CITATION: *Police v Balarka* [2009] NTMC 037

PARTIES:	ERICA ANNE SIMS
	v
	KURT BALARKA
TITLE OF COURT:	Court of Summary Jurisdiction
JURISDICTION:	Justices Act
FILE NO(s):	20911360
DELIVERED ON:	9 September 2009
DELIVERED AT:	Darwin
HEARING DATE(s):	25 August 2009
JUDGMENT OF:	Jenny Blokland CM

CATCHWORDS:

CRIMINAL LAW – SUMMARY OFFENCES - OBLIGATIONS UNDER CHILD PROTECTION (OFFENDER REPORTING AND REGISTRATION) ACT (NT) – COMPREHENSION OF OBLIGATION – "REASONABLE EXCUSE" – "ADEQUACY OF NOTICE"

Child Protection (Offender Reporting and Registration) Act (NT) ss 16, 26, 48, 53

"*Anunga Rules*"
Dumeo v Garner (1998) 143 FLR 245
Hon Justice Dean Mildren "Redressing the Imbalance Against Aboriginals in the Criminal Justice System" (1997) 21 Crim LJ7
Dr Michael Cooke "Indigenous Interpreting Issues For Courts" (AIJA) 2002

REPRESENTATION:

Counsel:

Prosecution:	Mr Dalrymple
Defendant:	Mr Dolman

Solicitors:

Prosecution:	ODPP
Defendant:	NAAJA

Judgment category classification:	C
Judgment ID number:	[2009] NTMC 037
Number of paragraphs:	14

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

No. 20911360

[2009] NTMC 037

BETWEEN:

ERICA ANNE SIMS
Complainant

AND:

KURT BALARKA
Defendant

REASONS FOR DECISION

(Delivered 9 September 2009)

JENNY BLOKLAND CM:

Introduction

1. The Defendant is charged with failing, without reasonable excuse, to comply with his reporting obligations, namely that he failed to report to police within seven days of being released from custody contrary to s 48 *Child Protection (Offender Reporting and Registration) Act* (NT). The primary issue is whether there was a "reasonable excuse" for the acknowledged failure to report.

2. Embraced in that issue is the question of whether the *Anunga Rules* ought to apply to a person who would ordinarily be subject to *Anunga Rules* in a police interview setting when that person is instead in the situation of being served with a notice or otherwise informed of their obligations to report pursuant to the *Child Protection (Offender Reporting and Registration) Act* (NT) "the Act". Alternatively, it is suggested that if the *Anunga Rules* do not apply, then generally the principles or understanding of the issues

underlying *Anunga Rules* ought to be applied to relevant Indigenous persons who do not speak English as a first language in this situation. It is submitted the Defendants background and lack of demonstrated English language skills has legitimately raised the question of "reasonable excuse".

3. Section 48 *Child Protection (Offender Reporting and Registration) Act 2004* provides as follows:

> 48. Failure to comply with reporting obligations
>
> (1) A reportable offender who, without reasonable excuse, fails to comply with any of his or her reporting obligations commits an offence.
>
> Penalty: 100 penalty units or imprisonment for 2 years.
>
> (2) A court, in determining whether a person had a reasonable excuse for failing to comply with his or her reporting obligations, must have regard to the following matters:
>
> (a) the person's age;
>
> (b) whether the person has a disability that affects his or her ability to understand or comply with those obligations;
>
> (c) whether the form of notification given to the reportable offender as to his or her obligations was adequate to inform him or her of those obligations, having regard to the offender's circumstances;
>
> (d) any matter specified by the Regulations for this section;
>
> (e) any other matter the court considers appropriate.
>
> (3) It is a defence to a prosecution for an offence of failing to comply with a reporting obligation if it is established that, at the time of the offence is alleged to have occurred, the defendant had not received notice, and was otherwise unaware, of the obligation.

The Evidence

4. Both counsel have been extremely helpful in the presentation of this case and I thank them for their efforts in coming to agreement on a number of primary facts. The following facts have been admitted: that the Defendant did not report in the manner alleged; that he was sentenced on 19 January 2001for various offences and as a result was subject to the operation of the Act; as a result of the operation of the Act he was required to report to police within seven days of being released and during that time he did not report. It was accepted by both parties that between being notified of his obligations under the Act and being released, he served a further seven and a half months imprisonment. It was further accepted he was not granted parole on the sentence he was serving. It was not disputed the Defendant was an Indigenous man from Maningrida whose counsel would ordinarily require an interpreter for court proceedings. It was accepted an interpreter was not available on the day of the hearing. It was not disputed that English was not the Defendant's first language.

5. Police evidence establishes the Defendant was spoken to by Senior Constable Wilson on 22 November 2007; the interview commenced at 9:27. Senior Constable Wilson gave the Defendant the Notice under s 53 *Child Protection (Offender Reporting and Registration) Act NT* and explained it to him. He said the Defendant expressed some concern at not being able to report as required if he was at FORWAARD (Foundation of Rehabilitation with Aboriginal Alcohol Related Difficulties Incorporated) alcohol rehabilitation centre. There was discussion of whether FORWAARD was in walking distance of Berrimah Police Station. (Counsel later agreed the officer must have meant CAAPS (Council for Aboriginal Alcohol Program Services) as it is CAAPS which is near Berrimah).

6. In relation to the notice, Senior Constable Wilson pointed out the defendant's signature and his own signature on the s 52 notice. He said he also generally asks persons subject to the Act if they would like the notice

stored in their property at the prison. He explained he had many interactions with Aboriginal people over 11 years in the police force including when he was based at Lajamanu. He said he had no problems communications wise during this interaction with the Defendant. He said he would rank the level of communication with the Defendant as seven out of ten. He said the conversation ran for ten minutes although there was discussion on other unrelated topics during that time. He said if he had formed the view there were comprehension difficulties he would have applied the *Anunga* principles and obtained an interpreter. Senior Constable Wilson said the Defendant didn't indicate he had any other language but that he had said he wanted to go back to Maningrida. He agreed no inquiries were made about where the Defendant grew up and who he associated with in prison. He said he didn't appear to need an interpreter. He explained he had done a background check on PROMIS on the Defendant. Usually an alert would be raised on PROMIS if an interpreter were required. He agreed he did not ascertain what grade the Defendant achieved at school – he said the Defendant appeared to read the document. He could not say what portion of the 10 minute visit concerned discussion of the document although he said he thought the majority of it included discussion of the service of the document; he did not recall going through the provisions of the notice with him. Senior Constable Wilson disagreed that he arranged the signature of the Defendant on the acknowledgement page to indicate the Defendant had received it; he said the Defendant's signature was there to indicate the Defendant had read it and was happy with it.

7. Senior Constable Newell attended Berrimah Correctional Centre on 31 March 2009 to interview the Defendant. He said the Defendant was well spoken and easy to understand – he said he didn't need to repeat himself to be understood. He said if he had had communication difficulties he would say what he needed in a different way, if that didn't work an interpreter

would be used. He said the Defendant said he spoke an Aboriginal language. The Defendant declined to participate in an interview.

8. On balance I conclude that the Defendant is an Aboriginal person who has lived a significant part of his life in Maningrida and English is not his first language. I note Exhibit P1 details appearances in Maningrida back to 1975. The Defendant has some competency in English, evident from the brief conversation he had with the two police officers concerned. Whether the level of competency is enough for him to understand the reporting conditions after the brief conversation with Senior Constable Wilson is questionable. The fact he signed the acknowledgment of the notification is not probative of a level of understanding as the signature on its face merely acknowledges receipt of the notice. The conversations with the Defendant were so brief, and given his background I am unable to be satisfied on the evidence that he had a functional understanding of his obligations, or an understanding of the legal significance of non-compliance.

Discussion of the Issues

9. Once reasonable excuse is raised on the evidence, s 48(2) *Child Protection (Offender Reporting and Registration) Act* requires the Court to examine the particular criteria enlivened. It is in my view probable that the Defendant's English competency affected his ability to understand or comply with the obligations. Although the principles underlying the *Anunga Rules* may be useful in objectively assessing a person's comprehension, it would be wrong to suggest all the rules must apply in all other circumstances concerning Aboriginal people whose first language is not English. As is acknowledged by counsel, the *Anunga Rules* concern questioning suspects by persons in authority. Breaches of the rules may lead to exclusion, including in the exercise of the discretion to exclude on public policy grounds: (*Dumoo v Garner* (1998) 143 FLR 245). This case is not a situation calling for consideration of the exclusion of evidence. In my view it would be an error

to simply state that *Anunga Rules* must apply to ensure understanding of the Notice under the Act.

10. Section 48 does, however implicitly require there be understanding of the obligations or explicitly that the form of notification was *adequate* to inform the Defendant in all of the circumstances (s 48(2)(b)(c)). Although *Anunga* itself should not be said to apply to these circumstances, the underlying issues resulting in decisions concerning the need for extra care when dealing with Indigenous people in the criminal justice system are relevant. This is to ensure the risk of miscommunication is minimised. The principles are well documented in circumstances involving not only suspects but also with witnesses and the consequent need for care by way of judicial directions: (See eg. The Hon Justice Dean Mildren "Redressing the Imbalance Against Aboriginals in the Criminal Justice System", (1997) 21 Crim LJ 7). I am reminded also of the observation that where an Aboriginal person speaks some English, lawyers often overestimate their capacity to be fairly interviewed in English: (Dr Michael Cooke, Indigenous Interpreting Issues for Courts) AIJA 2002.

11. The notification under the *Child Protection (Offender Reporting and Registration) Act* is important as it goes some way in monitoring offenders and contributing to a safer community. It is important that those offenders understand clearly their obligations. If those obligations are not clearly understood, the protection offered by the Act to the community may be compromised and the offender will be liable to prosecution. For those reasons it is important there be some clear objective way of assessing the understanding of persons being served with a notice under the Act. Doubts will arise on the question of their understanding when (as here) the person is from a remote community such as Maningrida and only minimal evidence of a conversation is given.. Although there is no need for full compliance with the *Anunga Rules*, the use of interpreters or having the person explain back

their obligations of reporting in their own words are two ways that would ensure the comprehension can be objectively assessed.

12. If I have been wrong in my assessment of the Defendant having a reasonable excuse by virtue of lack of understanding of his obligations, in my view the circumstances of the Defendant, being in custody, served with the notice and released some seven and a half months later without any reminders or prompts about his obligations is enough to enliven the "reasonable excuse". The delay of seven and a half months is in my view too long and results in the conclusion that the notice is not considered "adequate".

13. Mr Dolman also argued in the alternative that the failure to report was not made out as in reality the obligation was contained in s 16 of the Act. Section 16 provides a list of personal and associated details that must be reported in a initial report to police. I reject this argument, the failure to report the personal details may in themselves amount to other offences during the initial report, however s 26 requires a report to be made in person unless certain other exceptions (not relevant here) apply.

14. I will make an order dismissing the charge.

Dated this 9th day of September 2009.

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JENNY BLOKLAND
CHIEF MAGISTRATE