R v Karui [2016] NTSC 13

PARTIES:	THE QUEEN
	v
	KARUI, Arthur
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	21510248
DELIVERED:	16 March 2016
HEARING DATES:	22, 23 and 24 December 2015
JUDGMENT OF:	BARR J

CATCHWORDS:

CRIMINAL LAW – EVIDENCE – *Police Administration Act* 1978 s 142 – accused asked police officer a question indicating accused's knowledge of offence – implied admission – admission after formal questioning – not electronically recorded – evidence inadmissible – not within statutory exceptions – alternative characterization as admission made during questioning – evidence inadmissible because admission not electronically recorded.

CRIMINAL LAW – EVIDENCE – *Police Administration Act* 1978 s 142, 143 – discretion to admit evidence made inadmissible by s 142 – accused formally interviewed and arrested – accused in custody – conversation between accused and police officer travelling on police aircraft – no fresh caution administered – accused asked police officer a question indicating accused's knowledge of offence – implied admission – conversation not electronically recorded – partial record of conversation made by police officer – full context of implied admission not established – difficulty for

jury in assessing evidence – disadvantage to accused at trial – not established by prosecution that admission of the evidence "not contrary to interests of justice" – evidence not admitted.

CRIMINAL LAW – EVIDENCE – Voir Dire – admissibility – accused asked police officer a question indicating accused's knowledge of offence – implied admission – affirmative link in chain of evidence – capable of being regarded as an admission for the purpose of deciding admissibility.

REPRESENTATION:

Counsel:

Plaintiff:	M Chalmers
Defendant:	M Aust

Solicitors:

Plaintiff:	Office of the Director of Public Prosecutions
Defendant:	North Australian Aboriginal Justice Agency

Judgment category classification:	B
Judgment ID Number:	Bar1603
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

R v Karui [2016] NTSC 13
No. 21510248

BETWEEN:

THE QUEEN

AND:

ARTHUR KARUI

CORAM: BARR J

REASONS FOR DECISION ON VOIR DIRE

(Delivered 16 March 2016)

[1] These reasons are published to the parties in confidence, pending trial.

[2] The Crown alleges that on 6 March 2015, at Wadeye, the accused had sexual intercourse with KG, a 16 year old female,[1] without her consent and knowing about or being reckless as to the lack of consent, contrary to s 192(3) Criminal Code.

[3] Ms Chalmers summarised the Crown case for the purposes of the voir dire, but I subsequently heard the evidence of the complainant at a special sitting,[2] held in early February 2016. The following summary takes that recent evidence into account, and so is something of a composite. I have

[1] The complainant was 16 years old when interviewed by Police on 7 March 2015.
[2] *Evidence Act* (NT) s 21B(2)(b)(i).

deliberately not made any credit findings in relation to the evidence of the complainant.

[4] In the morning of Friday 6 March 2015, the complainant was staying at an address in Wadeye with her boyfriend, TK. The couple had sex early in the morning. TK saw the accused at the house that same morning, before leaving.

[5] Mid-morning, at about 10.00 am or 10.30 am, the complainant was in a bedroom at the house listening to music with her earphones on. The accused entered the room and shut the door behind him. The complainant saw him "standing at the door", "on the corner".[3] The door was closed at that stage.[4] The complainant recognised him as a relative of her boyfriend, whom she knew as Pulloo Pulloo, the Aboriginal name of the accused. On the complainant's description, the accused was wearing green army pants, a red and blue Melbourne Demons singlet or T-shirt, and a black cap with the word "Lica" on it.[5]

[6] The accused grabbed the complainant, covered her eyes with a pillow, removed her shorts and long pants "half way",[6] and had penile vaginal sexual intercourse with her, without her consent. The complainant said that he did it "really hard" and that it hurt. He did not speak during the sexual assault. After the accused left, the complainant walked away from the house.

[3] Transcript 1 February 2016 p 21.3.
[4] Transcript 1 February 2016 p 23.1.
[5] The complainant's drawing of the cap was exhibit P2 on the voir dire.
[6] Transcript 1 February 2016 p 34.7.

She was in pain and had difficulty walking. She was crying. At or near the shop, she met her grandmother, Assumpta. She told her grandmother that she had been "grabbed by someone" and identified her attacker as "Pulloo Pulloo", the accused.[7] She then continued to the Women's Centre. There she complained to her mother, who informed another grandmother, Stephanie, who attended and took the complainant to the clinic. Police also attended the Women's Centre at this time because someone (not identified) had rung them to inform them of the complainant's disclosure. The complainant did not reveal her attacker's identity to her mother at that time. However, she said in evidence at the special sitting that she told Stephanie at the Women's Centre that the man who attacked her was Pulloo Pulloo.[8]

[7] Police attended the house where the alleged rape had taken place, and photographed the identified bedroom in which the alleged offending had occurred. Various items were seized. At that stage, the Police did not know that the complainant had identified her attacker as Pulloo Pulloo.

[8] The Crown case on the voir dire[9] was that it was not until about 10.30 that evening that the complainant first identified her attacker as "Pulloo Pulloo", such disclosure said to have been made to her grandmother Stephanie. However, if the complainant's evidence at the special sitting was correct: (1) she had already identified her attacker to her grandmother Assumpta, very shortly after the alleged rape; and (2) she had also identified her

[7] Transcript 1 January 2016 p 35.8.
[8] Transcript 3 January 2016 p 84.7.
[9] See Crown Submissions dated 21 December 2015.

attacker to her grandmother Stephanie, at the Women's Centre, a short while later.[10]

[9] The following day, 7 March 2015, detectives from the Sex Crimes Unit in Darwin arrived in the Wadeye community, where an audiovisual statement was taken from the complainant in which she identified her attacker as Pulloo Pulloo. After the taking of her statement, she informed police that Pulloo Pulloo was the accused.[11]

[10] Further police inquiries and searches lead to the arrest of the accused, who was taken to the Wadeye Police Station. He participated in a formal interview with police between 12.15 pm and 12.45 pm on 7 March 2015. The accused denied having had sexual intercourse with the complainant. The Crown will seek to rely at trial on what Ms Chalmers contends were a number of lies told by the accused in relation to his whereabouts on 6 March 2015, his activities that day and the clothes he was wearing.

[11] None of the accused's DNA was found on or in the victim, or in or about the bedroom where the alleged rape took place.

[12] Various members of the accused's family told Police that he was playing cards with them at the time of the alleged rape.

[13] The Crown case will depend very significantly on the evidence of the complainant herself. There may be some corroboration or supporting

[10] See [6] above.
[11] Voir dire Exhibit P4, Statement Detective Sergeant Leafe dated 19 August 2015, par 7.

evidence, in terms of the alleged complaints made by the complainant to her two grandmothers, as described in [6] above, in which she identified the accused as perpetrator. The Crown case might also be assisted by the evidence of TK, referred to in [4], which places the accused at the scene of the alleged crime at or about the relevant time.

[14] However, there are doubts in relation to the complainant's credit, explained below:

- In her initial statement to the sexual assault doctor, she said that her attacker had ejaculated, but this was contradicted by a later statement to the Police to the effect that her attacker did not ejaculate. (No sperm attributable to the accused was found on or in the complainant's body.)

- She also said she could not recall when she had last had sexual intercourse prior to the alleged rape, but subsequently admitted it was with her boyfriend (TK) on the same morning as the alleged sexual assault by the accused. An additional complication is that, in her evidence at the special sitting, she said that she had not consented to intercourse with her boyfriend that morning.

- Depending on the jury's acceptance/rejection of her evidence referred to in [6], she may have first identified her attacker as the accused only in the late evening of 6 March 2015.

[15] In this context, the Crown wishes to adduce evidence of statements made by the accused to Detective Sergeant Glenn Leafe ("D/Sgt Leafe") in the course of a flight on a Police Air Wing plane from Wadeye to Darwin on 7 March 2015. The accused had been arrested, interviewed and was in police custody during the flight.

[16] The relevant part of the police statement of D/Sgt Leafe read as follows:[12]

> I then made arrangements to travel from Port Keats to Darwin with KARUI and [Constable David] MUNRO via Police Airwing. During the flight I sat next to KARUI. He continued to tell me he was innocent, further stating that he visited that house to visit his Grand Mother and that 'I never put my fingers in her'. He made a further two statements that I recorded in my notes, namely that 'what if witnesses don't come to court' and 'can you get DNA if no sperm?' I was unable to record these conversations as my recording equipment was secured in the rear of the plane.

[17] Although D/Sgt Leafe sat next to the accused, in that there was no one sitting between them, he actually sat across a narrow aisle from the accused, at the rear of the aircraft cabin.[13] Once the plane had levelled off, the accused leaned forward, looked towards D/Sgt Leafe and said something. D/Sgt Leafe sensed that he accused wanted to speak with him, and so he leaned across the aisle to speak with the accused.[14]

[18] D/Sgt Leafe did not caution the accused immediately before or during the in-flight conversation. He had earlier cautioned the accused after arresting him, prior to formal interview,[15] at approximately 11:35 am. Then, at the commencement of the formal police interview, shortly after 12:15 pm that day, D/Sgt Leafe had cautioned the accused again and obtained confirmation

[12] Voir dire Exhibit P4, Statement D/Sgt Leafe dated 19 August 2015, par 19.
[13] Transcript 22 December 2015 p 29.4.
[14] Transcript 22 December 2015 p 30.4; see also cross-examination at p 38.5.
[15] The so-called "s 140 caution", a reference to s 140 *Police Administration Act* which requires the investigating police officer, before any questioning commences, to inform the person in custody that the person does not have to say anything but that anything the person does say may be given in evidence.

that the accused had understood the caution. D/Sgt Leafe had administered a further caution to the accused when he charged him at 14:28 pm.[16]

[19] D/Sgt Leafe said that his in-flight conversation with the accused, with some pauses, lasted about 10 minutes.[17] I have assessed that the likely time frame within which the conversation occurred was approximately 15 minutes. It would appear that the accused had been reiterating his innocence prior to 15:47, and that, at that point, the sergeant started taking notes, time-referenced to 15:47, but reflecting some things said before that time.[18] D/Sgt Leafe said that the accused had started to proclaim his innocence some minutes before 15:47.[19] I assess that the non-continuous conversation started sometime about 15.45, and continued for a short time after 16:00.

[20] It is difficult to gain an understanding of the flow of that conversation. D/Sgt Leafe said in evidence, "He made a number of, I guess, statements to me".[20] He said, "There were some pauses but effectively I was leaning over most of the time and we were conversing like that."[21] At one point, Ms Chalmers asked D/Sgt Leafe the following question and received the answer set out:[22]

> Were you questioning him at any time about his involvement in the rape of KG? --- Most definitely not.

[16] Transcript 22 December 2015 p 27.1.
[17] Transcript 22 December 2015 p 31.2.
[18] The note: "1547 Arthur ongoing that innocent" suggests a continuance or repetition of things said before 15:47.
[19] Transcript 22 December 2015 p 39.1.
[20] Transcript 22 December 2015 p 30.5.
[21] Transcript 22 December 2015 p 31.3.
[22] Transcript 22 December 2015 p 32.7.

[21] It is likely that D/Sgt Leafe was mistaken in giving that answer because he had earlier said that he asked the accused whether he had gone to his grandmother's house on the day of the trouble, to which the accused had replied in the negative.[23] D/Sgt Leafe had thus questioned the accused, to clarify a statement made by the accused which Leafe thought was an admission. Although the in-flight conversation was not a formal interrogation session, D/Sgt Leafe clearly asked one question and it is probable that he asked one or more further questions during the overall conversation. Further, whether or not D/Sgt Leafe asked further questions, there is little doubt that he said things in response to some of the things said by the accused. D/Sgt Leafe conceded that he only noted down the things which he saw as pertinent and did not make a note of any of his own responses.[24]

[22] D/Sgt Leafe's actual diary entries for the plane trip were, relevantly, as follows:

15.47	Arthur ongoing that innocent. States went house to visit G/M [*grandmother*]. Then changes that. Indicates 'I never put my fingers in her'.
15.55	'What if witness not come court'.
16.00	'You get DNA if no sperm'
16.25	land – Darwin

[23] Transcript 22 December 2015 p 30.8.
[24] Transcript 22 December 2015 p 34.2.

[23] In giving evidence, D/Sgt Leafe said that he initially thought it was significant that the accused said that he went to the house to visit his grandmother, because that appeared to Leafe to be an admission by the accused that he had visited the house where the rape allegedly occurred, on the day of the rape.[25] The reference in his notes to "Then changes that" was, however, a correction or clarification: the accused said that he had visited the house quite often, but not on the relevant day. D/Sgt Leafe acknowledged in evidence that he had misunderstood the accused.[26] The statement "went house to visit G/M" therefore has no or no significant probative value, given that it was not an admission to having visited the house on the day in question. The "reduced probative value" of the statement was conceded by Ms Chalmers on the voir dire, although she contended that the evidence could remain as context if some of the other statements were admitted.[27] In my judgment, however, the evidence has no probative value, is confusing or distracting, and should simply be excluded.

[24] The statement, "I never put my fingers in her", might have had probative value if the complainant had complained of digital penetration, and the Police had not informed the accused of that precise allegation before he made the statement. However, I was informed at the conclusion of the voir dire that the complainant had been proofed and that she did not allege digital penetration. This was confirmed by the complainant's evidence at the

[25] Transcript 22 December 2015 p 30.8.
[26] Transcript 22 December 2015 p 31.1; p 40.3.
[27] Transcript 23 December 2015 p 71.9 - 72.1.

special sitting.[28] Ms Chalmers acknowledged that the accused's statement had thus lost probative value as evidence that the accused had knowledge of the crime that only the perpetrator could have had. Ms Chalmers conceded that the evidence did not have "a very high level of probative value". In my judgment, the evidence has no greater probative value than an ordinary denial and should be excluded. Indeed, I note that D/Sgt Leafe said he understood the evidence to have been "a denial much like we'd already dealt with in the interview."[29]

[25] The Crown did not press the admission of the statement: "What if witnesses don't come to Court?" or, as written in D/Sgt Leafe's diary: "What if witness not come court". Ms Chalmers acknowledged, very appropriately, that the statement was ambiguous; moreover, that it had potential prejudicial effect because of an available inference that the accused might have been prepared to intimidate witnesses to cause them not to come to court.[30]

[26] I turn to the last remaining in-flight statement:

> "Can you get DNA if no sperm?"/ 'You get DNA if no sperm'.

[27] D/Sgt Leafe said that the accused's question was not in response to anything he, Leafe, had said.[31] In cross-examination, he said that did not believe that he had raised the issue of DNA during the earlier in-flight conversation.[32]

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[28] Transcript 1 February 2016 p 27.3.
[29] Transcript 22 December 2015 p 32.2.
[30] Transcript 23 December 2015 p 73.4.
[31] Transcript 22 December 2015 p 32.6.

[28] D/Sgt Leafe gave evidence that he responded to the accused's question as follows:[33]

> I gave him a very rough explanation of how DNA works; not in relation to this case, but as a general thing, the things you can and can't get DNA from, without going into any sort of specifics as it's not my field of expertise. But yeah …. He was certainly paying attention to what I said back. … After the DNA explanation, I think that was effectively it and I just moved back to my seat and didn't say anything further.

[29] In cross-examination, D/S Leafe agreed that he tried as best he could to answer the accused's question "in very broad spectrum about DNA". However, he did not ask any questions of the accused in this context, and (in particular) he did not ask what the accused meant or intended by the question.[34]

[30] Defence counsel did not challenge D/Sgt Leafe in relation to his evidence about the in-flight statements attributed to the accused, or suggest that the evidence given by D/Sgt Leafe was untrue. I am satisfied that the accused asked the question extracted in [26]. The accused did not give evidence on the voir dire, and there is no direct evidence as to his state of mind or thought processes at the time he asked the question, nor as to whether he appreciated and understood at that time that anything he said might be recorded and given in evidence.

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[32] Transcript 22 December 2015 p 49.8.
[33] Transcript 22 December 2015 p 34.5.
[34] Transcript 22 December 2015 p 50.5.

The parties' arguments

[31] I confine my further consideration to the last of the in-flight statements, the question in [26] as to whether DNA could be obtained in the absence of sperm. For ease of reference, I will refer to it as "the in-flight question".

[32] Ms Chalmers argues that the question is evidence of guilt: evidence that the accused had particular knowledge of the crime committed against the complainant in which no sperm was deposited.[35] Two key pieces of evidence are said to make the in-flight question highly probative.[36]

[33] The first piece of evidence relied on by Ms Chalmers was that no sperm from the accused was found in the examination and testing of samples taken from the complainant reasonably close in time to the alleged rape, in the mid-afternoon of 6 March.

[34] The second piece of evidence was the reference to DNA in the formal interview between the accused and the police, as follows:[37]

> LEAFE: Have you ever been to that house [*scene of alleged rape*]?
>
> KARUI: No.
>
> LEAFE: When's the last time you went to that house?
>
> KARUI: Since when?
>
> LEAFE: Have you been there since you come out from gaol?

[35] Transcript 23 December 2015 p 71.1; Crown submissions par 35.
[36] Transcript 23 December 2015 p 73.5.
[37] Voir dire Exhibit P6, Transcript of the accused's EROI, pp 21 - 22.

KARUI: Yeah I go there and Dad took me there with him.

LEAFE: Okay.

KARUI: (inaudible) and to see my old nanna.

LEAFE: Yeah.

KARUI: Was crying, 'cause I was in prison too long.

LEAFE: Yeah

…

LEAFE: Have you ever been into any of them rooms in that house?

KARUI: No.

LEAFE: Okay and in the last few weeks have you had any reason to touch KG, like even just to shake hands or anything like that?

KARUI: No.

LEAFE: So there's no reason for your DNA to be on her or in that room?

KARUI: No. 'Cause I got children too you know so --

[35] D/Sgt Leafe would not have known at that early stage that none of the accused's DNA would be found on or in the victim, or in the relevant bedroom. The apparent purpose of his questioning was to exclude any 'innocent' explanation for the presence of the accused's DNA, should such DNA later be found on the person of the complainant or in the bedroom where the alleged rape had taken place. Ms Chalmers contends that the

question, “So there’s no reason for your DNA to be on her or in that room?” was thought-provoking, and that it ultimately caused the accused to ask the in-flight question, albeit some three hours later.

[36] Ms Chalmers also relies on the fact that there was no mention of sperm (whether the presence or absence of sperm) during the police interview. There was thus no explanation, in terms of conversational triggers, as to why the accused might have been pondering whether DNA could be obtained in the absence of sperm.

[37] In addition to the submission that the in-flight question had significant probative value, Ms Chalmers further contends that the question asked by the accused was unsolicited, and that it was made after the accused had been warned numerous times by Police as to his right to silence, the last warning at 14:28 that afternoon.[38]

[38] D/Sgt Leafe acknowledged that he did not further caution the accused at any time during their in-flight conversation.[39] He considered the need to re-interview the accused in relation to the initial statement that he had visited his grandmother’s house but, after the accused had clarified what he meant by that statement, D/Sgt Leafe took the view that the accused had not made an admission and he thus saw no need to expand on it in an interview.[40]

[38] Detective Sergeant Leafe said in evidence that he cautioned the accused when he charged him at 1428 hrs; see transcript 22 December 2015 p 26.9 - 27.
[39] Transcript 22 December 2015 pp 39.5, 43.4 and 49.5.
[40] Transcript 22 December 2015 p 50.8 – 51.1.

[39] In this context, it seems tolerably clear that D/Sgt Leafe did not appreciate the possible significance of the in-flight question in relation to DNA and the absence of sperm. D/Sgt Leafe did not electronically record the in-flight question, nor did he subsequently record an interview with the accused in relation to the question, whether to seek confirmation, clarification and/or an explanation. There was no further questioning after the flight ended.

[40] Ms Chalmers contends that there was no impropriety on the part of the police, and that the Crown is entitled to use the in-flight question in evidence against the accused as part of the Crown case. She submits that such use would not be unfair to the accused.

[41] There are several statutory bars to the admissibility of oral statements made by accused persons, depending on how such statements are characterized and when they are made.

The *Police Administration Act*

[42] I will first consider s 142 *Police Administration Act*, which applies to "confessions and admissions". If the statement made by a suspect is a "confession or admission", it is not admissible as part of the prosecution case unless it falls within one of the two exceptions set out in s 142(1). The first of those exceptions is where the confession or admission was made before the commencement of questioning, and applies only if the substance of the confession or admission was confirmed by the person and the

confirmation electronically recorded.[41] The second of those exceptions is where the confession or admission was made during questioning, and applies where the questioning and anything said by the person was electronically recorded.[42] In the case of both exceptions, the electronic recording must be available to be tendered in evidence.[43] There is no exception in the case of a confession or admission made after questioning has finished.[44] Therefore, evidence of such a confession or admission is not admissible, although a court has a discretion to admit the evidence pursuant to s 143 *Police Administration Act* if "admission of the evidence would not be contrary to the interests of justice".

[43] The in-flight question was not a confession. A confession is "either a direct admission of guilt, or of some fact or facts which may tend to prove the prisoner's guilt at the trial."[45] There was no direct admission of guilt or of probative facts of the kind described. The in-flight question was, however, evidence by implication that the accused knew that there was no sperm left by the perpetrator of the sexual assault upon the complainant, and therefore possibly an implied admission by the accused that he was the perpetrator. I say "*possibly* an implied admission by the accused that he was the perpetrator" because it might be evidence only that the accused had knowledge of the circumstances of the assault, without being the

[41] *Police Administration Act* s 142(1)(a).
[42] *Police Administration Act* s 142(1)(b).
[43] In the case of both exceptions, the electronic recording must be available to be tendered in evidence.
[44] See *R v Charlie* (1995) 121 FLR 306 at 312.7; *R v Kanaris* [1999] NTSC 94 at [29], [31] – [33].
[45] *Attorney-General for New South Wales v Martin* (1909) 9 CLR 713 at 732, per O'Connor J; *R v Doyle, ex parte Attorney-General* [1987] 2 Qd R 732.

perpetrator. Nonetheless, the in-flight question can be characterized as "a statement which is an affirmative link in the chain of evidence, because it admits some fact which tends to prove the guilt of the prisoner."[46]

[44] At common law, where the issue on the voir dire is the admissibility of a statement made by an accused and relied on by the prosecution as an admission, the test as to whether the statement is an admission is whether it was "capable of being regarded as an admission … of a fact relevant to the proof of guilt".[47] The in-flight question is clearly capable of being regarded as an admission, for reasons explained in [43].

[45] For present purposes, therefore, I proceed on the basis that the in-flight question was an admission. This is not a finding made for all purposes, but only for the purpose of determining whether evidence of the admission is admissible.

[46] In my judgment, evidence of the accused's admission, by the in-flight question, is not admissible as part of the prosecution case because neither of the two exceptions set out in s 142(1) *Police Administration Act* was satisfied. The in-flight question was an admission made after questioning had finished. If there had been further questioning subsequent to the in-flight conversation, and if the accused had confirmed that he had asked the particular question, and if such confirmation had been electronically

[46] *Attorney-General for New South Wales v Martin* (1909) 9 CLR 713 at 737, per Isaacs J.
[47] *Plevac* (1995) 84 A Crim R 570 at 580 par 5, citing *Astill* (unreported, Court of Criminal Appeal, NSW, 17 July 1992) at pp 8 - 13.

recorded, then the evidence would probably have been admissible as a result of the operation of s 142(1)(a) of the Act, as an admission made before the commencement of (the further) questioning and subsequently confirmed. However, that was not the case. No further questioning took place, as explained in [38] and [39] above.

[47] A possible alternative characterization of the in-flight conversation was that it constituted "questioning", if only because D/Sgt Leafe asked the question referred to in [21] early in the conversation in order to clarify something said by the accused which Leafe thought was an admission of a fact very relevant to the offence he was investigating. The overall in-flight conversation was thus "a particular period of questioning".[48] Such a characterization of the overall in-flight conversation would render the in-flight question an admission made "during questioning".[49] However, evidence of the in-flight question would be inadmissible because it was not electronically recorded.

[48] A difficulty with the in-flight question (and the other statements made by the accused in the aircraft) is that the full context has not been provided. I commented in [20] above that it is difficult to understand the flow of the conversation. I also commented, in [21], that D/Sgt Leafe did not record all of the things said by the accused, and that he recorded none of the things (whether questions or simple statements) which he said himself. Although I

[48] *R v Grimley* (1994) 121 FLR 236 at 276.2, per Kearney J.
[49] *Police Administation Act* s 142(1)(b). The question was "about the circumstances of the offence" and therefore constituted "questioning" within s 142(1)(b): see *R v Charlie* (1995) 121 FLR 306 at 312.5 per Mildren J.

am satisfied that the things noted by D/Sgt Leafe and attributed to the accused were said, I am also satisfied that they were not said in isolation, but rather in a context which has not been established and cannot be tested. I am concerned that, because of the absence of evidence of the full context, the jury could be greatly disadvantaged in assessing the evidence,[50] and the accused consequently prejudiced in terms of a fair trial.

[49] I turn to consider whether I should exercise the discretion granted by s 143 *Police Administration Act* to admit evidence of the in-flight question. In considering whether to admit evidence of admissions which have not been recorded in accordance with s 142, the Court is directed by s 143 to have regard to the nature of, and reasons for, the non-compliance and any other relevant matters and to then consider whether, in the circumstance of the case, admission of the evidence would not be contrary to the interests of justice. The Crown bears the burden, on the balance of probabilities,[51] of satisfying the Court that inadmissible evidence should be admitted. In my consideration, I have regard to the concerns stated in [48]. I note also that no fresh caution was administered at the start of the in-flight conversation, at the time D/Sgt Leafe asked the accused at least one question about an apparent admission. In all the circumstances, and while I note the Crown's contentions as to the probative value of the evidence, I am not satisfied that "admission of the evidence would not be contrary to the interests of justice",

[50] It is ultimately a question for the jury as to whether a statement alleged by the prosecution to be an admission made by an accused person is an admission or not. The jury must be clearly and fully directed in this respect: *Plevac* (1995) 84 A Crim R 570 at 580 par 6; *R v JGW* [1999] NSWCCA 116 at [37] – [41].
[51] *Grimley v The Queen* (1995) 121 FLR 282 at 301 (NT Court of Criminal Appeal).

as required by s 143 *Police Administration Act*. I therefore decline to admit the evidence of the in-flight question.

[50] Given my conclusion and decision in [49], it is not necessary to consider any further statutory bars to the admissibility of the in-flight question. However, in deference to the submissions of counsel, I will refer to some of the alternative arguments in relation to its admissibility.

The *Evidence (National Uniform Legislation) Act 2011*

[51] The accused's in-flight question was also an admission within Pt 3.4 *Evidence (National Uniform Legislation) Act 2011*. An "admission" means a previous representation, made by a person who is or becomes a party to a proceeding, "adverse to the person's interest in the outcome of the proceeding."[52] A "representation" includes an implied oral representation.[53]

[52] The test of what amounts to an admission for determining whether evidence of an admission is admissible is that stated in s 88 *Evidence (National Uniform Legislation) Act 2011*, namely whether it is "reasonably open to find" that what was said was an admission. The in-flight question satisfies that test. It would ultimately be for the jury to determine whether the in-flight question was an admission, but only where the Court has first determined that it is reasonably open to make that finding.

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[52] *Evidence (National Uniform Legislation) Act 2011*, Dictionary, Pt 1, Definitions: "admission". See *R v Horton* (1998) 45 NSWLR 426 at 437G; *R v Esposito* (1998) 45 NSWLR 442 at 458E, per Wood CL at CL, James and Adams JJ agreeing at 477E and 478E. The decision of the Federal Court in *R v GH* [2000] FCA 1618 at [15] – [18] and [79] does not affect the position in the present case because the in-flight question is an implied admission, and hence a statement adverse on its face, as distinct from a false denial or an exculpatory statement which ultimately turns out to be harmful for the defence because of proof of untruth.

[53] *Evidence (National Uniform Legislation) Act 2011*, Dictionary, Pt 1, Definitions: "representation".

[53] Counsel for the accused relies on s 138(1) *Evidence (National Uniform Legislation) Act 2011* and submits that evidence of the in-flight question was obtained improperly or in contravention of Australian law and hence should not be admitted because the desirability of admitting the evidence is not outweighed by the undesirability of admitting the evidence.

[54] On general principles, I do not consider that the evidence was obtained "improperly or in contravention of Australian law",[54] nor is it deemed to have been obtained improperly by s 138(2) *Evidence (National Uniform Legislation) Act 2011*, which applies where there has been misconduct during questioning. However, it is possible that the evidence of the in-flight question would be deemed by s 139(1) *Evidence (National Uniform Legislation) Act 2011* to have been obtained improperly, for the reason that "the investigating official" (D/Sgt Leafe) did not caution the accused "before starting the questioning". The statutory deeming as to impropriety would depend upon whether any of the earlier cautions referred to in [18] were still 'good' with respect to the questioning which took place during the in-flight conversation, or whether, given the time lapse, the cautions had also lapsed and D/Sgt Leafe was required to further caution the accused before asking any questions in-flight. There is some force in the argument that D/Sgt Leafe was required to further caution the accused before asking any questions in-flight, particularly when his initial question was intended to confirm or at least clarify what he thought to be a significant admission.

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

However, it is not necessary for me to decide this point, and I refrain from doing so.

[55] Counsel for the accused also relies on s 90 *Evidence (National Uniform Legislation) Act 2011*, pursuant which the Court has a discretion to refuse to admit evidence of an admission if "having regard to the circumstances in which the admission was made, it would be unfair to a defendant to use the evidence." It has been held that s 90 *Evidence (National Uniform Legislation) Act 2011* is concerned with the right of an accused to a fair trial and whether there is a risk of improper conviction.[55] It is a final or "safety net" provision after the more specific exclusionary provisions of the Act have been considered and applied. The questions with which those other sections deal (questions of the reliability of what was said to police, and as to what consequences flow from illegal or improper conduct by investigating authorities) are not to be dealt with under s 90.[56]

[56] Defence counsel refers to circumstances which he contends make the admission unreliable, and so make it unfair for it to be used against the accused at trial. The circumstances include the fact that the admission was made in the course of a much longer conversation, most of which was unrecorded; and that D/Sgt Leafe did not attempt to commit to writing an account of the whole conversation until some five months later.

[55] *R v Swaffield* (1998) 192 CLR 159.
[56] *Em v The Queen* (2007) 232 CLR 67 at [109] per Gummow and Hayne JJ. See also per Gleeson CJ and Hayne J at [56].

[57] Counsel for the accused contends that the accused would suffer a significant forensic disadvantage if the evidence were admitted at trial because the accused would be unable to effectively challenge the admission without having to give evidence, and thereby waving his right to silence; moreover, if the accused were to give evidence, there would be nothing to corroborate his evidence about the admission in the absence of an independent electronic record or an independent witness to the in-flight conversation.

[58] There may be some force in the arguments summarized in [56] and [57]. However, it is very difficult to assess the submission without knowing what the accused would say about the in-flight question if he were to give evidence. There has been no indication of that, whether in the cross-examination of D/Sgt Leafe or otherwise.[57] It is also difficult to assess the suggested prejudice to the accused in having to give evidence without knowing whether he would have given evidence in any event. Unlike the position under s 143 *Police Administration Act*, where the onus lies with the Crown,[58] the accused bears the onus of establishing unfairness, and I am not persuaded that he has done enough to discharge the onus. However, it is not necessary for me to decide this point, and I refrain from doing so.

[57] See [30] above.
[58] See [49] above.

Conclusion

[59] In conclusion, for reasons summarized and explained in [48] and [49], evidence of the accused's in-flight question should not be admitted at trial.
