensuring independent testimony of what occurred at the interrogation. Secondly, it gives disadvantaged persons access to advice from an independent and responsible third person before answering Police questions. The author says that given that independent evidence of what transpired during an interview can now be provided by visual and audio recording, it is arguable that it is the latter objective that is of paramount importance.
11. In *R v Warren* [1982] 2 NSWLR 360 at 367 the Court of Criminal Appeal suggested, with respect to a provision similar to s 18 that required

interviews only be conducted in the presence of certain adults, that the purpose of the section was to avoid the considerable disadvantage at which a person under 18 could be, or feel to be, if alone in a Police Station being questioned by mature men. In *R v Cotton* (1990) 19 NSWLR 593 at 595 Hunt J accepted the view of Roden J in *R v Williams* (unreported 9 August 1982) that such a provision was seen as a protection of an accused who was under 18 years against himself or herself rather than against any impropriety on the part of the Police. As I understand these authorities, provisions of this nature seek to ensure that the young person understands and can exercise the privilege against self incrimination and is not overborne in the interview process. In my view, the same purpose is apparent in s 18 of the *Youth Justice Act*.

12. The Act distinguishes between a “responsible adult” and a “support person” and their respective roles. It is a “support person” that is required to be present at an interview. In accordance with s 35, a “responsible adult” can be a “support person”, however it does not follow that the requirements of s 18(2) will automatically or always be met if there is some circumstance about the responsible adult which would make him or her inconsistent with, or unsuitable for, the role of support person for the youth in an interview. If for example, a “responsible adult” lacked sufficient command of English to be able to properly assist the young person or to understand the interview process or questions or if they did not understand the purpose of their presence and role (as explained at [10] and [11]) above, then the requirements of s 18 will not in my view have been met.

Part 2, Division 2 Youth Justice Act – Police Powers and Obligations

13. Part 2 of the *Youth Justice Act* deals with the apprehension and remand of youths. Division 2 of Part 2 is entitled “Police powers and obligations”. Section 15 deals with explanations to be made by Police Officers. Where an Officer is required to inform a youth of any matter in relation to an

investigation of an offence, the explanation must be made in a language and manner the youth is likely to understand, having regard to the youth's age, maturity, cultural background and English language skills (s 15(1)).

14. In my view the clear purpose of this provision is to ensure that Police involvement with a youth, including an interview with a youth, will be conducted in a fair way given the youth's background. What is required will vary according to the individual circumstances of the youth.

Access to Legal Advice and Representation

15. Section 15(2) provides that 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 ability to access legal advice and representation. Failure to comply with that section does not of itself render any evidence obtained inadmissible.
16. Section 16 provides that the arrest of a youth may be dealt with by general orders issued under the *Police Administration Act*. Although not tendered, evidence lead in relation to the guidelines was that they required that where a youth is believed to be Aboriginal, that the appropriate legal aid service should be contacted.

S 22 Youth Justice Act - Charge to be by summons except in certain cases

17. Section 22 of the *Youth Justice Act* provides that charges are to proceed by way of summons except in the circumstances set out in that section, in which case the youth may be charged at a Police Station. Two circumstances only apply. There must be a belief by an Officer on reasonable grounds that, first, the youth will not appear in Court to answer a summons in relation to the offence or secondly, that releasing the youth from custody will be accompanied by a substantial risk of a continuation or repetition of the offence or another offence, a loss or destruction of evidence

relating to the offence or of harm to the youth. These are the only circumstances in which charging at the Police Station may occur.

18. In my view the provision is aimed at ensuring that a youth is only to be detained for the shortest practical period at a Police Station in relation to investigation of a matter and then released to their parent or guardian except in the circumstances set out in s 22 which would justify a decision to hold, charge and then consider the question of bail. That view is consistent with the principle set out in s 4 of the Act that a youth should only be kept in custody for an offence (whether **on arrest**, in remand or under sentence) as a last resort and for the shortest appropriate period of time (my emphasis).

SKL

19. An interview was conducted with SKL on 4 April 2008 at 6.12pm. SKL was 16 years of age at that time. No admissions were made in relation to the offences which are alleged to have been committed by him. He denied being present when the alleged assaults took place. The Prosecution said that it would show that this assertion was untrue and that an adverse inference as to consciousness of guilt could and should therefore be drawn against him. The defendant now admits that he was present at the Hibiscus Tavern.
20. The two Police Officers who interviewed the defendant gave evidence, as did Mr Harold “Rod” Leedie, who is the defendant’s uncle and who was present as the “support person” for the defendant at his interview.

Background to the Interview – Apprehension of SKL

21. There was some variation in the evidence of the two Police Officers as to what occurred in relation to the arrest of the defendant. Constable Kennedy said that it was at Casuarina Police Station that SKL was told that he was under arrest. A tape recording confirming this was played and tendered. On the other hand, Constable McGrath’s evidence was that SKL was arrested at another young man’s house and that SKL’s mother was in the vicinity at the

time. Both SKL and the other young man were taken to the Police Station although the latter was not arrested. Constable McGrath's evidence was really put, it seems to me, on the basis that that is what would have happened, as opposed to his direct recollection of the detail of an arrest. Constable McGrath said Mrs KL **would** have been told that SKL had been arrested and was going to be interviewed and that he would need a parent or guardian present for the interview. He said he noted she was going to attend, but had to go home first. Constable Kennedy was unable to confirm what conversations were or were not had with Mrs KL at Justin Baker's house.

22. I am inclined to the view that Constable Kennedy's recollection of the timing of SKL's arrest is the more reliable account of when SKL was told he was under arrest. I am not suggesting that Constable McGrath was not telling the truth; his recollection is based on what he believed was said rather than directly having said particular things. My view is supported by the fact that no-one arrived at the station to support SKL until a phone call was made by Constable McGrath to Mrs KL, apparently after SKL was told he was under arrest by Constable Kennedy. Mrs SKL then contacted SKL's uncle and asked him to go down, as he said, "to represent SKL while he is being interviewed".

Mr Leedie as "support person" and conduct of the interview

23. In my view, there is nothing wrong with Mr Leedie in a personal sense as a support person. Mr Leedie is a forthright gentleman who undoubtedly had his nephew's best interests at heart. Mr Leedie was told during the course of the interview that he was there "in a support role for SKL". It is clear that the Officers viewed him as fulfilling the need for a "support person" in order to comply with the Act.
24. As mentioned previously, s 35 provides for four categories of persons who may be a "support person", including a person who is a "responsible adult".

Mr Leedie does not meet the definition of a “responsible adult” in the *Youth Justice Act*. There was no direct evidence that he exercises parental responsibility for SKL, although he lives with the family and might well undertake that role. He was not asked if that was the case. He might also qualify as a support person as a person nominated by the youth (s 35(1)(b)), but no question was asked at the commencement of the interview nor is there any evidence that SKL was asked whether he wanted or was happy to have his uncle present. No objection has been taken on this basis and I will proceed on the basis that SKL was prepared and happy to have his uncle present in that role. However, the omission to confirm that with SKL is indicative of a general failure to turn minds to the requirements of the *Youth Justice Act*.

25. SKL had been at the Police Station for something in the order of two hours by the time Mr Leedie arrived. Mr Leedie was taken straight to the interview room where SKL was seated. He was not given an opportunity to speak separately and alone to SKL before the recorded interview began. The interview actually begins with Mr Leedie asking:

“Can I – um – advise him on some of his – if he – for his answers?”

Constable Kennedy then responds “what – what I’ll do is I’ll explain your role of – of ...”. The interview progresses with Mr Leedie asking various questions regarding whether SKL is going to be charged or interviewed and asks what the difference is between those things. During most of this, Constable Kennedy interrupts and speaks over the top of Mr Leedie. She does not do so in any aggressive way, in fact her tone is friendly in nature, nevertheless Mr Leedie is consistently talked over and his questions not given proper consideration.

26. In my view, the Constables were anxious to get through the interview as a procedural step prior to charging SKL. They did not properly turn their minds to the role that Mr Leedie was meant to take as a support person nor

did they give him a chance to properly fulfil that role. Rather it seems that they considered that they just needed an adult there to comply with the Act and once Mr Leedie arrived, they simply got on with the interview as fast as they could. In fairness to them, SKL had by this time been held for a considerable period and no doubt they were anxious to complete matters as soon as possible. However, if Mr Leedie was to fulfil his role as support person, he should have been given a short opportunity to speak alone with SKL, both to ascertain what had happened during the time SKL was at the station alone and to provide him with any advice and support that he might have considered necessary.

27. As Mr Johnson put to me, there is no doubt that the Officers had already decided to charge the defendant. They already had the information they felt they needed to lay charges, SKL made no admissions and nothing further was obtained in the interview that would assist the laying or defining of charges. At its conclusion, he was taken to the Darwin Watch House where he was charged. The evidence of the Constables was that the decision to charge was made because of the seriousness of the offence. This is not a consideration under s 22 of the *Youth Justice Act* and the Officers each agreed in their evidence that none of the criteria in that section was applicable in SKL's case. I conclude that the Officers did not turn their minds to the requirements of s 22, rather there seems to have been a general decision made in the conduct of the investigation overall, that all matters were to proceed by way of charging at the Station.
28. I do not think that issue can be taken with a decision to arrest and then interview a young person suspected of committing an offence, provided that the provisions of the *Youth Justice Act* and any Police guidelines issued with respect to the arrest and interview of young offenders have been complied with. Non-compliance with the provisions of s 22 of the *Youth Justice Act*, requiring proceeding by way of summons rather than charge except in the circumstances that are provided in that section, will not necessarily affect

the admissibility of a recorded interview. However, it may, in an individual case, however form part of evidence of an overall disregard of the procedures and law in relation to the apprehension and interrogation of youthful offenders that is required by the *Youth Justice Act* and form part of a consideration of the exercise of the public policy discretion to exclude evidence.

Legal Advice and Representation

29. A question arises with respect to SKL being advised of his right to access legal advice and representation. The transcript provided with the EROI records this exchange towards the beginning of the interview:

KENNEDY: Yep...

LEEDIE: I've advised him ...

KENNEDY: ...no worries.

LEEDIE: ...to say nothing...

KENNEDY: Okay the time is...

LEEDIE: until he has seen a lawyer

KENNEDY: is 12 minutes past 6 on Friday the 4th of April
2008

30. The DVD shows SKL to look at Mr Leedie. Constable Kennedy shows no appearance of hearing what Mr Leedie said, because, as the transcript indicates, she is talking over the top of him whilst he is saying this.
31. It is actually difficult to distinguish, in hearing the DVD, that the words transcribed are the words spoken by Mr Leedie (i.e. "I've advised him to say nothing until he has seen a lawyer"). What is transcribed is not consistent with what occurred – Mr Leedie could not have given SKL advice not to say anything until he had seen a lawyer because he had not had any opportunity to speak to SKL. Mr Leedie's evidence was that he said "Does he need a lawyer?" Whatever was the exact form of the words, there is no doubt that in some form, the question of legal advice or the obtaining a lawyer was

raised by Mr Leedie and either not heard or responded to by the Officers conducting the interview.

32. The Officers agreed in their evidence that they had not advised SKL in accordance with s 15 of the *Youth Justice Act* that he could access legal advice and representation. Nor was the compliance with the guidelines issued by the Commissioner of Police with regard to contacting the appropriate Aboriginal Legal Aid Service. Constable Kennedy agreed she believed SKL was Aboriginal. There was a period of around two hours that SKL was held in custody at the Police Station when this advice could easily have been provided to him. SKL was taken to the Station during the afternoon when the local North Australian Aboriginal Legal Aid Office would have been staffed and contact made.
33. The failure to comply with s 15(2) does not of itself render a subsequent interview inadmissible (s 15(3)). However, in my view this matter can be distinguished from a case where there has been a simple omission to ensure that a young person is aware of their ability to access legal advice and representation and no other issue in relation to the interview process arises. Here, Mr Leedie asked if he could provide advice to SKL and, I am satisfied that in some form, he raised the question of obtaining legal advice. If this was heard by one or other of the Constables (and Constable McGrath conceded that he must of heard Mr Leedie say that), then it was incumbent on them at that point to comply with s 15 of the *Youth Justice Act* or at the least, terminate the interview to give Mr Leedie, as support person, an opportunity to explain to SKL his ability to obtain advice.
34. Alternatively, if the Officers did not hear what Mr Leedie said, then in my view, that goes to the aspect of whether the interview was being conducted in a fair and appropriate manner, giving time and consideration to the support person to ensure that he understood his role and allowing him an opportunity to speak with the youth prior to the interview. If the questions

of a support person are not being listened to or responded to by Police, then the young person is unlikely to have confidence in that person's ability to support him or her. As I have said, the rationale for a support person goes beyond simply having an adult person present, the role of the support person is to ensure that the young person is aware of the privilege against self incrimination and can exercise it.

Conclusion

35. I am satisfied by reason of the totality of the matters that I have mentioned that little, if any regard, was had to the provisions of the *Youth Justice Act* with regard to the apprehension and interview of SKL. There was a failure to comply with provisions (s 15 (access to legal advice), s 16 (compliance with Police guidelines as to contacting legal aid) or s 22 (ignoring the criteria for the laying of charges as opposed to proceeding by way of summons). The role and function of the "support person" was not properly considered and Mr Leedie was not given any proper opportunity to fulfil that role. In my view, this is a matter in which consideration of the exercise of the public policy discretion arises.
36. The exercise of the discretion involves a weighing exercise of the need to disapprove of impropriety, against the interests of justice in bringing a guilty person to account. Here there was not just a simple failure to observe proper procedures, but a failure to comply with a number of legislative provisions. The *Youth Justice Act* has, as an object, provision for how a youth who has committed, or is alleged to have committed an offence is to be dealt with (s 4(c)). These provisions, separate and distinct from those governing the apprehension and interrogation of adults are, as authorities suggest, designed to recognise and protect the greater vulnerability that young persons may have over adults in similar situations.
37. The interview statement makes no admission to any offence. It has been conceded that SKL was present at the scene of the assaults. At its highest,

the statement **might** be used to show a consciousness of guilt but that would depend on the strength of other evidence against him and the exclusion of any other inference. Balancing these matters, I have decided that the extent of non compliance with the *Youth Justice Act* is such that the Youth Justice Court cannot be seen to condone what was almost a total disregard for the provisions to which I have referred and to their purpose with respect to the presence of a support person as required. The electronic record of interview with SKL will not be admitted into evidence.

DM

38. DM is 17 years of age and was 17 at the date of interview. Two records of interview were conducted with him on the same day. The first commenced at 9.03am at the Casuarina Police Station and concluded at 9.50am and the second at 1.20pm at the Darwin Local Police Office concluding at 1.42pm. DM's mother was present as "support person" at both interviews although she had left him at the respective Police Stations for some time between the first and second interviews. In the first interview DM made no admissions or confessions of guilt, but provided an alibi for his whereabouts (at home on chat sites on the computer) at the time of the alleged offences. In the second interview, he made an admission both to being present and to "hitting" one of the victims of the alleged assault, although there is variation in his answers as to whether there was contact with the victim by the "hit".
39. Evidence on the *voire dire* was given by the interviewing Officers, Detective Senior Constable Hodge and Constable Luke McAuley. Constable McAuley conducted the first interview and Detective Hodge the second. DM's mother gave evidence as did DM. Objection is taken as to the admissibility of the records of interview both on grounds of voluntariness and fairness.

The requirement for a “support person”

40. In my view a question arises as to the suitability of DM’s mother as a “support person”. DM’s mother is Indonesian by birth, as is DM. She has been in Australia five years and that is how long she has been speaking English. DM arrived in Australia about a year after his mother. It was obvious from hearing her give evidence that she does not have a full or fluent command of the English language. She did not know what the words “incriminating” and ‘alibi” meant. When asked by the prosecution whether she had any difficulty understanding what the Police Officers were asking DM in the two records of interview, she said “Yeah”. When asked what was that difficulty, she said:

“Because Police asking [DM] question, I didn’t understand that question”.

Subsequent questions, put in leading form, sought to clarify that it was the answers she didn’t understand not the questions, to which she responded “yeah”. Her unsolicited answer, in my view, carries greater weight than that to which the response was suggested.

41. DM’s mother was also asked by the prosecution whether she had any concerns during the records of interview in relation to her role, to which she responded “No I don’t understand, sorry”. She was then asked:

“Did you have any concerns, in relation to the record of interview, from your role, so basically your role of being there for DM, as DM’s mum?”

Her response was “yes”.

42. It seems to me that both the prosecution and the interviewing Police either misunderstood the role of a support person or if the Police did understand it, they failed to explain that role in correct terms to DM’s mother. The overwhelming impression is that DM’s mother understood that she was required to be present simply because they needed an adult present and she

was his mum and therefore suitable. This is apparent from the interviews themselves and what she is told by Police as being the purpose for her being there. At page 87 of the transcript she said:

“They say DM need adult with him so I took with him” [transcript at 87]

And further, in cross-examination, she explained her understanding of her role as follows:

“Anyway, you thought you were there just because they needed to have an adult there? – Yeah

Yes? – Just to help DM

To help DM? – Yeah

Okay, well did you know what you were allowed to do to help DM? – Yeah

What was that? – If DM don’t understand I have to tell him

Right, okay, but could you understand what was going on? – No”

43. That understanding of her role (there as DM’s mother to help him understand) is consistent with the account given by Detective Hodge in his evidence:

“I told her that she would be required to be there because she is DM’s mother and so therefore she is a responsible adult...”[transcript at 100]

44. At the commencement of the first interview Constable McAuley says:

“Okay, there’s also another person present, who is the prisoner’s friend or guardian of ah, of DM”.

45. Quite what DM’s mother or DM might have understood by the term “prisoner’s friend” was not explored. However in passing I observe that it is not, in my view, a desirable term to use in the interview of a youth. DM was not a “prisoner”, though he had been arrested for the purpose of the interview. The use of the expression might convey a status, particularly to persons from a different cultural background, other than was intended.

46. As I have previously said, while it is true that a “support person” can be a “responsible adult” and a “responsible adult” is a person having parental responsibility for the youth, it is the rationale for the presence of that person that is the key to determine that person’s appropriateness overall in the role of “support person”. Most often a parent or guardian will be most capable of fulfilling that role, but it must be properly explained to them and steps taken to ensure their suitability. For example, if a young person had a particularly poor relationship with a parent, that parent may not be suitable because the youth would be unlikely to rely on the parent for support and advice during the interview or alternatively the parent would not be provide it.
47. The DVD of the interview shows that there were occasions during the interview when the defendant and his mother spoke together. I asked DM’s mother whether she was speaking to DM in English or whether she was speaking to him in Bahasa Indonesia. She responded that she was speaking to him in “Bahasa”. The Prosecutor then asked her what it was that was said, to which she responded:

“I told DM if anything you know, you have to tell Police the truth”.

This is inconsistent of course with a key rationale for the presence of a support person, to ensure that the youth understands the privilege against self incrimination and may exercise it. I do not suggest that it would never be appropriate for a parent to suggest to their child to “tell the truth”, A moral exhortation to do so is entirely consistent with the need to make a young person accept responsibility for their actions. However, if a parent is acting as a support person that should be done in a context in which the parent makes clear that although there is no legal obligation to tell the truth, morally the youth should consider accepting responsibility and owning up to the accusation if it is true. DM’s mother’s statement to DM does not appear to have been given in this context but rather appears to take the form of telling him that he had an obligation to tell the truth to the Police. That

advice is inconsistent with the privilege against self incrimination and therefore inconsistent with the role of a support person. In my view, his mother was unsuitable as a support person because she lacked sufficient understanding either of the questions that were being asked or of the privilege against self incrimination to be able to properly support DM as required by the Act.

48. The explanation provided by Constable McAuley to DM's mother of her role (leaving aside his description of her as the "prisoner's friend") was an adequate explanation. The question though is whether she properly understood what had been explained to her and in view of all of the evidence to which I have referred, the answer is strongly to the contrary.
49. Nevertheless, DM himself appeared in the first interview to have understood the nature of the caution because at points he declined to make a comment to questions that were asked. I am not however able to exclude the possibility that what was said to him by his mother, combined with the matters that I will now turn to, affected the voluntariness of the second record of interview.

Access to legal advice and representation

50. I have previously referred to the requirements of s 15 of the Act that a youth be advised by Police that he can access legal advice and representation.
51. Constable McAuley said that he advised DM's mother that DM could get legal representation. DM's mother, in her evidence, did not agree that anything had been said to her about lawyers. Even accepting Constable McAuley's evidence, his advice to DM's mother is not in strict compliance with s 15. Advice to her, as support person, is reliant on her understanding, and then ensuring that DM understood that he had the ability to access legal advice. Given my observations as to her level of understanding overall, there is nothing to suggest that DM was informed either by her or by one of

the Officers that he could access legal advice and representation. Of itself, this does not render the interviews inadmissible, but is a factor to be considered when assessing both voluntariness and fairness. It is of particular relevance in circumstances where there is some doubt that the support person appreciated that a privilege against self-incrimination exists.

Should DM have been released at the conclusion of the first interview?

52. I have referred above to the requirements of s 22 of the Act in relation to the decision as to whether to charge at the Police Station or to release and charge by way of a summons. As with SKL, the evidence of the Officers, in particular Detective Constable Hodge, was that because of the seriousness of the charges, the decision was taken to charge him at the Station. Detective Hodge referred to using his discretion. Both Officers agreed in their evidence that the s 22 criteria for the decision to charge at the Station were not met in DM's case. As with SKL, that decision appears to have been made without any consideration being given to the requirements of the *Youth Justice Act*. In DM's case, his mother, as support person, left him at the Casuarina Station and he was transported on his own to the Darwin Watch House, where he remained in a cell until the interviewing Officers arrived some time later. His mother was subsequently called back to attend the second interview.

Conduct and Content of the First Interview

53. As I noted, in the first interview, DM made no admissions and offered an alibi for the time of the events at Hibiscus. Constable McAuley was the primary questioning Officer in that interview. Constable McAuley's questioning of DM was conducted in a loud voice and can be described as vigorous and challenging. There is nothing wrong with vigorous questioning in an interview or to a challenge to answers received, provided that it does not go beyond a point at which the process of the interview becomes oppressive or unfair. It was apparent in giving his evidence that

Constable McAuley does speak in a reasonably loud clear voice, however, in my view the tone at times in the interview went beyond this natural attribute.

54. After DM gave his account of where he was on the night in question, Constable McAuley challenged this by telling DM that he has just told him a pack of lies. Constable McAuley then proceeded, one by one, to name numerous other young persons asking whether DM knew them and eventually said:

“We’ve got all your mates saying you were there ... We have a dozen statements and interviews where they’ve all put you as being there. Are you saying that all your friends are lying about you?”

This was not true. In cross-examination, Constable McAuley agreed that this statement was not true. He was only able in his evidence to point to two statements taken prior to the interview with DM that made reference to DM being involved in a fight.

55. DM had provided an alibi that he was at home on the computer talking to two girls. He was asked to provide the names of the girls that he was chatting to, which he did, then (at page 32 of the EROI transcript) an exchange takes place in which Constable McAuley challenges DM that if Police “go and seize your computer” and “download your transmissions” that will not confirm what he has said. The clear implication of the exchange was that Police had the present power to seize the computer from DM’s residence which was not a true representation.
56. I have referred above to the issue of DM’s mother’s understanding and command of English. Constable McAuley appears to have made an assumption that because DM’s mother worked as a security guard and because DM had been to school in Australia, that both had an adequate command of English for the purpose of the interview. The questions asked

in that regard, ones that sought only a positive or negative response to the query, were not adequate to ascertain the level of DM's understanding nor was either specifically asked whether they required the assistance of an interpreter. My observation of DM when he gave his evidence and particularly under cross-examination was that he became less able to respond in a detailed way in English and at times seemed confused.

57. The question that is raised by these matters is whether they may have had an effect on DM so as to induce him to make admissions in a second interview.

Was an inducement held out to DM by Police at the conclusion of the first interview as a result of which he gave a second interview?

58. In his evidence, DM said that at the end of the first interview his mother went to the toilet. In her absence, both Officers abused him, accusing him of telling lies and then said words to the effect that if he told them the truth they would only charge him with a couple of offences and that he could tell his lawyer that he had never been in trouble before, that he had a job and that he would then avoid going to jail. If he didn't tell them the truth they would charge him with everything and he would go to jail. Both Officers denied this conversation.
59. DM's mother left DM at the Casuarina Station and DM was transferred by other Officers to the Darwin Watch House. Officers McAuley and Hodge remained at Casuarina completing paperwork and then travelled to the Watch House. Constable McAuley said when they arrived at the Watch House to charge him he went to the cell and DM told him that he wanted to give a second interview. They then had to locate DM's mother and at 1320pm the second interview commenced with Constable Hodge taking the lead in questioning on this interview.
60. In the interview, DM makes the following admissions:

At Page 7 of transcript

DM: Yeah. And I hit, I did hit one of them. But I just hit him and after that, I go, because I couldn't get (inaudible) again, too much people was...

HODGE: Alright. How did you hit one of them?

DM: Oh, I think just, when he was in the ground, just sitting down I think and people was there, so I just hit him, but think I missed him...

HODGE: Can you demonstrate that to me? You don't have to, do you want to stand up? He was on the ground and obviously you were standing up.

DM: He's just...

HODGE: Can you show me how you did it?

DM: Just I was inside, just this side here, like this, they was walking like that, and after that, I seen them all running. I seen the other men with the chairs, nearly got hit by these chairs again, so I run in, I hit him with a (inaudible), but I think I missed him (inaudible).

HODGE: Just caught him a little bit?

DM: Yep.

HODGE: Alright, he was sitting down on the ground at that time?

DM: Yeah.

HODGE: Alright, why did you hit him?

DM: Oh, they was (inaudible) trying to bash us with stick or something.

At Page 13 of Transcript

HODGE: And what was happening to those three older men that were on the ground?

DM: I don't know, I just want to hit him, but them mob said, "Oh, coppers going to come", so I just keep walking.

HODGE: Alright, how many of those men did you hit?

DM: Just one.

HODGE: Just that one?

DM: Yep.

HODGE: Just – and that's the only one hit you had, is that correct?

DM: All I remember is this one with the chairs.

HODGE: The one with the chair?

DM: Yeah.

HODGE: It was, that was the one you hit, is that what you're saying?

DM: Yeah.

.....

HODGE: Alright, so did you have your fist clenched when you hit him, or did you slap him?

DM: I don't know. I'm not sure.
HODGE: You don't – not sure?
DM: Yeah
HODGE: What would you normally do?
DM: Because everyone just chucking cans and, there.

At Page 16 of transcript

HODGE: ...did you hit cause him to do anything, like, like, anything at all, fall over or...?
DM: I remember, just I hit him in the head and then I just walk away.
HODGE: Yeah, but what did he do, as soon as you hit him in the head? What did he – what was his reaction?
DM: He just there look, (inaudible).
HODGE: Alright, so you must have made a contact.
DM: Yeah.

61. It is apparent from this exchange that much of what DM admits to is suggested to him, particularly with respect to the question of whether contact was made by his “hit”.
62. Towards the end of the interview at page 19 of the transcript of the record of interview the following exchange takes place:

HODGE: Are you telling this, telling us this of your own free will?
DM: Yeah
HODGE: Did anybody, did we try and force anything out of you?
DM: Nah, you just tell me to tell me that, to tell yous the truth.
HODGE: Well, that's right. But, and you decided to do that, did you?
DM: Yeah

63. Then further, DM is asked why he decided to give a second interview and he responds “because I don't want to go to jail”. The defence submit that this is corroborative of what DM says occurred at the conclusion of the first interview. The prosecution on the other hand say that **because** the question

was asked I should take the view that nothing untoward occurred as DM suggested, because if it had, it was an extremely risky question to ask. I am not convinced that this is the case. It was in my view a question necessary to ask otherwise the reason for a second interview would not be recorded and would be open to speculation. If DM thought he had 'done a deal' with the Officers it would not be very likely that he would put that directly on the record. The risk would not have been as strong as suggested.

64. DM was not shaken in cross-examination on the *voire dire* on his account of what occurred including insisting that what he said in the second interview was not true. I note that he was not initially charged with all of the offences that were on record at the commencement of the hearing which were charges subsequently laid on 14 April 2008.
65. In addition, the matters that I have concluded affect the fairness of the first interview affect also affect the second interview. In addition to the matters I have already canvassed, there is a further issue of the process followed. The Officers did not release DM at the conclusion of the first interview. According to their evidence they had decided to hold and charge him. The charges they proposed to lay must have been based on some other evidence they had because he had not made any admissions at that stage.

Conclusion

66. In my view, the statements in the second interview are inadmissible because the prosecution have failed to discharge the onus of showing on the balance of probabilities that the statements were voluntary. I am not able to reject the evidence of DM as to what occurred between the two interviews. His answers in the recorded interview as to why he decided to give the interview are consistent with what he says occurred. The prosecution submitted that I should regard this evidence as a recent invention and reject it, however, in order to take that view I would need to determine that he concocted the story from his answer "because I don't want to go to jail". My observation of him

in giving his evidence is that he lacks the sophistication to have taken an answer from his interview and then constructed backwards a reasonably detailed fictional account that explains that answer and is consistent with it. Even if I had not reached that view with respect to voluntariness I would exclude that record of interview on the basis that the defendant had discharged the onus in relation to unfairness. In my view, the reliability of each interview is affected by the combination of these matters that I have referred to above and I therefore rule that the first interview is inadmissible on grounds of unfairness.

Dated this 16th day of October 2008.

Sue Oliver
STIPENDIARY MAGISTRATE