

R v Ashley [2014] NTSC 15

PARTIES: THE QUEEN

v

ASHLEY, Darren Anthony

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
TERRITORY EXERCISING
TERRITORY JURISDICTION

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RULINGS OF: BLOKLAND J

CATCHWORDS

EVIDENCE – Admissibility – Relevance of state of relationship – Evidence of enmity between accused and deceased relevant as to motive – Evidence of enmity and animosity relevant to fact in issue – relationship evidence admissible.

EVIDENCE – Admissibility – Hearsay evidence – Exception to hearsay rule as contained in section 65(2)(b) – Maker not available – Whether representation made in circumstances which make it highly probable that the representation is reliable.

EVIDENCE – Admissibility – Representations which are made “shortly after” the asserted fact occurred – Admissibility of contemporaneous statements made as per section 66A.

EVIDENCE – Admissibility – Assessment of probative value of representations – *Evidence (National Uniform Legislation) Act* – s65(2)(b), s 135.

Cases:

R v Kirk Ryan [2013] NTSC 54 – applied

R v Anderson (2000) 1 VR 1; *R v Gittany* (No. 2) [2013] NSWSC 1599; *R v Hissey* [1973] 6 SASR 280; *R v Serratorre* (1999) 48 NSWLR 101; *R v Clark* (2001) 123 A Crim R 506; *R v Hamoui [No 1]* (2005) NSWSC 99; *R v Frawley* (1993) 69 A Crim R 208; *Plomp v The Queen* (1963) 110 CLR 234; *Wilson v R* (1970) 123 CLR 334; *Arnott* (1995) 79 A Crim R 275; *R v Shamouil* [2006] 66 NSWLR 228; *Gojanovic (No. 2)* (2002) 130 A Crim R 179, cited

Legislation:

Evidence (National Uniform Legislation) Act – sections 55, 65(2)(b), 66, s 135.

REPRESENTATION:

Counsel:

Crown:	D Morters
Accused:	A Elliott

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Accused:	Robert Welfare

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

R v Ashley [2014] NTSC 15
No. 21218788

BETWEEN:

THE QUEEN

AND:

DARREN ANTHONY ASHLEY
Accused

CORAM: BLOKLAND J

RULINGS

(Delivered 24 April 2014)
(Re-Published 3 July 2014)

Background

- [1] These are rulings in relation to certain evidence sought to be adduced at trial by the Crown and objected to on behalf of the accused. The broad context is that the accused is charged with the murder of Kirsty Ashley. The deceased was killed on the morning of 15 May 2012. She was fatally stabbed numerous times at her residence at 48 Lovegrove Drive, Alice Springs.
- [2] It will not be in dispute that the accused and the deceased had previously been in a domestic relationship since around 1996 and had two children together, Arial and Jaryn. On or about 21 April 2012, the accused and the deceased separated. [The catalyst for the separation has been the subject of

an agreement about excluding evidence that will not be reproduced in this published version but the parties are aware of the agreed exclusion.]

- [3] The Crown has chosen, properly in my opinion, in the interests of fairness, not to attempt to lead that evidence, accepting that the evidence concerned carries a high risk of unacceptable prejudice. Other evidence bearing on the state of the relationship between the accused and the deceased, from around the time of the separation until shortly before the death of the deceased is sought to be adduced on the basis that the state of their relationship is relevant to a fact or facts in issue. Some of the evidence sought to be adduced is said to additionally be relevant to motive. Importantly, it is argued, and I broadly accept, motive may be inferred from the nature of the relationship between the parties.
- [4] On behalf of the accused, it was argued that evidence of the state of the relationship was not relevant in a context such as here where the accused denies perpetrating the alleged criminal act, as opposed to cases where the issue is one of whether a particular mental element has been proven or negated.¹ In my opinion, evidence of this kind is not constrained in the manner suggested on behalf of the accused. Although the relevance of the state of a relationship may be clearer in some cases involving the assessment of the mental state of the accused as relevant to a particular defence, a significant body of case law indicates that evidence as to the state of the

¹ In *R v Anderson* (2000) 1 VR 1, Winneke J referred to evidence of relationship relevant to state of mind being admitted to prove motive, intent or to negative a defence of accident, self defence or provocation.

relationship is admissible² if it is relevant to issues such as those articulated here, on behalf of the Crown, namely the accused's anger towards the deceased by the use of increasingly controlling behaviours and his demonstrated frustration and antipathy directed towards her since their separation and shortly before her death. The evidence relevant to the terms of the relationship sought to be adduced is beyond the "ordinary difficulties and disagreements".³

[5] As indicated, the Crown argues much of the same material is relevant to motive, given the accused's alleged antipathy towards the deceased, coupled with what to the accused may have been a series of challenging events since the separation. Motive is always relevant and clearly may be proven by circumstantial evidence,⁴ including the behaviours exhibited by the accused towards the deceased at the relevant time.

[6] The foreshadowed evidence includes a record of interview conducted between investigating police officers and the accused in which the accused asserted he was not responsible for the killing and gave police details of other persons he alleged may be responsible for the murder. Given the evidence that has been foreshadowed, and drawing on the approach taken in *Wilson v R*,⁵ it is clear that evidence of enmity between such parties as the accused and the deceased is relevant to the question of whether the accused

² Eg *R v Gittany* (No. 2) [2013] NSWSC 1599, McCallum J; *R v Hissey* [1973] 6 SASR 280 at [288]-[289]; *R v Serratorre* (1999) 48 NSWLR 101 at [108] and *R v Clark* (2001) 123 A Crim R 506; *R v Hamoui [No 1]* (2005) NSWSC 99, Kirby J at [44]-[58].

³ *R v Frawley* (1993) 69 A Crim R 208 at 220, per Gleeson CJ.

⁴ *Plomp v The Queen* (1963) 110 CLR 234 being the classic example of this approach.

⁵ (1970) 123 CLR 334; *Arnott* (1995) 79 A Crim R 275.

did kill the deceased. I do not here rely on any assumption that evidence of the relationship is presumptively admissible,⁶ however, the separation and, if accepted, the heightened animosity demonstrated through various acts on the part of the accused towards the deceased in the weeks and days before her death, in my opinion, are admissible as proof of the terms of the relationship and together, if accepted may demonstrate motive. It is not appropriate that a jury be required to decide the ultimate issue in a vacuum.⁷ Broadly, material of this kind is relevant both at common law and clearly within the meaning of s 55 of the *Evidence (National Uniform Legislation) Act*, as evidence that could rationally affect directly or indirectly, the assessment of a fact in issue. These general views are, however, subject to the discretionary and mandatory exclusions that will be dealt with below in respect of each proposed item of evidence.

- [7] As further background it may be noted the Crown case will also include evidence of the presence of blood alleged to be the accused's blood in locations that may be relevant to opportunity. There will also be evidence of phone records and texts that may shed further light on the items of evidence dealt with in this ruling.
- [8] A complicating factor is that some of the evidence relevant to the state of the relationship and/or to motive is the subject of a notice under s 67 of the *Evidence (National Uniform Legislation) Act* (NT) which seeks admission,

⁶ Such reasoning was discouraged in *R v Frawley* (1993) 69 A Crim R 208 per Gleeson CJ at 220.

⁷ *Wilson v The Queen* (1970) 123 CLR 334.

pursuant to s 65(2)(b) and (c), of hearsay representations alleged to be made by the deceased to other witnesses. I will deal with the particular arguments raised in respect of the items in the notice below, however, broadly, I agree with and adopt the most helpful summary of the relevant principles made after an extensive review of the authorities by Kelly J in *R v Kirk Ryan*.⁸ Although the question of the application of these principles to the case at hand will be dealt with below, broadly I apply the approach taken by her Honour in *Ryan*:

[27] The reasoning in both *Conway* and *Harris* is not easy to reconcile with *Williams*. The principles I think that can be distilled out of these cases are these:

- (1) The section is not just a restatement of the *res gestae* principles. It was intended to significantly expand upon the range of statements that were admissible at common law as part of the *res gestae*. (*Conway* at [123] and [133]; *Harris* at [33]).
- (2) A narrative of past events may be admissible under s 65(2)(b). (*Conway* at [133]).
- (3) The emphasis in s 65(2)(b) is not on reliability as such, but on admitting evidence that is unlikely to have been fabricated. For that reason the section requires that the statements be made “when” the asserted fact occurred (rephrased in *Williams* as “during the occurrence of the asserted fact”) or “shortly after” the asserted fact occurred (rephrased in *Williams* as “under the proximate pressure of the asserted fact”). (*Williams* at [48])
- (4) For that reason, the court should not over-emphasise such matters as whether the events in question were fresh in the memory of the person making the statement

⁸ [2013] NTSC 54.

in determining whether a statement was made “shortly after” the event. (*Williams* at [48]) However it is proper to take into account whether the events are likely to have been fresh in the mind of the person when the statement was made, as the policy behind the provision is to exclude evidence of a recollection which may have faded in accuracy over time. (*Conway* at [123] – [135]; *Harris* [33] to 40; *R v Mankotia* (unreported, Supreme Court, NSW, Sperling J, No 70049 of 1997, 27 July 1998) quoted in *Harris* at [34])

- (5) “The predominant factor in the phrase ‘shortly after’ must be the actual time elapsed and whether that fits the ordinary usage of the term “shortly after” in the circumstances of the case.” (*R v Mankotia* quoted in *Harris* at [34])
- (6) The assessment of whether a statement was made “shortly after” the event in question may be influenced by the subject matter of the statement and by how long the memory of such an event is likely to be clear in the mind. (*R v Mankotia*; *Harris* at [34])

[9] Section 65(2)(c) does not impose the temporal element “shortly after”, however, the representation is required to be of high quality as the evidence may only be admitted if the representation is made in “circumstances” that make it “highly probable that the representation is reliable”.

[10] The discretionary exclusions must also be considered but the discretions cannot be applied in a manner to effectively render s 65(2) inoperative; both the mandatory and discretionary exclusions, must however, be considered. I proceed on the basis of the reasoning in *R v Shamouil*⁹ that it is generally impermissible to engage in an assessment of the credibility or reliability of the evidence which is a matter for the jury, however, as will be seen below,

⁹ [2006] 66 NSWLR 228.

some representations are of low probative value due to vagueness or generality – in other respects they would ordinarily fall within the terms at s 65(2).

Particular Representations Sought to be Admitted Pursuant to Section 65(2)(b) or (c)

Item 1: Diary entries made by the deceased of events involving herself and the accused in the period prior to her death

[11] Admission of the written diary entries are no longer pressed given the entries do not comply with s 65(2) as they were not given “by a person who saw, heard or otherwise perceived the representation being made”.¹⁰ I confirm the diary entries will not be admitted.

Item 2: Contents of the statement of the deceased dated 5 May 2012 taken by investigating police officer Trent Barry

[12] This statement includes a representation by the deceased describing an assault by the accused on her earlier that day and her desire to obtain a domestic violence order. Although it is accepted that a single incident, or a remote incident,¹¹ particularly given its potentially prejudicial effect, should not be led in order to prove the terms of a relationship, this representation, taken with the other evidence is highly probative of the alleged level of control the accused was seeking to exercise over the deceased, along with evidence tending to show his sense of frustration and anger over issues associated with the separation from the deceased. Broadly, the Crown relies on the build up of tension and various other acts to prove not only the state

¹⁰ Similar evidential material was excluded on this basis in *Conway v The Queen* (2000) 98 FCR 204 at para [157].

¹¹ *Gojanovic (No. 2)* (2002) 130 A Crim R 179 at 180.

of the relationship in the weeks and days prior to the death of the deceased but also, as indicated, as evidence of motive.

[13] The accused will be unable to cross examine the representor, thus putting his case at some significant disadvantage, however, to interpret s 65(2) in a manner to exclude representations on this basis alone would be an error and lead to an extremely restricted interpretive approach to s 65(2). The jury will need to be warned of the dangers of any hearsay evidence exceptionally admitted. In relation to potentially prejudicial evidence there will need to be appropriate warnings. Clearly the Crown is obliged to persuade the Court that the “circumstances” are such that admission of the proposed evidence is justified in exception to the usual rule.

[14] In relation to the statutory declaration made by the deceased on 5 May 2012, a number of the representations sought to be admitted need to be considered separately. The representations made in the statutory declaration in my view are unlikely to be concocted. The statutory declaration is sworn in front of a police officer and contains a warning that a person who wilfully makes a false statement is guilty of a crime. I accept that at times people make false or unreliable statutory declarations, however, broadly, the contents of the statutory declaration comply with s 65(2)(b).

[15] Paragraph 3 relates to events occurring two weeks prior to 5 May 2012, concerning the deceased’s decision to leave the accused. The nature of the representation concerning the fact of leaving is unlikely to be a fabrication.

There is support elsewhere in the evidence for the fact of the separation. Given the subject matter, I am satisfied that the representation may be regarded as “shortly after” in the way that phrase is understood in the context of s 65(2)(b). If I am wrong on that point, in my view the circumstances in which the representation was made make it highly probable that it is reliable and therefore is also admissible under s 65(2)(c). I will admit paragraph 3. I see no reason to exclude paragraph 3 on a discretionary basis.

[16] There is a significant issue concerning the assertion that the accused took the deceased’s car keys; further, that he may have taken the deceased’s phone, or that he had Jaryn take the phone, or on the accused’s version he found the phone. There will be other evidence referring to these incidents. There will also be evidence that the accused, as a result of seeing text messages on the deceased’s phone thought the deceased was having an affair. Evidence of these matters is broadly relevant in the manner already discussed. The representation in paragraph 3; “When I left Darren wouldn’t give me the car keys so I called police” will be admitted. I see no reason to exclude it on a discretionary basis. The next sentence “At this time my son told police he wanted to stay with Darren”, does not appear to be prejudicial, nevertheless, it is not a representation made by the deceased but by her son. That representation will be excluded, although I would be open to an application on behalf of the accused to reconsider the matter if in

fairness, as a result of these rulings, it is otherwise probative of a further issue not considered here.

[17] Paragraph 4 is somewhat unclear as to whether the texting and threats to kill himself are close to 5 May 2012 or at an earlier time, perhaps on or around the separation. That part of the statement suggests this was an ongoing issue. In my view, save for the last sentence of paragraph 4, the representations are admissible under s 65(2)(c). In my view the representation contained in the last sentence of paragraph 4 is somewhat problematic. It may be relevant to the accused's state of mind in the week before the representation was made, however, not enough is known in relation to the card concerning authenticity, the precise wording, where in the house it was left, or other circumstances surrounding what is alleged to be written on the card. What was written on the card does not comply with s 65(2) as the making of the representation in the writing was not perceived or seen by a person. In my view, even if technically admissible under s 65(2)(b) or (c), which I doubt, because of the lack of detail about the circumstances, the probative value of this representation is diminished and is substantially outweighed by the danger of unfair prejudice and in any event is excluded pursuant to s 135.

[18] Paragraph 5 in my opinion should not be admitted as the representation is general and expresses an opinion, namely, that the accused has made an excuse to visit the deceased at her brother's house. There are no foundational facts available in order to assess whether the accused's actions

were an “excuse”. I have no reason to think this representation was fabricated or unreliable, however, because of the lack of facts that might give proper meaning to the representation, the probative value in my view is consequently not significant and is substantially outweighed by the danger of unfair prejudice. It will be excluded under s 135. Similarly, the statement concerning the deceased’s daughter having a domestic violence order and so the deceased didn’t want him to come into the yard has some, but little, probative value in terms of proof of the terms of the relationship between the deceased and the accused. If admitted it would immediately raise questions as to conduct by the accused towards the daughter rather than the deceased. Its probative value is substantially outweighed by the danger of unfair prejudice. That representation is excluded.

[19] In my view paragraph 6 is admissible as the representation on 5 May 2012 was made shortly after the facts asserted. It is unlikely to be fabricated in the circumstances. It is relevant to explain why the deceased went to the block on 4 May 2012.

[20] Paragraph 7 will be admitted under s 65(2)(b) save for the sentence “He must have looked at my phone and seen that work had called me lots and I had called them.” That representation is a conclusion drawn by the deceased that may or may not be open. Without further foundational facts to support the conclusion its probative value is diminished. Even if technically admissible under s 65(2)(b) or (c), I will exclude it pursuant to s 135.

[21] The first sentence of paragraph 8 reads: “Darren then accused me of making his daughter, my step daughter, Tamara Jane Ashley, make a statement against him.” This representation should also be the subject of discretionary exclusion. It has some, but not overly significant probative value in terms of the relationship, however, the prejudicial effect would be difficult to cure with a direction. The second sentence of paragraph 8 is, however, relevant and will be admitted under s 65(2)(b).

[22] Paragraph 9 describes the assault earlier on the same day that this representation was made. Taken with the other evidence relevant to the relationship, it possesses strong probative value notwithstanding the jury will need to be instructed as to its use and warned against substitution and tendency. The alleged assault is not asserted to represent a tendency on the part of the accused. Other evidence will suggest this was out of character for the accused. I will, however, exclude the sentence “The last couple of days he’s been trying to put his hands on me and I didn’t want him to touch me”. That representation does not have sufficient detail to be probative of particular facts that have a bearing on the state of the relationship and is substantially outweighed by the danger of unfair prejudice. That particular representation will be excluded.

[23] In my opinion paragraphs 10 and 11 are admissible as representations that describe the cessation of the incident. The expression that the deceased was “scared” is also admissible as a contemporaneous representation of her state of mind and feelings pursuant to s 66A. Her state of mind in turn is relevant

to the terms of the relationship.¹² In my opinion the sentence “I didn’t know what he was going to do if I didn’t get away” should, however, be excluded. There will already be evidence that the deceased was scared; this further statement does not add to the assessment of whether she was scared but is unduly prejudicial. The balance of paragraph 11 will be admitted.

[24] I conclude paragraph 13 is admissible pursuant to s 66A as a contemporaneous representation of the deceased’s state of mind to the effect that she wanted the accused arrested, wanted a restraining order, and did not want him to come near her. This in turn is relevant to the relationship, in that the deceased’s intention was that it would not continue.

Item 3: Representation by the deceased that the accused had possession of her mobile telephone, that he had tried to strangle her in certain circumstances and that she had reported that matter to police and that she had sought medical attention.

[25] These representations were made by the deceased on or about 5 May 2012 to Tamara Jane Ashley, the accused’s daughter, who was also close to the deceased. The representation in the sentence “She told me that while she was there she realised that dad had possession of her phone and that he had gotten Jaryn to steal it for him” should not be admitted. Without further factual foundation about how the deceased came to that “realisation”, the probative value of the representation is lessened and it has unfair prejudicial effect. I will exclude that particular representation pursuant to s 135.

¹² The discussion by Heydon JA in *R v Clark* (2001) 123 A Crim R 506 of the equivalent NSW section is relied on here.

[26] Although I understand the concern raised on behalf of the accused that the repetition of the representation concerning the assault may have an impermissible bolstering effect, and acknowledging the fact that repeating an allegation does not make it true, the particular circumstances of this representation in relation to the assault clearly comply with the requirements of the section. Tamara Ashley is a person who it would be expected would be told about this incident by the deceased. I conclude that the representation should be admitted under s 65(2)(b). It is understood that the more prejudicial aspects of that paragraph concerning sexual misconduct allegations will not be lead. I would exclude them in any event.

[27] I dispensed with the requirement of notice to permit the Crown to argue that the representation to Tamara Ashley that “Eventually she called me back and told me that her phone had gone missing and that during that same time my dad had called her and asked her to meet him at the block and talk” should be admitted. In my opinion this representation may be admitted and fulfils the requirements of s 65(2)(b).

[28] Similarly, notice was dispensed with in relation to the representation: “Kristy told dad that it was over and that she could never be with him again because she could not even look him in the eye”. This will be admitted, but pursuant to s 66A as a contemporaneous statement of feelings and intentions.

Item 4: Representation by the deceased that on the morning of 14 May 2012 as she began to drive off the accused cut her off on his motor bike

and when she returned from dropping her daughter at school she saw the accused standing in the front yard of her residence.

[29] This representation was made at around 8:38 am on 14 May 2012, the day before the deceased was killed. In my view this representation should be admitted under s 65(2)(b). The representation was made only minutes after the occurrence of the relevant facts. In my opinion it is relevant to the accused's attitude towards the deceased and the alleged controlling behaviours.

Item 5: Representation by the deceased in a telephone call with Tamara Ashley that on the morning of 15 May 2012 her dog had got out and the conversation culminated in a scream by the deceased.

[30] This refers to a telephone call made between 9:06 am and 11:17 am on 15 May 2012 to the accused's daughter. I understand that this representation is not objected to. In any event, I would admit the representation as it complies with s 65(2)(b).

Item 6: Representation by the deceased to Ivana Kristicevic on 20 April 2012 that the deceased had tried to leave the accused but he would not let her and that he would not hand over the car keys

[31] Ivana Kristicevic spoke to the deceased by phone on 20 April 2012. Ms Kristicevic is an advanced practitioner for the Department of Children and Families who was investigating certain matters and providing case management. Various arrangements were being made for the deceased to discuss relevant issues concerning Ariel's welfare with Ms Kristicevic. Although in my view the representation concerning the car keys is relevant and probative in respect of one aspect of the accused's conduct in the later

parts of the relationship, it is imbedded within a part of a statement full of prejudicial material that could not possibly be appropriately lead. The relevant representation would not be able to be explored in cross examination without disclosing prejudicial material. In my view its probative value is substantially outweighed by the danger of unfair prejudice and must be excluded under s 135.

Item 7: Representation by the deceased to Ivana Kristicevic on 23 April 2012 that the deceased was no longer living with the accused, that she was living with her brother and that the accused was not letting her see her son Jaryn.

[32] The phone call made by the deceased on 23 April explained the separation and that the deceased was staying with her brother. In my opinion the representation that the accused was threatening to take Jaryn away and that he was not letting her see her son are admissible as tending to show the alleged manipulative behaviours towards the deceased. The statement “She had concerns for her son Jaryn” are, in my view, admissible as relevant to the deceased’s state of mind and consequently relevant to the terms of the relationship at that time. In my opinion these representations are not prejudicial in the relevant sense. I see no basis to exclude this representation.

Item 8: Representation by the deceased to Ivana Kristicevic on 24 April 2012 that the accused was not physically abusive but was emotionally abusive towards her, that he was making threats against her, that she was crying and that the accused was refusing to let the deceased stay at their home.

[33] In my opinion most of this representation is not admissible. Section 65 is concerned with representations that assert facts. The terms “emotionally abusive” and that “He was making threats against her”, without further factual foundation are terms that do not relate to an asserted fact and are too broad to be admitted under the section. If I am wrong on this point, in any event, because of their general nature, the probative value is somewhat lessened and I would exclude this item under s 135 as the probative value is slight and it may be unfairly prejudicial to the accused. That the deceased “was crying” may be due to the accused’s conduct, however, it may also be due to another investigation. In any event this cannot be the subject of what would otherwise be an appropriate area of cross examination due to the risk of the witness straying into prejudicial material if full and frank answers are to be given. That part should be excluded. The representation that the accused was refusing to let her stay in the home will be admitted.

Item 9: Representation by the deceased to Ivana Kristicevic on 26 April 2012 that the accused was harassing her at her brother’s house.

[34] Although this representation asserts the accused was “harassing” the deceased, in my view without some further factual foundation it is difficult to know what particular behaviour the deceased was discussing. It is not a matter that can be pursued in cross examination. There will be other evidence on this subject. In my view the probative value is therefore slight

and yet the risk of unfair prejudice is substantial. This representation will therefore be excluded under s 135.

Item 10: Representation by the deceased to Ivana Kristicevic on 4 May 2012 that she continued to have issues with the accused being manipulative. That she had over 200 messages on her phone from the accused and was having the delete messages because her phone was full.

[35] In my opinion the phrase “continues to have issues with Darren being manipulative” does not assert a fact or facts. There would need to be a proper foundation. For similar reasons articulated in relation to parts of Items 8 and 9 above, this part of Item 10 should be excluded either because without further factual foundation it is too general or, if I am wrong on that point, its probative value without a factual foundation is slight. I will exclude it pursuant to s 135. In my view the balance of Item 10 is admissible under s 65(2)(b).

Item 11: Representation by the deceased to Ivana Kristicevic on 8 May 2012 that the accused had tried to choke her over the weekend and that she had applied for a DVO and that she had a new mobile telephone contact number.

[36] I have already admitted representations in relation to the assault episode. In my opinion it is appropriate to admit evidence of the representation about the assault to police, to the daughter of the accused, and to medical personnel and family members who it might be expected, the deceased would speak to about this matter. Although strictly speaking this representation is admissible, having been made on 8 May 2012, in my view there is a danger that the repetition of this evidence beyond the representations I have already admitted on the subject is unfairly prejudicial

to the accused. Its probative value is not increased by virtue of being repeated so many times. It is unlikely that the jury would think it strange that the allegation was not repeated to this witness. If, however, the conduct of the trial leads to this representation assuming greater relevance and probative value, I will need to reconsider this ruling. The repetition of the representation to this witness inappropriately bolsters the evidence. The balance of this item, however, concerning the new mobile telephone contact number will be admitted.

Item 12: Representation by the deceased to Arial Ashley that ever since the deceased left the accused the accused rings the deceased heaps of times when Arial is at school and after school.

[37] Although this representation is not clearly dated, it must have been made after the separation on 21 April 2012. This representation is part of a sequence of regular conversations between the deceased and her daughter. In my opinion it is admissible pursuant to s 65(2)(b); if not admissible by virtue of the precise time not being established, it is a representation that in my opinion is made in circumstances that make it highly probable that it is reliable. I see no valid reason to exclude this representation.

Item 13: Representation by the deceased to Natasha Braun that the accused had tried to choke her.

[38] Natasha Braun was a friend of the deceased. The history of their friendship is set out in Ms Braun's statement. The deceased would regularly discuss certain personal problems with Ms Braun. When Ms Braun saw the deceased on 7 May 2012, the deceased told Ms Braun that "he had tried to

choke her”. A number of witnesses will give more detailed versions of this representation. There is very little detail given by Ms Braun including the date on which the incident referred to by the deceased occurred. Although the representation is unlikely to be fabricated and is made only two days after the event, in my view because of the lack of detail, especially when compared with earlier accounts, the probative value of this representation is not significant, even though it may technically be admissible pursuant to s 65(2)(b). In my opinion it amounts to impermissible bolstering of the evidence, to the extent that the repetition will have an unfairly prejudicial effect and it will therefore be excluded under s 135. Should anything occur during the course of the trial that suggests this ruling should be re-considered, (for example, if it is suggested the other representations are weakened due to not being repeated), an appropriate application may be made.

Item 14: Representation by the deceased to Natasha Braun that the accused had stolen her old phone, and that he had blackmailed her by saying that if she didn't give him all the wedding money that she would never see Jaryn again and that he had taken Jaryn to Adelaide.

[39] In my opinion these representations meet the criteria in s 65(2)(b). There is some conflict around the issue of the phone at times being described as the accused stealing or taking it or having the accused assisting Jaryn stealing it, however, in my view not a great deal turns on that. There are different modes of expression at different times. The representation is unlikely to be a fabrication. Although the term “blackmailed” is pejorative and if care is not taken may be of prejudicial effect, in this context, it needs to be

understood in the context of how the deceased viewed the accused's behaviours. In the context of relationships it is not an uncommon term and is not readily taken to refer to the actual criminal offence 'blackmail', if the term is used colloquially. In my view these representations are strongly probative of the alleged controlling and manipulative aspects of the relationship that the Crown is seeking to prove. Item 14 will be admitted.

Item 15: Representation to Natasha Braun that she had not seen her son on Mothers' Day, that the accused had been giving her a hard time, that he had been texting her and stalking her. That she intended to get on with her life and fight for Jaryn's custody. That she had set up a new Facebook account because her and the accused shared log in details for her old Facebook account and that the accused had been getting into the account and looking at who her friends were.

- [40] These representations were made on 14 May 2012 concerning events on or around Sunday 13 May. I will admit most of this representation, however, without further factual material as to what the deceased meant by "stalking her", it is unfairly prejudicial and I will exclude only those words pursuant to s 135. Unlike "blackmail", when used colloquially, "stalking" conjures up far more serious threatening behaviours. It is unclear which of the behaviours amount to "stalking" from the deceased's point of view. Although by itself, setting up a Facebook account would not be relevant, the deceased's representation as to why she did this is relevant, it is relevant to her state of mind, the accused's controlling behaviours and taken with other facts is relevant to the relationship and to the accused's state of mind.

- [41] The Crown also seeks to have the representation that the deceased was missing her son, was upset that she had not seen him, she was intending to

move on and would fight for full custody of him admitted pursuant to s 66A as contemporaneous representations about health, feelings and intention. In my opinion this representation is relevant to the overall context of the deceased's position about the end of the relationship and should be admitted pursuant to s 66A.

Item 16: Representation by the deceased to Valerie Dearman that the accused had choked her at “the block” after she returned there to collect belongings from the house. That she saw the accused at the property who grabbed her by the throat which caused her to fall to the ground. That she twisted her back trying to get away from the accused. That the accused had been stalking her. That the accused had threatened to hang himself.

[42] This representation was made on the date of the alleged assault at approximately 7:00 pm. Ms Dearman works at the hospital and her role is to respond to circumstances involving family violence. Given these circumstances involving the deceased describing what had occurred only some few hours before and that there is a reasonable amount of detail in the representation of the facts surrounding the alleged assault, these representations will be admitted for reasons that have already been explained in respect of other items of evidence. Without further foundation or facts, however, I would exclude the representation that the accused had been “stalking her”. It is a highly pejorative term. It may be that what the accused was doing was perceived as “stalking” by the deceased, however, it is the actual behaviours that should be the subject of admissible representations, not conclusions drawn from facts which are not in evidence.

If admissible pursuant to s 65(2), I would exclude this term pursuant to s 135.

Item 17: Representation by the deceased to Donald Horran that the accused had messaged her saying “I know you’re upstairs with Donald, just come down and talk to me please”; that after separation on one occasion the deceased had seen the accused parked on Lovegrove Drive waiting for her; the accused would call or message her often, sometimes asking for cars to be signed over to his name or about kids being sick or wanting to talk.

[43] On the basis of similar reasoning with previous items, I conclude this item is admissible save for the representation that “Darren was parked around the corner on Lovegrove Drive waiting for her”. Without further particulars, in my view this representation is not sufficiently probative of the fact that he was “waiting for her”, however, the balance of the item well illustrates behaviours relevant to the relationship and will be admitted.

Item 18: Representations to Leah McCormack that the accused had accused the deceased of cheating with her boss; that the accused wanted to know where the deceased was and that he had threatened to take his life.

[44] Although infidelity or jealousy have not been asserted as motives for the killing, the accusation and associated behaviours illustrate the state of mind of the accused around the time of the separation. It informs the alleged underlying frustration, anger and enmity. This representation was made on 21 April 2012. Ms McCormack was the deceased’s sister-in-law. The deceased came to stay with them after the separation. This representation should be admitted pursuant to s 65(2)(b).

Item 19: Representation to Leah McCormack that the accused had asked her to come to the block by herself and while she was there the accused put his hands around her throat.

[45] Although this is a repetition in some respects of the representation made to police, Valerie Dearman and Tamara Ashley, it might be expected the deceased would tell her sister-in-law about this incident as she commenced living with her. Given its timing, being very close to the incident, in my view it is unlikely to be fabricated. Item 19 will be admitted.

Item 20: Representation to Leah McCormack that she had seen the accused back in town and riding his motor bike while she was driving on Larrapinta Drive; that the accused had walked passed their house that afternoon and parked his car further down Lovegrove Drive where she could not hear it and that she spoke about a DVO.

[46] This representation is admissible pursuant to s 65(2)(b). It was made on 14 May 2012 and is relevant to the Crown case given the evidence, including this representation, that the accused had returned to Alice Springs shortly before this time. In my opinion, however, the words “so she could not hear it” express an opinion that without further foundational facts lacks probative value. It has unfair prejudicial effect. I will exclude those particular words but admit the balance of this representation.

Item 21: Representation to Wendy Parkinson that her new mobile telephone number was 0428 099 351 and that the accused had taken her old telephone.

[47] This representation was made on 6 May 2012. Wendy Parkinson was a friend of the deceased. In my opinion this evidence can readily be admitted under s 65(2)(b).

Item 22: Representation to Christopher Schembri that the accused had grabbed her by the throat at Ilparpa.

[48] This representation was made on 7 May 2012. Mr Schembri was the deceased's employer and the information was disclosed at work. Given the general nature of the allegation contained in this representation and the fact that similar representations will be admitted through other witnesses, in my view, although it may technically meet the requirements of s 65(2)(b) it has substantial prejudicial effect when continually repeated and containing very little detail. Item 22 will be excluded.

Item 23: Representation to Heather Steadman that the accused said that if she wanted to see Jaryn she would have to transfer money to him and put cars in his name.

[49] Ms Steadman is the deceased's mother. The representation was made about 21 April 2012. The accused argues this is not relevant and could only be used prejudicially as there is no evidence to suggest the accused knew of financial contentions between himself and the deceased. Rather than being evidence of motive, this representation, if accepted tends to support the evidence of controlling and manipulative behaviour on the part of the accused, or at the very least that the deceased believed she would need to do these things suggested by the accused in order to see her son, which in turn reflects of the state of the relationship at the relevant time. Item 23 will be admitted.

Item 24: Representations to Heather Steadman that the accused had tried to kill her. That he accused her of an affair with her boss. That she accused him of going through her phone and numbers. That she walked back to her car, heard footsteps and the accused grabbed her by

the throat. That he held her tight. That she screamed and he let her go and that she reported the matter to police.

[50] This representation was made shortly after the incident to the deceased's mother, a person who it might be expected the deceased would speak to about these matters. Although most of this item is admissible, I will exclude the representation "she told me that Darren had tried to kill her". In my opinion it is the representations concerning the various facts and incidents which are admissible. That the deceased thought that Darren had tried to kill her adds little in terms of probative value to the overall representations and is unfairly prejudicial. I will exclude that part. In relation to paragraph 21 of Ms Steadman's statement, it may be noted that in relation to the observation of "muscle damage", that there will need to be some clarification prior to trial. On its own, it is unlikely to be admissible.

Item 25: Representation to Ms Steadman that the accused told the deceased he was leaving for Melbourne to look for work and he was taking Jaryn. That later that night the deceased told Steadman that she had been receiving messages from Jaryn and they had been stopping at locations like Maria.

[51] The first part of the representation is admissible in terms of the state of mind of the accused and the state of the relationship at that time – that the accused intended to go to Melbourne with Jaryn. I exclude, however, what the deceased said about receiving messages from Jaryn. This is not firsthand hearsay and cannot be admitted. I understand there may be other evidence on this point.

Item 26: Representation to Heather Steadman that the deceased had seen the accused drive past her house on the weekend.

[52] This representation was made on 14 May 2012. It fulfils the requirements of s 65(2) and is relevant to prove the accused was back in Alice Springs and had been in the area of the deceased's house.

Item 26(a): Representation to Iain Steadman that the accused had choked her at his house; convinced her to go to the property on Lillicrap Road; that the accused said that now they were separated they should separate their possessions; that he came up behind her and started to choke her; and that the deceased screamed for help and the accused stopped.

[53] Mr Steadman is the deceased's brother. The deceased was living with him after the separation and at the time of her death. Notwithstanding these representations to Mr Steadman may well meet the criteria pursuant to s 65(2)(b), these same representations have been made through other witnesses. In my view this repetition does not make the proof of the incident any more likely and would have an unfair prejudicial effect given the number of times it has been repeated. There is no further detail added by this account. This tends to over emphasise the importance of this aspect of the relationship. It is only part of the Crown case. If the conduct of the trial suggests there is a further reason to admit this representation, an appropriate application may be made.

Item 27: Representation by the deceased to Iain Steadman that the accused had been driving past 48 Lovegrove Drive a lot more than normal lately.

[54] This representation was made sometime after 21 April 2012. In the context of paragraph 9 of Mr Steadman's statement and the statement as a whole, this representation is unlikely to be fabricated. This item will be admitted.

Item 28: Representation to Iain Steadman that the accused had taken Jaryn to Melbourne and that he did not say when he was coming back.

[55] There will be other evidence to be adduced on this point. It is not particularly probative. It will not be admitted.

Item 29: Representation to Iain Stedman that she had seen the accused walking past 48 Lovegrove Drive after she had dropped Arial at school and that she kept driving and did not stop.

[56] This representation was made on 14 May 2012. It is relevant given it tends to show the accused has returned and is in and around the area of the residence. By itself it does not prove controlling or harassing behaviours, however, when taken with other evidence, it has probative value in relation to those matters. Item 29 will be admitted.

Item 30: Representation to Sergeant Carmen Butcher that the accused had been following her to school and also to her brother's house where she was staying and that she had seen the accused in her front yard the previous day.

[57] This representation was made by phone call to Sergeant Butcher on 14 May 2012. The circumstances of that phone call being made shortly after the events indicate that it is unlikely to be fabricated. It is, however, impossible to know the extent of the "following". It is a subjective matter of opinion that cannot be tested. Without more foundational facts relevant to the

“following” it will be excluded. The representation that the accused was in the front yard the previous day should be admitted.

Item 31: Representation to Senior Constable Timothy Healy that the deceased wanted to leave the residence at Lillicrap Road, Ilparpa but could not because the accused had hidden the car keys.

[58] This representation was made on or about 21 April 2012 at Lillicrap Road to Officer Healy who had attended in response to a report from the deceased. By itself this evidence would not be particularly probative, however, with the other evidence it indicates the exercise of control the accused was prepared to take at or about the time of the separation. In my view this representation was unlikely to be fabricated. It will be admitted.

Listing

[59] The trial is listed to commence on 7 May 2014. Given the length of the trial, there will be a jury induction session on 2 May 2014 at 10:00 am in Alice Springs. A call up notice will be issued for the attendance of the accused for that time.