CITATION:	*The Queen v Downs* [2019] NTSC 7
PARTIES:	THE QUEEN
	v
	DOWNS, Josiah
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY exercising Territory jurisdiction
FILE NO:	21726334
DELIVERED ON:	5 February 2019
DELIVERED AT:	Alice Springs
HEARING DATE:	11 January 2019
JUDGMENT OF:	Grant CJ

CATCHWORDS:

CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – CONFESSIONS AND ADMISSIONS

Whether evidence of admissions in record of interview inadmissible because influenced by oppressive conduct within meaning of s 84 of *Evidence (National Uniform Legislation) Act* (NT) ("ENULA") – s 84 of ENULA concerned with voluntariness – no intimidation, persistent importunity or sustained or undue insistence or pressure by interviewing police which would amount to oppressive conduct – accused's stated perception of involuntariness not borne out by DVD record of interview.

CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – CONFESSIONS AND ADMISSIONS

Whether evidence of admissions in record of interview inadmissible because circumstances not such as to make it unlikely that truth of admission adversely affected within the meaning of s 85(2) of the ENULA – s 85 of the ENULA not directly concerned with whether evidence improperly or illegally obtained – not directly concerned with general considerations of fairness – not directly concerned with voluntariness of the confession – admissions made in circumstances that were unlikely to adversely affect their truth.

CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – CONFESSIONS AND ADMISSIONS

Whether evidence of admissions should be excluded because obtained improperly within the meaning of s 138(1) of the ENULA – method or conduct only “improper” in the relevant sense if "not in accordance with truth, fact, reason or rule; abnormal, irregular; incorrect, inaccurate, erroneous, wrong" – method or conduct need not be intentionally improper – must be capable of characterisation as clearly and significantly inconsistent with minimum standards expected of those entrusted with powers of law enforcement – not established that evidence of admissions “obtained improperly”.

CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – CONFESSIONS AND ADMISSIONS

Whether admissions should be excluded because unfair to admit the evidence having regard to the circumstances in which made within the meaning of s 90 of the ENULA – considerations informing the exercise of discretion not restricted to conduct of investigating authorities and reliability of admission in question – accused failed to discharge onus of establishing unfairness.

Criminal Code (NT) s 192
Evidence (National Uniform Legislation) Act (NT) s 84, s 85, s 90, s 137, s 138, s 142

Em v The Queen (2007) 232 CLR 67, *Habib v Nationwide News Pty Ltd* (2010) 76 NSWLR 299, *Higgins v The Queen* [2007] NSWCCA 56, *McDermott v The King* (1948) 76 CLR 501, *Parker v Comptroller-General of Customs* (2009) 83 ALJR 494, *Plevac v The Queen* (1995) 84 A Crim R 570, *R v Amad* [1962] VR 548, *R v Esposito* (1998) 45 NSWLR 442, *R v GP* [2015] NTSC 53, *R v Lawrence* [2016] NTSC 65, *R v Rooke* (Unreported, NSW Court of Criminal Appeal, 2 September 1997), *R v Ul-Haque* (2007) 177 A Crim R 348, *Robinson v Woolworths Ltd* (2005) 158 A Crim R 546, *Ridgeway v The Queen* (1995) 184 CLR 19, referred to.

REPRESENTATION:

Counsel:

Prosecution:	M Penman
Accused:	R Anderson

Solicitors:

Prosecution:	Office of the Director of Public Prosecutions
Accused:	Northern Territory Legal Aid Commission

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
ALICE SPRINGS

The Queen v Downs [2019] NTSC 7
No. 21726334

BETWEEN:

THE QUEEN
Plaintiff

AND:

JOSIAH DOWNS
Defendant

CORAM: GRANT CJ

REASONS FOR JUDGMENT

(Delivered 5 February 2019)

[1] The accused is charged with one count of attempted sexual intercourse without consent contrary to s 192(3) of the *Criminal Code* (NT). The offence is alleged to have occurred at Tennant Creek on 3 June 2017. The accused is charged in the alternative with unlawful assault contrary to s 188(1) of the *Criminal Code*, aggravated by the fact that the victim suffered harm, the victim was a female and the accused is a male, and the victim was indecently assaulted.

[2] The prosecution seeks to lead evidence of admissions made by the accused in an electronic record of interview with police. It is common ground that the record of interview contains "admissions" within the

meaning of the *Evidence (National Uniform Legislation) Act* (NT) ("ENULA"), and that the record of interview is *prima facie* admissible under ss 55, 56 and 81 of the ENULA.

[3] The accused contends that the record of interview should be excluded on the basis that the admissions were influenced by oppressive conduct on the part of police within the meaning of s 84 of the ENULA; and/or on the basis that the circumstances in which it was made were not such as to make it unlikely that the truth of the admissions was adversely affected within the meaning of s 85(2) of the ENULA; and/or in the exercise of the discretion under s 90 of the ENULA because it would be unfair to the accused to use the evidence; and/or in the exercise of the discretion under s 138 of the ENULA because the admissions were obtained improperly.

[4] In the alternative, the accused contends that certain portions of the record of interview should be excluded on those same bases.

[5] The asserted factual circumstances which the accused says warrant the exclusion of the record of interview may be summarised as follows:

(a) the conduct of questioning by police during the course of the record of interview was variously unfair and oppressive, was in the nature of cross-examination, contained expressions by the interrogator as to the accused's guilt, subjected the accused to

ridicule and derision, and was based on certain misleading assumptions; and

(b) prior to the conduct of the record of interview the accused stated that he wanted to speak to a lawyer, but police did not defer the conduct of the interview until the accused had reasonable opportunity to do so.

[6] The admissions made in the record of interview are that on the night in question the accused had a physical interaction with the alleged victim during which he bit her on the side of the neck. The record of interview also contains exculpatory statements by the accused to the effect that the physical interaction do not involve any attempt at sexual intercourse or any element of indecency.

The circumstances of the accused's arrest and the subsequent interview

[7] The accused was educated to Year 11 level at Ali Curung. His expression and comprehension of spoken English is good. He is able to read and write English "a little bit". There is no submission by defence counsel that English is not a language in which the accused was able to speak and communicate with reasonable fluency, or that the evidence was obtained improperly by reason of his English comprehension.

[8] Certain details concerning the arrest and interview of the accused are uncontentious.

[9] At about 4.45 a.m. on 4 June 2017, the accused was arrested at a house in Tennant Creek. He was wanted for questioning in relation to the complaint that had been made by the alleged victim. At about 5.00 a.m. on that morning he was received into the Tennant Creek watchhouse and a caution was administered in pursuance of s 140 of the *Police Administration Act* (NT). Both the accused and the police officer who administered the caution gave evidence that at the time the caution was administered the accused said, "She came on to me".

[10] At some time shortly prior to 3.30 p.m. that day the accused indicated that he wanted to speak to a lawyer. That indication was given in response to a request by police that he participate in a record of interview. At 3:30 p.m. police attempted to contact the Central Australian Aboriginal Legal Aid Service contact number in Tennant Creek. There was no answer. Then, at 3:52 p.m. police attempted to call the Central Australian Aboriginal Legal Aid Service contact number in Alice Springs. There was no answer, and police left a message. Sergeant Littman and Constable Lum then reviewed the case materials and prepared to interview the accused. Those officers then attended at the watch house and spoke with the accused to ask whether he wanted to participate in an interview.

[11] There is a dispute in the evidence as to what occurred after that time. The interviewing police officer gave evidence to the effect that he told the accused that police had tried to contact the legal aid service and

received no response, and the accused stated that he was prepared to participate in an interview and that he did not require a support person. He was then taken through to the interview room. The accused's account is generally consistent with that, except he says the police officers told him that they would only conduct a "quick interview" and that he would be able to speak to a lawyer the following day. The accused also gave evidence that at all times he wanted to tell his story to a lawyer before determining whether to participate in a record of interview with police.

[12] The interview was conducted commencing from 4.43 p.m. on 4 June 2017. The interview was recorded in accordance with the provisions of the *Police Administration Act*. A viewing of the record of interview discloses the following matters. The caution was administered at the commencement of the record of interview. Prior to the administration of the caution, interviewing police spent some time assessing the accused's level of education and his general comprehension of the circumstances. The caution was then explained to the accused phrase by phrase. The caution was explained in plain English terms.

[13] The accused's responses to the first part of the caution indicated he understood what it meant. There is nothing to suggest that the accused thought he was under a compulsion to answer the questions put to him. The accused says explicitly that it was his choice whether to answer questions or not. The accused understood the second part of the

caution in the sense that what he said might be placed before a court and lead to the imposition of criminal sanctions, and was able to articulate the matter in those terms.

[14] After the administration of the caution the following exchange took place:

> Question: Yep. Um, now you said you wanted to speak to Legal Aid, unfortunately we haven't been able to speak to Legal Aid. Um – we have left messages on their mobile phone down there in Alice Springs.
>
> Answer: Yep.
>
> Question: Um – so you're still happy to do the interview by yourself?
>
> Answer: Yeah.

[15] That exchange is consistent with the police officer's evidence that prior to the commencement of the interview the accused had been asked whether he was prepared to proceed with the interview without having first spoken with a legal aid lawyer. It is also consistent with the accused previously indicating that he was prepared to participate in the interview in those circumstances. Having regard to that contemporaneous record, I find that police did not coerce the accused into participating in the record of interview.

[16] Against that background, the accused's contention that the record of interview should be excluded on the basis that he was not given prior opportunity to speak with a lawyer is necessarily predicated on the proposition that the interview had to be deferred until such time as the

accused had that opportunity notwithstanding his indication of consent. The accused's contention that the record of interview should be excluded having regard to the nature of the questions put during the course of that interview requires a consideration of the DVD recording of that interview.

The operation of s 84(2) of the ENULA

[17] The first exclusionary provision upon which the accused relies is s 84 of the ENULA, which provides relevantly:

> **Exclusion of admissions influenced by violence and certain other conduct**
>
> (1) Evidence of an admission is not admissible unless the court is satisfied that the admission, and the making of the admission, were not influenced by:
>
> (a) violent, oppressive, inhuman or degrading conduct, whether towards the person who made the admission or towards another person; or
>
> (b) a threat of conduct of that kind.
>
> (2) …

[18] Section 84 of the ENULA is concerned with whether the admissions were voluntarily made or the result of the conduct described therein, or the threat of such conduct. Counsel for the accused does not suggest that police engaged in violent, inhuman or degrading conduct within the meaning of the provision. The submission is that the conduct was "oppressive".

[19] The New South Wales Court of Appeal considered the scope of that term in *Habib v Nationwide News Pty Ltd*.[1] The Court observed that the dictionary definition of "oppressive" included "burdensome, unjustly harsh … causing discomfort because uncomfortably great, intense". The term "oppression" was defined as "the exercise of authority or power in a burdensome, cruel or unjust manner". Oppressive conduct is not limited to physical conduct, and extends to encompass mental and psychological pressure.[2] The assumption of unlawful powers of direction, control and detention may also amount to oppression in the relevant sense.[3]

[20] Given the findings made in relation to the circumstances in which the accused agreed to participate in the record of interview without first consulting with a lawyer, it cannot be said that the police conduct in that respect was "oppressive" in the relevant sense. That leaves the nature of the questioning. There are passages in the record of interview in which police questioned the accused's veracity, and at one point make a demeaning comment in relation to his hairstyle, but they do not amount to oppressive conduct. Defence counsel's principal contention in this context is that police "cross-examined" the accused during the course of the interview, and this amounted to oppressive

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1 [2010] NSWCA 34; 76 NSWLR 299 at [245]-[251].

2 *Higgins v The Queen* [2007] NSWCCA 56.

3 *R v Ul-Haque* [2007] NSWSC 1251; 177 A Crim R 348.

conduct. A representative example of this form of questioning appears at page 13 of the transcript of the record of interview:

> Question: OK. So, you're saying that Jasmine never left Limonite Street and she never came into town?
>
> Answer: No.
>
> Question: OK.
>
> Answer: The only time she could do that, she could do – do – do that with me. Like, if I wanted to go [to] town, I could always tell my wife, let's go for a walk.
>
> Question: OK. All right then.
>
> Answer: Yeah. She would all – –
>
> Question: Can you explain to me then Josiah, how it be that your wife got arrested by the police, last night, in town?
>
> Answer: No I got – I got a shock – um – when the police came up and start touching me and – –
>
> Question: No, before the police came to – to talk to you.
>
> Answer: No.

[21] In pressing the submission that this form of questioning constituted "cross-examination", and was therefore oppressive, counsel for the defendant relied principally on the decision of the High Court in *McDermott v The King*.[4] In that respect, Williams J stated:

> In *R v Gardner* [(1915) 114 LT 78 at 79], Avory J, speaking for Lord Reading CJ, himself and Lush J, said that the "police have been constantly told that a prisoner after being arrested and charged must not be cross-examined." But the mere asking by the police of a question which would only be asked in cross-examination at the trial does not, in my opinion, amount to cross-examination of the accused by the police. A cross examination for this purpose would be an examination intended to break down the

4 (1948) 76 CLR 501.

> answers of the accused to questions put by the police to which they had received unfavourable replies.[5]

[22] And further:

> There would only necessarily have been such a miscarriage if the appellant had in fact been cross-examined by the police, and it was part of the law of New South Wales that where an accused who has been or is about to be arrested is cross-examined by the police his answers are inadmissible. But, as Davidson J pointed out in *R v Jeffries* [(1946) 47 SR (NSW) at 298, 299] there is no such law. It is for the trial judge in the exercise of his discretion to see that the questioning was not carried out to an improper length, and if it was to exercise his discretion and reject the answers as unfair to the accused, and as having been obtained under such circumstances that to admit there might lead to a miscarriage of justice.[6]

[23] That characterisation was consistent with the reasons of Dixon J, which were directed to the question whether a confessional statement was made as the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure. It is not enough that the questions might be capable of characterisation as "cross-examination" in some sense. The nature of the questioning must have the effect that the confession (or admission) is not voluntary. Dixon J concluded

> The fact that the police intended to arrest the prisoner, that they virtually held him in custody and delayed for an hour making the charge, and that they asked him questions are not in themselves enough to require that the statements the prisoner made to them should be excluded. The character of the questions, the absence of any insistence or pressure and putting them, the fact that no questions were put directed to breaking down or destroying the prisoner's answers or statements and the fact that there was no

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5 *McDermott v The King* (1948) 76 CLR 501 at 517.

6 Ibid at 518.

> attempt to entrap, mislead or persuade him into answering the questions, still less into answering them in any particular way, these are all matters which negative such a degree of impropriety as to require the exclusion of the testimony as to the prisoner's admissions.[7]

[24] Similarly, in *Plevac v The Queen*[8], the New South Wales Court of Criminal Appeal observed that police may interrogate a suspect who is willing to answer their questions, and the interrogation may include putting to the suspect the facts as the police know or believe them to be in order to ascertain what the suspect will say about them. It is only when such questioning amounts to intimidation, persistent importunity or sustained or undue insistence or pressure that questions of voluntariness will arise. Questioning is not to be regarded as unfair merely because it is persistent.

[25] The DVD recording of the record of interview was tendered into evidence during the course of the *voir dire* hearing. A viewing of that record does not disclose any intimidation, and such insistence or pressure as police brought to bear on the accused could not be characterised as oppressive in the relevant sense. During the course of his evidence in the *voir dire* hearing the accused was asked to indicate how it was that police had forced him to answer questions against his will. His response was, in effect, that they were "looking at me roughly". Even if the accused's perception in that respect could be

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7 *McDermott v The King* (1948) 76 CLR 501 at 515.

8 (1995) 84 A Crim R 570.

characterised as oppression, which is doubtful, the DVD record does not disclose conduct on the part of the interviewing police which might attract that characterisation on an objective appraisal. Neither the demeanour of the interviewing police nor the nature of the questioning was such as to extort admissions from the accused or to overcome his mental resistance to making admissions.[9]

[26] Defence counsel's secondary contention in this context is that police based a substantial portion of the questions put to the accused on a misleading premise. The misleading premise is said to be that the interaction between the accused and the complainant took place at Limonite Street rather than in a laneway behind the Tennant Creek Hotel. The issue arises intermittently from pages 16 to 23 of the transcript of the record of interview. The difficulty with the defence submission in that respect is that it was the accused's account that the interaction took place at Limonite Street. That assertion was repeated by the accused on four further occasions. It cannot be said to be unfair or misleading, much less oppressive, that the questions put by police made reference to that assertion. Nor does the form of the questions appear to have given rise to any subjective confusion on the part of the accused.

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9 *R v Amad* [1962] VR 548.

[27] For these reasons, I am satisfied that the admissions were not influenced by oppressive conduct, or the threat of oppressive conduct, towards the accused.

The operation of s 85(2) of the ENULA

[28] The second exclusionary provision upon which the accused relies is s 85 of the ENULA. The accused contends that evidence of the admissions is not admissible because the circumstances in which they were made were not such as to make it unlikely that the truth of the admission was adversely affected within the meaning of s 85(2) of the ENULA. Section 85 of the ENULA provides:

> **85 Criminal proceedings – reliability of admissions by defendants**
>
> (1) This section applies only in a criminal proceeding and only to evidence of an admission made by a defendant:
>
> (a) to, or in the presence of, an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence; or
>
> (b) as a result of an act of another person who was, and who the defendant knew or reasonably believed to be, capable of influencing the decision whether a prosecution of the defendant should be brought or should be continued.
>
> *Note for subsection (1)*
>
> *Subsection (1) is inserted as a response to the decision of the High Court of Australia in Kelly v The Queen (2004) 218 CLR 216.*
>
> (2) Evidence of the admission is not admissible unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected.
>
> (3) Without limiting the matters that the court may take into account for the purposes of subsection (2), it is to take into account:
>
> (a) any relevant condition or characteristic of the person who made the admission, including age, personality and education and any

mental, intellectual or physical disability to which the person is or appears to be subject; and

(b) if the admission was made in response to questioning:

(i) the nature of the questions and the manner in which they were put; and

(ii) the nature of any threat, promise or other inducement made to the person questioned.

[29] Section 85 of the ENULA is concerned with whether the circumstances adversely affected the "truth of the admission". It is not directly concerned with whether the evidence has been improperly or illegally obtained, or general considerations of fairness. Nor is the provision concerned with the voluntariness of the confession, except to the extent that it might bear on the assessment of reliability in the relevant sense.

[30] The enquiry also does not raise any consideration of whether the admissions made were, in fact, true. The relevant enquiry is whether circumstances such as the accused's personal characteristics and the level of compliance with procedural safeguards may have affected the truth of the confession.[10] In other words, the enquiry is whether the circumstances were such that it was unlikely that the accused made a false confession.[11]

[31] Counsel for the accused has not identified with specificity, or at all, any matter concerning the accused's personal characteristics which may have affected the truth of the admissions. For the reasons already

10 *R v GP* [2015] NTSC 53 at [30].

11 *R v Esposito* (1998) 45 NSWLR 442 at 459-460; *R v Rooke* (Unreported, NSW Court of Criminal Appeal, Newman, Levine and Barr JJ, No 60550/96, 2 September 1997).

given in relation to the assertion of oppressive conduct, there was no misconduct on the part of interviewing police which may have borne on the reliability of the admissions made. Having regard to the circumstances of the accused's arrest and the subsequent interview which have been detailed above, it is plain that the appropriate cautions were administered and that the accused participated voluntarily in the interview.

[32] That leaves the question of the accused's request to speak with the lawyer, and the conduct of the interview before he had opportunity to do so. The accused's decision to take that course was voluntarily made. Moreover, although the accused's failure to take legal assistance was no doubt operative in his decision to proceed with the interview, there is nothing to suggest that his failure to do so gave rise to circumstances which bore on the reliability of the admission subsequently made.

[33] For these reasons, I am satisfied that the circumstances in which the admissions were made were such as to make it unlikely that the truth of the admissions was adversely affected.

The operation of s 138 of the ENULA

[34] The third exclusionary provision upon which the accused relies is s 138 of the ENULA, which provides relevantly:

Exclusion of improperly or illegally obtained evidence

(1) Evidence that was obtained:

(a) improperly or in contravention of an Australian law; or

(b) in consequence of an impropriety or of a contravention of an Australian law;

is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

(2) Without limiting subsection (1), evidence of an admission that was made during or in consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been obtained improperly if the person conducting the questioning:

(a) did, or omitted to do, an act in the course of the questioning even though he or she knew or ought reasonably to have known that the act or omission was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning; or

(b) made a false statement in the course of the questioning even though he or she knew or ought reasonably to have known that the statement was false and that making the false statement was likely to cause the person who was being questioned to make an admission.

(3) ….

[35] The burden is on the party seeking exclusion of the evidence to establish that it was improperly obtained.[12] The ENULA contains no general or specific definition of "impropriety". The method or conduct will only be “improper” in the relevant sense if it is "not in accordance with truth, fact, reason or rule; abnormal, irregular; incorrect, inaccurate, erroneous, wrong”.[13] The meaning of the term "improperly"

12 See *Parker v Comptroller-General of Customs* (2009) 83 ALJR 494 at [28] per French CJ.

13 Ibid at [29] per French CJ.

was described by Basten JA in *Robinson v Woolworths Ltd*[14] in the following terms:

> It follows that the identification of impropriety requires attention to the following propositions. First, it is necessary to identify what, in a particular context, may be viewed as "the minimum standards which a society such as ours should expect and require of those entrusted with powers of law enforcement". Secondly, the conduct in question must not merely blur or contravene those standards in some minor respect; it must be "quite inconsistent with" or "clearly inconsistent with" those standards.[15]

[36] As suggested in that extract, the test is not materially different to the common law position that in order to warrant the exclusion of evidence on this basis the conduct in question must be "inconsistent with the minimum standards which a society such as ours should expect and require of those entrusted with powers of law enforcement".[16] Moreover, that conduct must be “clearly inconsistent” with those standards. Although it may be accepted for these purposes that the method or conduct in question need not have been intentionally improper, it must still be capable of characterisation as clearly and significantly inconsistent with minimum standards.

[37] The relevant impropriety in this case was said by counsel for the accused to arise from the circumstances already described and considered above in the context of the assertion of oppressive conduct.

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14 (2005) 158 A Crim R 546.

15 Ibid at [23].

16 *Ridgeway v The Queen* (1995) 184 CLR 19 at 36 per Mason CJ, Deane and Dawson JJ.

None of those matters, either alone or in combination, could be said to constitute conduct which was inconsistent with the minimum standards expected of law enforcement officers; or to be in contravention of an Australian law or in consequence of a contravention of an Australian law.

[38] The accused has not established that evidence of admissions made by him during the interviews was "obtained improperly" within the meaning of s 138 of the ENULA, and should therefore be excluded on that basis.

The operation of s 90 of the ENULA

[39] The final exclusionary provision upon which the accused relies is s 90 of the ENULA. The accused contends that the record of interview should be excluded because it would be unfair to the accused to use the evidence having regard to the circumstances in which the admission was made. The accused bears the onus of establishing unfairness.[17] Section 90 of the ENULA provides:

> **90 Discretion to exclude admissions**
>
> In a criminal proceeding, the court may refuse to admit evidence of an admission, or refuse to admit the evidence to prove a particular fact, if:
>
> (a) the evidence is adduced by the prosecution; and

17 Proof of any facts required to demonstrate circumstances giving rise to unfairness must be established on the balance of probabilities: ENULA, s 142(1).

(b) having regard to the circumstances in which the admission was made, it would be unfair to a defendant to use the evidence.

Note for section 90

Part 3.11 contains other exclusionary discretions that are applicable to admissions.

[40] In *Em v The Queen*[18], the High Court considered the admissibility of an admission secretly taped by police. In the course of that consideration Gummow and Hayne JJ dealt with the interaction between the various exclusionary provisions in the ENULA in the following terms:

> When it is "unfair" to use evidence of an out-of-court admission at the trial of an accused person cannot be described exhaustively. "Unfairness", whether for the purposes of the common law discretion or for the purposes of s 90 [of the Uniform Evidence Acts], may arise in different ways. But many cases in which the use of evidence of an out-of-court admission would be judged, in the exercise of the common law discretion, to be unfair to an accused are dealt with expressly by particular provisions of the Act[s] other than s 90. Thus although the discretion given by s 90 is generally similar to the common law discretion considered in [*R v Lee* (1950) 82 CLR 133], it is a discretion that will fall to be considered only after applying the other, more specific, provisions of the Act[s] referred to at the start of these reasons. The questions with which those other sections deal (most notably questions of the reliability of what was said to police or other persons in authority, and what consequences follow from illegal or improper conduct by investigating authorities) are not to be dealt with under s 90. The consequence is that the discretion given by s 90 will be engaged only as a final or 'safety net' provision.[19]

[41] It follows that if circumstances are not such as to lead to the conclusion that it was not unlikely that the truth of that the admission was adversely affected, or the admission improperly obtained, it

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18 (2007) 232 CLR 67.

19 Ibid at [109].

nevertheless remains open to consider whether those circumstances call for exclusion on the grounds of unfairness. The considerations informing the exercise of that discretion are not restricted to the conduct of investigating authorities, the reliability of the admission in question, or the question of voluntariness.

[42] For the reasons given in relation to the operation of the other exclusionary provisions, I have also come to the conclusion that the accused has not discharged the onus of establishing unfairness in this case. That is the case in relation to the complaint concerning the nature of the questioning and the complaint concerning the accused's failure to take legal advice, both when considered individually and when considered in combination.

[43] The question concerning the failure to take legal advice resolves to a consideration of whether it was incumbent on police to defer the interview in circumstances where the accused had agreed to proceed without the benefit of legal advice and accompaniment, and whether it would be "unfair" in the relevant sense to use the evidence of the admissions in those circumstances. There may well be circumstances where a failure to defer an interview pending a suspect's receipt of legal advice does give rise to a relevant unfairness. Such circumstances might include, for example, where police are aware that

the suspect already has legal representation,[20] where the suspect suffers from some intellectual difficulty, or where the suspect's participation in the interview is procured by trickery. This is not such a case.

Redaction

[44] Although I have concluded that the record of interview should not be excluded in whole on the basis of the accused's contentions, I am satisfied that parts of the record of interview should be redacted on the basis that they are either irrelevant, unnecessary for the narrative, or contain inappropriate questions. Counsel for the Crown and the accused have agreed to certain redactions. Other passages remain in dispute and my determination in relation to those matters in dispute appears in the terms of the ruling.

Ruling

[45] The evidence of the electronic record of interview conducted on 4 June 2017 is admissible in the trial subject to the following exclusions:

(a) the redactions agreed by the parties and marked in green in the Exhibit PVD2 comprising the transcript of the record of interview;

(b) the series of questions and answers at page 11 of the transcript commencing with the words "LUM: Mm-hmm. I mean, she's making some pretty serious allegations …" and concluding with the words "… I'm not sure about that";

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20 *R v Lawrence* [2016] NTSC 65 at [131]-[136].

(c) the single question and answer at page 13 of the transcript commencing with the words “LUM: Hey, start tellin’ the truth …” and concluding with the words “Yeah”;

(d) the single question and answer at page 13 of the transcript commencing with the words “LUM: I don’t believe you Josiah …” and concluding with the words “That true stories”;

(e) the single question and answer at page 14 of the transcript commencing with the words “LUM: Levine, he don’t have that …” and concluding with the words “Levine?”;

(f) the series of questions and answers starting at page 14 of the transcript and going over to the top of page 15 commencing with the words “LUM: OK. You need to tell true story …” and concluding with the words “I would have run away”;

(g) The question at page 18 of the transcript “LUM: OK then. If ---”;

(h) the series of questions and answers at page 20 of the transcript commencing with the words “LUM: Oh” and concluding with the words “--- always tease”; and

(i) the series of questions and answers starting at the bottom of page 23 of the transcript and going over to the middle of page 24 commencing with the words “LUM: Yeah – yeah – yeah – yeah…”

and concluding with the words “LITTMAN: Yep, we’ll get to that afterwards”.
