AN ADVERSARIAL QUAGMIRE

THE CONTINUED INABILITY OF THE QUEENSLAND CRIMINAL JUSTICE SYSTEM TO CATER FOR INDIGENOUS WITNESSES AND COMPLAINANTS

by Nigel Stobbs

INTRODUCTION

In the recent case of *R v Watt* [1] (*'Watt'*) the President of the Queensland Court of Appeal said that

> [t]he application of the Rule of Law in Queensland depends not only on the right of an accused person to a fair trial according to law but also on victims of alleged crimes having a genuine opportunity to make a complaint and to give evidence about it.[2]

The President went on to add that there is a strong obligation to do 'everything practicable' to ensure that Indigenous complainants who do not speak English have this basic access. Despite this welcome reaffirmation by the President that the Rule of Law applies equally to Indigenous Australians, the release of a number of reports and the enactment of a number of legislative safeguards in relation to Indigenous witnesses, the reality seems to be that little of substance has been done to address the systemic biases which confront Indigenous complainants and witnesses for whom English is not the primary language. Certainly, the 18-year-old Aboriginal woman who was the complainant in *Watt*, who had reported multiple violent rapes over a 14-hour period, may well dispute that any purported reconciling of linguistic and cultural differences provided her any real means of redress when the Court of Appeal overturned the convictions against her alleged attacker on the grounds that her testimony, given through an interpreter, was 'unreliable'.

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In terms of the respective versions of events of the complainant and accused in *Watt*, and of the evidence to be considered by the jury, this ought to have been a relatively straightforward trial. But due to confusion over the statements of the complainant while under oath, which seem to be a paradigm example of cross-cultural communication problems, the trial appears to have been grossly unfair to both the accused and (especially) the complainant.

The complainant in this case gave evidence[3] that she was forced to have sex with the defendant three times on the evening of 20 July 2005 and then again on the morning of 21 July 2005. The defendant had been charged with three counts of rape and one count of deprivation of liberty for detaining the complainant against her will over this period. The defendant's version of events was that he had heard on 20 July that his sister had died and, realising that he would be unable to attend her funeral, spent the day at the pub. He said he met the complainant (a former girlfriend) on the road while walking home and that she had consented to staying with him at his sister's house and to having sex.

The complainant's version of events was very different and 'internally inconsistent' due (the Court of Appeal suspects)[4] to language and cultural barriers posed by the adversarial nature of the trial process.

At trial, the defendant was to answer four charges:

Count 1: Rape - which was alleged to have taken place at a Telstra communications tower.

Count 2: Rape - which was alleged to have taken place in the grounds of a local school.

Count 3: Rape - which was alleged to have taken place at the defendant's sister's house in the morning.

Count 4: Deprivation of liberty - from the time that the complainant was first apprehended by the defendant up until the time she was found by police.

The complainant's language was Wik Mungkan and she did not speak English. She also had a hearing impediment. An interpreter (who had qualifications in linguistics) was provided for the complainant in giving her evidence. The trial and appeal judges noted that the National Accreditation Authority for Translators and Interpreters ('NAATI') has not been able to accredit any Wik Mungkan interpreters to the level normally expected

of court interpreters.[5] According to the defendant's barrister in the trial, the complainant was at a further linguistic disadvantage due to the fact that the version of Wik Mungkan the interpreter speaks is 'richer' than that used by the younger generation of Wik Mungkan speakers (including the complainant) who tend to supplement their speech with English words and phrases.

There was no suggestion that the complainant's conflicting responses indicated an attempt at deception, rather, they were due to a lack of understanding of the adversarial trial procedure and differences in communications dynamics. At one point during the trial, the interpreter interjected and, with leave, made the following comments to the judge:

> [It] is a cultural background thing that you speak 'yes' to the person who is for you and 'no' to the person who is against you, regardless of what is involved, and I don't know – I've tried to explain that you're doing it – answering the question, you're not – it's not something to the person, without success.[6]

On the basis of this and other exchanges between the interpreter, the judge and the barristers in the trial it appears highly likely that the reason that the complainant appeared to contradict herself regarding a number of critical issues during the trial was due to this cultural phenomenon and what the interpreter referred to as 'the context in the court'.[7] In fact the interpreter asserts that the complainant had done exactly the same thing in the committal proceedings.[8] At one stage in the trial the following exchange took place:

Defence counsel:	Okay, you and [the defendant] went to the tower?[9]
Interpreter:	She wants to go from the start of the story.
Witness:	What are you saying about the tower? And who took me?
Defence counsel:	Okay, did you have sex with [the defendant] at the tower?
Witness:	No.
Defence counsel:	Did you go to the tower with [the defendant]?
Interpreter:	She's saying, "What?"
Defence counsel:	Did you and [the defendant] walk to the tower together?
Judge:	Do you think she understands the timeframe [interpreter]?
Interpreter:	I'm not sure what the – I think we're back with the problem we had with the first questions.

[lunch adjournment then the following.]

Defence counsel:	Okay. Did you and [the defendant] sit down at the tower?
Witness:	He said to have sex.
Defence counsel:	Did [the defendant] ask you to have sex with him?
Witness:	I'm saying honestly that he raped me[10]

The defendant was subsequently acquitted of the rape charges in relation to what allegedly occurred at the tower and at the school grounds. It seems likely that these acquittals were the result of the sorts of inconsistencies in the trial evidence of the complainant as illustrated above.

The defendant was convicted of the rape charge in relation to the events at the house on the following morning and the deprivation of liberty charge. The Court of Appeal, quite rightly, overturned the conviction for deprivation of liberty as the charge was framed in terms of the complainant being detained against her will for the whole of the period during which the four rapes were alleged.

Unfortunately, the trial judge seems to have also been confused by the various inconsistencies in the evidence and testimony. She stated in her summing up to the jury:

> He [the defendant] said that when they got to the sister's place he was no longer holding onto her, that he spoke to his sister and ... that the next morning he got up and had breakfast, went back in the bedroom, they [the defendant and the complainant] had had sex together and he went to sleep and when he woke up [the complainant] was no longer there and that's when the police arrived.

In fact the defendant at no stage gave evidence that he and the complainant had sex on that morning. The Court of Appeal therefore also overturned the conviction for the final rape charge due to this error.

It is hard to avoid the conclusion that the complainant in this case has been denied the opportunity to make a proper and competent complaint about what may well have been a harrowing and traumatising experience, simply because the justice system has not done what McMurdo P refers to as 'everything practicable' to provide basic access to justice for Indigenous people who do not speak English. If allowed to tell her story in her own language and in a less intimidating and alienating context, perhaps as a narrative of the events according to her recollection, the complainant may well have avoided the inconsistencies which doomed her case. The fact that at a late stage she responds to the defence counsel's repeated questions about whether she had sex with the defendant on different

occasions by simply stating 'I'm saying honestly that he raped me' indicates that she is able and willing to deliver a coherent narrative. In this case the jury seems to have made an assessment that the complainant was credible (since the defendant was initially convicted of the final rape charge), but she has lost her opportunity for redress as a matter of law.

FORMAL OBLIGATIONS TO CATER FOR INDIGENOUS WITNESSES AND COMPLAINANTS

There is little doubt that the criminal courts have evolved to suit the needs of the judges and the lawyer advocates rather than the litigants (or the witnesses) for whose benefit they ought to exist. An adversarial criminal court operates on the assumption that all complainants and witnesses have an equal procedural right to make complaints and to give evidence. I would go further and assert that this is a right which requires substantive equality. The potential for substantive inequality in the case of those who are not speakers of English is obvious given the complexity of the rules relating to procedure and evidence and the adversarial nature of criminal proceedings.[11]

Although there is no statutory or common law right to an interpreter for a complainant, a witness, or an accused person in Queensland, trial judges do have discretion to order that an interpreter be provided by the State.[12]

The conduct of the criminal trial which was examined by the Court of Appeal in *Watt* is surely a clear and significant case of systemic discrimination preventing the complainant from exercising these rights and her fundamental right to (in the words of McMurdo P) 'make a complaint and give evidence about it'. Despite the fact that the Commonwealth Government did not support adoption of the United Nations *Declaration on the Rights of Indigenous Peoples*,[13] the rights in relation to protection from systemic discrimination which it contains have all long been entrenched both in existing instruments of international law (to which Australia certainly is a signatory) and in extant legislation and common law in Australia.[14]

A 1996 Queensland Criminal Justice Commission ('CJC') Report on Aboriginal witnesses[15] made a number of practical recommendations about changes to the way that Aboriginal complainants and witnesses were to be treated by the criminal justice system. Recommendation 4.1 of that report suggested that the *Evidence Act 1977* (Qld) be amended to allow a witness in a criminal trial to give their evidence-in-chief wholly or partly in narrative form. Section 21(2)(e) of the Act now gives the court the power to make an order or direction about the giving of evidence by a special witness. There is nothing to suggest that this statutory discretion precludes a direction that a witness be able to give evidence in narrative form. In the *Watt* trial no direction of this nature was applied for or given and Wilson J (in the appeal hearing) suggests that it might have been more appropriate for the complainant's evidence to have been pre-recorded.[16] The lawyers and the trial judge were clearly aware of the difficulties that the complainant was encountering but by the time it seems to have become apparent, her evidence had already largely been given. This begs the question as to why it only became clear so late in the criminal justice process (after police investigation and interviewing, interviewing of witnesses by the lawyers and a committal proceeding) that this significant disadvantage would arise.

It might be assumed that the lawyers and judge involved were not expecting this level of confusion in the giving of evidence by the complainant. If that is so, it is especially disappointing considering the number of recommendations that the CJC Report makes in relation to cross-cultural awareness training of lawyers, prosecutors, judges and police.[17] A 1997 report on the status of the implementation of these recommendations by the CJC indicates that little of real substance had been done in relation to cross-cultural training. However, Susan Kerr, a contemporary critic of this apparent over-reliance on cross-cultural awareness training, commented that:

> What is necessary is an examination of the appropriateness of the adversarial and formal nature of these proceedings in terms of eliciting cogent and coherent testimony from Aboriginal witnesses. With respect to the CJC, improving cultural awareness will not affect the kinds of procedural changes that are necessary in ensuring that culturally disadvantaged witnesses receive the justice that is their due.[18]

One of the most basic recommendations of the CJC Report, that a witness have a statutory right to an interpreter (unless the witness can understand and speak English sufficiently to enable the witness to understand, and make an adequate reply to, questions that may be put), has not been acted upon. If there were such a statutory right, it may be that the Queensland Government would then have an obligation to ensure that the necessary resources were made available to train interpreters in Wik Mungkan to the levels ordinarily required by NAATI.

In relation to proper and adequate resourcing, Justice Wilson in the Court of Appeal judgment states that:

> Clearly there is still much to be done systemically by those involved at all levels of the criminal trial process ... to ensure

> that the complainant [in a case such as this] has a proper and meaningful opportunity to give her evidence. And implementation of any new procedures which may be devised will require proper resourcing.[19]

Section 21 of the *Evidence Act 1977* (Qld) provides that a court may disallow questions put to a witness in cross-examination where the court considers the question to be improper. 'Improper'can mean a question which is misleading or confusing, and the court is required to consider the cultural background of the witness when making this determination. Section 21A provides, inter alia, that where a special witness is, as a result of their cultural background likely to be so intimidated as to be disadvantaged when giving evidence, the court may make a direction that any questions put to such a witness be kept simple. It could well be that questions such as in the exchange set out earlier are 'improper' for the purposes of the *Evidence Act 1977* (Qld), but surely the appropriate solution is not to simply keep asking the question or to phrase it in a different way. The adversarial tactic of re-asking a question and then drawing a conclusion as to the reliability of the witness based on differing responses is simply unfair (and possibly unethical) when the advocate knows that the witness is not able to respond rationally to the adversarial process (or will respond in a way which is culturally divergent from what a jury will comprehend).

CONCLUSION

The systemic discrimination which militates against the right of a number of Indigenous Australians to make a fair and properly assessed complaint within the criminal justice system in Queensland is apparent. In 2007 the court system seems incapable of catering for the needs of those who do not have the same linguistic and cultural background of those who work within it. The defects in the *Watts* case made it inevitable that the convictions would be quashed and that the complainant would be left worse off for her experience with the justice system. The most significant problem that needs to be addressed is that these defects were all avoidable.

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1 [2007] QCA 286

2 *R v Watt* [2007] QCA 286, [3] (McMurdo P).

3 The original trial took place in the Cairns District Court, DC No 211 of 2007.

4 *R v Watt* [2007] QCA 286, [26] (Wilson J).

5 Transcript of Proceedings, *R v Watt* DC No 211 of 2007 (Cairns District Court) 52; *R v Watt* [2007] QCA 286, [37] (Wilson J).

6 Transcript of Proceedings, *R v Watt* DC No 211 of 2007 (Cairns District Court) 50.

7 Transcript of Proceedings, *R v Watt* DC No 211 of 2007 (Cairns District Court) 51.

8 Ibid.

9 There is significant academic and expert commentary on the appropriateness of using coercive leading questions in the cross-examination of Indigenous witnesses. Leading questions are usually considered fair but there may be scope for a judge to disallow leading questions in cross examination, and that may have been helpful in this case. For a discussion of this judicial discretion see Hon Justice D Mildren, 'Redressing the Imbalance Against Aboriginals in the Criminal Justice System' (1997) 21 *Criminal Law Journal* 7, 17-18.

10 Transcript of Proceedings, *R v Watt* DC No 211 of 2007 (Cairns District Court) 66-68 and excerpted in *R v Watt* [2007] QCA 286 [26].

11 The level of ear disease and hearing loss amongst Indigenous Australian people is higher than for the rest of the population and the discrepancy is particularly high among those living in rural and remote areas. See S Burrow and N Thomson 'Ear disease and hearing loss' in N Thomson (ed) *The Health of Indigenous Australians* (2003) 247-272.

12 *Evidence Act 1977* (Qld) s 131A.

13 Declaration on the Rights of Indigenous Peoples (Document No 61/295), adopted by the UN General Assembly 13 September 2007. One hundred and forty-three votes were made in favour of adopting the Declaration and there were 11 abstentions. Australia was one of only four nations to vote against adoption (the other three being Canada, the United States and New Zealand).

14 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, art 26 (entered into force 23 March 1976). Considering that Article 27 provides that members of an 'ethnic minority' shall not be prevented from practicing their own culture and language, it seems clear that such a person ought not to be denied equal protection of the law as a result of retaining their own language.

15 Criminal Justice Commission, 'Aboriginal Witnesses in Queensland's Criminal Courts' (1996).

16 *R v Watt* [2007] QCA 286, [42] (Wilson J).

17 Recommendation 3.4, for instance, advised the Office of the Director of Public Prosecutions ('ODPP') to ensure that any of their legal practitioners who were likely to come into contact with Aboriginal clients or witnesses undergo cross-cultural awareness training. The ODPP responded that it had convened one-day training sessions as a result. It may be that much more intensive training than this is required, especially for prosecutors and especially in relation to the communication issues covered in Diana Eades, *Aboriginal English in the Courts: A Handbook* which is distributed by the Department of Justice and Attorney-General.

18 Susan Kerr 'Gratuitous Justice: A Review of the Queensland Criminal Justice Commission's Report into Aboriginal Witnesses in Criminal Courts' (1996) 3(84) *Aboriginal Law Bulletin* 12.

19 *R v Watt* [2007] QCA 286, [43] (Wilson J).