**CHILDRENS COURT OF QUEENSLAND**

CITATION:

*R v AKE* [2019] QChC 41

PARTIES:

**R v**

**AKE**

(Applicant)

FILE NO/S:

96/2019

DIVISION:

Criminal

PROCEEDING:

ORIGINATING

590AA Application

COURT:

Childrens Court of Queensland at Cairns

DELIVERED ON:

20 December 2019

DELIVERED AT:

Brisbane

HEARING DATE:

29 November 2019

JUDGE:

Richards P

ORDER:

**Application allowed. The record of interview obtained on 16 December 2018 is excluded.**

CATCHWORDS:

CRIMINAL LAW – CHILDREN – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE

EVIDENCE – EVIDENCE UNFAIR TO ADMIT OR

IMPROPERLY OBTAINED – GENERALLY – where the

applicant child is indigenous – where the applicant child was 12 years of age at time of offending – where the applicant child is charged based on admissions during the record of interview – where the police officer cautioned the applicant child in relation to their right to silence and right to contact a solicitor – where the child did not initially understand the cautions but later indicated understanding – where the child indicated lack of confidence in their own comprehension skills – whether evidence unfairly or improperly obtained

CRIMINAL LAW – CHILDREN – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE

EVIDENCE – EVIDENCE UNFAIR TO ADMIT OR

IMPROPERLY OBTAINED – PROCEDURE – SUPPORT

PERSON – where the applicant child’s grandfather attended the interview as a support person – where the role of support person was not accurately explained by the police officer – whether the support person acted in the child’s best interests by ensuring the child’s comprehension of questions and their rights – where the support person gives the child advice and criticises the child – whether the grandfather acted in the role of a support person

*Police Powers and Responsibilities Act* 2000

*H (a child) v R* (1996) 85 A Crim R 481

COUNSEL: R Logan for the applicant

C Georgouras for the respondent

SOLICITORS: Aboriginal and Torres Strait Islander Legal Service for the applicant

Office of the Director of Public Prosecutions for the respondent

[1] There is an indictment before the court charging the applicant with entering premises and committing wilful damage and stealing. The charges are based on admissions made in a record of interview which was obtained on 16 December 2018 at the Lockhart River police station. The applicant contests the admissibility of the record of interview on the basis that it was unlawfully obtained and/or it is unfair to admit it.

[2] The offences relate to incidents where a group of young children, mostly 12 and 13 years of age, broke into the local school and vandalised it, causing an extensive amount of damage. The same group of children then went to the MyPathways Office, a government office, and created further damage. The applicant in this case was 12 years old at the time of the interview and was about to turn 13 [Date Redacted] days after the interview. She had previously had contact with the police by way of cautions. Her last caution was a week before the interview. During the interview she was accompanied by her grandfather, LKE.

[3] The applicant has applied to have her record of interview excluded on the basis that there was unfairness in the interview. Section 3.19 of the *Digital Electronic Recording of Interviews and Evidence* **(DERIE) Manual** *Issue 15 – (Effective 5 December 2019)* provides:

“Great care should be taken when administering a caution to an Indigenous person. It is not adequate to simply administer it in the usual terms. The caution should be explained in simple terms and the person should be asked to explain the caution in the person’s own words. The questioning should not continue until it is clear the person has an apparent understanding of his/her right to remain silent.”

It is submitted on behalf of the applicant that the police officer did not take enough care to ensure the child understood the warnings and the use that could be made of her answers.

[4] Given the age of the child at the time of the interview it is accepted that significant caution should be taken in assessing the circumstances of the confession. It was submitted by the applicant that there was a failure to properly ascertain an appropriate level of understanding of the warnings and cautions that ought to be given before embarking upon questioning, having regard to the child’s Aboriginality and age. In particular the applicant points to eight features:

(a) She was 12 years 11 months at the time of the interview;

(b) She lives in Lockhart River;

(c) She had not been to school for the whole of 2018 and had only

achieved a year 7 level of education;

(d) She said she had difficulty writing and sometimes understanding words, and when she doesn’t understand words she feel shame;

(e) When asked if she understood everything the police officer said she said she didn’t know;

(f) She didn’t know what a threat or promise was;

(g) She understand the right to remain silent and the police officer didn’t attempt to clarify or have her explain that the interview could be used against her; and

(h) The police officer didn’t ask her to explain back what he told her.

[5] The respondent says the police officer did ensure that the applicant understood the warnings prior to embarking on questioning. He ensured that an appropriate support person was present for the interview and that she understood she was entitled to contact a solicitor. The police officer ensured she understood her right to silence. She initially indicated she did not understand the cautions but then later said that she did. The respondent submits that she has failed to establish that she didn’t understand her rights, cautions or that there was unfairness in the interview.

[6] It is fair to say that the child was very young. It is true she had only reached grade 7 in education however at 12 years and 11 months she had only missed one year of school.

[7] The police officer explained to her that she had a right to contact a lawyer and she declined to do so. She indicated she had trouble reading and writing and that her writing was messy. She also indicated that if she did not understand words she felt shame. She did however understand that her grandfather was there to help her talk and that she knew that if there was a question she did not want to answer she did not have to answer. The police officer took the first 11 pages of the interview to explain her rights carefully to her. Furthermore she was not simply answering questions or agreeing with propositions put to her by the police officer.

[8] However, although LKE was with her as a support person as required by the legislation, it is not clear whether he had a proper understanding of his role.

Section 421 of the *Police Powers and Responsibilities Act* 2000 (Qld) provides that: “A police officer must not question a child unless before questioning the child has been allowed to talk to the support person in circumstances in which the conversation could not be overheard.” It is not evident that this was done.

[9] Additionally the role of the support person as described by the police officer was not correct. The police officer explained the role as follows:

“So what , what a support person is, LKE, I’ll just explain that. Um, your role today isn’t to answer questions for AKE…. --- MmHmm

But its to help us um try and communicate with each other better. --- Yeah

So if I ask her a question and she’s not sure about it you can jump in and help explain the question. --- Yes

And if she provides a response that I’m not sure about you can jump in and provide that response --- Yes

To me you can try and help me out that way okay? --- Yeah

[10] Unfortunately that is not really the role of the support person. Certainly he was there to make sure that the child understood the questions that were being asked but also to ensure she knew and understood her rights and was not being overborne in any way.

Certainly his role was not to help out the police officer. In *H (a child) v R* (1996) 85 A Crim R 481, Hidden J described a support person for a child as:

The primary aim of such a provision is to protect children from the disadvantaged position inherent in their age, quite apart from any impropriety on the part of the police. That protective purpose can be met only by an adult who is free, not only to protest against perceived unfairness, but also to advise the child of his or her rights. ….further, within appropriate limits, the adult might assist a timid child to frame his or her answer to the allegation. For example the child might be reminded of the circumstances within the knowledge of both the child and the adult which bear on the matter”

[11] Whilst not being critical of LKE it seems clear that he did not understand his role as a support person which was in contrast to his role as a supportive but disapproving grandfather. He was at times acting as a support person for the police officer but not necessarily in the child’s best interests, for example he told her “You tell the Constable about the school break in. You don’t tell the Constable all break in in the school”. He later admonishes her for saying that she didn’t take anything when she took a packet of juice and then again tells her to tell the Constable who is responsible for the school break in. Later on in the interview when discussing the process of bail he and the officer together give her advice on how she should behave in future and the consequences of breach of bail. This is all completely understandable from a loving and concerned grandfather but does not really fill the role of a support person in the interview.

[12] The effect of this clear lack of understanding of his role coupled with the officer’s failure to adequately explain it to him, the child’s very young age, and her aboriginality means that there was not a support person with the child during the interview. It follows that the interview was unlawfully obtained. It should therefore be excluded.