R v Tupou [2016] NTSC 56

PARTIES:	THE QUEEN
	v
	TUPOU, Paea
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	21541007
DELIVERED:	21 November 2016
HEARING DATES:	11, 12 and 13 April 2016
JUDGMENT OF:	BARR J

CATCHWORDS:

CRIMINAL LAW – Voir dire – accused charged with driving dangerously causing death – exculpatory statements made by accused at accident scene, in witness statement and later in police interview – exculpatory statements untrue – relied on by prosecution as lies told out of consciousness of guilt – exculpatory statements "admissions" – admissions made in circumstances that were not likely to adversely affect the truth of the admissions made – admissions not rendered inadmissible by s 85(2) of the Act.

CRIMINAL LAW – Voir dire – admissibility of accused's witness statement – accused not a suspect – police officer inadvertently gave accused reasonable grounds for believing he would not be allowed to leave police station until he had provided witness statement – s 139(5)(c) of the Act – accused deemed under arrest – accused not cautioned before start of questioning – statement contained untrue exculpatory statements – evidence of statement deemed to have been obtained improperly – s 139(1)(c) of the Act – accused's untrue exculpatory statements "admissions" – probative

value of admissions significant – impropriety not deliberate or reckless – desirability of admitting the evidence outweighs undesirability of admitting evidence obtained in the way in which it was obtained.

CRIMINAL LAW – Voir dire – admissibility of record of police interview – accused deemed under arrest – s 139(5)(a) of the Act – caution in full or substantial compliance with s 139(1)(c) of the Act – caution given in English – accused able to communicate in English with reasonable fluency – onus on accused to satisfy court that conditions for exclusion met – court not satisfied that accused did not have sufficient fluency in English to understand the caution and its underlying concept and function – accused did not establish that evidence of admissions to police were obtained improperly or in contravention of an Australian law – evidence of accused's admissions in police interview admissible.

Evidence (National Uniform Legislation) Act 2011 (NT) s 85, s 90, s 137, s 138, s 139

R v Deng [2001] NSWCCA 153; *Carr v Western Australia* (2007) 232 CLR 138; *Plevac* (1995) 84 A Crim R 570; *Astill* (unreported, NSWCCA, 17 July 1992); *R v Grimley* (1994) 121 FLR 236; *Lai v The Queen* (2003) 13 NTLR 139; *Bin Sulaeman v R* [2013] NSWCCA 283; *R v Frederick Hayes*, Reasons for Decision on Voir Dire (SCNT unrep.) 28 February 1979; *Edwards v The Queen* (1993) 178 CLR 193; *Kuhl v Zurich Financial Services Australia Ltd and another* (2011) 243 CLR 361; *R v Horton* (1998) 45 NSWLR 426; *R v Esposito* (1998) 45 NSWLR 442, applied.

Kelly v The Queen (2004) 218 CLR 216; *R v Swaffield* (1998) 192 CLR 159; *Tofilau v The Queen* (2007) 231 CLR 396; *Attorney-General for New South Wales v Martin* (1909) 9 CLR 713; *R v Lee* (1950) 82 CLR 133; *R v Doyle, ex parte Attorney General* [1987] 2 Qd R 732; Papakosmos v R (1999) 196 CLR 297; Festa v R (2001) 208 CLR 593; *Em v The Queen* (2007) 232 CLR 67, referred to.

R v GH (2000) 105 FCR 419, considered.

REPRESENTATION:

Counsel:

Crown:	S Robson
Accused:	R Goldflam

Solicitors:

Crown:	Office of the Director of Public Prosecutions

Accused:	Northern Territory Legal Aid Commission
Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

R v Tupou [2016] NTSC 56
No. 21451007

BETWEEN:

THE QUEEN

AND:

PAEA TUPOU

CORAM: BARR J

REASONS FOR DECISION ON VOIR DIRE

(Delivered 21 November 2016)

Introduction

[1] The accused was charged with an offence contrary to s 174F(1) Criminal Code that, on 10 August 2014 at Alice Springs, he drove a motor vehicle dangerously and (by that conduct) caused the death of Dexter Guevara.

[2] The Crown case was that, shortly after 3.00 am on 10 August 2014, the accused drove a minibus taxi in an easterly direction along Kempe Street. At the T-intersection of Kempe Street and South Terrace, he executed a right-hand turn into South Terrace, colliding with a motorcyclist who had been riding north along South Terrace. The motorcyclist died at the scene as a result of his injuries. The accused had not stopped his vehicle at the intersection of Kempe Street and South Terrace, and had failed to give way

to the motorcyclist who was approaching the intersection from the accused's right.

[3] In these reasons, I will refer to the fatal collision as "the accident".

[4] The voir dire hearing required consideration of three separate pieces of evidence, namely:

1. Evidence of statements made by the accused to Constable Swift at the scene of the accident, at about 3.30 am on 10 August 2014.

2. Evidence of a statutory declaration,[1] drafted and typed up by Constable Swift at the Alice Springs Police Station, signed by the accused at about 5.00 am on 10 August 2014.

3. Evidence of the audiovisual record of the accused's formal police interview on 20 October 2014.

[5] The evidence, on each of the three occasions, included a statement by the accused that (or to the effect that) he had stopped at the intersection of Kempe Street and South Terrace. The Crown alleged that those statements were untrue. The evidence also included statements made by the accused to the effect that he had exercised a proper lookout before proceeding into the intersection. The Crown disputed that the accused had exercised a proper lookout, and alleged that the accused drove into the intersection at a speed of approximately 19 km per hour and directly into the path of the oncoming motorcycle.

[1] Exhibit P2 on the voir dire.

[6] The Crown intended at trial to rely on the untrue statements made by the accused as lies evidencing consciousness of guilt: that the accused knew that the manner of his driving had presented a danger to the motorcyclist, and had caused the fatal collision; and that telling the truth would have implicated him in the serious criminal offence with which he stood charged.

[7] Defence counsel applied for redaction of the accused's untrue statements from the three pieces of evidence referred to in sub-paragraphs 1, 2 and 3 of [4] above; alternatively, exclusion of the entirety of the evidence.

[8] The voir dire was complicated by the fact that the accused in evidence denied that he had made two of the untrue statements referred to in [5] above. The accused claimed that a police officer had wrongly attributed to him the untrue statements alleged made (1) at the scene of the fatal collision and (2) at the time of making his statutory declaration at the Alice Springs Police Station. The accused also claimed that he had made the further untrue statements in his formal police interview only in order to maintain the earlier untruths wrongly attributed to him.[2]

Relevant facts

[9] As mentioned in [2], the fatal collision between the vehicle driven by the accused and the deceased motorcyclist took place shortly after 3.00 am on 10 August 2014.

[2] This is discussed further at [29] and [41] – [43] below.

[10] At the time of the accident, the accused had been driving his taxi minibus for about 13 hours, from 2.00 pm in the afternoon of 9 August 2014, although he had had a break of approximately 1 hour between 7.00 pm and 8.00 pm in the evening of 9 August.[3] But for the accident, he probably would have finished work at about 3.30 am.

[11] Constable Swift attended the scene just after 3.00 am and initially carried out chest compressions as part of the CPR performed on the deceased. The deceased was removed by ambulance at 3:22 am, and Swift remained at the scene until just after 4.00 am.

The accused's statement made at the scene

[12] After the deceased had been taken from the scene, Constable Swift spoke with the accused and obtained his address, date of birth and a phone number. He also asked the accused what had happened, and made contemporaneous notes as the accused was speaking.[4] The notes included the following:

> "Waiting at intersection. Didn't see bike coming from the south. The bike has slid into the right side of the van".[5]

[13] Although Constable Swift conceded in cross examination the possibility that the accused did not actually say "I was waiting at the intersection", he also said, "I would have written them down as he said them. I can't now recall the exact words that he used. I would have just wrote it down as I heard it

[3] T 50.
[4] T 90.5.
[5] T 22.7.

on the night."[6] In re-examination, he made it very clear that he would only have written those words down if Mr Tupou had said them.[7]

[14] The Crown relied on the statements made by the accused for two purposes: (1) the statement that the accused was "waiting at (the) intersection", as a lie evidencing consciousness of guilt, as explained in [6]; and (2) the statement that the accused did not see the bike coming, as an implied admission that he failed to keep a proper lookout.

The accused's police statutory declaration

[15] Constable Hunt took the accused from the scene to the police station in Alice Springs at approximately 4.00 am. Constable Hunt was informed by a doctor at the Alice Springs Hospital at approximately 4:16 am that the motorcyclist was "confirmed deceased". However, that information was not provided to Constable Swift, who took the statement from the accused, and nor was the accused informed. Constable Swift said that he found out that the motorcyclist had died after he had taken the accused's statutory declaration.[8]

[16] In his evidence on the voir dire, Constable Swift confirmed the evidence that he had given at his preliminary examination:[9]

> "We asked - we informed Mr Tupou that he would be - he needed to come back to the station to make that statement. We did that on the

[6] T 90.5.
[7] T 91.5: "I would have only wrote those words down as an account that Mr Tupou would have given me on the night by the side of the road."
[8] T 30.7.
[9] T 25.5.

> roadside on South Terrace, made it pretty clear to him that he was going to be coming to the station and, while at the station, he was going to be making a statement."

[17] The evidence suggested some degree of coercion on the part of police and/or that an obligation was imposed on the accused. The suggestion was not dispelled by Constable Swift's explanation that:

> "He's just been involved in an accident, you don't want to take a statement off him on the roadside at the actual scene. It's a bit more of a pleasant environment for him to be able sit down and gather his thoughts and give his statement at the station."[10]

[18] It is probable that the way in which Constable Swift spoke to the accused at the accident scene led the accused to believe that he was obliged to go back to the police station to make a statement about the collision. The accused already believed that the law required the driver of a vehicle involved in a serious accident to make a statement.[11] In that context, and although there was no undue pressure applied, the manner in which Constable Swift dealt with the accused, in particular the words he used, led the accused to believe that he had no choice other than to return to the police station and make a statement.

[19] The accused said in evidence that he did not believe that he was allowed to leave the police station while he was in the process of making his statement, notwithstanding that he could, if he wished, leave the interview room to have a smoke, get a drink, or go to the toilet. He thought that if he attempted

[10] T 27.7; see also re-examination at T34.9 - 35.
[11] T 71.5.

to get up and walk out (that is, without completing his statement), he would be locked up.[12] I accepted that evidence. Although the accused did not 'test the boundaries' by attempting to leave the police station,[13] he had been given reasonable grounds for his belief by Constable Swift's statements at the accident scene.[14]

[20] For some time after the accident, the police (and specifically Constable Swift) had an open mind about whether an offence had been committed and consequently as to the accused's possible criminal liability. A relevant consideration was that the deceased motorcyclist smelt strongly of alcohol and thus his intoxication may have caused or contributed to the collision. Police certainly did not have sufficient evidence to charge the accused with any offence at the time he made his police statutory declaration, and had no basis to doubt the version given by the accused that he had stopped at the accident intersection for a reasonable period, and had made a judgment that he could safely execute a right-hand turn. Police would not have reason to think otherwise until after the crash scene investigation had been completed, a point of impact on the roadway identified, and an analysis made of the data from the on-board CCTV camera in the vehicle driven by the accused. At the time the accused made his police statutory declaration, there was much evidence still to be obtained and considered.

[12] T 51.1.
[13] T 72.2: the accused agreed in cross-examination that he did not ask police whether he could leave.
[14] See [16] above.

[21] My conclusion in the previous paragraphs was reinforced to a limited extent by the fact that, even at the end of the accused's formal interview with police on 20 October 2014, police said that the matter was still being investigated and did not arrest the accused or charge him with any offence at that time. I say "to a limited extent" because police were obviously aware by then that the accused had not stopped at the intersection where the accident occurred. It was probable that, at least by the end of the interview on 20 October 2014, police had all the evidence necessary to charge the accused with an offence contrary to s 174F(1) Criminal Code.

[22] The statement-taking process in which the accused participated on 10 August 2014 lasted for an hour or more. The process probably took until sometime after 5.00 am, but assuming that the process started at some time after 4.00 am, say 4.15 am, the accused had commenced his driving shift some 14 hours previously. But for the accident, he would probably have finished work at about 3.30 am,[15] or about 4.00 am.[16] In his evidence in cross-examination, he was asked "Did you agree to make a statement?", to which he replied "I didn't want to, but because I was told to, so I had to go along with it." When asked why he didn't want to make a statement, he said that, after the incident, he was "flat out, tired".[17] He had earlier said that, by the time of the statement was finished, "Then I felt so tired, all I wanted was

[15] EROI, transcript 18/30.
[16] Exhibit P2, par 2.
[17] T 60.2.

to go home".[18] He later said, "… in that time all I had on my mind was to just to sign it over to them and let me go home."[19]

[23] The evidence in the previous paragraph might be contrasted with answers given in his formal police interview on 20 October 2014, as follows:[20]

> KELLY: Alright, how much sleep had you had the night before?
>
> TUPOU: I sleep all night.
>
> KELLY: You sleep all night, ok. Were you tired at all?
>
> TUPOU: Oh not really.
>
> KELLY: Not really, okay.

[24] However, the above extracted questions, in context, may have been directed at the accused's being tired while driving on his shift, or at the time of the collision itself, and the answers are not necessarily inconsistent with the accused's evidence of fatigue at a point one or two hours post-accident.

[25] The accused said in evidence that Constable Swift read out the contents of the statutory declaration before the accused signed it. The accused claimed that he did not think he could have "done a good job" reading it himself, because of his level of English.[21] I have difficulty accepting the accused's evidence. Although Constable Swift accepted that it was possible he had read the statement to the accused, before the accused signed it, he expressed

[18] T 51.7.
[19] T 53.4.
[20] EROI transcript 20/30.
[21] T 51.6.

doubt that that had happened because he had struck out the 'section (b)(ii)' at the end of the statutory declaration.[22] I assessed that the accused's evidence on this issue was unreliable. At one stage, he gave evidence as follows:

> Now, that last part you were trying to read, "And I make this solemn declaration by virtue of the Oaths, Affidavits and Declarations Act, did the policeman read that part out to you? ---No.
>
> Did he give you your statement to read yourself at all, or did he just read it to you? ---Well, he sort of said to me to read it and sign it, but I just grabbed it and signed it.

[26] The latter answer suggested that the accused grabbed and signed his statutory declaration document without first reading it (or without it being read to him). Whatever the case may have been, I was satisfied that the accused's statutory declaration accurately reflected what he told Constable Swift at the police station. It was more probable than not that the accused read the document himself before signing it. I considered that it was possible, but less likely, that Constable Swift read it to him. It was also more probable than not (and in my view very likely) that each piece of information provided by the accused was clarified and/or confirmed by Constable Swift as the statement-taking process progressed. Ultimately, I was satisfied that the accused knew and understood the contents of his police statutory declaration when he signed the document. My conclusion in this respect was reinforced by the fact that the accused's statutory

[22] T 33.9. That is, he left in section (b)(i), which read "I have read this statement before signing it". Constable Swift said he would have struck out section (b)(i) if the accused had not read the statement himself before signing it.

declaration was consistent with what he had said a short while earlier, at the accident scene, and consistent also with statements made in his formal police interview some two months later.

[27] Paragraph 3 of the accused's police statutory declaration was as follows:

> "At around just before 3 AM I had dropped some passengers off at [address] and was going to head back towards the Casino. I drove down Kempe Street and stopped at the intersection with South Terrace. I was going to turn right down South Terrace. …"

[28] Based on evidence obtained from the on-board CCTV camera in the taxi minibus driven by the accused, he did not stop at the intersection with South Terrace, but drove into the intersection at a speed of approximately 19 km per hour.

[29] In his evidence given on the voir dire, the accused resiled from par 3 of his statement. He asserted, in a series of answers to questions asked by defence counsel and by the prosecutor, that he did not say that he had stopped at the intersection.

[30] In examination in chief, he said that he "picked up" (when his statement was read back to him by Constable Swift) "that he has stated that I stopped whereas to me I did not say anything about stopping …".[23]

[31] In answer to the further question as to why he did not tell Constable Swift that the statement was wrong, and that he had not stopped, he said, "I had the impression that the police (officer) was try to keep me on the safe

[23] T 55.2.

side".[24] A short while later, in cross-examination, he said, "I had the impression that the police was saying something to help me out in a positive way".[25]

[32] The clear meaning of the accused's evidence was that the police officer had written his statement in a way which protected the accused (kept him "on the safe side"), but which was untrue, and that the accused adopted the untruth.

[33] Defence counsel reminded the accused that Constable Swift had made a note in his notebook of something said by Mr Tupou at the scene: that Mr Tupou had been "waiting at the intersection".[26] The accused then said that he did not make that statement.[27] The accused's response at that point was somewhat inconsistent with his evidence early in his examination-in-chief, extracted below:[28]

> And did you speak to any police at the scene of the crash? ---I don't recall. …
>
> Did you give a breath test to a policeman at the crash scene? ---Yes.
>
> Did that policeman talk to you? ---He just doing his part of the test and then he left.
>
> What did he say before he did the breath test? ---Just instruct me to blow. …
>
> Did you have a conversation with that same policeman, the one who talked to you at the police station about your statement about what

[24] T 55.4.
[25] T 60.9.
[26] See [12] above.
[27] T 55.5, T 56.7.
[28] T 48 – 49.

had actually happened in the accident, at the crash scene? ---I don't recall that sir, but I am sure if he had asked me, I would know that we had made that conversation.

Well, he made some notes in his notebook, saying 'had conversation with driver, waiting at intersection, didn't see bike from the south, bike has slid into right side of van'. …

The interpreter: He don't recall having that conversation.

[34] In cross-examination, Mr Tupou initially said that he did not remember telling the police officer about waiting at the intersection, but when pressed, denied that he had: "I did not say that".[29]

[35] When cross-examined about par 3 of his police statutory declaration, the accused repeated his earlier evidence.[30] He 'conceded' that he had agreed to the untrue statement because he thought it helped him. He sought to place responsibility on the police officer; he said, "When I went along with it I thought that was it, because a police officer put it that way and I went along with … whatever he put down".[31]

[36] I have already referred, in [13] above, to Constable Swift's answers in cross-examination in relation to the statement attributed to the accused at the scene of the accident that he "was waiting at the intersection". Constable Swift was not cross examined, when he first gave evidence, to suggest that the accused had not made that statement, or that the Constable had fabricated the content of par 3 of the accused's police statutory declaration

[29] T 57.5.
[30] T 60.5, T 60.8.
[31] T 61.4.

that the accused had stopped at the intersection of Kempe Street and South Terrace. In light of the accused's evidence, I granted leave for further cross examination of Constable Swift.

[37] During the further cross examination of Constable Swift in relation to the taking of the accused's police statutory declaration, the following question was asked and answer given:[32]

> During the course of that process [the process of preparing the statement], did you suggest to him that he stopped at the intersection and he didn't take issue with that suggestion that you made to him and then you typed that up as part of this statement?---I wouldn't have put it to him, I would have just been taking … his statement as he said it to me. If I needed to clarify something obviously I would ask questions about it. But if it's in that typed up statement, that's as he says it to me."

[38] When it was then put to him that the accused did not say "I stopped at the intersection", Constable Swift said:[33]

> "I would have just typed it as he said it. If he had any issues with what I typed up, he had plenty of opportunity to clarify things before signing the statement."

[39] With the exception of the allegation that he had stopped at the intersection (which the accused said he did not say), the accused did not give evidence that any other part of his statement was untrue; nor did he give evidence that his understanding of the conversation between himself and Constable Swift, or that his concentration, powers of reasoning or general awareness were impaired through tiredness or fatigue.

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[32] T 90.8.
[33] T 90.9.

The accused's EROI

[40] The shorthand expression "EROI" is a reference to the accused's formal interview with police, referred to below.

[41] On 20 October 2014, the accused participated in a formal interview with police, the audio-visual record of which was tendered in evidence at the voir dire.[34] In relation to the intersection of Kempe Street and South Terrace, he said: "I was come there and stop and have a look".[35] He said he "saw the light is coming, it's about 75k away" (he clearly meant 75 m away). He made a judgment that he could "go through easy there",[36] by which he meant safely complete his right hand turn to then drive south down South Terrace. He was asked to describe to the interviewing police officers the events at the intersection. He replied: [37]

> I was come down to Kempe Street there … and I stop there … and have a look to the right and look to the left … and I, I saw a, I was not really sure it's a bike or car … but I saw the light was coming …from that side [right side].

[42] A short while later, the accused was asked how long he thought he had been stopped at the intersection. He replied, "Just about 10 second", and then, "10 sec, something like that". He added "yeah, yeah, we was just looking to the left and to the right".[38]

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[34] Exhibit P4.
[35] EROI transcript, p 5.9.
[36] EROI transcript, p 6.2.
[37] EROI transcript, p 10.9 - 11.2.
[38] EROI transcript, p 11.9 - 12.2.

[43] In evidence in chief given on the voir dire, the accused did not dispute that he had made any of the statements extracted in the previous two paragraphs. However, he claimed that the reason he told the interviewing police officer that he had stopped at the intersection, an untrue statement, was that he was "trying to keep the statement records to be as close as to what being [had been] recorded before."[39]

[44] Mr Robson, prosecuting counsel, submitted that the accused's evidence, including his denial that he made the representations attributed to him at the scene of the fatal collision and at the time of making his police statutory declaration "just beggars belief".[40] He argued that it was most unlikely that a competent professional police officer would fabricate material exculpatory of the accused and insert it into the notes made in the officer's notebook and then into the accused's statutory declaration. Mr Robson submitted that the accused, in his EROI, not only repeated what he said in his earlier statement about stopping at the intersection, but enlarged on it, claiming to have waited for 10 seconds and looked both ways, neither of which were in his statement. Mr Robson submitted that "if [the accused] adopted it, he certainly adopted it with vigour."

[45] There was much force to Mr Robson's submission. To accept that the accused, in his EROI, adopted the officer's (alleged) fabrication in order to maintain the earlier untruths wrongly attributed to him, would require a

[39] T 55.3.
[40] T 100.5; see also T 103.4.

significant suspension of disbelief. However, I did not need to decide the issue beyond deciding that it was reasonably open to find that the accused made the statements attributed to him at the scene of the fatal collision and at the time of making his police statutory declaration.[41] That was because s 88 *Evidence (National Uniform Legislation) Act 2011* (NT) provides that, for the purpose of determining whether evidence of an admission is admissible, "the court is to find that a particular person made the admission if it is reasonably open to find that he or she made the admission". In the present case, that test was met.

Issue - exclusion of statements made at the scene

[46] Counsel for the accused argued that the accused's statements made at the accident scene (and also his statements or 'representations' contained in the police statutory declaration and in the EROI, described in [5] above) were properly characterized as "admissions" as defined in the *Evidence (National Uniform Legislation) Act 2011* (NT). An "admission" means a previous representation, made by a person who is or becomes a party to a proceeding, "adverse to the person's interest in the outcome of the proceeding."[42] A "representation" includes an implied oral representation.[43]

[47] It is not immediately apparent that a lie intended to avoid or mitigate criminal liability is an "admission". The decision of the Full Court of the

[41] There was no issue that the accused made the statements in his EROI, extracted at [41] and [42].
[42] *Evidence (National Uniform Legislation) Act 2011*, Dictionary, Pt 1, Definitions: "admission".
[43] *Evidence (National Uniform Legislation) Act 2011*, Dictionary, Pt 1, Definitions: "representation".

Federal Court in *R v GH* [44] is authority for the proposition that a statement which is exculpatory of its face is not a representation which is adverse to the interests of an accused; if it is proved to be untrue, it is the proof of its untruth which is adverse and not the representation itself.[45] However, a different view has been expressed by the New South Wales Court of Criminal Appeal in *R v Horton* [46] and *R v Esposito.*[47]

[48] In *R v Horton*, Wood CJ at CL (Sully and Ireland JJ agreeing) held that the dictionary definition of "admission" was wide enough to include any form of representation, whether by conduct or by oral or written statement, so long as it is "adverse to the (maker's) interest in the outcome of the proceedings", and that the expression was sufficiently wide to encompass exculpatory statements "that may turn out to be harmful for the defence".[48]

[49] In *R v Esposito*, Wood CJ at CL (James J agreeing) affirmed the Court's decision in *R v Horton* that a statement which qualifies as an admission for the purpose of uniform evidence legislation is not confined to one that is inculpatory.[49] The accused's statements in *R v Esposito* were adverse in that they were relied upon as constituting an implied admission of guilt, even though they were on their face exculpatory.

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[44] *R v GH* [2000] FCA 1618; (2000) 105 FCR 419.
[45] *R v GH* [2000] FCA 1618; (2000) 105 FCR 419 at [16], per Spender J and [79] per Madgwick J.
[46] *R v Horton* (1998) 45 NSWLR 426 at 437G.
[47] *R v Esposito* (1998) 45 NSWLR 442 at 458E, per Wood CL at CL, James J agreeing at 477E.
[48] *R v Horton* (1998) 45 NSWLR 426 at 437G – 438A.
[49] *R v Esposito* (1998) 45 NSWLR 442 at 458E, per Wood CL at CL, James J agreeing at 477E.

[50] The majority of the High Court in *Kelly v The Queen*[50] referred to the existence of "a debate as to whether the expression 'confession or admission' includes, in addition to statements which are apparently intended to be inculpatory, those which are apparently intended to be exculpatory". However, their Honours considered that it was undesirable to resolve the debate in that case.

[51] In the present case, counsel for the prosecution and defence agreed that statements made by the accused which might ultimately turn out to be adverse should be treated as admissions for the purpose of the exclusionary rules under the *Evidence (National Uniform Legislation) Act 2011* (NT).[51] The agreement of counsel accords with decisions of the New South Wales Court of Criminal Appeal in *R v Horton* and *R v Esposito*, referred to above. It also accords with the principle at common law that the telling of a lie by an accused may amount to an implied admission if the accused told the lie because he perceived that the truth was inconsistent with his innocence.[52] In the circumstances, I considered that I should give effect to the agreement of counsel and treat the accused's representations as "admissions".

[52] Mr Goldflam relied on the fact that Constable Swift had not administered a caution to the accused at the accident scene, to argue that the accused had been denied the rights of a suspect at common law. He contended that evidence of the accused's admission was therefore improperly obtained and,

[50] *Kelly v The Queen* (2004) 218 CLR 216, per Gleeson CJ, Hayne and Heydon JJ at [21].
[51] T 103; T 113.2.
[52] See, for example, *Edwards v The Queen* (1993) 178 CLR 193 at 208-209, per Deane, Dawson and Gaudron JJ; *Kuhl v Zurich Financial Services Australia Ltd and another* (2011) 243 CLR 361 at [64].

pursuant to s 138(1) *Evidence (National Uniform Legislation) Act 2011* (NT), should not be admitted.

[53] In the alternative, Mr Goldflam argued that the statement by the accused at the scene was "a confession or admission" for the purposes of s 142 *Police Administration Act*, the substance of which was not later confirmed by the accused and such confirmation electronically recorded, and hence the evidence was not admissible.

[54] As to the first defence contention, referred to in [52], I was satisfied that the accused was not a suspect at the time Constable Swift spoke to him at the accident scene. I refer to my findings in [20] above, and at [59] to [61] below. Moreover, there is no common law principle that a suspect has a general right to silence which requires the giving of a caution before interrogation. The position was explained by the High Court in *Carr v Western Australia*[53] as follows:

> "… there is no principle of the common law that persons suspected by police officers of having committed a crime must be given a caution before interrogation in which they are warned of their right to silence, or that in default of such warning, evidence of any confession is automatically inadmissible. The only relevant common law principle is that a failure of police officers to warn in those circumstances may result in the trial judge exercising a power to exclude the evidence."[54]

[53] *Carr v Western Australia* (2007) 232 CLR 138 at 152 [38], per Gummow, Heydon and Crennan JJ; see also at 141 [2], per Gleeson CJ.
[54] See also *R v Swaffield* (1998) 192 CLR 159 at 184-185 [33], per Brennan CJ; *Tofilau v The Queen* (2007) 231 CLR 396 at 409 [20], per Gleeson CJ.

[55] The accused did not establish that evidence of his statement made at the accident scene was improperly obtained. In those circumstances, s 138(1) *Evidence (National Uniform Legislation) Act 2011* (NT) did not require the exclusion of the evidence.

[56] As to the alternative defence contention, referred to in [53], s 142(1) *Police Administration Act* provides that evidence of a confession or admission made to a member of the Police Force by a person suspected of having committed a 'relevant offence'[55] is not admissible as part of the prosecution case in proceedings for a relevant offence unless one of two specified requirements is met. Where the confession or admission was made before the commencement of questioning, the substance of the confession or admission must be confirmed by the person and the confirmation electronically recorded.[56] Where the confession or admission was made during questioning, the questioning and anything said by the person must be electronically recorded.[57] If an applicable requirement has not been complied with, a court still has a discretion to admit the evidence pursuant to s 143 *Police Administration Act* if "admission of the evidence would not be contrary to the interests of justice".[58]

[55] A 'relevant offence' is defined in s 139 *Police Administration Act* as "an offence the maximum penalty for which is imprisonment in excess of 2 years".
[56] *Police Administration Act* s 142(1)(a).
[57] *Police Administration Act* s 142(1)(b). In the case of both exceptions, the electronic recording must be available to be tendered in evidence.
[58] *Police Administration Act* s 143: A court may admit evidence "… if, having regard to the nature of and the reasons for the non-compliance or insufficiency of evidence and any other relevant matters, the court is satisfied that, in the circumstances of the case, admission of the evidence would not be contrary to the interests of justice."

[57] The statement made by the accused at the scene was not a "confession". A confession is "either a direct admission of guilt, or of some fact or facts which may tend to prove the prisoner's guilt at the trial."[59] There was no direct admission of guilt or of probative facts of the kind described.

[58] The definition of "admission" in the *Evidence (National Uniform Legislation) Act 2011* (NT) does not apply to the word "admission" appearing in s 142(1) *Police Administration Act*.[60] At common law, where the issue on the voir dire is the admissibility of a statement made by an accused and relied on by the prosecution as an admission, the test as to whether the statement is an admission is whether it was "capable of being regarded as an admission … of a fact relevant to the proof of guilt".[61] The statement made by the accused at the scene, being a lie told out of consciousness of guilt, was capable of being regarded as an implied admission, for reasons explained in [49] above.[62] I therefore took the statement made by the accused at the scene to be an "admission" within s 142(1) *Police Administration Act*.

[59] In my opinion, however, s 142(1) *Police Administration Act* did not apply. The accused was not "a person suspected of having committed a relevant offence". The concept of 'suspicion' is a state of mind which falls short of

[59] *Attorney-General for New South Wales v Martin* (1909) 9 CLR 713 at 732, per O'Connor J; *R v Lee* (1950) 82 CLR 133 at 150.5; *R v Doyle, ex parte Attorney-General* [1987] 2 Qd R 732.
[60] *Evidence (National Uniform Legislation) Act 2011* (NT), s 8. The definition of "admission" is not made cognate with s 142(1) *Police Administration Act*.
[61] *Plevac* (1995) 84 A Crim R 570 at 580 par 5, citing *Astill* (unreported, Court of Criminal Appeal, NSW, 17 July 1992) at pp 8 - 13.
[62] *Edwards v The Queen* (1993) 178 CLR 193 at 208 - 209, per Deane, Dawson and Gaudron JJ.

belief but which requires an apprehension based on a consideration of known facts that the person might possibly have committed the relevant offence. That interpretation is taken from the observations of Kearney J in *R v Grimley*,[63] in the passage set out below, which was cited with approval by the Court of Criminal Appeal in *Lai v The Queen*:[64]

> … I do not consider that to suspect the person he is questioning, in terms of s 142(1), the police officer must at that time believe that he is probably guilty of the offence. Suspicion in general lies somewhere between mere speculation that the person committed the offence, without any factual foundation – a mere idle wondering – and a belief based on reasonable grounds that he committed it. It is a state of mind which arises from a consideration of known facts less than those required for a belief, resulting in an apprehension that the person might possibly have committed the offence. It requires a degree of conviction which is beyond mere speculation, and based upon some factual foundation. [underline emphasis added]

[60] Constable Swift was cross-examined by defence counsel in relation to his state of mind (both at the scene and later at the police station), as follows: [65]

> You knew that, at the scene, because you put this in your notebook, that Mr Tupou, a driver approaching a T-junction, had not – or, at least, he told you that he hadn't seen a vehicle approaching which actually had right of way over him, didn't you?---I – sorry, can you just ask that question again, please. I'm not sure I understood.
>
> You knew that he'd said at the scene; that is, you knew that Mr Tupou had said at the scene that he, a driver approaching a T-junction, had not seen an approaching vehicle that had right over way over him?---That's correct; that's what he told me at the scene, yes.
>
> So, you knew that Mr Tupou might possibly have committed an offence of failing to give way when you were taking the statement

[63] *R v Grimley* (1994) 121 FLR 236 at 258.9.
[64] *Lai v The Queen* (2003) 13 NTLR 139 at [21].
[65] T 31 - 32.

from him?---On face value but, obviously, I didn't know the full details of the incident itself. That's why I was taking a statement off him, to get his version of events.

And you knew that he might possibly have committed an offence of driving without due care at the time you were taking the statement? ---Possibly. I was just getting the information from him.

And you knew – you knew that he might possibly have committed a more serious driving offence at the time you were taking the statement, didn't you?---I didn't know as such that he may have committed an offence of driving without due care or anything like that. That would be for Major Crash investigators to sort out as they were taking carriage of the job after us.

Well, of course, you didn't know that he had committed a serious offence but you knew that it might be possible from the information that you had already gleaned, from having been there, spoken to him, seen the – what was on the road?---I'm not sure what you're trying to ask me.

I'm asking you if you knew that it might be possible that he had committed a serious traffic offence at the time when you were - - -

[*Objection*] …

MR GOLDFLAM: Do [did] you know that it might be possible that Tupou had committed a serious traffic offence when you were in the process of taking his statement from him?---At that stage, while I was taking that statement, yes. It may have been possible that he had committed an offence.

[61] It appears from the above extract that the witness was prepared to concede only that, when taking the accused's statement at the police station, he was aware of the possibility that the accused had committed *an offence*. He did not accept that he was aware of the possibility that the accused had committed a "serious traffic offence". I did not have the impression that

Constable Swift was being evasive in giving this evidence. Nor apparently did counsel, who accepted the limited concession, and did not press the witness for any further concession.[66] In any event, it was unclear what counsel meant by his use of the term 'serious traffic offence'. It is not a defined statutory term. A 'serious traffic offence' would arguably include the offence of driving on a public road at a speed or in a manner dangerous to the public, contrary to s 30 *Traffic Act*, which carries a maximum penalty of imprisonment of two years. However, even that offence is not a "relevant offence", because the definition in s 139 *Police Administration Act* requires that the offence be one for which the maximum penalty is imprisonment in excess of two years. Counsel did not refer to any specific offence and, as mentioned, the witness acknowledged no more than that he was aware of the possibility that the accused had committed *an* offence.

[62] For reasons explained in [20], and in [59] to [61], I concluded that the accused was not "a person suspected of having committed a relevant offence" when spoken to by Constable Swift at the accident scene. In my opinion, neither 'suspicion' nor 'relevant offence' was made out. The evidence of the accused's admission (implied admission) was not rendered inadmissible by s 142(1) *Police Administration Act*.

[63] Mr Goldflam also relied on s 85 *Evidence (National Uniform Legislation) Act 2011* (NT) to argue that evidence of statements made at the scene should

[66] Defence counsel subsequently submitted (T 125) that Constable Swift "… conceded that he knew it might be possible that Mr Tupou committed a serious traffic offence". However, that submission did not accord with the Constable's evidence.

be excluded. Under s 85(2), relevantly, evidence of an admission made to a police officer investigating the possible commission of an offence 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. The prosecution must satisfy the court on the balance of probabilities that the admission(s) relied on were made in circumstances that were not likely to affect their truth adversely.[67]

[64] The relevant admission was an exculpatory statement which, on the Crown case, was untrue. As explained above, it qualified as an "admission" under the *Evidence (National Uniform Legislation) Act 2011* (NT) because, as a result of proof of its untruth, it was a representation adverse to the accused's interests in the outcome of the proceedings. For the purposes of s 85, however, it did not matter whether the admission was true or untrue, reliable or unreliable. I had to determine whether the truth of the admission may have been impaired by the circumstances in which the admission was made. The circumstances for consideration included the characteristics of the accused: his age, ethnicity, education and English language skills, and whether he suffered any relevant disability. The circumstances also included whether there was any impairment of the ability of the accused to make a rational decision. The latter consideration had particular relevance because defence counsel argued[68] that things said by the accused at the scene were

[67] *Bin Sulaeman v R* [2013] NSWCCA 283 [81].
[68] T 120.6.

said in circumstances where the accused was in a state of 'shock', in the lay sense of that word, or "pretty shaken", in the words of the accused.[69]

[65] The accused was born in Tonga in April 1963. He was 51 years old at the time of the accident. He had received secondary schooling in Tonga (to the equivalent of Year 10) before moving to Australia in 1985.[70] In his home, he communicated with his wife in Tongan, but with his children in Tongan and English: "half and half".[71] He had studied English a little in Tonga, but had not taken English lessons in Australia. That English was not his first language was apparent from the level of English demonstrated during his EROI, for which he nonetheless declined the assistance of an interpreter. He spoke in basic English, with little regard for grammar. He generally appeared to understand the questions asked of him by police; his answers to questions were appropriately responsive. On one or more occasions, he did not understand questions and asked police to repeat them or ask them differently. In summary, the accused demonstrated reasonable (as distinct from good or very good) English language proficiency in his EROI. I assumed he had the same proficiency at the time of the accident and his conversations with police on the day of the accident. The accused suffered diabetes, for which he took prescribed medication. He also mentioned having (or having had) gout. However, he did not complain of any disability at the time of his EROI as a result of those conditions.

[69] T 49.8. In exhibit P2, his police statutory declaration, the accused said in par 12 "I was shaking when I was out there watching the Ambulance and Police do their job".
[70] T 54.2.
[71] T 54.4.

[66] The relevant conversation between the accused and Constable Swift at the accident scene was brief. Constable Swift and other officers at the scene of the accident had a responsibility to investigate the accident, ascertain the facts, and "within the limits of propriety and fairness",[72] to obtain evidence. The accused was the only witness available to describe the accident to police officers. His conversation with Constable Swift at the accident scene took place relatively soon after the collision, at approximately 3.30 am.[73] The conversation took place at or before the time the accused would have finished his shift.[74] In other words, it took place within his normal work hours. The circumstances of the accident were still fresh in the mind of the accused. There was no suggestion that Constable Swift questioned the accused in an overbearing way, or in a manner which was likely to place the accused under unnecessary stress. Indeed, it would appear that he hardly questioned the accused in obtaining the limited information he obtained at the accident scene. There was no evidence or even suggestion that Constable Swift or any other police officer made a threat, promise or other inducement to the accused at the scene or subsequently.

[67] I was satisfied on the balance of probabilities that the accused's admissions were made in circumstances that were not likely to adversely affect the truth of the admissions he made. To the extent that the admissions were untrue, it was because the accused sought to exculpate himself. That was his choice; it

[72] *R v Frederick Hayes*, Reasons for Decision on Voir Dire (SCNT unrep.) 28 February 1979, Muirhead J.
[73] Estimate of approximate time, based on the removal of the deceased motorcyclist at 3.22 am – see [11] above, after which Swift spoke with the accused.
[74] See [22] above.

was not because, in the circumstances, there was any impairment of his ability to make a rational decision.

[68] It followed from my conclusions that the evidence of the accused's admissions was not rendered inadmissible by s 85(2) *Evidence (National Uniform Legislation) Act 2011* (NT).

Issue – exclusion of the accused's police statutory declaration

[69] Defence counsel sought exclusion of the accused's police statutory declaration on several grounds. To the extent that the grounds were the same as those argued in support of the application for exclusion of the statements made at the accident scene, I considered that the result should be the same, unless relevant circumstances were materially different. Therefore, I rejected the argument based on the accused not having been afforded the (asserted) common law rights of a suspect, for the same reasons given in [54]. Similarly, for the reasons summarized in [62], I concluded that the accused was not "a person suspected of having committed a relevant offence" when spoken to by Constable Swift at the Alice Springs Police Station. Nothing had changed in this respect since the conversation between the two men at the accident scene.

[70] In relation to s 85 *Evidence (National Uniform Legislation) Act 2011* (NT), the circumstances were not the same at the Police Station as they had been at the accident scene, because of the passage of time. The accused was taken to the Police Station a short while after 4.00 am. He was by then out of

'work hours'. The process of interviewing the accused and typing a statement in the form of a statutory declaration probably took about an hour.[75] The statement was quite short, some twelve paragraphs, less than two pages. However, that does not necessarily reflect the time taken to provide the relevant information. In par 12 of the statement, the accused said, "I feel like I'm probably still in shock at the moment". I inferred that Constable Swift had given the accused the opportunity to say how he was feeling. If that is correct, he did not mention tiredness or fatigue. The accused claimed in evidence that he did not want to make a statement because he was "flat out tired".[76] I referred to the accused's evidence of tiredness in [22] above. While it is possible that the accused was tired, he was also "feeling uneasy" at the time he participated in the statement-taking process.[77] I concluded that he was probably more nervous than tired.

[71] I ultimately did not accept the accused's evidence that he did not want to make a statement. On my assessment, the true position was that, although he believed (wrongly) that he was legally obliged to make a statement, he was also willing to make the statement to ensure that his version of events was on the record.[78]

[72] In considering the circumstances in which the admissions contained in the police statutory declaration were made, I had regard to the manner in which

[75] Based on Constable Swift's estimate at T 33.1.
[76] T 60.2.
[77] T 32.7.
[78] See, for example, T 57.9, where he said he wanted to help the police; also, at T 59.5, where he said that he did not believe he had committed any offence, and agreed that he had "nothing to hide" and that he was "happy to help the police with their enquiries".

Constable Swift dealt with the accused. Although, as mentioned in [70], the accused appeared uneasy, Constable Swift tried to put him at ease. He asked questions in a calm manner. He carried out the task of obtaining the accused's statement in a way which was "designed to support him, to [make him] feel less uneasy after what had happened that night".[79] The accused acknowledged that he understood all but a couple of questions asked of him, and that, in relation to those, Constable Swift "broke it down" so that he could understand.[80] Constable Swift did not question the accused in a manner which was likely to place the accused under unnecessary stress. There was no evidence or even suggestion that Constable Swift or any other police officer made a threat, promise or other inducement to the accused at the police station.

[73] I was satisfied on the balance of probabilities that the accused's admissions in his police statutory declaration were made in circumstances that were not likely to adversely affect the truth of those admissions. I repeat what I said in [67] in relation to admissions made at the accident scene that, to the extent that the admissions were untrue, it was because the accused sought to exculpate himself. That was his choice; it was not because, in the circumstances, there was any impairment of his ability to make a rational decision.

[79] T 33.2, cross examination Constable Swift.
[80] T 51.4.

[74] It followed from my conclusions that the evidence of the accused's admissions in his police statutory declaration was not rendered inadmissible by s 85(2) *Evidence (National Uniform Legislation) Act 2011* (NT).

Constructive arrest/failure to caution

[75] Mr Goldflam argued, as an additional ground for exclusion of the accused's police statutory declaration (and in particular par 3 thereof), that the evidence had been "obtained improperly or in contravention of an Australian law" within the meaning of s 138(1)(b) read with s 139(1)(c) and s 139(5)(c) *Evidence (National Uniform Legislation) Act 2011* (NT).

[76] Relevantly, s 139 *Evidence (National Uniform Legislation) Act 2011* (NT) deems evidence to have been obtained improperly in certain circumstances. I set out below sub-sections (1) and (5):

> 139 Cautioning of persons
>
> (1) For the purposes of section 138(1)(a), evidence of a statement made or an act done by a person during questioning is taken to have been obtained improperly if:
>
> (a) the person was under arrest for an offence at the time; and
>
> (b) the questioning was conducted by an investigating official who was at the time empowered, because of the office that he or she held, to arrest the person; and
>
> (c) before starting the questioning the investigating official did not caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence.

---

(5) A reference in subsection (1) to a person who is under arrest includes a reference to a person who is in the company of an investigating official for the purpose of being questioned, if:

(a) the official believes that there is sufficient evidence to establish that the person has committed an offence that is to be the subject of the questioning; or

(b) the official would not allow the person to leave if the person wished to do so; or

(c) the official has given the person reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so.

[77] On the basis of the evidence summarized in [16] to [19] above, I considered that Constable Swift had given the accused reasonable grounds for believing that, until he had completed his statement, he would not be allowed to leave if he wished to do.

[78] Mr Robson argued that it was quite proper for the police to ask the accused to come to the police station and that the accused, for his own reasons, agreed to go along.[81] However, the argument did not effectively dispose of the inference to be drawn from Constable Swift's statements at the accident scene, set out in [16] above which, as I observed, were directive and appeared to impose an obligation on the accused. Mr Robson further argued that there must be mala fides on the part of the police before impropriety

[81] T 97 - 98.

could be established.[82] I did not accept the latter submission, because s 139(1) *Evidence (National Uniform Legislation) Act 2011* (NT) deems impropriety in certain circumstances, some of which might not otherwise constitute impropriety. Bad faith is not the relevant test.[83]

[79] Mr Robson made an amended submission to the effect that something more than 'ordinary police processes' was required to give rise to a reasonable ground for belief.[84] He argued that the relevant police conduct must "fall short of minimum standards of policing".[85] I did not accept that submission, because it was unsupported by the statutory provisions. Mr Robson submitted that the accused at no time expressed the wish to leave the police station. That is correct, but here again I considered that the Crown's arguments did not effectively deal with the inference to be drawn from Constable Swift's statements at the accident scene. Given that Constable Swift had "made it pretty clear" to the accused that he was "going to be coming to the police station" and "going to be making a statement" (as Swift acknowledged), I did not think it was significant that the accused did not ask to leave the police station before completing his statement.

[80] Constable Swift was a probationary constable tasked by his sergeant with obtaining a statement from the accused, a driver involved in a road accident. Constable Swift probably did not carefully consider the words he spoke to

[82] T 98.5.
[83] cf. s 138(3)(e), which provides that the state of mind ("deliberate or reckless") of the official committing the impropriety or contravention is a mandatory consideration in the balancing exercise required by s 138(1) *Evidence (National Uniform Legislation) Act 2011* (NT).
[84] T 170.7.
[85] T 172.2.

the accused and how they might be interpreted by him . Those words, however, gave the accused reasonable grounds for believing that he had an obligation to go straight from the accident scene to the police station in order to make a statement; that he had to make a statement, and that he had no choice in the matter. In the circumstances, s 139(5)(c) was triggered. The accused was under constructive arrest at the police station and the evidence of his statement was deemed to have been obtained improperly because Constable Swift, the 'investigating official', did not administer a caution as required by s 139(1)(c).

[81] The accused therefore discharged the burden of showing that the conditions for the exclusion of his police statutory declaration were satisfied.

[82] Notwithstanding the deemed impropriety, however, I determined pursuant to s 138(1) *Evidence (National Uniform Legislation) Act 2011* (NT) that the desirability of admitting the evidence outweighed the undesirability of admitting evidence obtained in the way it had been obtained. My reasons are set out in par [83] and par [84] below. As is apparent from those paragraphs, I took into account the mandatory matters set out in s 138(3), in particular in pars (a), (b), (c), (d) and (e). However, I considered that the matters in pars (f), (g) and (h) had little relevance in the present case.

[83] The accused's admissions (his untrue exculpatory statements) had significant probative value in the Crown case, for reasons explained in [6] above. The accused's police statutory declaration was a

contemporaneous account of the accident, in which (at par 3) the accused confirmed his statement made at the accident scene. The statutory declaration had greater probative value than the earlier oral statement because it was in writing, signed on each page by the accused as a declarant who had read the document and conscientiously believed the statements contained in it to be true.[86] The statutory declaration was an important link in the chain of consistency between the three pieces of evidence considered on the voir dire.[87] Moreover, the statutory declaration assumed greater importance, after the accused denied that he had made the statement attributed to him at the accident scene, because the statutory declaration tended to disprove his denial.

[84] Although I did not consider that the gravity or level of the impropriety was "minor or insignificant", as submitted by Mr Robson,[88] I was satisfied that the impropriety was not "deliberate or reckless" within the meaning of s 138(3)(e) *Evidence (National Uniform Legislation) Act 2011* (NT). In my assessment, the impropriety was unintended. Mr Goldflam conceded as much.[89] Constable Swift attempted to deal with the accused fairly in all respects, but simply failed to appreciate that the words spoken by him at the accident scene had triggered an obligation to administer a caution in circumstances where (contrary to his understanding) the accused was "under

[86] Exhibit P2, declaration clause.
[87] See [4] above.
[88] T 173.4.
[89] Defence submission at T 138.8: "… it is not as though Swift was trying to trick him into thinking he had to go down there. It's just the way the transactions unfolded that that impression, the very clear impression, was left in the mind of Mr Tupou."

arrest" as a result of the combined effect of s 139(1)(a) and s 139(5)(c) of the Act.

Issue – exclusion of the accused's EROI

[85] As already mentioned, the accused's formal interview with police took place more than two months after the accident, on 20 October 2014.

[86] Defence counsel contended that, at the time of the interview, the accused was deemed to have been "under arrest" within the meaning of s 139(1)(a) *Evidence (National Uniform Legislation) Act 2011* (NT), read with s 139(5)(a) of the Act, because the interviewing police officer (Senior Constable Jeshua Kelly) then believed that there was sufficient evidence to establish that the accused had committed an offence that was to be the subject of questioning. I accepted that submission. It was apparent from the EROI transcript[90] that Senior Constable Kelly was aware at the time of the interview that the accused had not stopped his minibus taxi before entering the intersection, but rather had driven the vehicle into the intersection at a speed of 19 km per hour. Indeed, Senior Constable Kelly had prepared to show the accused the crucial part of the 'film' taken from the cameras mounted in the accused's taxi, but his attempt to do so was unsuccessful for technical reasons.

[87] Because the accused was deemed to have been "under arrest", interviewing police officers were obliged to administer a caution in terms of s 139(1)(c)

[90] Exhibit P4, transcript p 27.5 – 28.

Evidence (National Uniform Legislation) Act 2011 (NT). Defence counsel acknowledged that a caution had been administered, but submitted that the caution was not "given in … a language in which the person [was] able to communicate with reasonable fluency", in breach of s 139(3) of the Act. Because of the inadequate caution, it was argued that the evidence in the EROI was deemed by s 139(1) to have been obtained improperly.

[88] It has been held that the requirement of reasonable fluency in s 139(3) requires more than just fluency in an accused's general language ability. In *R v Deng*, Greg James J made the following observation in relation to the identical s 139(3) of the *Evidence Act 1995* (NSW):

> In my view the section is purposive. It does not operate on an accused's general language ability. It operates on the ability to understand the concept underlying the caution and the function of a caution. The caution is meant to convey to an arrested person that he/she has the right to choose to speak or to remain silent. It is meant to ensure that the person is aware that if he/she speaks, what he/she says may be given in evidence.[91]

[89] In the same case, Ipp AJA observed as follows:

> In my opinion that the phrase "reasonable fluency" in s 139(3) of the Evidence Act 1995 means fluency sufficient to enable the person concerned to understand the caution.[92]

[90] I referred to limitations in the accused's English language proficiency in [65] above. With specific relevance to the caution, I set out below an

[91] *R v Deng* [2001] NSWCCA 153 at [17].
[92] *R v Deng* [2001] NSWCCA 153 at [34].

extract from the transcript[93] of the accused's police interview on 20 October 2014:

KELLY: Ok, alright now so the purpose of this interview today is for you to provide an account of what took place in that fatal crash on the 10th of August 2014, ok. That's what this interview's for. Now, as I talked to you before now, this interview is being recorded so it's on those DVDs. It's being video and audio with the microphone there, so everything that we're saying is being recorded ok.

TUPOU: Yeah

KELLY: Do you understand that?

TUPOU: I understand it

KELLY: You're alright, ok. Um, now what is your best language?

TUPOU: Tongan

KELLY: Tongan, ok. Ah you're speaking English with me today, are you happy to do this interview in English today?

TUPOU: Yes

KELLY: Do you need an interpreter at all?

TUPOU: No

[93] Part of Exhibit P4 on the voir dire. The extract starts at p 2.1, and extends (non-continuously) to p 5.4 of the transcript.

KELLY: No, ok. Um at any time, if you don't understand [what] I've said or ah Constable 1st Class Jackwitz has said, just let us know and we'll say it in a different way, ok.

TUPOU: Mm.

KELLY: Um alright, now before we talk about um this crash today, I just wana tell you your rights, ok and they are that you don't have to say anything about this matter unless you wish to do so, ok.

TUPOU: Alright

KELLY: So can you just explain what that means just so I know that you understand?

TUPOU: What do you mean?

KELLY: So I'll say it, when I say to you that you don't have to say anything about this matter …

TUPOU: Yeah

KELLY: What does that mean to you?

TUPOU: If I want to say it, say it. If not, don't say it.

KELLY: Yep

TUPOU: Yeah

KELLY: That's exactly right, so do you have to answer my questions today?

TUPOU: I can answer your questions – yes

KELLY: Do, do you have to …

TUPOU: Yeah

KELLY: … answer them though? Do you have to answer my questions?

TUPOU: Yes, yes

KELLY: No, no, you don't have to answer my questions. If you don't wana answer them, you don't have to answer them, ok

TUPOU: Ok

JACKWITZ: Yeah

KELLY: Ok, so if I ask you a question and you don't wana answer it, you can say "no comment"

TUPOU: No

KELLY: You can say …

JACKWITZ: Mm

KELLY: … nothing. You can say "I don't wana answer that question".

TUPOU: Mm

JACKWITZ: Yeah

KELLY: Ok?

TUPOU: Yeah

KELLY: So that's a very important thing that, for you to understand. It's um …

JACKWITZ: So if we ask you a question, whose choice is it to answer it? So myself or Senior Constable Kelly here ask you a question, um whose choice then is it to answer that question?

TUPOU: That's me.

JACKWTIZ: It's your choice.

TUPOU: (inaudible)

JACKWITZ: That's right yeah. So it's up to you, no one can force you to answer questions, ok.

KELLY Ok

TUPOU: Yep

KELLY: Alright. Ok, so the second thing that we have to tell you for your rights. So firstly, you don't have to speak to us if you don't want to, but secondly, that anything you do say, so if you do speak to us ah may be given in evidence in court. Ok ?

TUPOU: Alright

KELLY: You understand what that means?

TUPOU: I do understand, yes

KELLY: Yep, can you just explain that back to me so I know you understand.

TUPOU: Anything what I can say …

KELLY: Yep

TUPOU: to you …

KELLY: Yep

TUPOU: say in court.

KELLY: Can be used in court, yep that's exactly right. Ah Mars,[94] do you feel that your dad understands his rights?

M TUPOU: Yes, yeah it's all good.

[91] As the above extract shows, the accused was aware that his interview with police was being electronically recorded. Notwithstanding his unsophisticated explanation about the use to which that recording could be put, I was satisfied that he understood that what he said would be (or at least could be) replayed in court.

[92] The issue of the accused's understanding of his right to silence was less straightforward. The accused told police that he did not need an interpreter. As appears from the extract in [90] above, he was initially able to explain the right to silence in simple terms: "If I want to say it, say it. If not, don't say it". That explanation arguably showed adequate understanding. However, the accused then gave the 'wrong answer' when Kelly asked him whether he had to answer questions; the accused said that he *did* have to answer questions. After Kelly then explained to the accused that he did not have to answer police questions, the accused said that it was his choice as to whether or not to answer questions. In giving evidence on the voir dire

[94] Mars Tupou, then aged 23, was the accused's son. He was present in the role of 'support person'.

(through an interpreter), the accused agreed that police had given him a choice at the start of the interview as to whether to speak or not.[95] I was reassured by this that the accused understood at the time of his police interview that he had a choice as to whether or not to answer questions.

[93] Significantly, the accused did not give evidence on the voir dire that he had not understood or not properly understood the caution administered at the start of his police interview.[96]

[94] The accused had had relevant involvement with police in Alice Springs on two occasions prior to 10 August 2014. The first arose from an incident at the Alice Springs Casino in 2004 in respect of which he had been charged with assault. He had been arrested,[97] and (while under arrest) had participated in a police interview without an interpreter.[98] On the second occasion, in 2008, the accused was interviewed in relation to another assault, again without an interpreter.[99] I inferred from this history not only that the accused had previously been informed of his right to silence, but also that he understood the consequences of speaking to police investigators. He was not a 'complete novice' at the time he participated in the interview with police on 20 October 2014.

[95] Before s 138(1) *Evidence (National Uniform Legislation) Act 2011* (NT) could come into play, via s 139(1)(c) read with s 139(3) of the Act, the

[95] T 76.9.
[96] The absence of such evidence was raised in the course of submissions at T 83.5.
[97] T 54.5; T 77.1.
[98] T 75.3.
[99] T 75.9.

accused had to establish on the balance of probabilities that the condition for exclusion was met, namely, that evidence of his admissions was obtained improperly because the caution was not given in a language in which he had sufficient fluency to understand the concept underlying the caution and the function of the caution. However, as mentioned in [93], the accused did not give evidence on the voir dire to the effect that he had not understood the caution. Moreover, I was satisfied that the accused demonstrated reasonable fluency and comprehension throughout his police interview; he gave responsive and coherent answers to most if not all relevant questions asked.[100]

[96] I was positively satisfied that the accused properly understood the caution administered by Senior Constable Kelly and that, as a consequence, he understood his right to silence. The accused therefore failed to establish that evidence of admissions made by him during his police interview was "obtained improperly" within the meaning of s 139(1)(c) of the Act.

[97] Mr Goldflam mounted a further attack on the evidence of admissions made by the accused during his police interview, based on the evidence of the accused summarized at [41] – [43] above. The accused claimed that he had made the untrue exculpatory statements in his police interview to maintain the earlier untruths wrongly attributed to him in his police statement. On the basis of that claim, Mr Goldflam argued that the admissions in the accused's police interview were made "as a direct consequence of and were induced by

[100] For discussion of the accused's general level of understanding of police questions in his EROI, see T 84 - 85.

the admission made in the statement".[101] Because the evidence contained in the statement had been improperly obtained,[102] the admissions in the interview were obtained "in consequence of an impropriety or of a contravention of an Australian law" and the evidence was therefore inadmissible pursuant to s 138(1) *Evidence (National Uniform Legislation) Act 2011* (NT).

[98] In my judgment, the defence argument summarized in [97] could not be accepted. First, it depended on the truth of the accused's evidence. I referred to the problems in accepting that evidence at [45] above. I was not persuaded that the accused's untrue exculpatory statements (at the accident scene and in the police statutory declaration) had been wrongly attributed to him. The evidence suggested otherwise. Secondly, the defence argument was artificial. If indeed any untrue statement had previously been wrongly attributed to the accused, the accused had the opportunity and the responsibility to correct the alleged untruth(s). There was no reason why he could not have corrected the alleged untruth(s) in the course of his police interview. Rather than correct them, however, he expanded on them. I considered that the accused should not be permitted to take advantage of his own (asserted) failures in order to have untruthful statements excised from the record of his police interview.

[101] Outline of Accused's Submissions, par 6(b).
[102] As found by me in [80] above.

Prejudicial evidence

[99] Counsel for the accused also argued that s 137 *Evidence (National Uniform Legislation) Act 2011* (NT) required the Court to refuse to admit evidence of the accused's admissions because their probative value was outweighed by the danger of unfair prejudice. Mr Goldflam argued that because there was "undisputed independent evidence" (a reference to the CCTV footage obtained from the on-board camera in the taxi minibus) that the accused did not stop at the intersection, the accused's claims that he did stop would have no probative value in relation to the "central issue", that is, the issue whether or not he stopped.[103] Mr Goldflam argued that the accused's statements about his conduct after the event were of peripheral relevance to the central issue. Moreover, he argued there would be a significant danger of unfair prejudice in terms of a risk that the jury would misuse the evidence to promote malice against the accused (because of his lie or lies) or to punish the accused (for his false claims that he had stopped at the intersection).

[100] The prosecution argued that the accused not only told a "clear lie" about having stopped at the intersection, but also tried to minimize the danger posed by his own driving and to attribute the cause of the collision to the riding of the motorcyclist, who the accused said was 75 metres away, coming very fast, and who "almost coincidentally fell off the bike" as the accused straightened up at the end of his right-hand turn, with the bike then

[103] Outline of Accused's Submissions, pars 10 - 11.

colliding with the taxi.[104] Mr Robson submitted that the lies proceeded from the accused's consciousness not only that he drove dangerously but that his driving caused the collision.

[101] I resolved the opposing contentions referred to in [99] and [100] in favour of the prosecution. In relation to probative value, I concluded that the accused's statements in his police interview went well beyond the "clear lie" about having stopped at the intersection and had probative value additional to the objective evidence of the CCTV footage. I also concluded there was no danger of unfair prejudice to the accused. As a matter of law, "unfair prejudice" does not simply mean a greater risk of conviction.[105] It is concerned with the manner in which the jury might misuse evidence.[106] In my assessment, any possibility that the jury might misuse the evidence in some unfair way could be adequately dealt with by an appropriate direction at trial.[107]

Discretion to exclude admissions – the unfairness discretion

[102] Counsel for the accused also submitted that the court should refuse to admit evidence of the accused's admissions, pursuant to s 90 *Evidence (National Uniform Legislation) Act 2011* (NT) because, having regard to the circumstances in which the admissions were made, it would be unfair to the accused to use the evidence. The accused bore the onus of establishing such unfairness. Mr Goldflam argued that the admissions were unreliable, that

[104] T 65.1, referring to the evidence in the EROI transcript, exhibit 4, at pp 11 - 14.
[105] *Papakosmos v R* (1999) 196 CLR 297, per McHugh J at [91] - [92].
[106] *Festa v R* (2001) 208 CLR 593 per Gleeson CJ at [22], per McHugh J at [51].
[107] See the observations of Deane, Dawson and Gaudron JJ in *Edwards v The Queen* (1993) 178 CLR 193 at 209 - 210.

they were not voluntarily obtained, and that the process by which they were obtained involved a significant infringement of the rights of the accused.

[103] It is somewhat paradoxical to speak of the unreliability of "admissions" which were relied by the prosecution for the very reason that they were untrue exculpatory statements. In those circumstances, the fact that the accused's statements were untrue would hardly make it unfair for the prosecution to use the evidence. Further, I had determined that the accused's admissions were not made in circumstances which were likely to affect the truth of admissions made.[108] In relation to the submission that the admissions were not voluntarily obtained, the focus of the relevant provisions of the *Evidence (National Uniform Legislation) Act 2011* (NT) is not on whether the accused's will was overborne in some way – the voluntariness rule at common law – but rather on the likely reliability or truth of the admissions obtained, in light of all the circumstances in which they were made.[109]

[104] The provision in s 90 is concerned with the right of an accused to a fair trial and whether there is a risk of improper conviction.[110] It is a final or "safety net" provision after the more specific exclusionary provisions of the Act have been considered and applied. The questions with which those other sections deal (questions of the reliability of what was said to police, and as

[108] [67] and [73] above.
[109] An exception is contained in s 84 *Evidence (National Uniform Legislation) Act 2011* (NT).
[110] *R v Swaffield* (1998) 192 CLR 159.

to what consequences flow from illegal or improper conduct by investigating authorities) are not to be dealt with under s 90.[111]

[105] The accused failed to satisfy me that admission of the contested evidence would render his trial unfair. In my assessment, the matters argued by Mr Goldflam, referred to in [102] above, did not create any forensic disadvantage and would not otherwise have rendered the trial unfair. I therefore declined to refuse to admit the evidence.

Conclusion

[106] These are my reasons for deciding that the Crown could adduce, without redaction, the evidence considered on the voir dire and described in [4] above.

[107] These reasons for decision are published to the parties in confidence, pending the trial which is now listed in April 2017. I will review the restricted publication status at the conclusion of the trial.

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[111] *Em v The Queen* (2007) 232 CLR 67 at [109] per Gummow and Hayne JJ. See also per Gleeson CJ and Hayne J at [56].