

Indigenous Australian Gene Gibson was lost in translation

By **VICTORIA LAURIE**, SENIOR REPORTER

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On the clipped green lawns of Perth's Supreme Court Gardens, two small children run around in the autumn sunshine, under the watchful eye of their Aboriginal grandma, aunts and teenage cousins. Inside the Victorian-era building, beyond the white entry pillars of justice, their great-uncle Gene Gibson, 25, is fighting for the right to walk outside and join them.

After one of the most problematic murder cases in Western Australia's recent history, and after more than four years out of a nearly eight-year sentence served in prisons around the state, he is close to freedom.

Three black-gowned judges of the Court of Appeal heard Gibson's story this week, in the presence of the diminutive Gibson and a female interpreter at his side whispering to him in his first language, Pintubi. As an illiterate Western Desert man with his own set of customary laws, he might just as well have been sitting as an alien accused in an Iranian court, subjected to a complex Islamic law case conducted in Farsi.

The judges reserved their decision on whether (as his defence and the state that imprisoned him agreed in court they should) they would acquit him of manslaughter in the sad death of a young white man, Joshua Warneke, on February 26, 2010.

But even if he walks free in a few weeks, Gibson will leave behind a justice system that has yet again proved antiquated, ill-equipped and unjust in dealing with citizens like him.

When Gibson was first interviewed by police in 2012, it was two years after the body of the tousle-haired Warneke was found lying beside the Old Broome Road before dawn by a taxi driver. Warneke's skull had been smashed from a blow; there was alcohol in his blood after he'd had drinks with his mates and begun walking the short distance home from town on a wet season night in his Kimberley home town.

Gibson, then 18, also had been drinking and smoking weed that night. His path from a severely neglected childhood in Australia's remotest community of Kiwirrkurra, 850km west of Alice Springs, to that of a transient teenager driving around Broome in a stolen red car with fringe-dweller drinking mates was a fairly typical one in WA's Kimberley region.

Warneke also was typical of a free-spirited youth in an outback town, but the young carpenter's fate was to haunt his devastated mother, Ingrid Bishop.

Operation Aviemore was formed by the WA Police major crime squad to investigate Warneke's death. It suffered dead ends and vague accounts of different coloured stolen cars, drunk passengers and dobbing fellow drinkers who implicated Gibson as the driver of a car that had driven past Warneke's prone body on the roadside that night.

Gibson had gone back home to Kiwirrkurra, the outback community where the last of the nomads — the Pintubi Nine — had walked in from the desert in 1984.

Gibson's parents were alcoholics; the malnourished, poorly clothed child had been passed around to various adults.

Locals told *The Weekend Australian* two years ago that an account with a weekly limit in young Gibson's name had been opened at the Kiwirrkurra store, which they believed was paid for by the Department for Child Protection.

The boy lived on pies, junk food and soft drink until the money ran out.

Court-appointed experts later would confirm what people close to Gibson knew; he had an intellectual impairment that made it hard for him to defend or explain himself in complex issues.

He was planting community trees the day in 2012 when the cops flew in to Kiwirrkurra in a light plane. What took place next was later described in a Supreme Court judgment that threw out the "confession" the two police interviewers extracted from Gibson across the next two days.

Judge Steven Hall said Gibson had been interviewed for about nine hours, in English with no interpreter, no lawyer and no proper warnings that he was a suspect.

At some point, Gibson diverted from his original claim that he had simply driven past a body and not stopped. "Mistake. Hit him with a car," he said (an autopsy ruled out the car as a cause of death.) Then "Hit him with a rock." Later again, it was a pole.

But when, by phone from Kalgoorlie and speaking to Gibson with the aid of an interpreter, a legal aid lawyer told the police he would no longer take part in the interview, they continued.

An excoriating Corruption and Crime Commission report into Operation Aviemore in 2015 needed to look no further than the admission by one of the interviewing policemen himself: "The whole process was a mess," he said later.

"I think I was out of my depth (even though) I had good intentions. It turned into a dog's breakfast." Several police interviewed by the CCC admitted they knew little about Aboriginal culture.

Gibson had told his former Kiwirrkurra school principal Mitchell Drage, who described him as "the friendliest young bloke", that he was innocent. "He told me that police were trying to blame him for something bad that happened in Broome," Drage said. "He told me he didn't do it."

Hall ruled Gibson's confession inadmissible in a July 2014 finding. It left the prosecution relying heavily on the testimony of two men who had been with Gibson on the night Warneke was killed, Edwin Mandijarra and Tristan Nagomarra.

The men originally and consistently had said they saw a body on the side of the road as they drove with Gibson from One Mile camp back into Broome. They hadn't stopped. The two men later changed their testimony to say the car stopped, Gibson got out and hit Warneke, but this version came only after the men were presented by police with Gibson's confession.

Gibson's defence team would learn much later that, in fact, Nagomarra took back his incriminating version within minutes, saying "You mob was keep pushing me, pushing me, pushing me and so I have to make (it) up." "So all that you just told us was make up?" one of the police asked. "Yeah."

Both men later officially recanted their evidence in fresh police interviews in 2015. But it was far too late. By mid-2014, facing a murder conviction, Gibson had agreed to plead guilty to a lesser charge of manslaughter at the urging of his then Aboriginal Legal Service lawyer Dominic Brunello.

This week, Brunello told Gibson's appeal hearing that it was a dreadful but necessary choice. He feared the incriminating statements of Nagomarra and Mandijarra would be used against Gibson, and that the Department of Public Prosecutions might take the manslaughter offer "off the table".

Prompted by questions from Gibson's barrister Sam Van Dongen SC, Brunello painted a picture of a justice system that made it hugely difficult to represent a man such as Gibson; the ALS was "notoriously underfunded"; only two Pintubi interpreters in the entire state were available at certain times; and even when they were, funds to pay them to come to Perth were not.

And Brunello was always worried that Gibson "rarely expressed in his own words his understanding of what I was saying".

"Very little came out of Mr Gibson's mouth," he told the court. "He was inscrutable, impossible to read ... He's from a different culture."

On the day Gibson was due to make the life-changing guilty plea, an interpreter was hastily sought. In the cells below the Supreme Court, he would hear for the first time in his own language what his plea would be. But in this week's appeal hearing, Gibson's defence lawyer, the judges and even the lawyer for the state that convicted him alluded to the almost farcical inadequacy of trying to translate complex legal phrases for indigenous Australians whose fluency was not in English.

State prosecutor Amanda Forrester SC asked interpreter Robert Nanala if, on the day of Gibson's plea, he had translated into Pintubi every word of the statement: "I understand that I am entitled to maintain my plea of not guilty and to defend that plea at trial."

Nanala said he couldn't remember saying the sentence. Asked if Gibson had ever told him he didn't understand what was happening, Nanala said: "No, he was really quiet."

Forrester asked Gibson if, on the day of his sentencing, he had wanted to plead guilty. "No, I wanted to say not guilty." So why did he agree? Because he thought he had been told he would get "big time" in jail if he said not guilty, instead of "small time" if he pleaded guilty. Asked what he considered small time, he said about nine years whereas long time was about 30 years.

Van Dongen told the court "a perfect storm" had led an illiterate Aboriginal man with "significant cognitive deficits" to plead guilty to a crime he repeatedly claimed not to have committed.

Sitting in the upstairs gallery in court this week were two mothers joined in sorrow. Gibson's infirm mother, Alamay Gibson, who speaks little English, sat alongside Warneke's mother, Bishop.

Fierce and articulate, Bishop now believes in Gene Gibson's innocence and has lobbied hard in recent years for his acquittal.

An ache in her heart remains that her son's murder is unsolved, with clues left hanging. Forensic testing of hairs on Warneke's head suggested they were cut cleanly by a sharp implement.

A Broome man interviewed by police had told three people in town he killed Warneke with a tomahawk, - although when confronted by a reporter, he said: “I drink a lot of alcohol ... I talk a lot of shit.”

The two mothers, if they could converse, might agree that a profound question of justice hangs over the Gibson case. Aboriginal people make up under 5 per cent of the West Australian population but constitute 38 per cent of the state’s prison inmates.

Ironically, the prison system sometimes treats them better than the legal system that put them inside. Last May, *The Weekend Australian* caught up with Gibson in the Kimberley’s Roebourne prison; wearing a prison-issue green T-shirt and black shorts, he looked healthier and better fed than he’d been in his short life.

He said he liked his daily routine at the prison, working on the garden outside the unit he shared with his uncle and other Aboriginal men.

The jail has been designed carefully around its exclusively indigenous inmates. In 2014, it was the place where television personality Ray Martin took participants in the SBS program *First Contact* for a reality check about Aboriginal incarceration rates in the nation.

But the justice system has made little progress in even basic ways of meeting the needs of indigenous accused.

As a direct result of the Gibson case, for example, the Corruption and Crime Commission in 2015 stipulated that all basic police cautions must be translated into WA Aboriginal languages and made available as recordings. It has not yet occurred.

The Kimberley Interpreting Service, defunded by the WA government in 2012, now relies on federal funds alone.

Last year it provided 40 interpreters across nearly 2000 hours but it says too few agencies, including police and courts, call routinely on its services and create demand; they simply don’t rate it a high priority.

Playing on the grass outside the Supreme Court, the tiny Aboriginal children who are Gibson’s great-niece and nephew are already caught up in the justice system: their father is serving a prison term, along with many of their relatives.

In a few weeks, if three Supreme Court judges permit Gibson to walk out of the marbled court entrance and into the sun, will his case ensure those children get the proper justice system they deserve?

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