21/84

SUPREME COURT OF THE NORTHERN TERRITORY

FRY v JENNINGS

Muirhead J

21 October 1983 — [1983] 25 NTR 19

PRACTICE AND PROCEDURE – PROCEDURE TO BE FOLLOWED WHEN A *VOIR DIRE* IS HELD – RECORD OF INTERVIEW SAID NOT TO HAVE BEEN VOLUNTARILY GIVEN BY THE DEFENDANT – CROWN TO CALL EVIDENCE FIRST IN PROOF OF VOLUNTARINESS.

Muirhead J considered the practice and procedure to be followed in a *voir dire* examination. The defendant was an aboriginal and his counsel objected to the admissibility of the record of interview on the ground that the confession was not made voluntarily because the defendant did not understand the nature of the caution administered. The magistrate insisted that the defendant should lead off upon the *voir dire*.

HELD: The Crown should call its evidence of voluntariness first.

MUIRHEAD J: "... Each case depends on its own facts, one of which may be the apparent sophistication of an accused to be ultimately assessed, if not from the record, from evidence given on the *voir dire* by prosecution witnesses or by the defendant or other witnesses. The record of interview in issue, together with counsel's assurance, should have indicated that counsel was not involved in a mere fishing expedition; it raised a *prima facie* case for further investigation and the appropriate order was that the Crown should call its evidence in proof of voluntariness.

When that evidence and any evidence called by the defence had been called and evaluated – and I use that term legally as well as factually – it was for the magistrate to rule as to voluntariness and if necessary to determine whether or not in the exercise of his "fairness discretion" the evidence should be admitted, stating briefly his reasons.

In this Territory, especially in localities where consideration of the Anunga guidelines is of such importance, and where Aboriginals of varying degrees of sophistication and familiarity with English are concerned, it is a sound and fair rule of practice where a challenge to voluntariness is made that the Crown "should begin".

The magistrate should be given the opportunity of inspecting the written record (if any) and he is perfectly entitled to ask defence counsel as to the basis of the objection. If this practice is followed in a Court of Summary Jurisdiction the flow of evidence is not unduly interrupted and the magistrate has the advantage of knowing the dispute issues. In some cases defence, counsel may consider it unnecessary to call, or may not call, evidence from the defendant.

In weighing up admissibility, or in the exercise of discretion, the fact that evidence has not been called by the defence may be a factor which the magistrate will consider of significance in reaching his decision as to admissibility, as indeed it may be a factor in consideration of the ultimate question as to whether a case has been proved..."
