CHAPTER FOUR

ABORIGINALS AND THE CRIMINAL COURTS

John Coldrey

Some years ago the Alice Springs Drive-In was screening what may facetiously be referred to as an Adult Western. White cowboys were systematically massacring Red Indians amidst a growing murmur of anger from black patrons. Suddenly, a figure clambered on the bonnet of a battered Kingswood and shouted 'Send for Legal Aid'! A raucus cheer erupted and the tension disappeared.

Aboriginal Legal Aid has proved vitally important to Aboriginal people throughout Australia. In such places as the Northern Territory, the days have long passed when Aboriginal defendants queued up to dutifully plead guilty, enabling the police to clear the books, the courts and the streets.

The emergence of Legal Aid is not, however, a panacea for the legal ills from which the Aboriginal defendant suffers. Indeed, Legal Aid representation has served to highlight incon-

sistencies which exist between the tribal law, with its concepts of property sharing and familial obligations of punishment, and European law where the State jealously guards both property and the sole rights to retribution.

The magistrate, pontificating upon the sacredness of the motor car, tells a fringe dweller: 'After a man's house, his motor car is his most valuable possession. You have taken a man's car and I propose to punish you with a severe fine'. The Aboriginal field officer leading the bemused defendant from the court illustrates the incongruity of the situation with a mischievous: 'You heard what that magistrate said. You better never steal any bloke's house'!

On an outstation 150 kilometres from Alice Springs an Aboriginal is speared in the thigh. It is a traditional punishment. An artery is severed accidentally. Lack of medical knowledge or facilities results in death from blood loss. The bewildered spearman is about to make the acquaintance of the criminal justice system.

In discussing the problems of this encounter I want to stress two matters. First, although such problems are virtually identical to those encountered by large numbers of Aboriginal people in Queensland, Western Australia and South Australia, my contact with them has been predominantly in Central and Northern Australia. It is therefore within that arena that my comments should be seen to primarily apply. Second, I will address the situation from the practical perspective of the criminal justice system as it currently exists. Discussions of reform I leave to others.

If our potential defendant is typical of most Aboriginals in Central and Northern Australia he will be submissive to police authority. He will respond willingly to the, no doubt, courteous police request for him to accompany them to the police station. Once there he will be in total ignorance of any rights to contact legal advisers. The police are unlikely to see it as their task to endanger this blissful state.

Next, as efficient investigators, the police will desire to question the suspect about the circumstances surrounding the spearing. The peculiar difficulties faced by Aboriginal suspects in the interrogation process have been recognised by the Supreme Court of the Northern Territory. Consequently that court, through its Chief Justice (Mr Justice Forster) in *R* v. *Anunga and Others* (1976)[1] laid down a series of guidelines for the interviewing of Aboriginal suspects. In prefacing those guidelines Mr Justice Forster remarked:

> Another matter which needs to be understood is that most Aboriginal people are basically courteous and polite and will answer questions by white people in the way in which they think the questioner wants. Even if they are not courteous and polite there is the same reaction when they are dealing with an authority figure such as a policeman. Indeed, their action is probably a combination of natural politeness and their attitude to someone in authority. Some Aboriginal people find the standard caution quite bewildering even if they understand that they do not have to answer questions because, if they do not have to answer questions, then why are the questions being asked?

This latter comment is particularly pertinent since the caution is almost inevitably couched in terms evincing a fixed intention to question the suspect, for example: 'I am going to talk to you about . . .' or 'I am going to ask you some questions about . . .'. Since this is the policeman's expressed purpose it is difficult indeed for an Aboriginal suspect to grasp the fact that he can refuse to answer the questions to be put by this white authority figure.

In the 1977 case of *R* v. *Steven Dixon* (unreported Northern Territory Supreme Court) a senior detective who had been involved in hundreds of interviews with Aboriginal people indicated in evidence that he had never known them to avail themselves of their legal right to remain silent. In subsequent years, so far as I am aware, that situation has remained virtually unaltered. Nonetheless, in an effort to achieve fairness in the interviewing process, the Supreme Court stated: 'Interrogating police officers, having explained the caution in simple terms, should ask the Aboriginal to tell them what is meant by the caution, phrase by phrase, and should not proceed with the interrogation until it is clear the Aboriginal has an apparent understanding of his right to remain silent'.

Among the Anunga guidelines (breach of which may lead to the exclusion of admissions obtained by interviewing police) was the necessity for a 'prisoner's friend' to be present at the interrogation. According to the court the prisoner's friend should be a person who knows, and is known to, the suspect, someone in whom he has apparent confidence and by whom he will feel supported. Additionally, the guidelines required that unless an Aboriginal suspect was as fluent in English as the average white man of English descent, an interpreter able to interpret in and from the Aboriginal person's language should be present, and his assistance should be utilised whenever necessary to ensure complete and mutual understanding. In

essence therefore, the guidelines were designed to ensure that material elicited in an interview situation was provided voluntarily, was fairly obtained, and was an accurate reflection of what the parties had said to each other.

Apart from the difficulties Aboriginal people have in exercising the right to remain silent, there remains the threshold difficulty of understanding the right itself. The case of *R* v. *Cedric Kennedy* (1978),[2] noted in John McCorquodale's comprehensive bibliography of cases,[3] provides not only an excellent example of police difficulties in ensuring this concept is understood, but also demonstrates a certain lack of sensitivity in the selection of a prisoner's friend. Cedric Kennedy had fired at his wife when she determined to go searching for witchetty grubs rather than get his 'tucker'. A combination of poor marksmanship and a rather derelict rifle resulted in his missing her and shooting an unfortunate bystander.

At the subsequent interrogation, after which Kennedy was charged with murder, the police used his wife Lillian — the intended victim — as the prisoner's friend. This factor, together with Kennedy's patent failure to understand the caution, were reasons why the Record of Interview was excluded. This classic piece of interrogation was preserved for posterity because at the time, 1978, it was a frequent practice of police to tape-record the Records of Interview in serious crimes. I would like to share it with you:

Policeman: Right. Now Cedric, I want to ask you some questions about what happened at Jay Creek the other day. Do you understand that?
Kennedy: Yes.
Policeman: Right. Now it's in relation to the death of (that dead fellow). Do you understand that?
Kennedy: Yes.
Policeman: Right. Now I want to ask you some questions about that trouble out there but I want you to understand that you don't have to answer any questions at all. Do you understand that?
Kennedy: Yes.
Policeman: Now. Do you have to tell me that story?
Kennedy: Yes.
Policeman: Do you have to, though?
Kennedy: Yes.
Policeman: Do you, am I making you tell me the story?
Kennedy: Yes.
Policeman: Or are you telling me because you want to?

Kennedy: Yes.
Policeman: Now I want you to understand that you don't have to tell me, right.
Kennedy: Yes.
Policeman: Now do you have to tell me?
Kennedy: Yes.
Policeman: But you don't have to tell me. You misunderstood. There is no reason that you have to tell me the story, do you understand?
Kennedy: Yes.
Policeman: Do you want to tell me the story, do you want to tell me the story?
Kennedy: Yes.
Policeman: You do, but what I must make you understand is that you don't have to, see. Lillian, will you stand up for a moment. Stand up. Lillian, do you understand that Cedric doesn't have to talk to me?
Lillian: Yes.
Policeman: Does he, does he have to talk to me? Does he have to, is anyone making him talk to me?
Lillian: Yes.
Policeman: Who?
Lillian: You.
Policeman: You. No, no you don't. See you don't have to answer my questions. There's no one making you answer my questions. It's only up to you. You can keep quiet and say nothing. Do you understand that?
Kennedy: Yes.
Policeman: Then do you want to answer do you want to tell me the story?
Kennedy: Yes.
Policeman: Yes, but even though you want to tell me the story, I've got to make you understand that you don't have to, you see. You can keep quiet if you like, can't you, can you, can you keep quiet if you like?
Kennedy: Yes.
Policeman: You can. Now you realise that you don't have to tell me the story. Do you understand that?
Kennedy: Yes.
Policeman: You realise that you don't have to answer my questions?
Kennedy: Yes.
Policeman: Fully realising that you don't have to answer my questions, or tell me anything, can you tell me if you were at Jay Creek on Wednesday, 21st of June, were you at Jay Creek on Wednesday?
Kennedy: Yes.

In the end having received eighteen consecutive 'Yes' answers from Kennedy the policeman does not bother about further ascertaining his level of understanding but just presses on with the questioning.

The safeguard of a prisoner's friend may in some instances be more apparent than real. An Aboriginal friend may well feel unable to protect the suspect from undue police pressure since he is subject to the same psychological mechanisms. In *R* v. *Gus Forbes* (1980)[4], a rape-murder trial in Alice Springs, the investigating police officer, according to the evidence of the Aboriginal prisoner's friend, threatened the suspect that he would 'cut his cock off' if he failed to tell the truth. This swift informal surgery was to be performed, apparently without benefit of anaesthetic, with an office guillotine. Nonetheless, the prisoner's friend also swore that the police had treated the accused well. He reconciled the seeming contradiction in his evidence with the perfectly logical explanation that the prisoner had been well-treated because the threats were never carried out.

In *Collins* v. *R* (1980)[5] (the Huckitta murder trial) the police provided a prisoner's friend whom the suspects had never met before. The role of prisoner's friend was never explained to him or to the suspects (three of whom were children) and no conversation was permitted between the parties prior to the interrogation.

Nonetheless the Federal Court of Appeal found that in this regard there had been sufficient compliance with the guidelines. It was said that the presence of an Aboriginal who spoke the appellant's own tongue must, of itself, have been supportive. In any event it was held that such a finding was open to the trial Judge. With the greatest respect I cannot agree with this view.

The Federal Court made it clear that the *Anunga* guidelines did not alter, or constitute a departure from, the general law relating to the admissibility of confessions, or the matters to be taken into account in the exercise of a court's discretion. Each case had to be assessed in the circumstances with regard to the individuals involved.

In a recent decision, *Gudabi* v. *The Queen* (1984)[6], the Full Court of the Federal Court of Australia in examining the *Anunga* rules stated: 'Social conditions and values, and community standards and expectations, have changed and are continuing to change and, while the basic principles underlying the *Anunga* guidelines remain valid, their application

Policeman: In the leg, you wanted to kill her in the leg?
Kennedy: Yeah.

Here, therefore, the expressed 'to kill' is used synonymously with the verb 'to hit'. This policeman knowing that construct is able to accommodate it and fairly represent the accused's intent.

Notions of time or distance do not have the same relevance and hence the same precision ascribed to them by Europeans. 'Long time' can mean anything from minutes to years depending on the context in which it is used. To say that one can travel from point A to point B in 'about a day' may merely mean that you can get there the same day as you leave. 'Half way', as an expression of distance travelled, means anywhere out of sight of both start and finish of the journey.

Linguistic problems exist even with the use of interpreters. As Chief Justice Forster said in *Anunga*:

> Police and legal English sometimes is not translatable into Aboriginal language at all and there are no separate Aboriginal words for some simple English words like 'in', 'at', 'on', 'by', 'with', or 'over', these being suffixes added to the word they qualify. Some words may translate literally into the Aboriginal language and mean something different. 'Did you go into his house?' means to an English speaking person, 'Did you go into the building?' but to an Aboriginal it may also mean 'Did you go within the fence surrounding the house?'

The use of an interpreter is no guarantee that all the relevant material will be elicited. For example, the kinship relationship between the suspect and the interpreter may, of itself, inhibit the answers given, or the use of a fluent white interpreter may create difficulties where he is uninitiated. The spectre of unfairness, therefore, haunts virtually all police interrogations, however well-intentioned they might be, and, as *Anunga's case* recognises, it may exist even when an interpreter is used.

The factors to which I have adverted may equally impede the legal adviser in his quest to obtain adequate instructions from his Aboriginal client. It can take several conferences before a shy client has sufficient confidence to talk freely with his lawyer. Thereafter, unless the questioning is done with skill and sensitivity, the instructions may leave large gaps in the scenario of events. The following two cases, both for manslaughter, provide examples.

One accused initially omitted to describe two fights instigated by the victim with members of his family, which fuelled the accused's belief that he also was in danger of imminent attack, and hence needed to defend himself. The other accused failed to mention a second potential attacker armed with a *nulla nulla* waiting to join the fray as he faced the primary aggressor. Both situations were confirmed by Crown witnesses during cross-examination in the subsequent trials. These facts, redolent of self-defence, were obviously relevant in the European legal context. There can be little doubt that a European client, with any understanding of the legal system, would have volunteered this information as being in his best interest.

In yet another case of manslaughter the accused stabbed his father with a pocket knife at a time when the drunken paternal figure was advancing with an upraised lump of wood. Objectively it seemed an excellent case of self-defence, a defence the European client would have quickly grasped. In conference the accused would consistently affirm suggestions that he feared being hurt and stabbed his father to thwart the attack. Alas, when asked to say in his own words why he stabbed his father the unswerving reply was 'Because I am mad at him'! He was not called to give evidence.

In my last murder trial in the Northern Territory the accused, a traditional Aboriginal man, had inflicted 201 separate injuries on his deceased wife who had thereafter bled to death. He was drunk at the time. His instructions were that he had wanted to punish her for being with other men earlier in the day but had not wished to kill her, or cause her serious injury. At first blush the extent of the injuries made this seem a preposterous proposition. However, on examination the wounds, most of which had been inflicted by a broken flagon, and many of which were superficial, revealed a surprising pattern. Despite the drunken nature of the attack virtually all the injuries were on the deceased's legs, back and head.

Consultation with a tribal elder confirmed my suspicion that these were traditional sites for the infliction of punishment. I had initially failed to grasp this fact and elicit this information from the accused. He had not been able to volunteer it. Fortuitously it had emerged for consideration by the jury. They acquitted of murder, convicting the accused of the appropriate offence of manslaughter.

It goes without saying that the luxury of time in which to obtain proper instructions is rarely available to the Legal Aid lawyer charged with the responsibility of daily representing

dozens of clients at Magistrate's Courts throughout outback Australia.

All the cultural and social disadvantages heaped by history upon an Aboriginal accused weigh heavily upon him in the courtroom. There is the fear of the unfamiliar. Who is this judge? Where does his power come from? Who are these people called 'the jury' — very few if any of whom are black? (This is another forensic drawback.)

The adversary system adds to the confusion, with police saying one thing and lawyers frequently saying another. In the courtroom all the previous problems are multiplied. In this atmosphere of tension and anxiety the police, as authority figures, are augmented by the judge and counsel clad in their awesome robes. In such an environment the Aboriginal accused is easy pickings for the skilled cross-examiner who, by accusation and assertion in leading questions, utilises the adversarial rules to create forensic mayhem.

The unsworn statement (currently under attack) enables the educationally underprivileged and inarticulate accused to present his version of events to a court without the risk of its distortion and hence devaluation under cross-examination. The unsworn statement is ideally suited to this purpose whatever be the validity of other criticisms of it as a mode of adducing evidentiary material. In its recently enacted Criminal Code the Northern Territory Government has seen fit to withdraw the right to make an unsworn statement from the thousands of its most disadvantaged citizens. It should be reinstated.

It must not be thought that the disabilities I have mentioned afflict only the accused person. Aboriginal witnesses are equally vulnerable. Added to their susceptibility to cross-examination is anxiety, shyness and the problems of language. Their evidence can quickly be made to appear unreliable.

The vulnerability of the Aboriginal victim must also be mentioned, particularly where the support of a competent interpreter is lacking. For example, in *R* v. *Banjo Anglitchi and Others* (1980)[7] the evidence of the young prosecutrix was so mutilated in cross-examination at the preliminary hearing that the Crown was forced to accept pleas of guilty to conspiracy to rape but not the completed offence. The trial Judge, Mr Justice Muirhead, was moved to remark: 'In this matter I request that the depositions of the girl principally involved be referred to the Solicitor General. They illustrate graphically what has been known for so long, namely that without the aid of trained

and skilled court interpreters in Aboriginal languages, the administration of justice in the Northern Territory remains sadly impeded'. Aboriginal witnesses are also nonplussed when Legal Aid lawyers, who are supposed to help and empathise with Aboriginal people, attack the veracity of their evidence in the courtroom setting.

Upon hearing the catalogue of woes which may befall an Aboriginal person embroiled in the criminal justice system one might be forgiven for thinking that the attainment of justice is rare, if not illusory. If that were the reality then those practitioners who battle in the courts for Aboriginal clients would give up in despair. They do not do so. Indeed their very presence within the system has forced the courts to confront the plight of the legally underprivileged. Thus, the courts have felt obliged to take on a supervisory role in determining what evidence may fairly be admitted against Aboriginal accused who come before them.

It is a vital role which the courts must continue to exercise, but it is no easy role given the enormous variation in the number and degree of the problems facing Aboriginal defendants. In my opinion, however, what is even more important than court surveillance in the long run is the need for Aboriginal people to understand the criminal justice system and how it operates. Until then Aboriginal people will never feel comfortable with its processes. This demystification should occur through a specific educational program. Its overall effect would be markedly accelerated if Aboriginal people were to be recruited into the agencies which administer the criminal law — as policemen, as clerks of the court, as trained interpreters and, ultimately, as magistrates and judges.

Concurrently with the elimination of the uncertainty and confusion about the legal system, the insidious influence of the white authority figure may be expected to wane as Aboriginal people gain self-confidence, generated by the power of education and by the resurgence of pride in their cultural traditions and achievements. I look forward to the day when Aboriginal people will find the vagaries of the European legal system no more intimidating and no more infuriating than do most of the Australian community.[8]

NOTES

1. *R* v. *Anunga and Others* (1976) 11 ALR 412.
2. *R* v. *Cedric Kennedy* (1978) Northern Territory Supreme Court.
3. McCorquodale, John. 'An Annotated Bibliography' Chapter 10 in P. Hanks and B. Keon-Cohen (eds), *Aborigines and the Law: Essays in Memory of Elizabeth Eggleston*. George Allen and Unwin, Sydney, 1984, pp. 238–303.
4. *R* v. *Gus Forbes* (1980) Northern Territory Supreme Court, August.
5. *Collins* v. *R* (1980) 31 ALR 257.
6. *Gudabi* v. *The Queen* (1984) 52 ALR 133.
7. *R* v. *Banjo Anglitchi and Others* (1980) Northern Territory Supreme Court, December.
8. Some of the material in this chapter previously appeared in an article by Coldrey, J. and Vincent, F. 'Tales from the Frontier: White Laws-Black People', *Legal Service Bulletin*, vol. 5, no. 5, 1980, pp. 221–4.