The Queen v Adam Joseph Filippone [2016] NTSC 67

PARTIES:	THE QUEEN
	v
	FILIPPONE, Adam Joseph
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING CRIMINAL JURISDICTION
FILE NO:	21016368
DELIVERED:	9 December 2016
REPUBLISHED:	24 March 2017
HEARING DATES:	15, 16, 17, 18 February 2016
JUDGMENT OF:	BLOKLAND J

CATCHWORDS:

EVIDENCE – Hearsay – notice to admit hearsay evidence – person who made representation not available – whether circumstances make it highly probable that the representation is reliable – whether representation made against the interests of the person who made it – whether made in circumstances that make it likely that the representation is reliable – onus on the Crown to satisfy the requirements for admission – onerous requirements – circumstance where the representor is the principal offender or accomplice may constitute an unreliable circumstance – factors to be considered – admission by third party not adopted is additional ground to be considered.

EVIDENCE – Person who made representations not available – evidence relevant to relationship between deceased principal offender and accused – evidence of transporting cannabis not tendered for tendency purpose – significant probative value in terms of establishing principal offender's motive – despite hearsay elements circumstances make it probable evidence of drug transportation reliable – relevant representations made prior to police investigation – evidence admitted.

EVIDENCE – Evidence relevant to relationship between deceased principal offender and accused – evidence relevant to drug transportation and motivation of principal offender – statement by principal offender as to knowledge of cannabis in vehicle – admissible as contemporaneous representation as to knowledge – outside of scope of hearsay rule – evidence admissible.

EVIDENCE – Hearsay – person who made representations not available – representation by principal that accused would do anything principal asked – representation too generalised to be of significant probative value but in context highly prejudicial – evidence excluded.

EVIDENCE – Hearsay – person who made representations not available – evidence of conversation between principal offender and deceased over drug debt made in reliable circumstances – evidence of conversation admitted – evidence of conversation offering to supply a witnesse's friends with drugs excluded.

EVIDENCE – Hearsay – person who made representations not available – taped conversation containing representations that in part implicate accused – circumstances in which representations made unreliable – declarant an accomplice – principal offender – motivation to implicate accused on part of declarant and witness who recorded conversation – motivation for witness to cooperate to protect herself against criminal proceedings – possible financial benefit – evidence conversation may have been rehearsed to protect witness – circumstances unreliable – alternatively preservation of common law rule in *Uniform Evidence Act* that an admission cannot be used against a third party deeming evidence of this kind inadmissible – evidence excluded.

EVIDENCE – Hearsay – person who made representation not available – representation by principal offender to accused about accused's statement to police – outside of scope of hearsay rule as representation of principal offender's state of mind – apparent concern or knowledge – evidence admitted.

EVIDENCE – Hearsay – person who made representation not available – evidence principal offender instructed witness to buy two phones – one phone for accused – evidence outside of scope of hearsay rule – representation explanatory of why witness bought phones – alternatively contemporaneous expression of principal's intention – evidence admitted.

EVIDENCE – Statement governed by *Police Administration Act* – presumptively excluded given non-compliance with *Police Administration Act* – insufficient compliance to permit exercise of the discretion to admit the conversation.

Evidence (National Uniform Legislation Act) UEA (NT) s 83; s 67; s 65; s 66A

Police Administration Act s 142(1); s 143

Conway v The Queen (2000) 98 FCR 204; *IMM v The Queen* (2016) 90 ALJR 29; *Miles v The Queen* [1999] NTCCA 05; *Munro v The Queen* [2014] ACTCA 11; *R v Ambrosoli* (2002) 55 NSWLR 603; *R v Cook* [2004] NSWCCA 52; *R v Charlie* (1995) 121 FLR 306; *R v Kanaris* [1999] NTSC 94; *R v Karui* [2016] NTSC 13; *R v Mankotia* [1998] NSWSC 295; *R v Shamouil* (2006) 66 NSWLR 228; *R v Suteski* (2002) 56 NSWLR 182; *R v XY* (2013) 84 NSWLR 263; *Walton v The Queen* (1989) 166 CLR 283; *Williams v The Queen* (2000) 119 A Crim R 490; referred to

Sio v The Queen (2015) 249 A Crim R 533; not followed

Sio v The Queen [2016] HCA 32; followed

REPRESENTATION:

Counsel:

Prosecution:	D.Morters
Accused:	P.Boulten SC

Solicitors:

Prosecution:	Office of the Director of Public Prosecutions
Accused:	Greg Walsh & Co

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

The Queen v Adam Joseph Filippone [2016] NTSC 67
No. 21016368

BETWEEN:

THE QUEEN

AND:

ADAM JOSEPH FILIPPONE

CORAM: BLOKLAND J

REASONS FOR RULINGS

(Delivered 9 December 2016; Republished 24 March 2017)

Rulings on the Voir Dire
Introduction

[1] These reasons were originally provided in confidence to the parties and their respective representatives. As the trial concluded on 20 March 2017, the reasons may now be published generally.[1]

[2] The accused was charged with one count of murdering Peter Wayne Murphy ('the deceased'). The date of the alleged offending was 17 August 2008. In the alternative, the indictment charges one count of assisting Gregory Allan Russell ('Russell'), who to the accused's knowledge had committed murder,

[1] Minor typographical and referencing errors have been corrected since the first version of these reasons was delivered on 9 December 2016.

in order to enable Russell to escape prosecution. Russell committed suicide on 7 May 2010, and was never charged for the homicide.

[3] The deceased ordinarily resided in Central Australia. For some time he had lived and worked in Yuendumu Community. In the six weeks prior to his death he had been living in Alice Springs.

[4] He went missing on or about the 17th of August 2008. Police investigations were not successful for some time. The Crown alleges, on the basis of evidence and information gathered between August 2008 and May 2010, the accused and Russell kept in contact with each other. Both Russell and the accused relocated to Queensland in late 2008.

[5] Prior to his suicide, Russell participated in a conversation with his then partner, Wendy Hassett. Wendy Hassett recorded that conversation. Russell admitted killing the deceased and also asserted the accused was present and involved in the killing. He marked a map depicting where the murder took place and where the deceased's body could be found. Police located the deceased's remains in a shallow grave, in a remote Central Australian location, as indicated in the map Russell had marked.[2]

[6] The autopsy established that the deceased suffered two bullet holes to the left side of his skull and blunt force trauma to his left cheek.

[2] Exhibit 5 on the Voir Dire.

[7] The accused was extradited to the Northern Territory from Queensland on 15 May 2010. It was alleged that during the flight he spoke to a police officer and gave a hypothetical scenario in which he was not responsible for the murder but was present when the deceased was killed. The conversation was not recorded.

[8] These rulings were made on the basis of a lengthy voir dire hearing focussed on Notices served pursuant to s 67 of the *Evidence (National Uniform Legislation Act)* (NT) ('UEA') advising of the Crown's intention to adduce hearsay evidence. A further question concerned the admissibility of the alleged conversation on 15 May 2010 between the accused and an investigating police officer.

Outline of the Crown case and facts relied on for the purpose of the voir dire

[9] An outline of facts for the purpose of providing the context in which to make rulings on the voir dire has been agreed between the parties, but solely for that limited purpose. This outline of facts represents the Crown evidence taken at its highest.[3] This was supplemented by evidence given by the following witnesses: Gemma Olivia Beattie; Peter Errol Goodwin; Tamara Elizabeth Murphy; Wendy Jane Hassett and Detective Sergeant David Richardson. This has been further supplemented by materials

[3] This summary does not necessarily represent the strength of the evidence presented at trial, but rather the available pre-trial material. It may also be noted that a significant amount of evidence was disputed at trial.

tendered in joint court books,[4] and a detailed chronology filed on behalf of the accused.

[10] The Crown will rely on evidence to prove the accused worked as a tiler, subcontracting for Steven Williams Tiling at the Target Store site in the Alice Springs Plaza during 2008.

[11] At the time of his death the deceased was 46 years of age and was working as a painter for Curt Tomlinson. He married Tamara Murphy in 2000. They separated in 2004. They had two children together. Since their separation they maintained contact. Tamara Murphy also had two children from a previous marriage.

[12] For six weeks prior to his death, the deceased had been residing at the Elkira Motel in Alice Springs. Prior to this, he was living and working in the Yuendumu Community.

[13] Tamara Murphy was residing at 1912 Fuschia Road with her partner Adam Moore and children Leigh, Chase and Jackson Murphy, Leisa Ford and the deceased co-offender Gregory Allan Russell. Just prior to this time, Russell separated from his wife Angela Russell. Angela Russell resided at 17 Standley Crescent with her children Ainsley Russell then aged 10 and Sheena Russell then aged 25.

[4] Exhibit 1.

[14] The accused and Russell were close associates. Russell was involved in the distribution of illicit drugs. On one occasion on or about May 2008 the accused participated in the transportation of illicit drugs with Russell from the Gold Coast to Alice Springs. Russell told others that he was involved in the drug trade with the accused. Russell also kept firearms and told others that he and the accused had a location they used to bury their firearms. Russell also told others that he was hit man for interstate motorbike clubs.

[15] The deceased supplied cannabis to persons in indigenous communities where he worked. He sourced some of that cannabis from Russell. Prior to his death, the deceased acquired a significant debt to Russell from these activities.

[16] A few months prior to August 2008, the accused was present during a conversation between Tamara Murphy and Russell. Tamara Murphy was criticising the deceased and said to Russell, words to the effect, 'he is useless, doesn't pay child support and somebody needs to bump him off but he was that much of a tight arse, he only had a $100,000 dollar life insurance policy.' Russell asked about whether the deceased had life insurance and told Tamara Murphy that it would cost $10,000 to "knock off" the deceased.

[17] On 18 June 2008, Russell approached Tamara Murphy at her home and showed her a small silver handgun wrapped in a shirt. Russell gave the

handgun to Tamara Murphy who placed it in a safe in her bedroom. Both Adam Moore and Leigh Murphy saw a pistol in that safe.

[18] At the time of the deceased's alleged murder, the accused returned to Alice Springs and resided with family friends Damien and Simone Peirce. He commenced work with Steve Williams at the Target site.

[19] The deceased was a heavy gambler. In the months preceding his disappearance he told an associate Graham Brewster that he needed to borrow $30,000. In the same conversation the deceased stated "If they get me, they come and get me". In the months leading up to the deceased's disappearance, Russell told others that the deceased owed him money.

[20] The accused, Steve Williams, Rodney Moseley and Thomas Spence started work at the Target project about 8am on 17 August 2008. They were "topping" floors. Topping is a preparation phase of tiling where the floor bed is levelled with cement prior to tiling. It is a job which is commonly performed by a team of workers.

[21] The deceased also commenced work at 8am after being picked up from the Elkira Motel by his employer Curt Tomlinson. They worked for a four hour period at the Charles Darwin University, Alice Springs Campus.

[22] At around 9am, Russell received the firearm from Tamara Murphy. He told her he was going to 17 Standley Crescent to do his washing. He drove from

her residence in his white Holden utility which is fitted with a front bench seat.

[23] At 10:33am, Tamara Murphy had a telephone conversation with the deceased in which she made arrangements for him to see his children later that afternoon. The deceased told Tamara Murphy that he had 'something to do first' and would make contact with her later in the day.

[24] At 11:40am, Russell contacted the accused via mobile telephone and had a conversation of 41 seconds.

[25] At 11:41am Russell called the landline located at 17 Standley Street. The call lasted for 50 seconds.

[26] At 11:57am the accused called Russell. The call lasted for 37 seconds and was transmitted from the Anzac Park Telstra tower. That tower is the closest to the Target project.

[27] At midday a call was made from the landline at 17 Standley Crescent to the deceased's mobile telephone. Angela Russell was sick in bed at the time. She confirmed that the only visitor during the day until her children arrived in the late afternoon was Russell. Angela Russell did not use the landline to make this call. The call lasted for 62 seconds.

[28] At 12.02pm the accused called Russell. The call lasted for seven seconds and was transmitted from the West Gap tower. That tower is the closest to the Standley Street address.

[29] At 12:09pm the deceased arrived at the Town and Country Hotel located at the southern end of Todd Street Mall. At the hotel, the deceased told Dashwood that he was being picked up and that they would all benefit from this. Sunny Torgman was a barmaid who arrived for work at the Town and Country Hotel on 17 August 2008 at 12:15pm. She was ill. She rang a taxi to take her home from the landline at the hotel at 12:26pm. At 12:40pm she walked out of the rear door of the hotel to wait for a taxi in the laneway behind the hotel. Whilst in the laneway she was approached by a male who met the description of Russell including the sunglasses he was known to wear. The male asked Ms Torgman if the deceased was inside. Ms Torgman re-entered the hotel by the rear door and approached the deceased at 12:43pm to tell him someone was waiting in the lane for him.

[30] At 12:44pm the deceased said to Dashwood that he wasn't going to 'get on it' because he had the kids in the afternoon. He left half his beer and left the hotel via the front door. He turned left towards the lane at the back of the hotel.

[31] Telstra records for Russell's mobile telephone record no connected calls between 12:02pm and 3:39pm. Gemma Beattie made ten attempts to call Russell's mobile telephone over that period without success.

[32] The last call ever made or answered on the deceased's mobile telephone was at 12:19pm on 17 August 2008. The call was to Christine Willmott who was managing the Elkira Motel where the deceased was living. Ms Willmott

discussed payment of rent with the deceased. In that phone call the deceased stated to Ms Willmott that his pay cheque went in late and that he would pay his outstanding rent on Monday. The deceased indicated the same to the owners of the Elkira Motel.

[33] Telstra records for the accused's mobile telephone show no calls were made or received between 12:02pm and 3:14pm.

[34] In a statement made to police on 26 August 2008 the accused claimed to have worked at the Target project until between 5 and 6pm. The Crown relies on this statement as a lie demonstrative of a consciousness of guilt.

[35] Steve Williams states that the group worked half a day only and that the accused was working quickly because he wanted to get away. It is Mr Williams' recollection however, that they did not finish at the site until between 1 and 2pm. Williams conceded to an associate Peter Braham on 17 November 2014 in a telephone conversation recorded by investigators that he knew they knocked off that day at one o'clock or something and that the accused was moving fast and in a hurry. The security guard for the site confirmed that no workmen were present at the site when he inspected it at 2:00pm.[5]

[36] Leisa Ford was living at Tamara Murphy's house at the time. She knew Russell and the accused. She was familiar with the vehicle that Russell

[5] It may be noted that on this subject in particular, at trial there was additional evidence apparently not supportive of this aspect of the Crown case.

drove. She had met the deceased on several occasions. She stated that at about 1:30pm she saw Russell's vehicle travelling on the Stuart Highway heading north as she was travelling in the opposite direction near the intersection with Wills Terrace. She saw two other males in the front of the vehicle. The vehicle was fitted with a bench seat. She identified two of the males as Russell and the accused. She later described the male sitting in the middle as having a grey beard and grey hair like Peter Murphy. Ms Ford went to the supermarket after she made this observation and then to work. Employment records show that Ford was paid for working from 2pm at a residence in Giles Street.

[37] At 3:14pm a telephone call was made from the accused's mobile telephone to Steve Williams' mobile telephone that lasted for 66 seconds. At 3:39pm a telephone call was made from Russell's mobile telephone to Gemma Beattie's mobile telephone that lasted for one second. Immediately after that call there was a call from Russell's mobile telephone to voice mail consistent with Russell seeking to retrieve messages.

[38] At 5:44pm the accused's mobile telephone was used to call Russell's mobile telephone. That call lasted for 11 seconds.

[39] The accused and Russell arrived at Tamara Murphy's house in separate vehicles about 6:30pm. Russell had a shower and changed clothes. Both Russell and the accused stayed for dinner. Others at the residence were Adam Moore, Leigh Murphy, Chase Murphy and Jackson Murphy. Russell

was in possession of a pistol. Tamara Murphy became concerned about the way that Russell and the accused were acting so she called police. The first of these calls was at 7:21pm. During the course of the dinner the accused said to Russell in the presence of Leigh Murphy "It was like underbelly" or "it's going to be like underbelly".

[40] At about 7:50pm Russell and the accused left the Fuschia Road address in a white hatchback. Russell was in possession of the pistol and had placed rubber gloves and a balaclava in the vehicle. At 9:00pm police approached the vehicle but did not stop it. Police saw two persons in the vehicle.

[41] At 9:06pm Tamara Murphy called 000 to advise that Russell and the accused had returned to Fuschia Road in the hatchback. The accused left the residence soon afterwards. Russell expressed anger at the police presence to Tamara Murphy then went to bed.

[42] About 1:35am on 18 August 2008 police executed a search warrant at the Fuschia Road address. No pistol was found. Police located rubber gloves and a balaclava in the hatchback. Russell later told Gemma Beattie that the pistol police were looking for was behind the drawers.

[43] At 7:42am on 18 August 2008 there was a call of 121 seconds from Russell's mobile telephone to the accused's mobile telephone. At 12:22pm there was a call of 28 seconds from the accused's mobile telephone to Russell's mobile telephone. At 5:06pm there was a call of 14 seconds from Russell's mobile telephone to the accused's mobile telephone. The accused

and Russell kept in contact up until Russell's death. On 25 August 2008, Wendy Hassett purchased two mobile telephones in her name which she gave to the accused and Russell. Between 26 August 2008 and 1 October 2008 there were 29 contacts between these two mobile telephones.

[44] On 26 August 2008, Russell stated to the accused in the presence of Wendy Hassett to stick to his story and that he should be alright. Russell further told the accused that he should not have told police that he had been to Tamara Murphy's house.

[45] At some point Russell delivered a toolbox to Matthew Poe. Gemma Beattie arrived in Alice Springs on 1 September 2008 and stayed for about three or four days. During that visit Gemma Beattie and Wendy Hassett went to Mr Poe's house and took possession of the toolbox. Whilst at Mr Poe's place they removed a pistol from the toolbox and cleaned it. They later took the toolbox back to Ms Hassett's place and gave it to Russell who buried it under the shed floor. Police later searched the shed and found the hole where the toolbox had been buried but not the pistol. Ms Hassett asserts that Russell retrieved the pistol, chopped it up and scattered it at a beach in Queensland.

[46] Russell told others including Angela Russell, Gemma Beattie and Wendy Hassett either directly or in words to the effect that he had killed the deceased. Russell demonstrated a relationship of closeness to the accused

which is reflected in contact between the two after the deceased's disappearance.

[47] Both the accused and Russell subsequently relocated to Queensland. They kept in contact up until Russell killed himself on 7 May 2010. Investigators lawfully intercepted telephone services used by Russell and the accused. Several of those conversations demonstrate that Russell and the accused maintained a relationship subsequent to the deceased's disappearance. The recordings demonstrate that both parties believed their conversations were being intercepted by police but there was a concern about investigations that were occurring in Alice Springs that they did not want to discuss on the telephone.

[48] Prior to his suicide, Russell participated in a conversation with Ms Hassett which she recorded. In that recording Russell asserted that the accused was present and was involved in the killing of the deceased. He marked a street directory in her presence. After the recorded conversation and prior to his suicide, Russell also asserted that this killing was the first time he had another person with him and that he had given the accused jobs to do to cement trust and that he had wanted the accused to be his right hand man in being a hit man.

[49] Police seized the recording and the map. Police arrested the accused in Queensland on 11 May 2010 and extradited him to Alice Springs. Whilst on the plane to Alice Springs, the accused engaged in a conversation with

Detective Richardson. The accused posed a hypothetical situation in which he admitted being with Russell when the deceased was killed but suggested he played no part in the killing.

[50] Police located the deceased's body buried in a shallow grave adjacent to the Plenty Highway as was indicated in the map that Russell had marked. Police further located three beer bottles in the vicinity which were the types that the deceased, the accused and Russell were known to prefer. The XXXX Gold beer bottle showed an expiry date of 12 March 2009. The Corona bottle showed an expiry date of 8 January 2009. Investigations have since established that beer bottles are manufactured and dispatched to liquor outlets nine months prior to their expiry date.

[51] Forensic examination of the body confirmed the identity of the human remains to be that of Peter Murphy. The deceased's skeleton was fully clothed and matched the description of the clothing worn by him on 17 August 2008 at the Town and Country Tavern. A sim card was located in the deceased's pocket and investigations confirmed this belonged to his mobile telephone.

[52] On 8 and 9 June 2010, an autopsy was conducted by Forensic Pathologist, Doctor Terrence Sinton. Dr Sinton established that the deceased suffered two bullet holes to the left side of his skull and blunt force trauma to his left cheek. A ballistic expert later identified the projectiles as being from a .22 calibre firearm.

[53] Police served an ex officio indictment on the accused on 25 November 2014. Prior to this a surveillance device was lawfully installed in his residence and an interception of the mobile telephone service he was known to use was obtained.

[54] On 8 February 2015, whilst being quizzed by his partner Donna Olver about whether the allegations were true he commented “Who knows?...The only persons that does is me, Greg Russell and Peter Murphy – (inaudible). Nobody will ever know.”

Notices of hearsay evidence – general considerations

[55] Four Notices to Admit Hearsay Evidence have been served. At the commencement of the voir dire, a number of items of proposed hearsay evidence were either no longer pressed by the Crown or objections were no longer maintained on behalf of the accused. The parties have indicated that some of those matters may need to be revisited in the light of these rulings. The Crown relies on s 65(2)(c) and (d) of the UEA as both “representors”, Russell and Peter Murphy are deceased and therefore “not available” for the purposes of the hearsay exceptions. Section 65(2)(c) and (d) permits the admission into evidence in these circumstances of a representation seen heard or otherwise perceived by a person if:

> (c) it was made in circumstances that make it highly probable that the representation is reliable; or
>
> (d) was:
>
> > (i) against the interests of the person who made it at the time it was made; and
> >
> > (ii) made in circumstances that make it likely that the representation is reliable.

[56] It is not in dispute that the onus is on the Crown to satisfy the requirements for admission under either s 65(2)(c) or (d). Section 65(c) significantly expands upon the range of statements that were admissible at common law as part of the *res gestae*.[6] Section 65(2)(c) does not impose the common law temporal element "shortly after" however the evidence may only be admitted if the representation is made in circumstances that make it "highly probable" that it is reliable. The Court must consider the circumstances in the relevant sense. It is necessary to consider the circumstances both before and if relevant, after the making of the representation that bear on the reliability of the representation. A number of observations have been made in respect of the application of s 65(2)(c). In *R v Ambrosoli* Mason P said:

> …since the matter to be determined is the admissibility of the evidence of the person who saw, heard or otherwise perceived the previous representation the focus remains the reliability of the representation, not (directly) the reliability of the asserted fact. [7]

[6] *Conway v The Queen* (2000) 98 FCR 204.
[7] (2002) 55 NSWLR 603.

[57] In *Conway v The Queen* the Court observed:[8]

> We think it is legitimate for a trial judge to have regard to evidence of what the maker of the previous representation has said on other occasions, when determining whether or not it is highly probable that a particular statement was reliable.

[58] The authorities make it clear that the exceptions to hearsay should be interpreted strictly. In *Conway v The Queen* it was said that in order for a representation to be admissible under the section the requirement was "an onerous one". That was because the section has the potential to operate unfairly against an accused person. For example, it has been held that the test would not necessarily be satisfied simply because a representation was made to a police officer or made in the context of an understanding that a false statement would expose the maker to prosecution.[9] Relevant "circumstances" have been held to mean "the circumstances in which the representation was made, its factual setting at the time it was made".[10] In *Williams v The Queen*[11] it was acknowledged the question for the Court was whether the circumstances in which the representation was made, make it unlikely that the representation was a fabrication: "the trial judge was entitled to consider the other available evidence as to all the circumstances in which the representation was made".

[8] (2000) 98 FCR 204 per Miles, Von Doussa and Weinberg JJ at [145].
[9] *Munro v The Queen* [2014] ACTCA 11 per Refshauge ACJ and Penfold J at [5] – [14], as cited from Odgers pg 413.
[10] *R v Mankotia* [1998] NSWSC 295, p10.
[11] (2000) 119 A Crim R 490 at [53] – [54].

[59] Additional considerations apply to s 65(2)(d). This is especially the case here with respect to the admissions made by Russell that simultaneously implicate the accused. To satisfy s 65(2)(d) the representation must be shown to be against the maker's interest and to be made in "circumstances" that make it "reliable". Similar considerations apply to "circumstances" as discussed with respect to s 65(2)(c). Section 65(2)(d)(ii) does not require the characteristic "highly probable" to be met in respect to reliability, but rather "reliable".

[60] Since the voir dire hearing in this matter, the High Court has had occasion to consider the application of s 65(2)(c) and (d) in *Sio v The Queen*,[12] a case involving the admissibility of an admission by an accomplice against the appellant. Briefly, the facts in *Sio* were that Mr Sio drove the alleged co-offender, Mr Filihia to a brothel in Clyde, New South Wales. Mr Filihia entered the brothel alone, armed with a knife, intending to commit robbery. During an altercation, Mr Filihia fatally stabbed Mr Gaudry, who worked at the brothel. Mr Filihia removed a pencil case from Mr Gaudry's back pocket which contained cash. He left the brothel, running past Mr Sio's car. Mr Sio caught up with and collected Mr Filihia, and accelerated away from the scene. Mr Sio was charged with the murder of Mr Gaudry and with armed robbery and wounding. Mr Filihia refused to give evidence at Mr Sio's trial.

[12] [2016] HCA 32. It is acknowledged counsel for the Crown helpfully drew the decision to the Court's attention since the voir dire.

[61] The prosecution tendered two electronically recorded interviews, and two supplementary statements given by Mr Filihia in which he named Mr Sio as the driver of the car and as the person who had given him the knife. The trial judge admitted this evidence as an exception to the hearsay rule when the maker of the representation is unavailable, where the representation was against the interests of the person who made it at the time it was made and was made in circumstances that make it likely that the representation was reliable.

[62] At the time of the hearing in this matter, the Crown drew attention to the comments of Adamson J in the New South Wales Court of Criminal Appeal in *R v Sio*: "accordingly the question arises whether the representation was made in circumstances that make it likely that the representation is reliable within the meaning of s 65(2)(d)(ii) of the Act. In making this assessment, I am not assessing the credibility of Mr Filihia's evidence since this remains within the province of the jury: *R v Shamouil*.[13] I am required to assess whether the circumstances make it likely that the representation is reliable".[14] Further, reference was made to Leeming JA's approach in relation to s 65(2): "Those paragraphs are not directed to any particular asserted fact, but instead to the reliability of the representation considered as a whole".[15] There it was held it was not relevant to distinguish between representations made by Mr Filihia which were exclusively against his own

[13](2006) 66 NSWLR 228 at [56] per Spigelman CJ, Simpson and Adams JJ agreeing, referring to *R v Cook* [2004] NSWCCA 52 at [43] per Simpson J; see also *R v XY* (2013) 84 NSWLR 263.
[14] [2013] NSWSC 1412, [54].
[15] *Sio v The Queen* (2015) 249 A Crim R 533at [27].

interests and representations relevant to Mr Sio.[16] His Honour also held that while it is possible that Mr Filihia was motivated by animosity towards Mr Sio, that possibility did not preclude the conclusion that the circumstances made it likely that the evidence was reliable.[17]

[63] Counsel for the Crown emphasised the distinction of the roles between judge and jury, consistent with the approach taken in *R v Shamouil.*[18] Attention was also drawn to *R v Ambrosoli,*[19] for the proposition that the assessment of reliability does not exclude consideration of evidence contained in other parts of the Crown case in terms of assessing the circumstances of the making of the representation. Reliance was placed on Mason P's discussion in *Ambrosoli*:[20]

> Nevertheless, whilst it was open to his Honour to consider the consistency of what was said with the other material in the Crown case, this is only part of the inquiry as to whether those circumstances make it probable or highly probable that the representation was reliable.

[64] For the purposes of determining whether a representation is against the interests of the person who made it, s 65(7) provides that a representation is taken to be against the interests of the person who made it if it tends to include damage to the person's reputation; or to show they have committed an offence for which they have not yet been dealt with; or that they are liable in an action for damages.

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[16] *Sio v The Queen* (2015) 249 A Crim R 533at [34].
[17] *Sio v The Queen* (2015) 249 A Crim R 533at [35].
[18] (2006) 66 NSWLR 228. Now confirmed in *IMM v The Queen* (2016) 90 ALJR s 29.
[19] [2002] 55 NSWLR 603.
[20] [2002] 55 NSWLR 603 at 613.

[65] Overall, the Crown submitted that many of the objections taken to the admission of evidence that is the subject of the Notices were flawed as they focused on the credibility of the evidence, rather than the circumstances of the making of the representations. Further, it was contended that consideration was to be given to all of the surrounding circumstances including those which corroborate the representations and add to their consistency.

[66] With respect to consideration of the representations made by Russell which implicate the accused, the High Court decision of *Sio v The Queen* is particularly relevant and has necessarily influenced a somewhat revised approach taken here. The High Court held that the trial judge in *Sio* was in error in admitting the hearsay evidence of the co-offender who stabbed the victim that "Mr Sio gave him the knife". Further, it was held the Court of Criminal Appeal (NSW) was in error in taking a "compendious" approach to s 65 and upholding the trial judge's ruling. The error was manifest in the Court of Criminal Appeal's approach to considering the issue of the likely reliability of the accomplice's statement (that the appellant gave him the knife) by examining the "overall impression" gained from his evidence as a whole.[21]

[67] The High Court held s 65 requires the court to identify each material fact that would be proven by a hearsay statement and to apply the section to the

[21] *Sio v The Queen* [2016] HCA 32 at [52].

particular statement being considered.[22] This in turn requires that the circumstances of the making of the statement suggest that the representation is likely to be reliable and the facts asserted true.[23] It was held the section operates on the footing that to admit hearsay evidence, the circumstances in which the representation was made are such that "the dangers which the rule seeks to prevent are not present or are negligible in the circumstances".[24] Examining the particular circumstances presented by the facts in *Sio*, it was noted that it was unlikely that the accomplice's recollection was incorrect, and while the totality of the accomplice's statements to police were against his own interests, the specific statement that the appellant gave him the knife and put him up to the robbery were "plainly apt to minimise his culpability by maximising that of Mr Sio".[25]

[68] The High Court expressly approved of the statement by Mason P in *R v Ambrosoli*,[26] in the context of the discussion on s 65(2)(c) to the effect that the provision seeks to focus attention upon the circumstances of the making of the representation to determine the likelihood of its reliability, but that:[27]

> Evidence of events other than those of the making of the previous representation [can] throw light upon the circumstances of the making of that representation and its reliability as affected thereby.

[22] Ibid at [55] – [57] and [61].
[23] Ibid at [63].
[24] Ibid.
[25] *Sio v The Queen* [2016] HCA 32 at [68], citing *Walton v The Queen* (1989) 166 CLR 283.
[26] (2002) 55 NSWLR 603 at [28]-[29].
[27] (2002) 55 NSWLR 603 at [28]-[29].

[69] The focus when considering the representation directed by s 65(2)(d)(ii) is not to the apparent truthfulness of the person making it, but the objective circumstances in which it was made. The issue is whether a trial judge is affirmatively satisfied that, notwithstanding the hearsay character of the evidence, it is likely to be reliable evidence of the fact asserted.[28] The High Court also confirmed that the circumstances in which the representation was made may include other representations which form part of the context in which the relevant representation was made. It was said a representation may, for example, be demonstrably unreliable because it is followed by a specific retraction of the assertion of the relevant fact. Statements that are demonstrably or inherently incredible, fanciful or preposterous may be circumstances forming part of the context in which a relevant representation is made which tend against a positive evaluation of the likely reliability of the representation.[29]

[70] A further part of the High Court's reasoning emphasised with respect to the circumstances in *Sio*, was that had Mr Filihia pleaded not guilty and he and Mr Sio been tried together, Mr Filihia's hearsay statements would not have been admissible in a joint trial against Mr Sio. That is because s 83 of the UEA preserves the exclusionary operation of the hearsay rule in respect of evidence of an admission by a co-accused.

[28] *Sio v The Queen* [2016] HCA 32 at [70].
[29] *Sio v The Queen* [2016] HCA 32 at [71].

[71] Plainly the issues here are required to be resolved in a manner that is consistent with the approach outlined by the High Court in *Sio v The Queen.*[30] The approach to admissibility here is to ensure the representations are not dealt with in a compendious manner; the particular fact sought to be proven and the particular representation to be adduced in evidence as proof of that fact must be identified, and the circumstances in which that representation was made may then be considered in order to determine whether the conditions of admissibility are met. The High Court held this process must be observed in relation to each relevant fact sought to be proved by tendering evidence under s 65.[31]

[72] Further, when s 65 refers to "a representation", it is referring to the particular representation that asserts a relevant fact that is sought to be proved. This is confirmed by s 65(2)(d)(i), "which requires that *the* representation tendered against the other party is able to be seen to be against the interest of the maker of the statement".[32]

[73] Representations relied on should however be considered in context to determine whether read together, they "constitute an admission or answer against interest".[33] This does not however support a "compendious" approach to the reliability of the whole of a hearsay statement inculpatory of the accused.

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[30] [2016] HCA 32.
[31] *Sio v The Queen* [2016] HCA 32 at [57].
[32] *Sio v The Queen* [2016] HCA 32 at [56].
[33] *Sio v The Queen* [2016] HCA 32 at [59]; approving of the approach taken in *R v Suteski* (2002) 56 NSWLR 182 at 196 [93]-[94].

[74] As already indicated, decisions on admissibility must be made on the basis that it is, "no light thing" to admit a hearsay statement against an accused and being cognizant of the continuation of the rule finding expression in s 83 of the UAE.[34] Admission of evidence under the section should only occur when the inherent dangers that the hearsay rule seeks to prevent are not present or are negligible.[35] Relevant considerations with respect to the reliability of the representations in *Sio* included the circumstance that the representor was an accomplice in the commission of the crimes.[36] In the circumstances, a "plan of falsification" could be expected given the interest of one co-offender to shift blame, especially where the circumstances also included the opportunity to seek to curry favour with authorities. This factor is recognised within the framework of s 165(1)(d) of the UEA: "evidence that may be unreliable". While in *Sio* the accomplice's statement satisfied s 65(2)(d)(i), it did not follow that the circumstances in which it was made were such that the statement was likely to be reliable as evidence against Mr Sio.

[75] Evidence of other events can throw light on the making of the representation and its reliability.[37] The focus is to be the objective circumstances, not to the apparent truthfulness of the representation. The true concern of the provision is with the identification of circumstances which of themselves warrant the conclusion that the representation is reliable notwithstanding its

[34] *Sio v The Queen* [2016] HCA 32 at [60].
[35] *Sio v The Queen* [2016] HCA at 32 at [63].
[36] *Sio v The Queen* [2016] HCA 32 at [60].
[37] As noted above from *R v Ambrosoli* (2002) 55 NSWLR 605 at 615, per Mason P.

hearsay character. It is the circumstances that are at issue, not a general assessment of whether or not it is likely that the representor is a reliable witness.[38]

Hearsay notice number 1:[39]

[76] This Notice concerned a number of representations by Russell. No rulings will be made with respect to those items no longer pressed or objected to. There was an indication that depending on other rulings, some of those matters may need to be revisited.

[77] Part of the context to these rulings is that the Crown case against this accused is primarily circumstantial. A further matter of context is that the Crown seeks to prove the accused was engaged in drug trafficking with Russell that, at the relevant time, provided a motive for Russell to kill the deceased. It also revealed the relationship between Russell and the accused. In my view, evidence of the association between the accused, Russell and/or the deceased is relevant even though it shows they may have been engaged in selling drugs together at the relevant time. I do not regard that part of the evidence that is directed towards proof of the nature of the relationship between Russell, the accused and/or the deceased, to be in the nature of tendency evidence. As the Crown case is currently understood, evidence of drug dealing is introduced to primarily explain the relationship between the accused and Russell. It also places the principal allegations in some

[38] *Sio v The Queen* HCA [2016] 32 at [72].
[39] 28 May 2014.

context. It would be artificial not to allow evidence of this kind. It is also relevant to Russell's motive given the evidence that Russell was pursuing the deceased in respect of a drug debt. Because the evidence of the drug dealing by various parties is not directed to proof of the charge, save for showing an association between them and a motive on the part of Russell, it falls outside of the requirements of tendency evidence. Whether it can be proven Russell then enlisted this accused to assist with the killing or assist Russell in the aftermath will primarily be the subject of other evidence. Appropriate directions may be fashioned to deal with the drug dealing evidence. This is not out of the ordinary. The jury will need to be directed about the use that can be made of that evidence and not to employ tendency reasoning. Although broadly the evidence revealing the relevant relationship between the accused and Russell is admissible on that basis, the process of reasoning outlined in *Sio v The Queen* must be applied to any hearsay statements that implicate the accused.

Item 1

[78] **The representation contained in the Notice under Item 1 and its extension to the further representation of Russell stating that he and the accused were dealing in drugs will be admitted. Evidence of Mr Goodwin's observations about the relationship between the accused, Russell and Murphy will be admitted.**

[79] This item alleges that at around December 2012 and January 2013, Peter Goodwin witnessed Russell make a representation that he "got the shits with

Peter because Peter owed Greg over 100 grand. The debt was all drug related". The circumstances in the Notice were that Russell was a silent business partner of Peter Goodwin. Russell and Peter Goodwin were good friends and would tell each other things in faith.

[80] Mr Goodwin gave evidence of his own overall relationship with Russell, to the effect that Russell was a silent partner in his business because Russell had a criminal record and could not have participated formally in the business. Russell introduced Mr Goodwin to the deceased. Mr Goodwin's only dealing with the deceased was fixing his car. He also stated that Russell had told him the deceased was from Yuendumu. Mr Goodwin believed the deceased and Russell were selling cars at Yuendumu where the deceased worked. Cars were picked up from Adelaide for Mr Goodwin's business. Mr Goodwin had also met the accused at a barbeque at Russell's place in 2006 or early 2007. Mr Goodwin saw the accused at his business premises "a couple of times". Mr Goodwin had gone to Adelaide with Russell to purchase cars in February or March in 2007. They each purchased a car. They drove the newly purchased cars back to Alice Springs.

[81] According to Mr Goodwin, Russell told him there was "some green in the back of it". Mr Goodwin said he was not happy about this and terminated both the business relationship and later the personal relationship with Russell. The end of the personal relationship was also brought about by Russell sleeping with Mr Goodwin's daughter and his daughter becoming

pregnant in 2007/2008. The baby was born in August 2008. Mr Goodwin said he thought he terminated the business relationship in the second half of 2007. Mr Goodwin said Russell had told him about the accused being involved in delivering cars to Yuendumu; that Russell had said "me and the wog have got to go to Yuendumu tomorrow. We've got a delivery to do". He said he did not see what Russell was taking with him. He said this would have happened a week after they got back from Adelaide. He did not know how Russell got to Yuendumu. Notwithstanding the relationship was later terminated, the representation there was "some green in the back fit" is against Russell's interest and in context is reliable. The representation he and the accused were delivering cars in Yuendumu is highly reliable in the context of the business relationship. The representations were made prior to the relationship souring.

[82] Mr Goodwin said Russell told him that Murphy (the deceased) owed him over $100,000. This was said in early 2007. He had said "I've got to go back out to Yuendumu, see Murphy" and "the arsehole owes me over $100,000 and he hadn't paid me". That was the only time Russell ever spoke about the deceased owing him money. Not long before, Russell also told Mr Goodwin he was dealing marijuana with the accused and the deceased. Mr Goodwin said that was at a different time. It was a month before the conversation about money.

[83] Later in evidence in chief Mr Goodwin said the amount was "$150,000-odd". He said he could not put an exact figure on it. He said he knew Mr Russell went to Yuendumu but he did not know if the accused went.

[84] In cross examination Mr Goodwin expressed some uncertainty about the timing and dates of the conversations. He also acknowledged he did not have a good memory with respect to a conversation concerning cannabis and Yuendumu, including a reference to the deceased and the accused being present. He could not recall what any of the persons present specifically said. His recollection was poor.

[85] In relation to the representation that Russell said the deceased owed him $100,000 dollars, in my view that representation is reliable in the context of Russell and the deceased's relationship. That the amount Mr Goodwin recalled changed in his evidence is not significant in this context. There is other material relevant and supportive of that assertion. It is not a representation made with respect to the accused.

[86] It is the case that Russell was not only a seasoned criminal, but utilising his own later admission, it is likely he was a multiple murderer, however as is clear from *Sio*, it is not the honesty of the representation but the circumstances in which the representation was made that must be the focus. Overall, Russell's character may be seen as a relevant circumstance in which to assess reliability, but on these facts, he and the accused were operating in

a particular milieu involving drugs, without at that time the pressure of an investigation by authorities influencing the reliability of the representations.

[87] Although parts of Mr Goodwin's evidence are somewhat confusing, the representation by Russell to the effect that the accused was involved in drug dealing would appear to relate to a conversation that was a month or two before the conversation about Russell stating Murphy owed him $100,000 or $150,000 dollars. Mr Goodwin said the conversation occurred at his workshop. He said Russell was there, Peter Murphy had turned up and the accused was there. Russell said "I'm doing a deal with me and the wog and Peter Murphy is our agent out at Yuendumu". More particularly he said "we've got a load of green that's going to go to Yuendumu and me and the wog's taking it out and Peter Murphy is selling it for us out at Yuendumu". Mr Goodwin said he did not know if the accused went to Yuendumu but that Russell did.

[88] In cross examination about that particular conversation, Mr Goodwin said it occurred when he was working on Russell's car and the accused turned up. He said the deceased had come to town and it was just a casual conversation. Asked if he had a good memory of that conversation he said "not really, no". Mr Goodwin agreed that he would have spoken, Russell would have spoken and that Peter Murphy would have said something. Asked if he remembered what they said, he said he did not remember exactly the conversation. Then when asked "you don't know if Murphy said anything, is that right?" He said "not particularly, no". Asked about whether the accused said anything

and he said “maybe, I want another beer – that might have been it – I don’t know”.

[89] The fact sought to be proven by the first representation is that the deceased owed Russell money for a drug debt. In my view that is clearly reliable when the context is understood. Closely associated is the fact that Russell was a drug dealer. The next fact sought to be proved by the further representation is that the accused was involved in drug dealing with Russell and the deceased at Yuendumu. These facts that are sought to be proven are part of the Crown’s circumstantial case. I have set out the relevant representations above. Although Russell in strict terms was an accomplice of the accused, at the time these representations were made, the circumstances were not unreliable. Russell was a trusted business partner of Mr Goodwin at the relevant time. As far as can be seen, at that time Russell had no reason to minimise his own conduct or implicate the accused to Mr Goodwin. This all occurred well before any police involvement and investigation. There are weaknesses in the evidence of Mr Goodwin in terms of his recollections but not in a manner impacting on the reliability of the circumstances in which the representations were made. There is other evidence supportive of the facts sought to be proven by Russell’s representations to the effect that the accused was involved in drug dealing with Russell and that Russell was owed a substantial amount of money by the deceased for drugs. The weakness in Mr Goodwin’s recollections will no doubt be tested further at trial, but that does detract from the reliability

of the circumstances. In my view the representations relevant to Item 1 made by Russell are admissible pursuant to s 65(2)(c) and (d). Further, Russell's statements about there being "green" in the car and intended activities in Yuendumu are admissible under s 66A.

[90] I would not exercise the discretion to exclude any of the representations in Item 1. The evidence is not prejudicial in the relevant sense once the facts and circumstances are fully appreciated. The evidence is significantly probative of the nature of the relationship between Russell, the deceased and the accused.

Item 2:

[91] **Not Pressed. No ruling made.**

Item 3:

[92] **Not Pressed. No ruling made.**

Item 4:

[93] **Not pressed. No ruling made, save that representations of Russell concerning his involvement in the drug trade consistent with Item 1 will be admitted. Evidence with respect to the relationship between the accused, Russell and the deceased may be admitted.**

[94] This item concerns representations of burying firearms on the Ross Highway. It is no longer pressed, so no ruling will be made in respect of it, however the Crown seeks to include the representations similar to those dealt with under Item 1 which go to Russell's involvement in the drug trade and the accused's involvement with him.

Item 5:

[95] **Not Pressed. No ruling made.**

Item 6:

[96] **No longer objected to. No ruling made.**

Item 7:

[97] **No longer objected to. No ruling made.**

Item 8:

[98] **No longer pressed. No ruling made.**

Item 9:

[99] **No longer objected to. No ruling made.**

Items 10 and 12

[100] **Item 10: Admitted.**

[101] **Item 12: Not admitted in the exercise of the discretion under s 137.**

[102] Item 10 refers to Russell trying to get the accused to slow down while the accused was driving so that he would not be caught with drugs in the car. This arose when Russell took Ms Beattie to the Black Uland's Club House at Cooper Plains with the accused. When the accused was driving them back to Daisy Hill, Ms Beattie states she saw Russell smacking the accused on the back of the head and telling him to slow down because "he knows what is in the car". The next morning she also heard Russell trying to get the accused to hurry up and get going. She also heard a phone conversation the next day when Russell was talking in an animated way about possibly hitting a kangaroo, that there may be a dent in the car that would attract police

attention and that there was speed in the car. Later there was interaction between Ms Beattie and Russell when she visited Alice Springs and he picked her up from the airport. After being stopped and searched by police, Russell stated to her that police were a little bit too late. Those representations by Russell are sought to be admitted to prove the fact that Russell was engaged in dealing drugs and that the accused and he were dealing drugs. In essence to prove the nature of their relationship or association. Russell's conduct and words were in effect admitting to his biological daughter that he was dealing in speed. Ms Beattie's observations were made in the context of the two engaging in criminal activity, but that is not the point. It goes towards the nature of the association between the accused and Russell. There is no known police involvement at the time (save for being searched later in Alice Springs). In my opinion, the circumstances in which the representations are made are highly reliable, being made to Ms Beattie and somewhat confirmed by the conduct of Russell and the accused that she gives evidence about. Ms Beattie became involved with Ms Hassett by cleaning Russell's gun, but those activities that would otherwise cast doubt on the reliability of the circumstances did not arise until approximately one year after the representations covered in Item 10.

[103] Item 12 concerns a representation by Russell to Ms Beattie that the accused would do anything Russell asked him. As a description of what was occurring between Russell and the accused, the representation is in such

general terms that it does not contribute to an understanding of the relationship, certainly not to the point that it would reliably assist in the fact finding process to assess, with the other evidence, whether the accused would be a party to murder with Russell. The representation is not against Russell's interest so is not admissible under s 65(2)(d). It could only be admitted if it fulfilled the requirements of s 65(2)(c). Although the circumstances in which this representation is made are highly reliable and would fulfil the criteria under s 65(2)(c), the probative value of the representation, even taken with other evidence is low. When it is considered that the Crown will seek to use this evidence with other evidence to suggest or to prove the accused would go so far as to kill or assist to kill on Russell's instructions, it can be seen the prejudicial effect of allowing such evidence far outweighs its probative value. I would exclude this item of evidence in the exercise of the s 137 discretion.

Item 11:

[104] **No longer objected to. No ruling made.**

Item 13:

[105] **Not pressed. No ruling made**.

Item 14:

[106] **Admitted, but not to extent to the evidence of offers to supply Ms Murphy's friends.**

[107] This item refers to evidence to be given by Tamara Murphy that when she was at her home, she overheard Russell saying on the phone that the deceased owed him about $350,000. The conversation is alleged to have

occurred around 13 August 2008. Russell was staying at her home. Ms Murphy told the Court that Russell had left a trailer and tools at the house. He was storing items at the house. They would discuss illicit drugs, including the supply of certain drugs to her friends. She said Russell, his family and the accused went to the Finke Desert Race in June of 2008. Russell returned with the accused from the race. Russell told her there were not as many drugs left as they had a great weekend. When Russell was speaking on the phone, she said she thought he was talking to the deceased. On the phone, he was angry and swearing and screamed that the deceased owed him money. Ms Murphy told the Court he said "you owe me enough money – I could buy a fucking house in Melbourne". This conversation took place about a week before the deceased went missing. She spoke to the deceased after the call. She said that conversation was about Russell hardly ever being there.

[108] In cross examination Ms Murphy agreed she had been asked a lot of questions about the deceased's disappearance by police. She agreed she had not told police about Russell supplying her friends with drugs. She said she was not asked about that. She agreed that at the inquest she had only said Russell got some heavy drugs to take to Finke Desert Race. She agreed she had not spoken of the conversation previously.

[109] Although there has been a shift in the evidence about overhearing the conversations about the deceased owing money, there is nothing in the gist of the conversation, the representations, or the overall circumstances that

lead me to consider it is unreliable in proof of the fact that Russell was owed a drug debt, dealt in drugs or that his group of friends including the accused had drugs at Finke River. This latter part of the representation is relevant to the overall association and relationship between Russell and the accused.

[110] The conversation about Russell offering to supply the deceased's friends does not meet the reliability threshold. If I am wrong, I would in any event exclude it in the exercise of the s 137 discretion.

Items 15 to 17:

[111] **No longer objected to. No ruling made.**

Items 18 and 19:

[112] **Not pressed. No ruling made**

Item 20:

[113] **No longer objected to. No ruling made**

Items 21 and 22:

[114] **Not pressed. No ruling made**

Items 23 and 24: Excluded

[115] These items concern representations made by Russell to his then partner Wendy Hassett on about 7 May 2010 that he had killed the deceased and the accused had helped (Item 23). Further, the representations state where he had buried the deceased (Item 24). These representations were recorded by Wendy Hassett.

[116] The representations amount to statements against interest by Russell, but in my view they should not be admitted against the accused. The circumstances in which they were made may be sufficiently reliable if they were to be considered against Russell, but not in respect of the accused. It is here the reasoning of the High Court in *Sio v The Queen* is highly relevant. Given the recording of the conversation, there is no question of any confusion as to what Russell actually said. The representations that inculpate the accused were made in grossly unreliable circumstances. While this is not a case of evidence that Russell was attempting to secure favourable treatment for himself from authorities, the whole circumstances are unreliable as the representations were made to Ms Hassett who perceived she needed to cooperate with authorities.

[117] Not only was Russell an accomplice, but Ms Hassett who arranged the recording was actually or potentially implicated, at least with cleaning and hiding a gun and silencer that was to her knowledge most likely to have been involved in a criminal endeavour. She seemed to have some knowledge of the murder. This may be drawn from the way the conversation started. I am unable to consider her to be a completely innocent party. Both Ms Hassett and Russell had motivations to implicate the accused. As indicated previously, Russell was a seasoned criminal including on his admission, a multiple murderer. It is likely Russell did not want to see Ms Hassett prosecuted or for Ms Hassett's daughter to be affected detrimentally. Ms Hassett, in general terms was motivated to ensure Russell would hand

himself into police, which in turn may have absolved her from criminal responsibility.

[118] Russell may have been making preparations to either suicide or to be arrested but he was well motivated to implicate the accused to possibly share the responsibility for the crime he accepted he committed and/or to ensure Ms Hassett would not be criminally liable herself. Further, Ms Hassett had knowledge or a belief of either a reward or at least the possibility of financial assistance if she cooperated with police. Her further concern was her daughter and Ms Hassett was motivated to assist police, probably to protect herself against criminal proceedings. After a police search of their residence, Ms Hassett became involved in assisting police to obtain information, all the time in the knowledge she was believed to be an accessory after the fact.[40]

[119] Further, the way the recorded conversation commenced, reeks of a set up or staged conversation: "Hassett: What happened? Tell me. I'm going through hell Greg… with… You fuckin gotta tell me what's happened. Be honest. I know someone else was with you. What happened? Just tell me".

[120] Ms Hassett has not satisfactorily explained why the conversation commenced in this manner, that is by immediately indicating or suggesting that someone else was involved. Her diary notes indicate detailed interactions with police including a discussion to the effect that she may go

[40] See eg. Diary entries, Exhibit 4.

to prison, that she knew police had spoken to others, including the accused and she would help police obtain a confession from Russell.

[121] The representations in summary are that Russell and the accused picked Peter (the deceased) up from the pub and took him out of town. Peter was involved because of drugs. He owed (Russell) money for drugs. The accused came and was interested because of money. It took a few years to get his trust. The accused dug the hole and threw the deceased in it.

[122] There is other evidence that may go some way to implicating the accused, for example, evidence around the relevant time Russell picked up the deceased from the hotel, and circumstantial evidence that Russell and the accused were dealing drugs. While Russell's representation was accurate in relation to the location of the deceased's body, I am not satisfied at all as to the reliability of the circumstances in which any of the representations against this accused were made. I find the circumstances in which these representations were made, positively unreliable.

[123] There are multiple reasons the representations concerning the accused do not meet the requirements of s 65(2)(c) or (d). In the lead up to Russell's representations, it is likely that Ms Hassett was engaged initially at least in covering up for Russell's criminal activities. This conversation did not take place until police effectively told Ms Hassett that they suspected her to have some knowledge or to be engaged in being an accessory after the fact. The overly self-protective tone of Ms Hassett's questions to Russell appear to be

designed to protect her from suspicion. “What are you talking like? Not since we’ve been together?” At the end of the conversation, “I’ve never known. I just can’t believe that.” This was quite a performance on Ms Hassett’s part. In my view Ms Hassett structured the conversation to protect herself. As indicated, she was also concerned about her daughter should she go to prison. It is likely that some scenarios were discussed with police during the period just prior to the recording when police, by necessity, and I am not to be taken as being critical about the police’s role, but police were liaising with Ms Hassett and signalling their suspicions. Ms Hassett also had some motivation to disparage Gemma Beattie’s evidence that was far more detailed about Ms Hassett’s role in cleaning the gun and silencer than Ms Hassett was prepared to reveal.

[124] Gemma Beattie’s evidence would also suggest Ms Hassett knew about Russell’s involvement in the murder before 30 April 2010. The only conclusion that can be drawn from the whole of the circumstances is Ms Hassett had multiple motivations to elicit a rehearsed statement from Russell. Police had effectively, on Ms Hassett’s evidence, told her they had questioned the accused and believed he and Russell had something to do with the disappearance or death. Ms Hassett knew the police believed the accused was involved in the killing. The police evidence on what precisely the conversations were between themselves and Ms Hassett is somewhat vague, but the circumstances lead me to find Ms Hassett, most likely for reasons of self-protection from criminal responsibility, rehearsed or

structured significant parts of the conversation with that end in sight. Ms Hassett also believed, possibly on the basis of what Russell had told her, that there may have been a reward for information about the deceased's disappearance. Ms Hassett was not sure of when she knew about that. At the committal proceedings, Ms Hassett indicated she spoke to police about a reward but that police had said that as far as they were concerned there was no reward. Ms Hassett agreed that since Russell's arrest she had financial assistance from police. Ms Hassett also asked police if she needed a lawyer but she said she was told that as she had not been cautioned, the evidence could not be used against her.

[125] It is impossible to know the motivations of Russell and whether he made a truthful statement in respect of the accused, but as was stressed in *Sio* it is not the truthfulness of the witness or the representation that is the focus, but rather the circumstances in which the representation is made. The representations concerning the accused are not intrinsically reliable in the same way that a statement against the representor's own interest may be. It is no small matter to allow evidence of a person who cannot be cross examined to be admitted that implicates another for murder. Russell was clearly emotional at the time of making the statement. It may have been because he was going to turn himself in, break up with Ms Hassett or possibly to commit suicide. The circumstances are positively unreliable.

[126] Although the map drawn by Mr Russell is accurate and reliable in terms of where the deceased was buried, this in no way means that his assertion the

accused assisted is reliable. Similar to what was pointed out in *Sio*, had Russell and the accused faced trial together, this evidence could not be tendered against this accused by operation of s 83.

[127] Although not canvassed with counsel, it is acknowledged it is possible there are other reasons the map may be admissible on an original evidence basis, for example, so that the jury are aware of how investigators found the deceased's grave, however references to the accused on the yellow sticky paper or using any part of a statement by Russell implicating the accused, will not be admitted.

Item 25:

[128] **Admitted on the basis of s 66A or on an original evidence basis.**

[129] This item concerns a conversation Wendy Hassett said she overheard. She said Russell told the accused to stick with his story and he should be right and that the accused should not have said that he had been to Tamara Murphy's house.[41] This conversation took place well before the circumstances already discussed that contributed to the significant unreliability evident in the representations of 2010, however it is unlikely this conversation is caught by the hearsay rule.

[130] It is the case that Russell became aware of the accused speaking to police. This is evidence relevant to the nature of the association between the accused and Russell and the fact that the relationship was such that Russell

[41] Statement of Wendy Hassett, 25 June 2010, para [40].

and the accused were discussing what occurred with police. It is admissible on the basis of s 66A. Russell is communicating his state of mind (apparent concern or knowledge) to the accused. In any event it is admissible on an original evidence basis, as the evidentiary value of the statement by Russell does not rely on its truth. I would not exclude this evidence on the basis of the discretionary exclusion as its probative value is significant in illustrating the association between the two at a relevant time.

Item 26:

[131] **Not Pressed. No ruling made.**

Item 27:

[132] **Not objected to. No ruling made.**

Items:28, 29, 30 and 31:

[133] **Not Admitted.**

[134] Evidence of these representations by Russell were given by Wendy Hassett. Ms Hassett says that Russell told her, after the recording on 7 May 2010, that this murder was the first time he had another person with him and that was why everything went badly; that he had given the accused jobs to do to cement trust so he could use him for bigger jobs; that he wanted the accused to be his right hand man – hit man; that Russell apologised to an ex-spouse of the deceased about not considering father's day; and that the accused had dug a hole that the deceased was buried in.

[135] If it were Russell on trial, there is every reason to think those representations would be admissible against him, not only with respect to

the actual commission of the murder, but also with respect to motive. For reasons that are similar to those given already with respect to evidence given by Ms Hassett and bearing in mind the approach taken in *Sio v The Queen*, these representations will not be admitted against the accused.

Item 32: Admitted under s 66A.

[136] This item includes Ms Hassett's evidence of her own observations of the accused and Mr Russell. She also gave evidence Russell said he and the accused were best mates. In my view this readily falls within s 66A. It is probative of the relationship between Russell and the accused and a contemporaneous representation about Russell's state of mind. There is other evidence on the point. What weight to be given to this evidence is a matter for the jury. It is not prejudicial in the relevant sense and will be admitted.

Item 33:

[137] **Not pressed. No ruling made.**

Item 34:

[138] **Not pressed. No ruling made.**

Items 35 and 36:

[139] **No longer objected to. No ruling made.**

Items 37, 38, 40 and 41:

[140] **Not pressed. No ruling made.**

Item 39:

[141] **Not objected to. No ruling made.**

Item 42:

[142] **Not objected to. No ruling made.**

Hearsay Notice No 2:[42]

[143] This notice concerns various representations made by the deceased. It was indicated on behalf of the accused that none of these items were in contention. No rulings have been made in respect of this notice.

Hearsay Notice No 3:[43]

Item 1: Admitted

Item 2: Admitted

[144] This notice contains two representations made by Russell. Item 2 was not in contention. With respect to item 1, evidence was given on the voir dire about the circumstances that Russell told Ms Hassett to buy two mobile phones. In my view Ms Hassett can give evidence about buying the mobile phones and giving one to the accused and the other to Russell. I do not regard the evidence that Russell told her to buy the phones solely as hearsay evidence. It is evidence explaining why Ms Hassett bought the phones and may in any event be admitted on that basis. Alternatively it may be viewed as the contemporaneous expression of Russell's intention for Ms Hassett to provide the phones and is admissible under s 66A.

[42] 5 May 2014.
[43] 5 October 2015.

Hearsay Notice No 4:[44]

[145] **No rulings made, none of the representations by the deceased in this Notice were in contention.**

Conversation between Sergeant Richardson and the accused on 15 May 2010: Not admitted

[146] I have set out the bare elements of the alleged scenario conversation. It is not necessary to set it out in full. The alleged conversation took place prior to police finding the deceased's body.

[147] Sergeant Richardson gave evidence on the voir dire. It can be accepted that after police had retrieved the map drawn on or about 7 May 2010 by Russell, a warrant was obtained for the extradition of the accused from Queensland to the Northern Territory. The accused accompanied police to Bundaberg Police Station. In the presence of his solicitor at Bundaberg Police Station, the accused declined to answer questions about the killing of Peter Murphy.

[148] Sergeant Richardson flew with the accused from Bundaberg to Brisbane. It was a small plane. In Sergeant Richardson's statement made in August 2014 he said the alleged scenario conversation occurred on the flight from Brisbane to Alice Springs, however, in his evidence he said he was clear that it occurred during the May 2010 Bundaberg to Brisbane flight. Sergeant Richardson realised this error when he spoke to current investigators and was given the manifest of the seating arrangements for the Bundaberg to Brisbane flight.

[44] 5 October 2015

[149] After the conversation in question, Sergeant Richardson told the accused that if he wished to tell him about that, he would put the tapes on in Alice Springs and "he can tell me that formally". He did not make a note of the conversation. He told the accused he would only record the conversation formally in an interview. The accused told him he wanted to speak to his lawyer. Sergeant Richardson agreed he had told the accused about how he could speak to him on tape in Alice Springs. More particularly, Sergeant Richardson arrived back in Alice Springs with the accused in the afternoon of 15 May. He said he did not make a note of the conversation as he was being as fair as he could to the accused.

[150] The reason Sergeant Richardson said he did not make a note or other record of this conversation was that he was not relying on it. He did not believe it was admissible at that time. He did not enter a record of the conversation in any of the police records. He believed he had told Detective Hamlyn about the conversation but had no record of it. He later said he could not recall specifically telling Detective Hamlyn. He did not attempt a recorded interview with the accused as he said he was giving the accused an opportunity to get legal advice.

[151] Once they arrived in Alice Springs the accused was taken to the Alice Springs Watch House. Sergeant Richardson recalled it was a busy time. The accused was to be charged before being taken before the court on the following Monday. Officer Richardson left the accused at the Watch House to be processed in the usual way and prepared the paper work for the bail

application. He had no contact with the accused, or his legal representative on the Sunday but saw him at the bail application on the Monday.

[152] After Sergeant Richardson flew home to Darwin he said he received a call from the accused's legal representative. The evidence was not clear about when he flew back to Darwin but it would appear to be on the Monday after the bail application. Sergeant Richardson could not recall the name of the lawyer. The lawyer made it clear the accused would not speak to police about the conversation. Sergeant Richardson could not recall whether it was he or the lawyer who raised the conversation. He said there was no discussion or details given or raised by either party during the phone conversation. He did not attempt to speak with the accused about the conversation between Saturday 15 May and when he spoke to the accused's lawyer at a later time.

[153] As to whether he contemplated taking the accused to an interview room, recording a caution and advising that he wished to speak to him about the conversation and whether he wanted legal advice, Officer Richardson said he was giving him the opportunity to obtain legal advice, as he was already represented at the time but that he did not want to jeopardise the fact that if the accused wanted to tell him, he wanted to be fair and frank that it was a "voluntary thing for his part to do". He said he was not going to force the issue and allow him time to talk to his lawyer. Because he was not contacted, he chose not to use evidence of the conversation at the bail hearing and committal, although Sergeant Richardson said he had ample

opportunity to do so. He chose not to because he had given the accused the opportunity to participate and he did not want to participate in a formal record of interview. Sergeant Richardson acknowledged that his impression was that if he taped the fact that the conversation had occurred, it would make it admissible.

[154] As the accused had not got back to him before the bail hearing, he did not pursue the matter. In relation to not making a note or record of the conversation, Sergeant Richardson said he was aware anything he had written down would need to be disclosed. He told the Court if he had invented a conversation it would have been a far better conversation than the one he had given evidence about. He said he had no intention of disclosing or utilizing the conversation and the decision to interview the accused had been "taken out of (his) hands" as the accused had said previously he did not want to speak with him and he was engaged with a lawyer. Sergeant Richardson said he would have written the conversation down if he was to challenge the accused on the conversation in a record of interview, but he did not choose to participate.

[155] Sergeant Richardson gave evidence at committal proceedings against the accused on 11 October 2010. He gave no evidence of the conversation at the committal. The accused was discharged at the conclusion of those committal proceedings. Sergeant Richardson said he did not tell the prosecutor about the conversation as he did not believe it was admissible at that time.

[156] During a coronial inquest in April 2011 into the disappearance of the deceased, Sergeant Richardson gave no evidence himself of the conversation, but was present when the accused gave evidence. The accused denied in his evidence that he was present or involved in the killing. Sergeant Richardson reminded counsel assisting the Coroner of the scenario conversation that he said he spoke to her about during preparation. His recollection was noted on a sticky note he gave to counsel that now cannot be found, although clearly the accused was asked by counsel assisting the Coroner about the conversation. When asked about the conversation at the coronial inquest, the accused claimed privilege. Sergeant Richardson made a statement on 27 August 2014 outlining the conversation. He told the Court he brought up the conversation with Counsel assisting as he knew the rules of evidence did not apply at coronial inquests. In his own evidence at the inquest Sergeant Richardson did not however reveal the conversation.

[157] Section 142(1) of the *Police Administration Act* provides, subject to s 143, that evidence of an admission by a suspect made to a police officer is not admissible as part of the prosecution case except in the circumstances provided for in s 142(1)(a) and (b). The confession or admission will be admissible if, in the circumstances provided for in (a), the substance of the confession or admission is confirmed by the person concerned, and with respect to (a) and (b) the confirmation or admission was electronically recorded and that recording is available to be tendered. Admissions that fall

outside of the scope of s 142(1)(a) and (b) will not be admissible unless the Court exercises a discretion in favour of admission under s 143.

[158] As Mildren J observed in *R v Charlie*,[45] s 142 envisages that admissions may be made either before or after questioning.[46] It is not to the point that the accused had refused to answer questions previously, as the operation of s 142 is not predicated on the admission being in response to questioning, official or otherwise as some other jurisdictions require. Admissions such as the conversation described are presumptively excluded by operation of s 142. The admission is then to be considered pursuant to the discretion to admit the conversation set out in s 143.

[159] There are many examples of courts admitting admissions into evidence on the basis of the discretion in s 143 even though there is non-compliance with s 142. Obvious examples are when there has been a failure or unavailability of recording equipment, refusal on the part of a suspect to cooperate with recording[47] or the general circumstances of how the admission came about.[48] As with the exercise of any discretion, each case must be considered on its own facts.

[45] (1995) 121 FLR 306.
[46] Ibid at 312 and see *R v Karui* [2016] NTSC 13.
[47] *Miles v The Queen* [1999] NTCCA 05.
[48] Eg. *R v Kanaris* [1999] NTSC 94, the admission was made to a police auxiliary, not part of the investigation.

[160] Section 143 provides:

> A Court may admit evidence to which this Division applies even if the requirements of this Division have not been complied with, or there is insufficient evidence of compliance with those requirements, if, having regard to the nature of and the reason 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.

[161] It is accepted that Sergeant Richardson could not reasonably be expected to record the conversation on the plane, however I do not find the explanation for not at least attempting to confirm the conversation particularly persuasive. The explanations given are somewhat contradictory. A further significant consideration is that the record keeping in respect of such an important conversation is so poor that in my view the evidence of the conversation cannot be relied on as being accurate, nor the explanation for not at least attempting to record a confirmation.

[162] If Sergeant Richardson had noted or made a record of the conversation in some timely way, accepting for argument's sake he perceived he was unable to proceed with an interview to confirm the conversation, there may well have been reason to find positively that the discretion should be exercised in favour of admission.

[163] The Court must have regard to "the nature of and the reason" for insufficient compliance and "any other relevant matters", when determining whether the admission of the evidence would not be contrary to the interests of justice.

In terms of "any other relevant matters", not making even a note of the conversation is a relevant factor. The Court must be concerned with reliability of the evidence after such an effluxion of time. In the 'scenario' conversation, if only brief details are misreported, or some mistake made with respect to recall, the consequences would be highly prejudicial. It cannot be ignored that when Sergeant Richardson made a statement in 2014, he recalled the conversation occurring on the wrong flight. To his credit Sergeant Richardson openly acknowledged the mistake. On one view, that is a very minor detail, however, any error in a minor detail when reporting the conversation, a hypothetical scenario, could change the whole meaning of what was intended to be communicated. In these circumstances, and bearing in mind the important historical underpinnings relevant to the administration of justice that led to the enactment of ss 142 and 143, and comparable sections in other jurisdictions, it would be quite wrong to excuse non-compliance in the circumstances and admit the conversation.

[164] It is accepted the scenario style of conversation constitutes an admission in the circumstances, although the Crown case differs significantly from the terms of the alleged conversation. That factor has not influenced the decision not to admit evidence of the conversation.

[165] The strong public interest in bringing those who commit crimes to justice is a strong factor in favour of admission of the evidence, but not at the significant risk of unreliable and significantly non-compliant evidence being admitted. It is well appreciated that admissibility questions generally fall to

be considered under to the UEA. This includes an approach that conforms with the distinction between the roles of judge and jury in accordance with *R v Shamouil*,[49] however the question of compliance with the *Police Administration Act* requires an evaluation by the trial judge as well as the consequential issue of whether in the event of non-compliance, an admission should be admitted in the exercise of the discretion. Admissibility questions under the UEA are surplusage in this context.

[166] Evidence of the conversation will not be admitted.

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[49] (2006) 66 NSWLR 228.