

# SUPREME COURT OF QUEENSLAND

CITATION: *R v Sailor* [2012] QCA 246

PARTIES: **R**  
**v**  
**SAILOR, Jelta Murray**  
(appellant)

FILE NO/S: CA No 277 of 2011  
SC No 42 of 2011

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: Supreme Court at Cairns

DELIVERED ON: 13 September 2012

DELIVERED AT: Brisbane

HEARING DATE: 29 May 2012

JUDGES: Margaret McMurdo P and White JA and North J  
Separate reasons for judgment of each member of the Court,  
each concurring as to the order made

ORDER: **Appeal against conviction dismissed.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL –  
MISCARRIAGE OF JUSTICE – PARTICULAR  
CIRCUMSTANCES AMOUNTING TO MISCARRIAGE –  
IMPROPER ADMISSION OR REJECTION OF EVIDENCE  
– where the appellant is a Torres Strait Islander who was  
convicted of murder by a jury – where the appellant  
participated in a video-taped interview with police – where  
the *Police Powers and Responsibilities Act 2000 (Qld)*  
required the interviewing officer to take additional  
precautions if she reasonably suspected the appellant was at  
a disadvantage in comparison with members of the Australian  
community generally – where the record of interview was  
found to be admissible evidence at a pre-trial hearing –  
whether the record of interview (or parts of it) should have  
been excluded at the pre-trial hearing because of unfairness of  
the style of questioning – whether trial counsel should have  
applied to re-open the pre-trial ruling under s 590AA  
*Criminal Code 1899 (Qld)* – whether the admission into  
evidence of the record of interview amounted to a substantial  
miscarriage of justice  
*Criminal Code 1899 (Qld), s 590AA*  
*Police Powers and Responsibilities Act 2000 (Qld), s 420*  
*Police Powers and Responsibilities Regulation 2000 (Qld),*  
sch 10 s 36

*R v LR* [2006] 1 Qd R 435; [\[2005\] QCA 368](#), cited  
*R v Ryan* [\[2002\] QCA 92](#), cited  
*TKWJ v The Queen* (2002) 212 CLR 124; [2002] HCA 46,  
 cited

COUNSEL: A W Collins for the appellant (pro bono)  
 N Rees for the respondent

SOLICITORS: No appearance for the appellant  
 Director of Public Prosecutions (Queensland) for the  
 respondent

- [1] **MARGARET McMURDO P:** The appellant, Jelta Sailor, was convicted on 23 September 2011 in the Cairns Supreme Court after a three day jury trial of murdering Niko Wowo on 24 November 2009. It was not an issue at trial that the appellant killed the deceased. The issue was whether he should be convicted of murder or the lesser charge of manslaughter, either on the basis that he was so intoxicated he did not form an intention to kill, or provocation.<sup>1</sup> The appeal has also been conducted on this basis.
- [2] This appeal against conviction is on three interconnected grounds. The first is that Jones J, in a pre-trial hearing under s 590AA *Criminal Code* 1899 (Qld), erred in admitting into evidence the police record of interview with the appellant. The next two grounds were spawned during the oral submissions of the appellant's counsel. He was given leave to amend the grounds but did not file an amended notice of appeal. Doing the best I can from the transcript, the second ground is that a miscarriage of justice occurred at the pre-trial hearing when the appellant's counsel failed to request Jones J to listen to the whole of the appellant's record of interview and to exclude inadmissible portions of it. The third ground is that the appellant's counsel at trial caused a miscarriage of justice by not asking to re-open Jones J's ruling and to have excluded inadmissible parts of the appellant's record of interview. The appellant contends that the appeal should be allowed and a new trial ordered.
- [3] The respondent contends the interview was admissible. The trial judge gave appropriate directions about parts which may have been prejudicial. If there has been any error, the prosecution case was so compelling that under s 668E(1A) *Criminal Code* there has been no substantial miscarriage of justice. The appeal should be dismissed.
- [4] Before discussing these grounds, it is necessary to set out the background facts, large portions of the impugned record of interview, and relevant aspects of the pre-trial hearing and the trial.

### **Background facts**

- [5] The following matters are uncontroversial. On the evening of Monday, 23 November 2009, the deceased died from head injuries he sustained near a foot bridge at the intersection of Mulgrave Road and Brown Street, Cairns. When ambulance officers arrived, he was cold to touch, had no pulse and efforts to revive

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<sup>1</sup> This was the way the defence was conducted at trial although the judge, out of an abundance of caution, directed the jury as to s 23(1)(b) *Criminal Code* 1899 (Qld) so that technically a verdict of not guilty to manslaughter was also open.

him proved fruitless. The subsequent autopsy revealed he had multiple head injuries, including fractures to the back and side of the skull and subdural haemorrhaging. The injuries were consistent with being caused by multiple blows and blunt trauma. A receipt for the purchase of liquor from "Cazaly's", a nearby bar, was found adjacent to the body. The appellant's partner, Selena Dick, was identified on CCTV footage at Cazaly's purchasing liquor. The footage showed she was with another person. This led police to make enquiries at Woree where the appellant and Ms Dick were staying.

- [6] At about 2.30 pm on 28 November 2009, the appellant was arrested on a warrant issued in an unrelated matter. He was at that stage "a person of interest" to the police officers investigating the murder. They placed an undercover operative in the cell with him in an unsuccessful attempt to obtain information.

### **Ms Dick's statement to police**

- [7] That afternoon, Ms Dick told police officer Clark that the appellant (her boyfriend) had attacked the deceased. She showed them what had happened at the foot bridge. She was taken to the police station where she had a sleep and something to eat and drink. She returned to the foot bridge and again showed the police what the appellant had done to the deceased. On this occasion, she was video recorded.
- [8] Shortly before 11.00 pm on 28 November 2009, she commenced to give police a statement to the following effect. At about 6.30 pm on 23 November 2009, she met up with the appellant and they went to Cazaly's bottle shop where they bought two casks of wine. They walked to the Westcourt Tavern on Mulgrave Road. The appellant was inside the tavern with others whilst she drank wine outside. At about closing time, probably around 10.00 pm, the appellant came out. His mother and Ms Dick's uncle went home in a taxi. She and the appellant walked towards Woree. He was not drunk and she was "happy drunk". She continued to drink wine from a lemonade can. She suggested they relax on the bridge on Brown Street. They crossed the bridge and sat down on the other side. She was listening to her MP3 player and they were "yarning".
- [9] After a while she saw the deceased, whom she did not know, crossing the road from Hungry Jack's. He was from Papua New Guinea and seemed to be in his 40s. The appellant would get jealous if she looked at other men; she was careful not to make eye contact with the deceased and to mind her own business. The deceased walked over the bridge towards them. She moved up and he sat down next to the appellant. They were "yarning" and seemed to be getting on very well. They shared their wine with the deceased. The appellant was talking "double dutch, half islander lingo".
- [10] After about 10 minutes, he punched the deceased in the face. She did not know why. The deceased went onto his back on the bridge. She told the appellant to leave but he kicked the deceased with his left foot, hard to the face, like a footy kick. He went crazy and "got stuck into" the deceased. He wound his fingers into the back of the deceased's hair or shirt and dragged him into the middle of the bridge. The appellant hung onto the bridge rails and stomped down really hard on the deceased's head about three times with his whole foot making contact with the head. She could do nothing to stop the attack. Finally, she ran up to the appellant, punched him in the face and pushed him off the deceased. The appellant fell backwards. She stood between the appellant and the deceased to try and stop the attack. The appellant said, "Fuck off, get out of my way." She "was crying [her]

lungs out". The appellant got up and went back to the deceased and stomped on him again. She heard a sound like a coconut cracking. She was crying and screaming and telling the appellant to leave him. She bent down and tried to wake the deceased, touching his head which felt wet. When she looked at her hand she saw blood on it and showed the appellant. She knew straight away the deceased was dead because of the blood at the back and side of his face.

- [11] She saw a small Chubb security car nearby and watched the security guard get out and put a card in the door of the Bendigo Bank. She screamed out, "Fuck, fuck, fuck." The security guard looked at her and got back in the car but did not do anything. She wanted the security guard to help her. She followed the appellant up the road towards Woree. She concluded giving her statement to police in the early hours of the morning of Sunday, 29 November.

### **Police officer Clark's evidence at the pre-trial hearing**

- [12] Police officer Clark swore an affidavit which the prosecution relied on in the pre-trial hearing. She had 14 years experience as a police officer, including interviewing Aboriginal and Torres Strait Islander people in remote communities. She was also a qualified teacher. She initially considered the appellant to be a person of interest, but not a suspect, in the murder investigation. His girlfriend, Ms Dick, told her that he had bashed a man and stamped on his head at the location where the deceased's body was found. She then decided to interview the appellant whom she knew was in the watch-house. She and Detective Senior Constable Johnson, video-recorded that interview.
- [13] She understood her duties under s 420 *Police Powers and Responsibilities Act 2000* (Qld) ("the Act"). Accordingly, she had police officer Johnson speak to the appellant's mother to ascertain his level of education, his understanding of English and his comprehension levels. She also had police officer Johnson speak to the police officer who had interviewed the appellant in relation to an offence in 2008 about his capacity to understand English and comprehend questions.
- [14] Police officer Johnson reported his conversation with the appellant's mother. The appellant had lived in Cairns since he was three and attended high school there with a cross-section of both Indigenous and Caucasian students until year 10. English was the common language spoken in his household. Police officer Clark considered a year 10 education at this high school was a more comprehensive education than provided in many Indigenous communities. She also learned that the investigating police officer in 2008 considered the appellant understood the warnings she gave him and the questions she asked.
- [15] As a result, police officer Clark considered the appellant "was not a disadvantaged person in comparison with the rest of the Australian community". She said she took care to use appropriate questions and her cognitive interviewing skills during the interview so that the appellant was "in control of the information flow". She did this to counter any gratuitous concurrence. At no time did she apprehend he "was a disadvantaged person requiring [her] to cease the interview and inform a legal representative" so as to comply with s 420 of the Act.
- [16] Police officer Clark also gave brief oral evidence at the pre-trial hearing. The appellant's criminal history was tendered through her. It was seven and a half pages long and commenced in 1994 in the Cairns Childrens Court. It continued in the

Cairns Magistrates Court in 1997. Much of it concerned street and bail offences but there were also many convictions for offences of dishonesty and minor violence. Of most significance was that in September 2008 in the Cairns District Court he was convicted of torture on 4 January 2008 and sentenced to three years imprisonment with parole on 8 November 2008.

- [17] Police officer Clark explained she held a Diploma in Primary Teaching which she completed before she joined the Queensland Police Service. The police officer who interviewed the appellant in respect of the 2008 torture offence was also a qualified teacher with some teaching experience, had previously worked in the juvenile aid bureau and was trained in interviewing children and people with special needs.
- [18] In cross-examination she agreed that she knew that if she had contacted the Aboriginal and Torres Strait Islander Legal Service (ATSILS) on behalf of the appellant the likely result was that he would have been advised not to say anything further to police. When asked whether this was an outcome she desired, she responded that the question as to his legal representation was not what she wanted but what he wanted.

### **The appellant's record of interview with police**

- [19] The wide-ranging attack on the admissibility of the record of interview as a whole, and, alternatively, on specific parts of it, make it necessary to set out large portions. It commenced at 8.01 pm and concluded at 11.58 pm on 29 November 2009 and it is recorded in 141 pages of transcript.
- [20] Police officer Clark explained that she and police officer Johnson were investigating the murder of the deceased the previous Tuesday. She asked the appellant whether he understood the nature of their investigation and he responded, "Yeah, definitely, yeah." The questioning continued:

"SGT CLARK: Now before I ask you any questions, I'll again warn you, I must tell you that you have the right to remain silent. This means that you don't have to say anything, answer any questions or make any statement unless you wish to do so. If you do say something or make any statement--

[APPELLANT]: Mmm-hmm.

SGT CLARK: --it may be later - be used as evidence. So do you understand what I've just said to you?

[APPELLANT]: Yep. Yeah.

SGT CLARK: Okay. Do you understand that if you speak, or whatever you say, will be recorded on the recording device?

[APPELLANT]: Yep. Yeah.

SGT CLARK: Okay, and do you understand, if you do speak, whatever you say may be told to a Court?

[APPELLANT]: Yep.

SGT CLARK: Okay. You have a right to telephone or speak to a friend or relative to inform that person where you are, and to ask him or her to be present during questioning.

[APPELLANT]: Mmm-hmm.

SGT CLARK: You also have the right to telephone or speak to a lawyer of your choice, to inform that person where you are, and to

arrange or attempt to arrange for the lawyer to be present during questioning.

[APPELLANT]: Yep.

SGT CLARK: If you want to telephone or speak to any of these people, questioning will be delayed for a reasonable period of time for that purpose. Now is there anyone you would like to telephone or contact?

[APPELLANT]: Ah, no.

SGT CLARK: All right. And is there any reason why you don't want to telephone or speak to a friend, relative, or arrange a person to be present during questioning?

[APPELLANT]: Ah, nope.

SGT CLARK: Okay. And do you understand that arrangements can be made for a support person to be present during questioning?

[APPELLANT]: Mmm-hmm, yep.

SGT CLARK: Ah, do you also understand that you do not have to have a support person present during questioning?

[APPELLANT]: Yep.

SGT CLARK: All right. Do you want a support person present?

[APPELLANT]: No.

SGT CLARK: Okay. I propose to conduct the interview by using this electronic recording device that you see before you.

[APPELLANT]: Yep.

SGT CLARK: Our conversations will be recorded on both audio and digital recording.

[APPELLANT]: Mmm-hmm.

SGT CLARK: So do you understand that?

[APPELLANT]: Yep.

SGT CLARK: Now at the conclusion of the interview, you'll be - ah supplied with a compact disc of the recording. Do you understand that?

[APPELLANT]: Yep.

SGT CLARK: Okay, for the purpose of clarity and later identification of voices, I would ask that you speak clearly and try not to speak when another person is talking. Do you understand--

[APPELLANT]: Yep.

SGT CLARK: --that? If I say anything that you don't understand, please stop me and ask me to explain. Do you--

[APPELLANT]: Yep.

- [21] Police officer Clark asked him his occupation. He questioned what "occupation" meant and she responded, "Work?" He explained that he was not in work. He said he was educated to year 10 level at Smithfield High School. He could read. He read newspapers like the Cairns Post and football magazines. He could write but "not good". When asked if he could write a letter to his Mum he responded, "Yep." He agreed that English was his first language and that he did not speak other languages. He identified as a Torres Strait Islander. He was not suffering from any medical condition that would affect his ability to answer questions and was not presently affected by alcohol, drugs or medication. When asked whether he understood everything that was happening, he responded, "Yep."
- [22] Police officer Clark next asked him about his knowledge of the murder of the deceased. He responded, "Ah, I like - I didn't do that for him." He stated that he

and his girlfriend heard a scream from the bridge and they saw "that same old fella laying on that bridge part". Later, his girlfriend's cousin rang the ambulance and they heard about a body on the bridge on the news. He answered the police officers' questions about his whereabouts and actions on the evening of the killing in a way which did not implicate him in any attack on the deceased. This part of the questioning is recorded in about 77 pages of transcript. The interview was suspended at 9.53 pm.

[23] It resumed at 10.20 pm. Police officer Clark again asked him if he wanted to contact anyone and he responded, "No." He agreed he was given a cup of water during the break. Police officer Clark summarised the appellant's account of what happened on the previous Monday. She stated that other police officers had spoken to a woman, Seeba Tapau. The appellant said she was Ms Dick's cousin-sister. Police officer Clark read Ms Tapau's statement which addressed what he was wearing on the night of the killing. Police officer Clark stopped after each sentence or two to allow him to comment and he agreed the statement was correct.

[24] Police officer Clark repeated the exercise with a statement from Ms Elena Ghea, the appellant's mother. The appellant accepted the portions of the statement read to him and added further details. Ms Ghea said that he got up at about 5.30 pm on Friday, 27 November. She added that he was still a bit drunk. She watched the local news and called out to him that Ms Dick's picture was on the news. By the time he came to see, the news items was over. Ms Ghea stated that the appellant "got a bit uptight about this and said, 'Mum, don't fucking spread any yarn around Cairns about [Ms Dick] coming on the news.' ... Don't ring [Ms Dick's] Mum and let her know." He agreed he said this and explained that Ms Dick's mother was sick and he was worried that this would make her worse. The following exchange then occurred:

"SGT CLARK: Okay. "I said to him, 'What happened that night?' "

[APPELLANT]: Mmm.

SGT CLARK: Okay. Can you tell me what you said?

[APPELLANT]: No, I forgot.

SGT CLARK: All right. Um, she says that [the appellant] said, "We're at the corner store and we were arguing and we split up. I went to Birch Street and I don't know where [Ms Dick] went."

[APPELLANT]: Mmm.

SGT CLARK: So did you say that to your mum?

[APPELLANT]: Yeah.

SGT CLARK: All right. Why would you have told her that?

[APPELLANT]: Ah, I told her like when we always growl and that, argument, me and [Ms Dick]--

SGT CLARK: All right.

[APPELLANT]: Like she - she know us.

SGT CLARK: All right. So what you told your mum that "We were at the corner and we were arguing and split up."

[APPELLANT]: Yeah. Yeah.

SGT CLARK: That's different to what you've told us here?

[APPELLANT]: Yeah. That corner, that's where that same corner where um ah Bendigo Bank.

SGT CLARK: Okay. So you were referring to the Bendigo Bank corner.

[APPELLANT]: Yeah.

SGT CLARK: Okay. "And we split up."

[APPELLANT]: Yeah.

SGT CLARK: Why did you tell your mum you split up?

[APPELLANT]: Oh, well, I went--

SGT CLARK: Sorry?

[APPELLANT]: I went.

SGT CLARK: Yeah.

[APPELLANT]: Yeah.

SGT CLARK: "So I went to Birch Street and I don't know where [Ms Dick] went."

[APPELLANT]: Yeah. That's in um Festival Fare Birch Street.

SGT CLARK: But so you're telling us here tonight you said that you stayed together and went back to the flats.

[APPELLANT]: Yeah.

SGT CLARK: And yet with your mum you're saying that – you told her that you had a argument and went Birch Street and you don't know where [Ms Dick] went.

[APPELLANT]: Mmm-hmm.

SGT CLARK: Why - why is the difference? Can you explain that?

[APPELLANT]: No.

SGT CLARK: Okay. How do you get on with your mum?

[APPELLANT]: Yeah, good.

SGT CLARK: So when she asks you things how do you normally talk to her?

[APPELLANT]: Like normal.

SGT CLARK: Yeah.

[APPELLANT]: Yeah.

SGT CLARK: All right. Do you normally tell the truth to her?

[APPELLANT]: Yeah.

SGT CLARK: All right. And why on this occasion did you tell her something different?

[APPELLANT]: Like on that paper.

SGT CLARK: She's – she's provided police her version saying that 'Jelta said "We were at the corner and we were arguing and split up." 'So she's saying that you told her on that night--

[APPELLANT]: Mmm.

SGT CLARK: --you split up from [Ms Dick].

[APPELLANT]: Yeah. Yeah.

SGT CLARK: So my question is why would you have told your mum something different to what you've told us here?

[APPELLANT]: Ah, I don't know.

SGT CLARK: So you can't explain that?

[APPELLANT]: Mmm."

- [25] Police officer Clark then interrogated the appellant in a similar manner with the statement of Priscilla Billy, also known as Conai, whom he said he knew as a member of Ms Dick's family. He agreed that Ms Billy lived at Woree where he and Ms Dick returned on the night of 23 November after the incident on the bridge. Ms Billy said that she saw the appellant's bloodstained clothing in the pile of washing. The appellant explained that when Ms Dick went to check on the man on the bridge she got blood on her hands and she wiped it on his shirt, on the bag he was carrying, and on clothing in the bag. Police officer Clark asked whether it

struck him as strange that, after they ran off having seen a man bleeding on the bridge, they stopped for Ms Dick to wipe blood from her hands onto a jumper inside the bag they were carrying. The appellant responded, "No. I was just panicking. Just went."

[26] Police officer Clark next put to the appellant the statement of the security officer. At about 1.10 am on Monday, 24th November the security officer was checking premises near the Bendigo Bank at Westcourt when she heard an Indigenous male and female arguing. She heard the man say, "Fuck off" and the woman say something like, "Please stop". She described their clothing and appearance. She thought it looked like a domestic violence situation and that they were scuffling in front of the foot bridge. The woman was trying to cling onto the man with her arms. The appellant nodded his head and said, "Yeah, yeah". The interviewed continued:

"SGT CLARK: "I saw the man walk two steps away towards Mulgrave Road direction and I turned around and walked back. Sometime during this it looked like to me that he had stomped his foot and I saw him move towards her."

[APPELLANT]: Mmm-hmm.

SGT CLARK: I didn't see any actual hits or punches ah throw but I heard loud thuds which sounded like he was hitting her. He wasn't making any other noises than saying 'fuck off'. She sounded to me like she was the one doing the pleading, saying words like 'Please stop. Please don't.' " She states that she got back into the patrol car and reversed back to the – the front entrance to the Bendigo back [sic] shopping centre. "And the last thing that I heard was a woman crying around the foot bridge area."

SCON JOHNSON: Tell us your thoughts--

PAUSE IN RECORDING

SCON JOHNSON: -- [appellant]?

[APPELLANT]: No. I'm beating her there.

SGT CLARK: Beg your pardon.

[APPELLANT]: I'm beating her there.

SGT CLARK: Who?

[APPELLANT]: [Ms Dick].

SGT CLARK: Tell me about it.

[APPELLANT]: Ah, just - just went off at her.

SGT CLARK: You went off at [Ms Dick].

[APPELLANT]: Mmm-hmm.

SGT CLARK: Well, tell me about that. What happened?

[APPELLANT]: I just hit her.

SGT CLARK: Hit her where?

[APPELLANT]: Around the head.

SGT CLARK: So you hit [Ms Dick] around the head?

[APPELLANT]: Mmm-hmm.

SGT CLARK: How did you hit her?

[APPELLANT]: I just slapped her.

SGT CLARK: Which hand did you use?

[APPELLANT]: Ah, left.

SGT CLARK: All right. Tell me – tell me the whole incident about what happened.

[APPELLANT]: Ah, we were just sitting there and started drinking. And all of a sudden just started going psycho.

SGT CLARK: And who went psycho?

[APPELLANT]: [Ms Dick].

SGT CLARK: All right. Tell me about that.

[APPELLANT]: Started to - starting just hitting her around.

SGT CLARK: All right. You said you started hitting her around.

[APPELLANT]: Mmm-hmm.

SGT CLARK: What do you mean by that?

[APPELLANT]: Just hit her.

SGT CLARK: How many times?

[APPELLANT]: Oh, a couple of times.

SGT CLARK: Okay. Can you show me how you hit her? Just do it slow motion.

[APPELLANT]: Ah, just whacked - whack him [sic].

SGT CLARK: Okay. So for the purpose of the interview you're clenching your right--

[APPELLANT]: Left.

SGT CLARK: Sorry, left - left fist and you do a - a roundhouse swing.

[APPELLANT]: Mmm.

SGT CLARK: Where did that roundhouse swing hit her?

[APPELLANT]: SAILOR: In the mouth.

SGT CLARK: Okay. And when you were swinging and hitting her in the mouth, whereabouts was this happening?

[APPELLANT]: Oh, on the step - step part near that Commonwealth, ah, thing, Bendigo Bank.

SGT CLARK: On the step part of the Commonwealth Bank?

[APPELLANT]: Mmm.

SGT CLARK: Oh, sorry, the Bendigo Bank.

SAILOR: Yeah.

SGT CLARK: Okay. Which - which step? There's a few steps there.

[APPELLANT]: Ah, this one next to the bank."

- [27] Police officer Clark continued to question him about his assault on Ms Dick. The appellant stated that this assault occurred before they went to the tavern. They probably left the tavern at about midnight. The "old fella" came from the Mulgrave side of the bridge. The interview continued:

"SGT CLARK: ... Tell me what - what happened when - with the old man.

[APPELLANT]: Well, he was trying telling me for he was gonna catch my family with black magic.

SGT CLARK: Right. So--

[APPELLANT]: Like kill my family with black magic.

SGT CLARK: Yes. So when he said that; what happened next?

[APPELLANT]: I just hit him.

SGT CLARK: Okay. How did you hit him?

[APPELLANT]: Oh, on my right.'

SGT CLARK: Okay.

[APPELLANT]: Straight under the chin.

SGT CLARK: Can you show me what - how you did - did the punch?

[APPELLANT]: Just one hit...and fall down, bang him head.

...

SGT CLARK: ... Tell me - you said he - he um said something, pardon me, he was telling me um about black magic.

[APPELLANT]: Mmm.

SGT CLARK: All right. Where was he talking to you about the black magic? Where, on the map, did you first talk to him?

[APPELLANT]: On the step.

SGT CLARK: Okay. Tell me about that. How were you on the steps? How were you positioned?

[APPELLANT]: Like facing my back to him.

SGT CLARK: So you were - you had your back to him?

[APPELLANT]: Mmm-hmm.

SGT CLARK: All right. So you got your back to him, who else was there or who else was around?

[APPELLANT]: Ah, just me and [Ms Dick].

SGT CLARK: Okay. Where's [Ms Dick] at that point?

[APPELLANT]: Sitting beside me.

SGT CLARK: So are you - she's sitting next to you?

[APPELLANT]: Yeah.

SGT CLARK: All right. Again, with the drain, can you show me which side - who was sitting where? Can you draw in the circles? Okay. And can you just initial who's who? Okay. So you've put the - um JS is closest to the Bendigo Bank side and you're sitting side by side on the steps with SD closest to the drain, so ah [Ms Dick]?

[APPELLANT]: Mmm.

SGT CLARK: Okay. Where is the man - can you mark an X where the old man is when he talks to you about the black magic?

[APPELLANT]: Um, just out the back there.

SGT CLARK: Okay. So how does he get up the back behind you?

[APPELLANT]: He got the little ramp come up them step.

SGT CLARK: Yeah.

[APPELLANT]: Like, yeah, that ramp there it got step.

SGT CLARK: Oh, right, so he's come up--

[APPELLANT]: He came from behind.

SGT CLARK: All right. So he's come up the ramp, okay, go on.

[APPELLANT]: And started yarning, yarning and something like that. What you gonna talk [INDISTINCT], kill your family. Black magic.

SGT CLARK: Okay. So yarning, yarning. How long were you yarning, yarning for?

[APPELLANT]: Not good - not for long. Just once he said that, that's when I stand up and start hit him.

SGT CLARK: Okay. So you stand up and start hitting him?

[APPELLANT]: Mmm.

SGT CLARK: What's the first hit that you throw on him?

[APPELLANT]: Oh, my right.

SGT CLARK: So your right?

[APPELLANT]: Yeah.

SGT CLARK: And what sort of hit is that? What sort of--

[APPELLANT]: Ah, king hit.

SGT CLARK: King hit.

[APPELLANT]: Yeah.

SGT CLARK: Can you show me the king hit that you did to him?  
Can you show me the movement?

[APPELLANT]: I just went...like that.

SGT CLARK: Okay. And where - where did that strike him?

SAILOR: Under the chin.

SGT CLARK: Under the chin. So when you hit him under the chin,  
what happened to the - the man?

[APPELLANT]: He just falling and bang he head on the cement.

SGT CLARK: Fall and banged his head on the what?

[APPELLANT]: On the footpath cement.

SGT CLARK: On the cement. Sorry.

[APPELLANT]: Yeah.

SGT CLARK: All right. So which side up is he laying?

[APPELLANT]: Probably up - facing up.

SGT CLARK: So he's facing up? So when you hit him what's -  
what's he like when he's on the ground at that point?

[APPELLANT]: Ah, he was already like unconscious.

SGT CLARK: Unconscious.

[APPELLANT]: That's what I thought.

SGT CLARK: All right. What happened next?

[APPELLANT]: Um, gone from there.

SGT CLARK: All right. You said um earlier you started hitting him,  
so how many hits are you saying that you - you hit him with?

[APPELLANT]: Say two.

SGT CLARK: Two. All right. So tell me how you strike him with  
the second hit.

[APPELLANT]: Just same.

SGT CLARK: Same?

[APPELLANT]: Same right.

SGT CLARK: Okay. So he's lying face up, can you maybe  
demonstrate, stand up, show me how you do the second hit if he's  
laying down?

[APPELLANT]: No, it's - he didn't lay down. I hit him twice when  
he fall.

SGT CLARK: So as he's falling you throw two quick rights?

[APPELLANT]: Yeah.

SGT CLARK: Okay. So when you're doing the hitting what's being  
said and done at this time?

[APPELLANT]: No. [Ms Dick] just said, "Stop, stop." And that's  
that--

SGT CLARK: Yes, go on.

SAILOR: That's when I said "fuck off" then.

SGT CLARK: Who were you saying fuck off too?

[APPELLANT]: [Ms Dick].

SGT CLARK: Why were you saying that?

[APPELLANT]: I was wild.

SGT CLARK: And what--

[APPELLANT]: I just walked away then."

[28] Police officer Clark's questioning of the appellant as to his subsequent movements are recorded over the next two pages of transcript. She then asked:

"... All right. And is there any reason why like you've told us several versions?

...

So which one's the correct version?

[APPELLANT]: Probably, there.

SGT CLARK: This one? All right."

[29] Police officer Clark returned to the security officer's statement:

"SGT CLARK: She says, "I saw the man walk two steps away towards Mulgrave Road direction and turn around and walk back. Some time during this it looked like to me like he has stomped his foot and I saw him move towards her. Um, I did not see any actual hits or punches" it should be thrown - "thrown but I heard loud thuds."

[APPELLANT]: It's from [Ms Dick].

SGT CLARK: Yeah. Tell me about that.

[APPELLANT]: Yeah, I just stomped on her head.

SGT CLARK: You stomped on [Ms Dick's] head?

[APPELLANT]: Yeah.

SGT CLARK: Okay. So tell me how that happened?

[APPELLANT]: 'Cause I keep telling her to fuck off so I kicked her.

SGT CLARK: Okay. Where did you kick her?

[APPELLANT]: Probably side on the ear.

SGT CLARK: Sorry.

[APPELLANT]: Probably side on the ear.

SGT CLARK: Side on the ear? So you kicked her side on the ear?

[APPELLANT]: Yeah, like when she was sitting down.

SGT CLARK: Sitting down where?

[APPELLANT]: On the bridge?

SGT CLARK: Okay. And when - when did this happen in the sequence of the old man?

[APPELLANT]: Ah, just minutes after.

SGT CLARK: Minutes after?

[APPELLANT]: Yeah.

SGT CLARK: And why did you kick her in the head?

[APPELLANT]: Ah, just being loud. Yeah.

SGT CLARK: So she's - she was being loud?

[APPELLANT]: Mmm.

SGT CLARK: How was she being loud?

[APPELLANT]: Like scream.

SGT CLARK: And what was she--

[APPELLANT]: Calling me names.

SGT CLARK: What names was she calling ya?

[APPELLANT]: Ah, just called me names.

SGT CLARK: Yeah, what's--

[APPELLANT]: Like dirty names.

SGT CLARK: Yeah. What names were they?

[APPELLANT]: Arsehole.

SGT CLARK: And what--  
 [APPELLANT]: She just trying to make me more wild.  
 SGT CLARK: So she was making you wild.  
 [APPELLANT]: Mmm.  
 SGT CLARK: So you kicked her in the head and what part of the head did you kick her?  
 [APPELLANT]: Just on the side. Here.  
 SGT CLARK: So--  
 [APPELLANT]: Ears.  
 SGT CLARK: All right. So you - which side of the head? Left or right?  
 [APPELLANT]: Ah, left.  
 [SGT CLARK]: Which side of the head you kicked her?  
 [APPELLANT]: Mmm.  
 SGT CLARK: And which foot did you kick her with?  
 [APPELLANT]: Oh, my right leg.  
 SGT CLARK: If you stand up can you show me the movement that you kicked her with?  
 SCOT JOHNSON: A bit hard with that, maybe you can just hoick it up, maybe that might help.  
 [APPELLANT]: My shorts.  
 SCOT JOHNSON: Yeah. That will do.  
 [APPELLANT]: Just went like that.  
 SGT CLARK: So you're doing a swinging sort of round – round kick.  
 [APPELLANT]: Yeah.  
 SGT CLARK: And what happened to [Ms Dick] when you kicked her in the head?  
 [APPELLANT]: Oh, just started crying, singing out.  
 SGT CLARK: Okay. So she started singing and crying out, then what happened?  
 [APPELLANT]: I went.  
 SGT CLARK: And what happened with her?  
 [APPELLANT]: She follow too."

- [30] Police officer Clark next read portions of Ms Dick's statement to the appellant, again pausing to allow him to comment. The most relevant portions are as follows:

SGT CLARK: Okay. Um, she states that "When I'm with [the appellant] he gets jealous if I look at other men." So you did a bit of a chuckle.  
 [APPELLANT]: Back to front.  
 SGT CLARK: Okay. So she gets jealous of you?  
 [APPELLANT]: Mmm.  
 SGT CLARK: Not with men?  
 [APPELLANT]: No.  
 SGT CLARK: No. With women?  
 [APPELLANT]: Yeah.  
 ...  
 SGT CLARK: ... And she said "I'm guessing um it was about 10 minutes talking and drinking." She said, "I don't know what caused it but I saw [the appellant] punch his face."

[APPELLANT]: Mmm.

SGT CLARK: "[The appellant] threw a left hook which smashed the old man the right side of the face, I think. The punch flicked him all right, he went on his back lying on the bridge."

[APPELLANT]: Mmm.

SGT CLARK: I said something like in a good way, "You'd better go."

[APPELLANT]: Mmm.

SGT CLARK: Yeah. "[The appellant] got up and the old man was still - still sitting back and so [the appellant] used his left foot and kicked him crazy like a footie kick."

[APPELLANT]: Yeah, yeah.

SGT CLARK: Okay. Tell me about that.

[APPELLANT]: Yeah, I just, yeah, kicked him, yeah.

SGT CLARK: Okay. Can you show me--  
--how you kicked him?

[APPELLANT]: I just kicked - kick him.

SGT CLARK: All right. So you're using your right foot.

[APPELLANT]: Yeah.

SGT CLARK: Just kicking. Um, whereabouts did you kick him?

[APPELLANT]: Ah, on the face.

SGT CLARK: On the face. And when you kicked him what happened to the old man?

[APPELLANT]: Ah, I don't know, probably out I think.

SGT CLARK: He was out?

[APPELLANT]: Yeah. I don't remember much that night.

SGT CLARK: Okay. So you don't remember--

[APPELLANT]: Mmm-hmm.

SGT CLARK: --much? Um, she said "The kick was hard and hit the old man in the face." So you're nodding your head?

[APPELLANT]: Yeah.

SGT CLARK: "[The appellant] was still crazy and I saw he just got stuck into the old man."

[APPELLANT]: Yeah.

SGT CLARK: "[The appellant] got one of his hands and somehow wound his fingers into the back of the man's hair or shirt and dragged him in the middle of the bridge."

[APPELLANT]: Yeah.

SGT CLARK: All right. Tell me about that.

[APPELLANT]: I don't remember but, yeah.

SGT CLARK: So you don't remember but you're saying yeah?

[APPELLANT]: Mmm.

SGT CLARK: What do you mean by that?

[APPELLANT]: I was real intoxicated that night, don't remember much.

SGT CLARK: Okay. So intoxicated.

[APPELLANT]: Yeah, if she said - said it then it should be right.

SGT CLARK: All right. Um, "The old man was sliding on his bum. [The appellant] was hanging on to the bridge rails and stomping down really hard on the old man's head." Tell me about that.

[APPELLANT]: Ah---Nah.

SGT CLARK: What do you remember  
[APPELLANT]: Probably nothing much.  
SGT CLARK: Well from that--  
[APPELLANT]: All I remember I kicked him and that, yeah, that was it.  
SGT CLARK: Okay. So you remember kicking him.  
[APPELLANT]: Mmm-hmm.  
SGT CLARK: And what was the kick that you kicked him? Where did that - where did that occur on the bridge?  
[APPELLANT]: That same spot where he was laying down.  
SGT CLARK: So the same spot he was lying down. And then what do you remember from there?  
[APPELLANT]: Oh, nothing. Probably went off.  
SGT CLARK: Okay. Tell me about that. So--  
[APPELLANT]: Probably kicked him in the head.  
SGT CLARK: Yeah.  
[APPELLANT]: And that's it.  
SGT CLARK: How many times did you kick him in the head?  
[APPELLANT]: Oh, a couple of times.  
SGT CLARK: Yeah.  
[APPELLANT]: I think.  
SGT CLARK: All right. Can you show me how you were kicking him in the head?  
[APPELLANT]: No, just kicked him. Kicked.  
SGT CLARK: So what was your kick? Can you show me the way you kicked him?  
[APPELLANT]: Yeah, this way. Like that. [Demonstrates]  
SGT CLARK: So you're kicking your leg full out?  
[APPELLANT]: Yeah.  
SGT CLARK: Okay. And how many times did you kick him in the head like that?  
[APPELLANT]: Oh, a couple of times. Yeah.  
SGT CLARK: All right. And what--  
[APPELLANT]: Three, four.  
SGT CLARK: Three or four times? And what was the man doing when you were kicking him in the head those three or four times?  
[APPELLANT]: Oh, probably sleep.  
SGT CLARK: He was asleep?  
[APPELLANT]: Unconscious.  
SGT CLARK: Unconscious. And why did you kick him in the head?  
[APPELLANT]: I don't know.  
SGT CLARK: So you don't know why you kicked him in the head?  
[APPELLANT]: Mmm.  
SGT CLARK: All right. When you kicked him in the head; what happened - what was happening to the man's head as you did that?  
[APPELLANT]: I don't know, probably - just I left him there.  
SGT CLARK: You left him there? All right. [Ms Dick] states that "[The appellant] was hanging on to the bridge rails and stomping down really hard on the old man's head."  
[APPELLANT]: All I remember I was gonna pick him up and chuck him in the creek.

SGT CLARK: All right. Tell me about that.

[APPELLANT]: After when I finish kicked him but I couldn't get him up.

SGT CLARK: Okay. Tell me how - how were you trying to pick him up?

[APPELLANT]: Pick him up under the arms.

SGT CLARK: All right. And what made you not been able to pick him up?

[APPELLANT]: Ah, probably too heavy and I was too drunk.

SGT CLARK: So he was too heavy? Why did you want to do that?

[APPELLANT]: I couldn't, so I just left him there.

SGT CLARK: But why were you wanting to throw him off the bridge?

[APPELLANT]: I wasn't gonna throw him but I think after I just leave him.

SGT CLARK: Okay. All right. Well, tell me about the - the stomping.

[APPELLANT]: I don't remember much about that stomping.

SGT CLARK: What do you remember?

[APPELLANT]: Just picking him up trying to chuck him over but, no, couldn't.

SGT CLARK: So when did - when - what - can you go through the sequence of how it happened that you were gonna throw him over? So what had you done to him at that - at that point?

[APPELLANT]: I was gonna pick him and chuck him over but I couldn't.

SGT CLARK: All right. But how many times had you hit him before then?

[APPELLANT]: Three or four times.

...

SGT CLARK: ... What were you intending to do to the man when you were kicking him? Why did you do it?

[APPELLANT]: 'Cause he said he gonna kill my family using black magic.

SGT CLARK: All right. And what--

[APPELLANT]: That's when I got wild.

SGT CLARK: Okay. And when you got wild what was your intent to do with the man?

[APPELLANT]: Belt him.

SGT CLARK: Okay. How bad did you want to belt him?

[APPELLANT]: Not like - like now.

SGT CLARK: All right. [Ms Dick] said, "I was standing back because there wasn't anything I could do. If I tried to stop [the appellant] I would have got it. [The appellant] stomped hard on the man's head about three times. The same whole foot going on to - on to the man's head. I ended up running up to [the appellant] and I punched him once in the face." So you're nodding your head.

[APPELLANT]: Yeah.

SGT CLARK: "While he was bent over hanging on the bridge I did a straight punch at his head and turned and pushed out of the old man's way."

[APPELLANT]: Yeah.

SGT CLARK: Tell me about that.

[APPELLANT]: Well, I stomped on his head three times.

SGT CLARK: Yeah.

[APPELLANT]: Then [Ms Dick], yeah, tried to stop me and she did.

SGT CLARK: Yeah. All right. Can you show me the action you were doing to stomp on his head? Can I get you to stand up?

[APPELLANT]: Like that.

SGT CLARK: Okay. And how hard were you stomping him?

[APPELLANT]: Like that hard. [Demonstrates]

SGT CLARK: All right. Can you just stand up so I can see the force that you were doing?

[APPELLANT]: Just went like that.

SGT CLARK: All right. So using - for the purpose of the interview you're using the sort of--

SCON JOHNSON: Ball.

SGT CLARK: --the ball of your foot and toes and what part of the head was that hit - coming in contact with the man, what part of his head?

[APPELLANT]: Probably face I think.

SGT CLARK: So on the face? Okay. And when you stomped down on his face, what was happening to his head?

[APPELLANT]: Ah, I don't know.

SGT CLARK: Did you hear any noises?

[APPELLANT]: Nuh.

SGT CLARK: All right. And what about underneath your foot? Um, did you feel anything as you did that?

[APPELLANT]: No.

SGT CLARK: All right. So when you stomped the three times on - on the head and [Ms Dick's] come in; what happened next?

[APPELLANT]: Ah, she probably slapped me a few times then we went. She pulled me out of it.

SGT CLARK: What are you wearing on your foot when you're stomping?

[APPELLANT]: Ah, sandals.

SGT CLARK: Tell me about them. What--

[APPELLANT]: I don't know where they are now.

SGT CLARK: What colour?

[APPELLANT]: Black.

SGT CLARK: All right. And what do they look like?

[APPELLANT]: Oh, some one those photographs.

SGT CLARK: So I didn't understand before with the - the foot itself where's the - the strap?

[APPELLANT]: No, they got no strap on the other end. Just them slip-ons.

SGT CLARK: So just you slide your foot into it?

[APPELLANT]: Mmm.

SGT CLARK: And describe the sandal to us? What - what does it - is it made out of?

[APPELLANT]: Leather.

SGT CLARK: Leather?

[APPELLANT]: Yeah.

SGT CLARK: All right. And what happened to those sandals?

[APPELLANT]: Um, another brother took them.

SGT CLARK: Yeah, what's his--

[APPELLANT]: Like he's not in Cairns, the Islands.

SGT CLARK: Yeah. What's his name?

[APPELLANT]: Ah, no last name but the name's Joseph.

SGT CLARK: And which island did he go to?

[APPELLANT]: Ah, St Paul.

...

SGT CLARK: All right. She said, "I moved back towards the stairs. I was crying my lungs out."

[APPELLANT]: Mmm-hmm.

SGT CLARK: [The appellant] got up and went back to the old man and stomping on the old man again once.

[APPELLANT]: Mmm-hmm.

SGT CLARK: Why did you do that?

[APPELLANT]: Probably tempered up.

SGT CLARK: "When he stomped on the old man's head I heard - it was like a coconut cracking." Tell me about that?

[APPELLANT]: Nuh. Nah ...

SGT CLARK: "I was crying and screaming saying something - saying something 'Leave him.'"

[APPELLANT]: Yeah, probably, yeah.

...

SGT CLARK: All right. And she basically says when she felt underneath his head ah it felt like a new born baby's head, it was all wet and there was blood on her hand. "I was holding my hands out showing the blood to [the appellant]." Show me what she was doing? How was she--

[APPELLANT]: Oh, probably went like that.

SGT CLARK: Oh, right. And what did you see?

[APPELLANT]: Probably blood. I walked away.

SGT CLARK: "I knew it straight away that the man was dead 'cause the blood at the back of and the side of his face." When you walked away, what did you think how the man was?

[APPELLANT]: I didn't think nothing. I just walked.

SGT CLARK: Why didn't you think anything?

[APPELLANT]: I couldn't get time to think.

SGT CLARK: Okay. Ah, she said "I said something like 'I'm gonna ring the ambulance.'" So you're nodding your head.

[APPELLANT]: Yeah, did she? I don't know. Probably she did.

SGT CLARK: He said something like "Hurry the fuck up, we're going home." She said when this was happening ah she thought it was a Chubb security guard that had pulled up, ah, and she said that the security guard just looked at them - "Looked at me, I know that [the appellant] walked off the bridge on the Bendigo Bank - on the Bendigo side."

[APPELLANT]: Yeah.

...

SGT CLARK: All right. "The only thing that [the appellant] told me, this was on the walk home, "was something like 'Don't tell your cousins.'"

[APPELLANT]: Yeah, probably, yeah.

SGT CLARK: And why was that?

[APPELLANT]: I just don't want no-one to know. They'll find out sooner or later.

SGT CLARK: Okay. She said when they got back to the house there was a party or there was, not a party, but there was um ah there was a few cousins at the back of that house. Ah, "[The appellant] washed his hands in the bathroom." How were your hands at that stage? What was on your hands?

[APPELLANT]: Ah, no blood or nothing.

SGT CLARK: All right. How were your clothes?

[APPELLANT]: No blood, I think.

SGT CLARK: All right. "There's a mattress in the lounge room. [The appellant] was already sleeping on the mattress." All right. You said the - the man said to you, the old man mentioned something to you about black magic.

[APPELLANT]: Yeah, think he said something like kill my brother.

SGT CLARK: All right. So what language was he speaking in?

[APPELLANT]: Ah, broken.

SGT CLARK: Broken?

[APPELLANT]: Yeah.

SGT CLARK: So broken meaning what?

[APPELLANT]: Broken English, Creole.

SGT CLARK: Creole? And what were his exact words or words to the effect of?

[APPELLANT]: Ah, I don't know.

SGT CLARK: So with the words he spoke do you think that was reasonable with what you did to him?

[APPELLANT]: No.

SGT CLARK: All right.

[APPELLANT]: Um--

SGT CLARK: So did he do anything else other than say words to you?

[APPELLANT]: No."

- [31] He told police officer Clark that during the evening he and Ms Dick between them drank two casks of wine. He also had three glasses of wine at the tavern. He did not take any drugs, medication or substances. The questioning continued:

"SGT CLARK: Like in your um in your community how would the elders look at what you did on that night?

[APPELLANT]: I don't know.

SGT CLARK: Do you think that would be acceptable?

[APPELLANT]: Probably no.

SGT CLARK: Right. What about with people your own age? Within the Island Community; do you think your actions with what you did that night would be acceptable?

[APPELLANT]: Oh, they'd probably do the same, I think.

SGT CLARK: You think they'd do the same? Have you heard of any other fellas your age doing the same?

[APPELLANT]: No."

[32] The interview concluded at two minutes before midnight with this:

"SGT CLARK: ... Um, I'll just ah finalise things here. Is there anything else that you want to say in relation to this whole matter we've spoken to that hasn't already been said?

[APPELLANT]: No.

SGT CLARK: All right. Um, has any threat, promise been held out to you to take part in this interview?

[APPELLANT]: No.

SGT CLARK: Were you told of your right to silence at the start of the interview?

[APPELLANT]: Yeah.

SGT CLARK: Have you answered all the questions truthfully here today?

[APPELLANT]: Yeah.

SGT CLARK: Do you have any complaints about the way in which you have been treated by any police officer throughout this investigation?

[APPELLANT]: Yeah.

SGT CLARK: You do?

[APPELLANT]: Ah, no, sorry.

SGT CLARK: Okay. Before concluding the interview is there anything else that you wish to say?

[APPELLANT]: No."

[33] The appellant did not give or call evidence at the pre-trial hearing.

#### **The submissions at the pre-trial hearing**

[34] The appellant's counsel applied to Jones J to have the whole record of interview excluded. He referred to s 420 of the Act, s 36 *Police Powers and Responsibilities Regulation* 2000 (Qld) ("the Regulation") and portions of the Queensland Police Service Operational Manual ("the Manual") which required persons of Aboriginal and Torres Strait Island descent to initially be treated as persons with special needs until the contrary was demonstrated. Of particular relevance, he contended, was the appellant's capacity to effectively communicate answers and to understand his legal rights. In the context of the appellant having been in custody since 2.30 pm the previous day, it was unfair to admit the record of interview as evidence at trial.

[35] The prosecutor submitted that the appellant was in no different position to many others in the Australian community. He had lived in Cairns all his life and was educated to grade 10 standard. English was his first and only language and he was able to read newspapers and football magazines. Police officer Clark's opinion that he was not a disadvantaged person was objectively reasonable in light of her enquiries. Even if the judge found the appellant was disadvantaged, questions of fairness did not require the interview to be excluded.

#### **The pre-trial ruling**

[36] After setting out the relevant facts, Jones J reasoned as follows. Police officer Clark was conscious that the appellant was a Torres Strait Islander and of her obligations

under the Act and the Manual. She determined that he was not a person with special needs after having police officer Johnson speak to the appellant's mother about his level of education and his understanding of English. The appellant was fluent in English. That was confirmed in the subsequent interview. She also sought information from the police officer who interviewed the appellant in 2008. This officer told her that he was able to understand the warnings she gave him and to communicate effectively. Police officer Clark was also aware of the appellant's extensive criminal history from which it could be inferred he had been interrogated on previous occasions and advised of his rights.

- [37] He was a 30 year old male who had been educated to Grade 10 standard at a suburban Cairns high school. He came to Cairns when he was three years old and had lived in the general north Queensland community so that he spoke only English. He could read and write. The judge had listened to the first part of the interview and was satisfied that the requirements of the Act had been met. The appellant was advised that he could seek legal advice "and was made aware of the special services of the [ATSILS]".<sup>2</sup> The judge was satisfied he understood the questions and he responded quickly and accurately to them.
- [38] The Manual referred to the question of whether the interviewee was capable of effectually communicating his answers and understanding his rights. Jones J was satisfied that the appellant had those capacities.
- [39] As the Act and the Manual had been complied with, the next question was whether it would be unfair to use this interview in evidence against the appellant. The appellant initially denied involvement in the killing. He responded quickly and responsively to the questions asked of him. In light of all these circumstances, Jones J did not consider it would be unfair for the record of interview to be used in evidence against the appellant.

### **The trial**

- [40] Neither Ms Seeba Tapau, the appellant's mother (Ms Ghea) nor Ms Billy (Conai), whose statements were all put to the appellant in the record of interview, gave evidence at the trial. The security officer gave evidence broadly in terms of her statement to police which police officer Clark read to the appellant in the interview.<sup>3</sup> She recorded the incident on the bridge as occurring at 1.10 am.
- [41] Evidence was also given by the ambulance officer who first arrived at the bridge that he examined the deceased and was unable to revive him. Police officer Hermann gave evidence that he assisted the ambulance officer and arranged for other police to attend. Police scientific officer Walker gave evidence of her findings which are not of significance in this appeal.
- [42] Ms Dick gave evidence broadly consistent with her statement to police summarised earlier in these reasons<sup>4</sup> and put to the appellant by police in the interview.<sup>5</sup> In cross-examination, she said that she and the appellant drank wine, drink for drink, from the two casks they bought. He may have had more to drink inside the hotel. At the time of the killing she was pretty drunk. The appellant had been drinking but

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<sup>2</sup> Transcript 1-30.

<sup>3</sup> See these reasons [26] and [29].

<sup>4</sup> See these reasons [7]–[11].

<sup>5</sup> See these reasons [30].

she could not comment on whether he was drunk. The appellant asked the deceased whether he killed the appellant's cousin-brother who hanged himself in 2001. The deceased nodded his head. The appellant then "whacked" the deceased for the first time. She did not hear any conversation about whether the deceased "caught" the appellant's cousin-brother with black magic. She agreed she told the police something to this effect when she was first interviewed. She also told the police that she said to the appellant: "you're going to kill him" and the appellant replied: "No, no, no, no. I'm not going to kill him. I - I not kill him." She was a Torres Strait Islander and she agreed that pirri pirri or black magic was strong in her culture.

- [43] The edited record of interview was tendered<sup>6</sup> through police officer Clark and played to the jury. The judge told counsel in the absence of the jury that he would warn the jury to take care in how they approached the appellant's answers to police officer Clark's reading or paraphrasing of the witness statements. His Honour noted that there were sound forensic reasons why defence counsel would want the interview before the jury and that counsel had reached agreement to edit out some prejudicial material. But the edited interview still contained arguably objectionable material. In answer to the judge's question, defence counsel confirmed that the tendering of the edited interview was a forensic decision.<sup>7</sup>
- [44] The defence case emphasised the appellant's intoxication and urged the jury to find that as a result, the prosecution had not proved beyond reasonable doubt that the appellant intended to kill or do grievous bodily harm to the deceased. Alternatively, defence counsel emphasised the evidence about the deceased's involvement with black magic and his use of it to kill the appellant's relative, and that this discussion immediately preceded the appellant's violent attack on the deceased. The jury could not be satisfied beyond reasonable doubt that the deceased did not provoke him.
- [45] The prosecution case was that the evidence against the appellant was compelling. The jury would be satisfied beyond reasonable doubt that the appellant killed the deceased intending to kill him or to do him grievous bodily harm. He may have been intoxicated but he still formed that intention. The jury would also be satisfied beyond reasonable doubt that he was not acting under provocation at the time of the killing.
- [46] In his directions to the jury, the judge warned the jury that they must take some care in dealing with those portions of the interview where the police put witness statements to the appellant. Sometimes it was not clear whether he was accepting the statements as a whole or only portions of them. The judge also directed the jury to ignore as irrelevant the appellant's opinion in his interview about what his fellow community members might think about what had occurred.<sup>8</sup> His Honour warned the jury about the possibility of the appellant's gratuitous concurrence to the police officers' questioning, something which was not unheard of amongst Indigenous people.
- [47] The judge explained that, if the jury found the appellant's account changed as the interview progressed and that he deliberately lied or withheld information, this was relevant only to his credibility in the record of interview. His Honour warned the

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<sup>6</sup> Ex 1.

<sup>7</sup> Transcript 2-2 to 2-3.

<sup>8</sup> See [31] of these reasons.

jury not to reason that, simply because he had told a lie about something, he was guilty. Any lies would seem to have little relevance to the issues in the case, namely, whether the appellant was guilty of murder or guilty only of manslaughter, either by way of lack of intention because of intoxication or by way of provocation.

[48] The jury retired at 3.37 pm and returned less than half an hour later with their verdict.

### **The appellant's contentions**

[49] The appellant's counsel in his written submissions contended:

- "a) That the pre-trial application to exclude the electronically recorded interview was not fully argued before the primary Judge.
- b) That the primary Judge did not properly consider matters relevant to the exercise of the 'unfairness discretion' including:
  - i. The mode of questioning including cross examination of him during the interview;
  - ii. Reading witness statements to the appellant and asking the appellant to comment on the statements;
  - iii. Asking him to comment upon inadmissible matters such as opinions;
  - iv. That some of those witnesses were not called to give evidence on the trial;
  - v. The fact that the appellant had been in custody for over 24 hours before being interviewed, and
  - vi. The time of night the interview was conducted."

and

- "c) That the trial judge was not asked to consider whether parts of the interview should not be admitted."

[50] In his oral submissions counsel emphasised the following additional matters. The appellant was a Torres Strait Islander. The record of interview was taken in circumstances where s 420 of the Act and s 36 of the Regulation were not complied with. In any case, the conduct of the interview itself was unfair. For example, the police officers should have asked him to explain to them in his own words what the warning meant. The style of questioning amounted to a "technical hard interview".

[51] Alternatively, counsel at the pre-trial hearing should have asked for the exclusion of those portions of the record of interview which were unfair, namely, those where the appellant was cross-examined and where police officers put statements from others to him for comment. Counsel submitted that the admission of the record of interview, or at least these portions of it, rendered the trial unfair and amounted to a miscarriage of justice under s 668E(1) *Criminal Code*.

[52] When the trial commenced before a different judge, the new defence counsel should have applied to re-open Jones J's ruling and have the record of interview excluded in whole or at least in part. This was particularly so once the trial judge identified that the interview contained "clearly objectionable material". The reading of witness statements to the appellant resulting in a monosyllabic grunt or a simple 'yes' meant

that the appellant did not unequivocally adopt the passage read. At times the questioning amounted to cross-examination. Some of the witnesses did not give evidence in the trial so that their version contained in the statement read to the appellant was not tested in cross-examination. Police officer Clark put to the appellant that his version was different from that of other witnesses and invited an explanation. The admission of the record of interview has meant that the appellant has been deprived of a fair chance of an acquittal and amounts to a substantial miscarriage of justice.

### **The relevant legislative provisions**

[53] Section 420 *Police Powers and Responsibilities Act 2000* (Qld) ("the Act") relevantly provides:

**"420 Questioning of Aboriginal people and Torres Strait Islanders**

- (1) This section applies if—
  - (a) a police officer wants to question a relevant person; and
  - (b) the police officer reasonably suspects the person is an adult Aborigine or Torres Strait Islander.
- (2) Unless the police officer is aware that the person has arranged for a lawyer to be present during questioning, the police officer must—
  - (a) inform the person that a representative of a legal aid organisation will be notified that the person is in custody for the offence; and
  - (b) as soon as reasonably practicable, notify or attempt to notify a representative of the organisation.
- (3) Subsection (2) does not apply if, having regard to the person's level of education and understanding, a police officer reasonably suspects the person is not at a disadvantage in comparison with members of the Australian community generally.
- (4) The police officer must not question the person unless—
  - (a) before questioning starts, the police officer has, if practicable, allowed the person to speak to the support person, if practicable, in circumstances in which the conversation will not be overheard; and
  - (b) a support person is present while the person is being questioned.

..."

[54] The Regulation in its Sch 10 *Responsibilities Code* relevantly provides:

**"36 Questioning of Aboriginal people and Torres Strait Islanders**

- (1) A police officer who is about to question a relevant person the police officer reasonably suspects is an adult Aborigine or Torres Strait Islander must, unless he or she already knows the relevant person, first ask questions necessary to establish the person's level of education and understanding.
- (2) The questions the police officer may ask include questions, not related to the relevant person's involvement in the

offence, that may help the police officer decide if the person—

- (a) is capable of understanding the questions put to him or her, what is happening to him or her, and his or her rights at law; and
  - (b) is capable of effectively communicating answers to the questions; and
  - (c) is aware of the reason the questions are being asked.
- (3) If the police officer considers it is necessary to notify a representative of a legal aid organisation that the relevant person is about to be questioned in relation to an offence, the police officer must inform the relevant person of the intention to notify the legal aid organisation, in a way substantially complying with the following—

'As you have not arranged for a lawyer to be present, a legal aid organisation will be notified you are here to be questioned about your involvement in an indictable offence.'

..."

## Conclusion

- [55] The appellant's first contention is that Jones J erred in the pre-trial ruling in allowing the record of interview to be admitted into evidence.
- [56] Police officer Clark knew the appellant was a Torres Strait Islander so that s 420 of the Act and s 36 of the Regulation applied. She did not comply with s 420(2) but that sub-section has no application if, under s 420(3), she reasonably suspected the appellant was not at a disadvantage in comparison with members of the Australian community generally. Jones J found that the requirements of the Act were met in this respect.<sup>9</sup>
- [57] The question for police officer Clark under s 420(3), whether she reasonably suspected the appellant was not at a disadvantage in comparison with members of the Australian community generally, is one about which different police officers could reasonably reach different conclusions. It is only if there is no evidence that could be reasonably seen to support police officer Clark's conclusion that it is possible to find she was not "reasonably satisfied": *R v LR*.<sup>10</sup>
- [58] The appellant went to school until grade 10 at a Cairns high school but his manner of presentation during the record of interview and the fact that he said he could not write "very good" suggested to me that he was disadvantaged. Police officer Clark, however, was aware of his criminal history and his considerable experience in the criminal justice system. A police officer who had interviewed him a year earlier in respect of the serious offence of torture told her that she considered him capable of effectively communicating his answers and of understanding his rights. Police officer Clark was also aware from enquiries made of the appellant's mother that he spoke English and had attended high school in Cairns until year 10. This was sufficient evidence upon which she could form a reasonable suspicion under s 420(3) that the appellant was not at a disadvantage in comparison with members

<sup>9</sup> See [37] of these reasons.

<sup>10</sup> [2005] QCA 368, [44].

of the Australian community generally. It follows that Jones J was right in finding that she complied with s 420.

- [59] His Honour was also entitled on the evidence before him to find that she considered the appellant was capable of understanding the questions put to him, what was happening to him and his rights at law, and was capable of effectively communicating answers to the questions and was aware of the reason the questions were being asked. It follows that police officer Clark complied with s 36 of the Regulation.
- [60] Although the point was not raised by counsel for the appellant, his Honour, in determining whether the requirements of the Act and the Regulation were met, made an error in that he stated the appellant "was made aware of the special services of the [ATSILS]".<sup>11</sup> There was no evidence to this effect. This error, however, does not affect the correctness of the judge's conclusion that in this case police officer Clark complied with s 420 of the Act and s 36 of the Regulation.
- [61] The more difficult question is whether Jones J should have excluded the record of interview because it was unfair to the appellant. There were many concerning aspects about the conduct of this record of interview which made it far from a model of fairness in police investigation. These aspects of concern are as follows. The appellant was a Torres Strait Islander and the interview suggested to me that he was not articulate. His writing skills were, in his words, "not good". He had been in custody since 2.30 pm the previous afternoon. This Court has been told that an undercover police officer was placed in the cells with him to obtain evidence, but without success. (It was not suggested to police officer Clark in cross-examination, however, that she was involved in or even knew of this. And nor was it suggested that the appellant knew of this or that this had an impact on his state of mind during the interview.) I would infer from police officer Clark's cross-examination at the pre-trial hearing that she apprehended that if she contacted ATSILS the appellant would probably have accepted their usual legal advice that he not speak to police and this was not the outcome she was seeking. The interview was conducted over almost four hours, from 8.00 pm to midnight, with only one break during which the appellant was given a drink of water.
- [62] But I have watched and listened to large portions of the record of interview, including those parts emphasised by the appellant's counsel. Having done so, I am satisfied the appellant understood the questions put to him and what was happening to him, had some understanding of his legal rights, was aware of the reason for the questions and was capable of effectively communicating answers to them. He was not affected by liquor or other substances. The questioning, whilst persistent and sometimes amounting to cross-examination, was courteous. The appellant gave his accounts in his own words, initially exculpatory. He did not appear overborne. Ultimately, and not without considerable hesitation, I am satisfied that Jones J was entitled to conclude that questions of fairness did not require the record of interview to be excluded. It follows that ground 1 of the appeal is not made out.
- [63] The appellant's second contention is that the failure of the appellant's counsel at the pre-trial hearing to request Jones J to listen to the whole of the record of interview and to exclude inadmissible portions of it amounted to a miscarriage of justice. As Jones J was not asked to exclude any portion of the record of interview, there has

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<sup>11</sup> See [37] of these reasons; transcript 1-30.

been no legal ruling and therefore no error of law. This ground of appeal is only made out if it has resulted in a miscarriage of justice under s 668E(1) *Code*. It therefore raises much the same issue as the third ground of appeal, that the appellant's trial counsel caused a miscarriage of justice by not applying to re-open Jones J's ruling so that those parts of the record of interview where police put to the appellant statements from others or cross-examined him could be excluded. I will therefore consider grounds 2 and 3 together.

- [64] It should be noted that after the appeal hearing in Townsville, counsel for the appellant handed my associate a CD containing the impugned record of interview for the judges' use. After viewing it, it became clear that this was the unedited version which was admitted as an exhibit at the pre-trial hearing. As I have noted, at the trial, an edited version of the interview was admitted<sup>12</sup> and a transcript of that edited interview provided to the jury as an aid.<sup>13</sup> The submissions of the appellant's counsel may have been made on the basis of the unedited copy. In determining this appeal, the Court has considered the transcript of the edited version of the record of interview which was before the jury.
- [65] Under s 590AA *Code*, Jones J's pre-trial ruling was binding unless under s 590AA(3) the trial judge for special reason gave leave to re-open it. Portions of the interview were clearly inadmissible, for example, the appellant's irrelevant opinion as to what his fellow community members might have thought of his conduct.<sup>14</sup> Had Jones J been asked to exclude this evidence, it can be expected he would have done so. Jones J wrongly found that the appellant was made aware of the special services of ATSILS when there was no evidence to this effect. These were matters capable of constituting special reason to re-open the ruling under s 590AA(3) *Code*. Trial counsel did not make that application but instead agreed with the prosecutor to exclude some inadmissible and prejudicial parts of the interview whilst leaving in other inadmissible and, at least on one view, prejudicial parts.
- [66] Contrary to the appellant's contentions, I am unpersuaded that simply putting a statement of a witness to a suspect in an interview makes the questioning unfair and inadmissible. It is true that portions of the statements of Seeba Tapau, Elena Ghea and Priscilla Billy were put to the appellant for comment in the record of interview.<sup>15</sup> It is also true that those witnesses did not give evidence at the trial. But the information in the statements put to the appellant was of no particular significance and did not damage his case as it was conducted. It has not resulted in a miscarriage of justice.
- [67] Of more concern was the statement of the security officer which triggered the appellant's admissions of an assault on Ms Dick some hours before the deceased was killed.<sup>16</sup> Ms Dick did not mention any such assault in her statement to police or at trial. The admissibility of this evidence was not raised at the trial. Defence counsel may have wanted it before the jury to raise the possibility that the security officer's evidence about seeing an assault on the bridge at 1.10 am may have involved an assault on Ms Dick not the deceased. He may have thought it might

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<sup>12</sup> Ex 1.

<sup>13</sup> Marked for identification A reproduced in the appeal record book at 279.

<sup>14</sup> See [31] of these reasons.

<sup>15</sup> See these reasons [23]–[25].

<sup>16</sup> See [29] of these reasons.

undermine the reliability of Ms Dick's evidence. The prosecution may have wanted it led as a lie, undermining the reliability of his later statements about the deceased using black magic to kill a member of the appellant's family. The evidence was admissible on either basis.

- [68] A major difficulty confronting defence counsel at trial was that the case against the appellant was strong: he was directly implicated in the killing by Ms Dick's compelling evidence. The record of interview, damning as it was, provided him with two potential partial defences to the charge of murder: lack of intention to kill or do grievous bodily harm because of intoxication, and provocation. Although these issues were also raised in Ms Dick's evidence, there was further evidence of them in the record of interview. Defence counsel was not entitled to have all the inculpatory portions of the record of interview excluded so that only those exculpatory self-serving portions of it were before the jury. Where both inculpatory statements against interest and exculpatory self-serving statements are made, ordinarily the evidence of both the exculpatory and the inculpatory statements must be given. The defendant and the prosecution are required to take the good with the bad. Were the statements solely exculpatory and self-serving, the interview would have been inadmissible. See *R v Ryan*.<sup>17</sup> Trial counsel's decision not to apply to exclude the parts of the record of interview now impugned by the appellant's counsel was therefore explicable on a forensic basis.
- [69] It is true, as counsel for the respondent conceded, that the appellant should not have been asked to comment on the opinion of others in the Torres Strait islander community about his actions.<sup>18</sup> But defence counsel may have considered this, too, was helpful as to the question of provocation. In any case, the primary judge gave the jury careful directions concerning it.<sup>19</sup>
- [70] The judge fairly directed the jury as to the defence case and as to the need to take care when considering those portions of the record of interview now impugned on appeal.<sup>20</sup> As I have explained, trial counsel's omission to ask for portions of the record of interview to be excluded is explicable on a forensic basis and does not amount to a miscarriage of justice under s 668E(1) *Code*: see *TKWJ v The Queen*.<sup>21</sup> Grounds two and three are not made out.
- [71] It follows that as none of the appellant's grounds of appeal have been made out, the appeal against conviction must be dismissed.

#### ORDER:

- [72] Appeal against conviction dismissed.
- [73] **WHITE JA:** I have read the reasons for judgment of the President and agree with those reasons save for one minor matter. In para [58] of the President's reasons her Honour expresses her view about the appellant's disadvantage when he was interviewed. I express no view myself as to whether the appellant was disadvantaged. It is sufficient that police officer Clark was reasonably satisfied that he was not.<sup>22</sup>

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<sup>17</sup> [2002] QCA 92, [41].

<sup>18</sup> See [31] of these reasons.

<sup>19</sup> See [46] of these reasons.

<sup>20</sup> See [46] of these reasons.

<sup>21</sup> (2002) 212 CLR 124.

<sup>22</sup> s 420 *Police Powers and Responsibilities Act 2000*.

- [74] I agree with the President that none of the grounds of appeal have been made out and that it should be dismissed.
- [75] **NORTH J:** I have read the reasons for judgment of the President and those of White JA. Subject to the qualification of White JA (with which I agree) I agree with the reasons and orders proposed by the President.