

CITATION: *R v Durilla* [2014] NTMC 026

PARTIES: Police
V
Collum Durilla

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Criminal

FILE NO(s): 21334533

DELIVERED ON: 6 November 2014

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Alyangula

JUDGMENT OF: Ms Elisabeth Armitage SM

CATCHWORDS:

Section 85 Evidence (National Uniform Legislation) Act
Criminal Law, Evidence – Admissibility of admissions in a police record of
interview, role of Anunga Rules

REPRESENTATION:

Counsel:

Plaintiff: Ms Grealy
Defendant: Mr McMaster

Solicitors:

Plaintiff: DPP
Defendant: NTLAC

Judgment category classification: A
Judgment ID number: 026
Number of paragraphs: 33

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

No. 21334533

BETWEEN:

Police
Plaintiff

AND:

Collum Durilla
Defendant

REASONS FOR JUDGMENT

(Delivered 6 November 2014)

Ms Elisabeth Armitage SM:

1. Mr Collum Durilla was charged with assaulting his partner on 20 July 2013, and in the alternative breaching a domestic violence order. Aggravating circumstances were alleged.
2. It was not in issue that Mr Durilla had been interviewed by police and the interview contained relevant admissions. However, the defence objected to the interview being admitted in evidence. The defence argued that the interview should be excluded because the interviewing police failed to comply with the Anunga Rules¹. In particular, it was argued that in circumstances where Mr Durilla spoke English as a second language, the police had failed to:
 - ensure Mr Durilla understood the caution, and
 - provide an interpreter.

¹ *R v Anunga* (1976) 11 ALR 412 at 413.

The defence argued that those failures so affected the reliability of the interview it would be unfair to admit it.

3. Section 85 of the *Evidence (National Uniform Legislation) Act* (the Act) applied to the interview. I found the interview inadmissible pursuant to that section and not in the exercise of a discretion. I now provide my reasons.

Do the Anunga Rules apply to section 85 of the Act?

4. The defence submissions raised the question as to whether, following the introduction of the Act, the common law Anunga Rules have any role to play on the question of the admissibility of police interviews.
5. Chapter 3, Part 3.4 of the Act deals with admissions. The starting point regarding the admissibility of evidence in Chapter 3 is section 56. Section 56 provides:

(1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.
(emphasis added)

(2) Evidence that is not relevant in the proceeding is not admissible.

6. As to the effect of section 56, in *Uniform Evidence Law, Tenth Edition*, Stephen Odgers notes and concludes:

This is the key provision regarding the admissibility of evidence in Ch 3. It displaces State and Territory law (including common law) on admissibility of evidence unless that law is preserved elsewhere in the Act. According to s 56, if evidence is not relevant (as defined in s 55) it is not admissible in a proceeding. If it is relevant it is admissible, “except as otherwise provided by this Act”. It may be excluded by one of the exclusionary rules, in the exercise of judicial discretion, or under one of the procedural provisions in the Act².

² *Uniform Evidence Law, 10th Edition*, Stephen Odgers SC at [1.3.260].

7. In his paper, *The Uniform Evidence Act and the Anunga Rules: Accommodation or Annihilation*, Professor Les McCrimmon adopts Odgers interpretation of section 56 and concludes:

In the context of the Northern Territory, therefore, once the Evidence (Uniform National Legislation) Bill (NT) comes into force, *R v Anunga* will no longer be binding precedent on matters relating to the admissibility of evidence³.

8. However, McCrimmon notes that the kinds of matters addressed in the Anunga Rules may still be considerations relevant to the application of section 85 or when the court exercises a discretion under the Act.
9. Section 85 is an exclusionary provision that applies in criminal proceedings to, inter alia, admissions made to police during an investigation. Subsections (2) and (3) provide that:

(2) Evidence of the admission is not admissible unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected.

(3) Without limiting the matters that the court may take into account for the purposes of subsection (2), it is to take into account:

(a) any relevant condition or characteristic of the person who made the admission, including age, personality and education and any mental, intellectual and physical disability to which the person is or appears to be subject; and

(b) if the admission was made in response to questioning:

(i) the nature of the questions and the manner in which they were put; and

(ii) the nature of any threat, promise or other inducement made to the person questioned.

³ (2011) 2 NTLJ 91 at

10. Odger's extracts the Australian Law Reforms Commission's explanation of this provision as follows:

The trial judge should determine as a preliminary issue whether the reliability of the admission may have been impaired by the way it was obtained. The judge should consider all the circumstances, including the characteristics of the person making the admission. In making the decision he should take into account a number of factors - whether there was misconduct by those interrogating, whether procedural safeguards were adopted, whether the ability of the person making the admission to make rational decisions was substantially impaired. It would also be relevant to this question whether other incriminating evidence was discovered or obtained as a consequence of the admission being made⁴.

11. In my view, section 85 does not preserve the common law or require a magistrate to apply the Anunga Rules. Rather it requires the magistrate to consider all the relevant circumstances in which an admission was made (some of which may be identified in subsection (3)) to determine whether the circumstances were unlikely to adversely affect the truth of the admission. To the extent factors addressed by the Anunga Rules are relevant to the application of section 85, they are to be considered because they are relevant considerations under that section, and not as an application of common law.
12. When considering admissibility of an interview, section 189(3) of the Act applies, which provides:

In the hearing of a preliminary question about whether a defendant's admission should be admitted into evidence (whether in the exercise of a discretion or not) in a criminal proceeding, the issue of the admission's truth or untruth is to be disregarded unless the issue is introduced by the defendant.

13. In Anderson, Williams and Clegg's text, *The New law of Evidence*, authorities on the nature of the court's inquiry under section 85 were considered and summarised as follows:

⁴ Ibid Odgers at [1.3.5220] extracting ALRC 26, para 765, p 437

The court's inquiry is not concerned with whether the admission was in fact made, or whether it was true or untrue; these are matters for the tribunal of fact. Rather the focus of the inquiry is...upon the impact of the circumstances in which the admission was made on the actual reliability of the admission. The section does not require police impropriety. The Court must take into account all relevant considerations when determining admissibility..(references deleted) ⁵.

14. In my view, sections 85 and 189 (3) require the court to focus on the circumstances in which an admission is made and the likely affect of those circumstances on the reliability of the admission. In conducting that exercise the court is not to consider the truthfulness (or otherwise) of the admission unless it is raised by the defence.

Did the evidence enliven the application of section 85?

15. Section 85 is an exclusionary provision that applies to police interviews in criminal proceedings. In order to enliven a consideration of the section, the court must first be satisfied that “a question legitimately arises as to whether the circumstances (of the admission) were such that the truth (or untruth) of the admission might have been adversely affected.”⁶
16. The defence sought to enliven the provision by pointing to circumstances in the conduct of the interview which the defence argued might have affected the truth of any admission. In particular the defence submitted that the police had failed to comply with the Anunga Rules by not providing Mr Durilla with an interpreter and by not ensuring he understood the caution.
17. Although the defence based its application on the Anunga Rules, I was persuaded that the circumstances identified by the defence were considerations relevant to the application of section 85 of the Act. In my view, the circumstances identified by the defence did give rise to a real question as to whether the truth of the admissions might have been adversely

⁵ 2nd Edition 2009 at [85.2]

⁶ R v Esposito (1998) 105 A Crim R 27 at 44

affected and I was satisfied that there was an evidential basis for the section 85 exclusion to be considered.

18. That being so, it was for the prosecutor to prove on the balance of probabilities⁷ that the alleged police conduct did not occur, or if it did, that the conduct did not make it unlikely that the truth of the admissions was adversely affected⁸.

What were the circumstances in which the admissions were made?

Were the circumstances likely to adversely affect the truth of the admissions?

19. An incident occurred on 20 July 2013. Police were called to Mr Durilla's home to investigate an alleged assault on his wife. Mr Durilla was not located that night but was spoken to by police on 8 August, at which time he voluntarily attended the police station for an interview. He was accompanied by his father, Mr Greg Durilla. 19 days after the alleged incident the interview took place in the presence of Mr Durilla's father who performed the role of prisoner's friend. There was no significant delay between incident and interview and I am satisfied that the events of the night in question were likely to have been reasonably fresh in Mr Durilla's memory. In my view a delay of some weeks between incident and interview is not likely to have adversely affected the reliability of any admissions.
20. It was not in issue that:
 - the interviewing police knew that Mr Durilla's first language was Andilyakwa,
 - the interview was conducted in English without an interpreter being offered or provided, and
 - Andilyakwa interpreters are available on Groote Eyelandt.

⁷ s142 Uniform Evidence Act

⁸ s85(2) Uniform Evidence Act

21. The prosecutor sought to establish that Mr Durilla had sufficient command of English and understood the caution for the interview to proceed without an interpreter.
22. There was, however, little evidence before me from which I could objectively ascertain the extent of Mr Durilla's understanding and capacity to communicate effectively in English. During the interview most of Mr Durilla's answers were one word (often yes or no) although there were some short sentences. The interview established that Mr Durilla had attended Anurugu School but it was not clear whether he left at the end of year 12 or at age 12. When asked whether he could read and write Mr Durilla said "yes". When asked if he could understand English Mr Durilla said "most of it". When asked what he spoke at home Mr Durilla said "Andilyakwa". When asked if he could understand what the police officer was saying Mr Durilla said "yep". In spite of those answers, on occasions during the interview Mr Durilla's father interpreted for him and Mr Durilla appeared to turn to his father for assistance with interpretation. Without more, the interview did not satisfy me that Mr Durilla had adequate capacity in English for police to proceed without an interpreter.
23. In addition to the interview, the prosecution sought to rely on evidence from Senior Constable Scott Lewis as to Mr Durilla's capacity to communicate in English. Senior Constable Lewis gave the following evidence:

Q: Why wasn't there an interpreter there?

A: I've spoken to Collum on several occasions and he speaks, what I would say to be, fairly good English, and so does his father, Greg.

Q: Fairly good English, what do you mean by that?

A: Well I can have a conversation with him. I think he clearly understands what I am saying.

No further detail as to the nature or extent of the conversations was provided. Without such additional detail, the basis for Senior Constable Lewis's lay opinion about Mr Durilla's understanding of and capacity to communicate in English remained substantially undisclosed and could not be challenged or tested by the defence. In my view the evidence was so scant as to the other conversations that there was little to no basis established for Senior Constables Lewis's opinion and I could not give it much weight.

24. During the interview Mr Durilla was cautioned. The caution was not interpreted into Andilyakwa. The prosecution conceded that Mr Durilla did not explain the caution back in his own words. However, it was the prosecution case that Mr Durilla demonstrated an understanding of the caution by the following exchange in the interview:

Q: Do you have to answer my questions?

A: No

Q: If you do is it your choice to answer?

A: Yes

Following the caution the interviewing officer asked Mr Greg Durilla:

Q: Greg do you feel Collum understands the caution there?

Greg Durilla: Yes he does.

Police then asked Mr Durilla if there was anything he wanted to tell them and Mr Durilla remained silent for a period of time.

25. I am not persuaded that Mr Durilla's single word answers demonstrated an understanding of the caution. His subsequent silence was equally unenlightening. Mr Durilla may have been silently exercising his right or he may have been silent because he did not understand the question or because he did not have sufficient command of the English language to respond. In

my view, there was nothing that pointed to one possibility in preference to another.

26. The prosecutor also sought to rely on Mr Greg Durilla's opinion that his son understood the caution. However, as the prosecutor did not call Mr Greg Durilla to give evidence, the basis for his opinion was not disclosed or tested. Further, in my view the prosecutor failed to address section 78 (b) of the Act, which is a precondition for the admission of a lay opinion. In those circumstances, Mr Greg Durilla's words were not admissible opinion evidence.
27. On the prosecution evidence I was unable to determine Mr Durilla's level of capacity in English, and I was left uncertain as to whether he understood the caution or his right to silence. In my view these were circumstances which may well have adversely affected the truth of any admission.
28. In addition I note that on occasions in the interview Mr Greg Durilla spoke in language, apparently providing interpretation or advice to his son. What was said in language was not interpreted into English either during or after the interview. What was said in language, and what effect that had on the interview and the answers given is simply not known. It remains possible that what was said in language might also have adversely affected the admissions.
29. I note in passing that the interview was not transcribed. Mr Durilla was softly spoken and it was not easy or always possible to hear what he said. The lack of a transcript made it very difficult, if not impossible, for the parties to agree on what was said, nor were they able to properly identify any areas in dispute.

Decision

30. I was not satisfied on the balance of probabilities that the circumstances in which the admissions were made were such as to make it unlikely that the truth of the admissions was adversely affected. In those circumstances, applying section 85 of the Act, the admissions were not admissible.

Dated this 6th day of November 2014

Elisabeth Armitage
STIPENDIERY MAGISTRATE