

CITATION: *Police v KR [2015] NTMC 020*

PARTIES: POLICE

V

KR

TITLE OF COURT: YOUTH JUSTICE COURT

JURISDICTION: Criminal

FILE NO(s): 21512327

DELIVERED ON: 19 October 2015

DELIVERED AT: Katherine

HEARING DATE(s): 23 April, 29 May and 27 August 2015

JUDGMENT OF: Sue Oliver SM

CATCHWORDS: CRIMINAL LAW – Evidence – Confessions and Admissions – Discretion to exclude

Evidence (National Uniform Legislation) Act– Section 138

Youth Justice Act Sections 14,18,35

REPRESENTATION:

Counsel:

Prosecution: Mr Smith
Defendant: Mr Karpeles

Solicitors:

Prosecution: ODPP
Defendant: NAAJA

Judgment category classification: B

Judgment ID number: 020

Number of paragraphs: 34

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

No. 21512327

BETWEEN:

POLICE

AND:

KR

REASONS FOR JUDGMENT

(Delivered 19 October 2015)

SUE OLIVER SM:

1. On the hearing of this matter I ruled that the record of interview conducted by Police with the youth was inadmissible and reserved my reasons for that decision. I now provide those reasons.
2. An electronically recorded record of interview commenced at 9.14am on 23 March 2015 with K. He was 14 years old. He had been held in custody from the night before. There are a number of issues regarding the proper and lawful conduct of the record of interview.

The provision of a support person

3. Section 18 of the *Youth Justice Act* requires that an interview must not be conducted with a youth unless a support person is present during the interview. Section 35 lists the categories of persons who may be support persons for the purpose of an interview. These are
 - (a) a responsible adult
 - (b) a person nominated by the youth
 - (c) a legal practitioner acting for the youth
 - (d) a person from a register of support persons
4. In my view section 35 clearly creates a hierarchy of support persons. In particular section 35(5) limits the use of a support person from the Register to be maintained under section 14 because such a person may only be called upon to act as a support person where reasonable attempts have been made to have a person mentioned in subsection (a), (b) or (c) present but it was not practicable for any such person to be present within two hours.
5. K had initially requested that his father (his responsible adult) be present as his support person at the interview. He was told this was not possible as his father was potentially a witness in the matter. There is no difficulty with this decision. However he was not then asked who else he might like to have as a support person. At some point he spoke to a lawyer but was not asked if he wanted her present. Rather, a person from the register as support person was organised to attend and be present during the interview. It appears for the evidence of Constable Mora that this decision was made by some other officer prior to Constable Mora setting up for the interview as he said he believed that the support person was already there. No attempt was made to contact the lawyer he had spoken to in order to have her attend the interview.
6. K was not given an opportunity to speak to the support person prior to the commencement of the interview as according to the evidence of Constable

Mora they met up as they went into the interview room, although it appears that the support person may have previously been known to K. He was not asked in the record of interview whether he wanted her with him or not.

7. There was no explanation given in the recording as to the role of the support person so that it was clear that both K and the support person understood what was expected.
8. The support person did not sit next to K but sat considerably away from him with a chair in between them. There was no interaction observable between the support person and K and I was left with the strong impression that she was just “sitting in”. When K said he did not want to answer any questions and the officer persisted in asking him questions she offered no assistance to K to support his right to silence.
9. In *Police v DM and SKL* [2008] NTMC 067 I referred to a number of authorities as to the purpose of provisions such as section 18 of the *Youth Justice Act* requiring the presence of an independent support person in interviews with a youth. As I said there, 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.
10. In order to be an effective exercise of the provision of a support person, it is essential, particularly where the support person is one drawn from a category set out in section 35(1)(d) that the young person has an opportunity to meet with the support person prior to the interview so that the person can explain who they are and what their role will be in the interview as support for the use. In my view it is both appropriate and necessary for the role of the support person to be explained to the youth in the recording at the outset of the interview so that there can be no doubt that the support person has been properly informed of his or her role and that the youth likewise understands the role of the support person.

11. Constable Mora did give an explanation in relation to the support person in the interview. He said

“Um, so you’re .. you’re able to communicate any time with Kyle, um, and offer support where you think it is necessary, um, but in relation to that you can't hinder the process and you can't answer questions for him and stuff like that, okay?”

12. This explanation is not consistent with the role of a support person as I have explained. The words “you can't hinder the process” are likely to suggest to a support person that they cannot remind the interviewer that the young person has said that they do not wish to answer any questions and ensure that the privilege against self-incrimination is not overborne by the process. It might suggest that there can be no interference with the manner in which questions are being put even if the support person thinks that the officer is acting in an overbearing manner or that the questions are confusing.

13. In this matter the presence of the support person with little more than window dressing. Much of my comments go also to the issue of people being placed on the Register. I am not aware of the training that is given to those people, but it is essential that anyone placed on the register understands fully what is required by them at law so that they can properly to fill the role that they have undertaken. That appears to have been sadly lacking in this particular matter.

The Explanation of a Right to Silence

14. The interviewing officer gave K a warning in relation to whether he needed to answer questions. It was in these terms:

“It's your rights, ok? So, you’re not obliged to say or do anything unless you wish to do so, alright anything you do say or do will be recorded alright and may be used as evidence later on”

K responds "Yeah"

"So in other words, you don't have to answer our questions in relation to what we want to talk about but if you do answer those questions, they'll be recorded and might be heard in court, all right?"

K responds "Yep"

"Um... What's your, what's your understanding, um, what can happen in court?"

K responds "Um... just... probably gonna get locked up and that"

"Yep so what happens is the magistrate can listen to what you say and, and everything else and they can make a decision on, about you, ok?"

K responds "Yeah I know that"

15. Constable Mora then asks the support person

"Yep alright cool. Um... are you, are you happy, mam, that he's under, he understands that question?"

She responds "Yep"

"that caution sorry?"

She responds "Yes"

"You are happy with that?"

She responds "Yep"

16. There are problems with this exchange. First, the caution is given at least initially in what I would regard as quite formal terms. Section 15 of the *Youth Justice Act* requires that explanations by police officers in relation

to the investigation of an offence are to be made in a language and manner that the youth is likely to understand having regard to the youth age, maturity, cultural background and English language skills. Whilst K appears to have reasonable language skills the caution should have been put in a staged and simplified manner identifying each separate limb of the caution. Secondly, he should have been asked to explain the caution back in his own words. That would have made his understanding of the caution free from any doubt. Third, the support person confirms she believes he understands the caution but it is unclear to me on what basis she formed that opinion. In circumstances where the caution is administered in formal terms without the youth being asked to give back his or her understanding of it, it is in my view incumbent on a support person to ask that the youth explain his or her understanding of it. How else in those circumstances can the support person safely assert that the youth understood the caution in full?

17. Nevertheless, it does seem that K understood the caution because he did try to exercise a right to silence.

K's Exercise of the Right to Silence

18. Following this exchange K tried to exercise his right not to answer questions put to him. Constable Mora says

“Alright too easy. Mate you seem pretty switched on I don't have to explain it that much for you but, um. Alright so what we want to talk to you about is something that happened last night.

K responds “yeah”

“Um what can you tell me about, about that incident?”

K responds “Nothing. Don't want to talk about it now.”

19. There is nothing ambiguous about this response. It is clear that he does not want to answer questions. Nevertheless Constable Mora persists and tells him that he wants to put some allegations to him and that he can choose if he wants to answer them. He then proceeds to read parts of the statement of RD and ask K what he says about that. He elicits some answers to the passages that he puts to him with K generally saying to what is put that it is true or not true.

20. Leaving for the moment the issue of persisting with questioning Kyle in this way after he had clearly stated that he did not want to answer questions, the manner in which the contents of Raymond Davison statement is put to Kyle is such that the answers given may well be misleading or unreliable. What is put frequently contains multiple facts drawn from different paragraphs of the statement.

21. The interview continued in this way. At various points K reiterates that he does not want to answer any questions. For example Constable Mora says

“alright so, can you, can you like, because I wasn't there, can you set the scene, like how it started, like how, how did you come to be there, how did he have the pole and all that sort of thing. Can you tell me about that like how it just...”

K responds “Nah I don't even want to talk about that.”

22. Once again this is an unambiguous statement that he does not want to talk about the incident.

23. Nevertheless, Constable Mora produces photos, including one of a pole, and shows K eventually engaging him in conversation about K's skills at making things out of metal and from this point K begins to talk to him and answer questions.

24. In cross-examination Constable Mora said that he continued to ask K questions because he thought it was fair that he hear those things and he wanted to test if he wanted to not answer questions. I reject that assertion. I think a very clear strategy was used to continue to ask questions in order to elicit responses from Kyle.
25. Police General Orders provide that where a suspect says that he does not wish to answer any questions the interview should not continue. K gave an unambiguous statement that he did not want to answer questions at the outset but this was ignored.
26. In addition, K had spoken to a duty lawyer from the NAAJA legal service and had taken advice about his right to silence. She had informed the police officer that she spoke to that K did not want to answer any questions. Nevertheless, the interview was set up and proceeded as I have described. No mention was made to K in the interview about whether he had spoken to a lawyer.
27. In the *Queen v CS* [2012] NTSC 94 Barr J said this

[71] In my opinion, there is no proper reason to have an audiovisual record of the suspect declining to be interviewed. “People” do not need to see and hear “the responses” of a suspect as he declines to be interviewed. To commence the unwanted interview, to proceed with the loading of the DVDs, to go through the formal introductions, to administer the caution and to require the suspect to demonstrate that he has understood the caution – as happened in the present case – all flies in the face of the accused is this express wish not to be interviewed. All these acts amounted to a refusal to acknowledge and accept the exercise by the accused of his right to remain silent. They had no purpose other than to circumvent the accused's unwillingness to be interviewed”

These remarks may be applied exactly to this case. Further His Honour said

[72] Further, the offer of information “in fairness to the accused” was not fair at all after the accused had indicated that he did not wish to participate in an interview with the police. The offer of information was quite specious. The offer of information was not made with a view to being fair, in the sense of ensuring procedural fairness; rather it was done to engage an unwillingness suspect in conversation and to maintain the conversation once it started. The purpose of the offer of information was to circumvent the suspect’s unwillingness to be interviewed.

Once again these observations may be equally applied to this case.

28. The question was whether the electronic record of interview should be excluded, amongst other provisions, pursuant to the discretion under section 138 of the *Evidence (National Uniform Legislation) Act*.

28. Section 138 provides that evidence that was obtained improperly or in contravention of an Australian law; or in consequence of an impropriety or of a contravention of an Australian law; is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

29. In determining whether to exercise the discretion to exclude evidence the court is to have regard to the matters set out in s138(3). In my view the following matters are relevant:

Section 138(3)(a) the probative value of the evidence and section 138(3)(b) the importance of the evidence in the proceedings

30. There is in my view a difficulty in assessing the probative value of the evidence contained in the record of interview because of the way in which many of the questions were asked and answers elicited. Rather than being able to provide a description in his own words of what occurred K is asked to respond to what is said in the statement of the alleged victim often containing multiple factual statements and eliciting a single response of either true or not true. It is not possible to determine whether his response applies to all that was stated or only to some of it therefore calling into question the reliability of the answers.
31. The admission of the record of interview and its contents was not critical to the prosecution case because there were a number of eye witnesses to the event.

Section 138(3)(d) the gravity of the impropriety or contravention and section 138(3)(e) whether the impropriety or contravention was deliberate or reckless

32. I have identified a number of improprieties and contraventions of the law. In my view the issues with the support person appear to be a lack of appreciation on the part of the interviewing officer of the significance of those provisions in the *Youth Justice Act* and the necessity for strict compliance rather than a deliberate strategy to provide an ineffective support person. Nevertheless the result was the same and K did not receive the support to which he was entitled. However, it is my view that the continuation of the interview after Kyle declined to answer any questions was a deliberate strategy on the part of the interviewing officer to get K to the point where he would answer questions, which he succeeded eventually in doing.
33. Taking those matters into account, I formed the view that I should exercise my discretion to exclude the evidence contained in the electronic record of interview. It is not as if the law in relation to persisting with an

interview after the suspect has declined to answer questions is unclear. It is supported by a Police General Order. In the context of dealing with youth justice matters I would adopt the observations of Wood CJ in *R v Phung and Huynh* [2001] NSWSC 115

34. It may be accepted that the purpose of the legislative regime, but now applies to the interview of children, and particularly those in custody following arrest, is to protect them from any disadvantage inherent in their age, as well is to protect them from any form of police impropriety. As to the former, what is required is compliance with the procedure laid down so as to prevent the young or vulnerable accused from being over awed by the occasion of being interviewed, at a police station, by detectives who alight this to be considerably older and more experienced than they are.

...

38. It is important that police officers appreciate that the regime now established is designed to secure ethical and fair investigations, as well as the protection of individual rights, of some significance, which attached in particular to children. Those rights, obviously are of great importance when a child is facing a charge as serious as murder or armed robbery.

39. The provisions need to be faithfully implemented and not merely given lip service or imperfectly observed. The consequences of any failure to give proper regard to them is to risk the exclusion of any ERISP, are the product of an investigation procedure, which is undertaken in circumstances where there has not been proper compliance with the law.

34. It is not as if the requirements for the conduct of an interview with a youth under the *Youth Justice Act* are new ones. The Act has been in operation now since 1 August 2006 yet the Court continues to see interviews which do not comply with the provisions of the *Youth Justice Act*. If the practice is to continue it is to risk the exclusion of evidence so obtained.

Dated this 16th day of October 2015

SUE OLIVER SM_____