R v McKerlie [2016] NTSC 37

PARTIES:	THE QUEEN
	v
	MCKERLIE, Rosemarie Ann
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	21358288
DELIVERED:	12 July 2016
HEARING DATES:	1 July 2016
JUDGMENT OF:	BLOKLAND J

CATCHWORDS:

CRIMINAL LAW – Evidence – Admissibility – Relevance - Hearsay – Exceptions to the hearsay rule – Criminal proceedings - Previous representations – Maker unavailable – Evidence given a preliminary examination – Evidence of previous statements - s 65(3) *Evidence (National Uniform Legislation) Act* –Requirements under s 65(3) satisfied – Evidence partly admissible

CRIMINAL LAW – Evidence – Admissibility - Relevance - Tendency Evidence – Tendency to engage in the supply of drugs – Evidence strengthened by independent evidence – Evidence directly relevant to the charge – Evidence of “significant probative value” – Evidence substantially more probative than prejudicial – Part of evidence admissible

CRIMINAL LAW – Evidence – Relevance- Admissibility - Tendency Evidence – Broad and general statements to be excluded - Evidence lacking "significant probative value" – Effect of an inability to cross examine – unavailable witness – Risk of serious prejudice – Part of evidence excluded

Evidence (National Uniform Legislation) Act (NT) s 55, s 65, s 65(2), s 65(3), s 65(9), s 85, s 97(1)(a), s 97(1)(b), s 101, s 135, s 137, s 165

IMM v The Queen [2016] HCA 14, *Harriman v The Queen* (1989) 167 CLR 590, applied

Director of Public Prosecutions (Vic) v BB (2010) 204 A Crim R 85, *Galvin v The Queen* (2006) 161 A Crim R 449, *Puchalski v The Queen* [2007] NSWCCA 220, *R v A* (No 3) [2015] NSWSC 79, *R v Ford* (2009) 201 A Crim R 451, *R v Lockyer* (1996) 89 A Crim R 457, *R v Shamouil* (2006) 66 NSWLR 226, referred to

REPRESENTATION:

Counsel:

Plaintiff:	N Loudon
Defendant:	B Cassells

Solicitors:

Plaintiff:	Office of the Director of Public Prosecutions
Defendant:	Northern Territory Legal Aid Commission

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

R v McKerlie [2016] NTSC 37
No. 21358288

BETWEEN:

THE QUEEN
Plaintiff

AND:

ROSEMARIE ANN MCKERLIE
Defendant

CORAM: BLOKLAND J

PRE TRIAL RULINGS

(Delivered 12 July 2016)

Background

[1] The accused is charged with one count of supply cannabis between 17 - 24 December 2013. A co-accused, Mr Wayne Mawson, was also charged with supply of cannabis, arising from the same incident. Mr Mawson pleaded guilty on 22 October 2014.

[2] Mr Mawson was to give evidence for the Crown at the accused's trial scheduled earlier this year. The trial was adjourned as at that time Mr Mawson was very ill.

[3] Sadly, Mr Mawson died on 25 March 2016. In terms of this trial, rulings have been required to deal with questions of admissibility of evidence given

by Mr Mawson at the preliminary examination in the Local Court and the content of certain telephone interceptions.

Brief Outline of the Crown Case

[4] The essence of the Crown case is that during 2013, Mr Mawson was the subject of a police investigation with respect to interstate transportation of cannabis to the Northern Territory and its further supply or distribution. The police investigation revealed some six interstate trips undertaken by Mr Mawson between June and November 2013.

[5] On 9 December 2013, police commenced telephone interceptions of Mr Mawson's mobile telephone. On 11 December 2013, police seized approximately six kilograms of cannabis from two separate search warrants executed on two offenders in Katherine.

[6] On 12 December 2013, Mr Mawson contacted the accused and informed her of those warrants and the seizure of cannabis on 11 December 2013. He and the accused discussed the presence and movements of police in Katherine. On 15 December 2013, the police interception of Mr Mawson's phone revealed he was communicating with a person in South Australia. During those conversations he indicated he had money available to pay for cannabis. Mr Mawson told that person that he intended to drive to South Australia the following day and would have time for a quick visit. On 16 December 2013, Mr Mawson left Pine Creek driving a white Ford Falcon utility. He drove to Hoppers Crossing in Victoria via South Australia.

[7] On 17 December 2013 the accused contacted Mr Mawson by phone. In the course of a discussion about money, Mr Mawson asked her if she had any and stated he would need all the money he could get for the "next order", alleged to be the next order of cannabis. On 18 December 2013, the accused sent a text message to Mr Mawson which stated "$1600 bank". This is alleged to refer to money to buy cannabis. Later on the same day the accused contacted Mr Mawson by telephone and apologised for not being able to deposit more money. Mr Mawson told the accused that he had met with his cannabis supplier the night before and was informed of a rise of price in cannabis. He asked the accused if she was out of cannabis and the accused advised she still had one pound left. Mr Mawson told the accused to put more money in the bank by the end of that week.

[8] On 19 December 2013, Mr Mawson contacted the accused who asked Mr Mawson how things were going. He stated he had worked out a deal although the price was "jacked" up a bit. This is alleged to refer to the cost of cannabis. On 20 December 2013, Mr Mawson contacted his supplier in South Australia. The supplier indicated he was preparing the cannabis for Mr Mawson to pick up and asked if he wanted extra. Mr Mawson stated he wanted the same amount unless the supplier wanted to "chuck a couple of extra in". Later the same day Mr Mawson was in contact with the accused who indicated she had identified a buyer for their last pound of cannabis. She stated she may as well get rid of it and Mr Mawson agreed.

[9] While in Victoria on 22 December 2013, Mr Mawson contacted his supplier advising he was a "couple of hours" away from meeting him. The supplier informed Mr Mawson that he should pull up where he usually does and that he would supply him with eight pounds of cannabis. At 4:30 pm the accused contacted Mr Mawson and advised they had lost a pound of cannabis. The accused stated she had supplied the pound to a female and then dropped her at her home where police were waiting. The accused was to pick up the money from her house, however police had told her to leave. On the Crown case this police intervention did not take place.

[10] During the evening of 22 December 2013, Mr Mawson travelled to Adelaide, met with his supplier and received eight packages of cannabis with an estimated weight of 3.6 kilograms. He packed them into a box in the back of his Ute. He left Adelaide and commenced to drive to the Northern Territory.

[11] At about 2:50 pm on 23 December 2013, the accused contacted Mr Mawson and stated that police were not interested in her. On the Crown case she further falsely advised Mr Mawson that an unknown female who had taken the pound of cannabis on 22 December had her court date adjourned.

[12] At 3:35 pm on 24 December 2013, the accused contacted Mr Mawson while he was driving through Tennant Creek towards Katherine and warned him that a police road block had been moved from Mataranka to Pine Creek. Mr Mawson told the accused that he would contact her in a "couple of

hours" so she could drive towards Mataranka to check if there was a police presence.

[13] At about 9:00 pm the accused sent Mr Mawson a text message stating that she would be leaving soon to travel south towards Mataranka in her daughter's white Hilux Ute. At about 10:00 pm while under police surveillance it is alleged the accused travelled along Stuart Highway towards Mataranka to look for police checks and patrols. Mr Mawson and the accused met briefly in Mataranka before travelling in their respective vehicles back towards Katherine with the accused driving approximately 100 metres in front of Mr Mawson. At 10:10 pm both vehicles were intercepted by police a short distance north of Mataranka. Both of their vehicles were searched and the 3631.05 grams of cannabis was located in the rear of Mr Mawson's vehicle. Both were arrested. In relation to the seized cannabis Mr Mawson told police he intended to sell it to pay for a holiday. He also admitted buying three lots of cannabis from suppliers in South Australia and bringing it to the Northern Territory. When interviewed by police the accused denied any knowledge of the offending.

Section 65(3) of the *Evidence (National Uniform Legislation) Act (NT)*

[14] The Crown seeks to have evidence of certain previous representations made by Mr Mawson admitted into evidence at the trial of the accused.

[15] Section 65 of the *Evidence (National Uniform Legislation) Act (NT)* ("*Uniform Evidence Act*") provides exceptions to the hearsay rule in criminal proceedings if the person who made a previous representation is not

available to give evidence about an asserted fact. More particularly, s 65(3) provides an exception for evidence of a previous representation made in the course of giving evidence in proceedings. The conditions of admissibility are that the defendant:

(a) cross examined the person who made the representation about it; or

(b) had a reasonable opportunity to cross examine the person who made the representation about it.

[16] In my view the formal requirements of s 65(3) are met. The evidence that is potentially admissible under s 65(3) must still however be considered further in the light of other exclusionary rules. This is necessary as the Crown seeks admission of certain parts of the evidence as tendency evidence, which requires additional considerations beyond the requirements of s 65(3).

[17] It is however inappropriate to exclude this evidence at the outset by reference to the discretions in s 135 and s 137 if the sole reason for exclusion is that the accused is unable to cross examine Mr Mawson at trial. Such an approach would defeat the operation of s 65(3).[1] That is the approach that should generally be taken with respect to s 65(3), however none of the authorities provided during the voir dire deal with the question of the admission of tendency evidence that in itself is reliant on admission through s 65(3). This in turn requires consideration of the corresponding

[1] *Director of Public Prosecutions (Vic) v BB* (2010) 204 A Crim R 85; *Puchalski v The Queen* [2007] NSWCCA 220.

discretionary power under s 101. The s 101 test is much more stringent than s 137.

[18] The first item of evidence is an audio recorded statutory declaration of Mr Mawson taken on 16 October 2014 and tendered through him during the preliminary examination. Although there was argument on behalf of the accused that Mr Mawson had not accepted the contents of the document, at the preliminary examination Mr Mawson gave evidence stating he recalled speaking to police on 16 October 2014, that the conversation was recorded and that he understood a transcript had been prepared.[2] He identified a copy of the transcript. He indicated he understood that a disc of the interview had been prepared. In the preliminary examination he confirmed that everything he told police in the conversation of 16 October 2014 was correct. This is sufficient compliance with s 65(3).

[19] In brief, in the recorded statutory declaration he provided details about how he met the accused, certain financial arrangements between them for the supply of cannabis and an earlier history of supplying cannabis. He also gave evidence of incidents closer in time to the offending such as arranging to meet with the accused in Mataranka, the transfer of eight pounds of cannabis to her vehicle and that two pounds of the cannabis were for the accused to sell.

[20] The accused was represented at the preliminary examination by an experienced criminal lawyer who did not seek leave to cross examine

[2] Transcript, Katherine Local Court, 29 April 2015.

Mr Mawson on the statutory declaration but did seek and was granted leave to cross examine Mr Mawson about various intercepted and recorded phone conversations between Mr Mawson and the accused.[3]

[21] The accused had a reasonable opportunity to cross examine Mr Mawson. The evidence he gave at the preliminary examination was primarily about the content, nature and meaning of the telephone intercepts between himself and the accused.

[22] Evidence of the representations contained in the recorded statutory declaration made in the course of an interview between Mr Mawson and investigating police of 14 October 2014 is extremely contentious. It is evidence of representations by a person criminally concerned. The interview took place prior to Mr Mawson being sentenced and, as is contemplated by s 65(3), there of course can be no cross examination at trial directed to reliability and credibility, including what might be a standard subject in a case such as this, namely whether there was any incentive for Mr Mawson to reduce his own role and inculpate or magnify the role of the accused. Unlike the exceptions to hearsay under s 65(2), reliability or lack of fabrication are not threshold issues for admissibility under s 65(3).

[23] The Crown seeks to lead the evidence of alleged drug supplying between Mr Mawson and the accused at times prior to December 2013 as tendency evidence. This will be discussed further. Based on the accused's record of interview with police it is possible the accused will argue an innocent

[3] Exhibit 2 on the voir dire, Notice In Relation To Witnesses Preliminary Examination, *Police v Rosemarie Ann McKerlie.*

association or meeting with Mr Mawson on 24 December 2013. Evidence that has the capacity to show a connection or relationship between the accused and Mr Mawson being concerned together with the distribution of cannabis in December 2013 is consequentially probative of the charge.

[24] Mr Mawson's record of interview with police made shortly after his arrest on 25 December 2013 implicated the accused to a far less significant degree. At the most his interview after arrest suggests the accused "Gives me a few pointers". Mr Mawson alleged far greater involvement on the part of the accused in the later interview of 16 October 2014, made in the knowledge he was about to be sentenced. As pointed out on behalf the Crown, any unfairness that may arise because the interview of 25 December 2013 is not before the Court can largely be remedied by resort to s 65(9), or indeed possibly by consent to the tender of the previous inconsistent statement.

[25] The issue of potentially serious reliability and credibility problems with the proposed evidence is not a ground for exclusion of the evidence under s 65(3).

[26] In relation to the evidence of representations made concerning the accused's conduct in December 2013, the potential problems that otherwise may undermine the probative value are somewhat mitigated because there is substantial supportive evidence by way of the content of certain of the phone intercept recordings.

[27] Depending on the facts and circumstances of a case, it now seems clear that unsupported evidence that may lack probative value may be strengthened by

independent evidence such that the requisite degree of probative value is more likely to be met.[4] The primary way the *Uniform Evidence Act* operates is that provision is made under s 165 for appropriate warnings and cautions to deal with evidence of this kind. This is made clear in *IMM v The Queen:*[5]

> 17 Only limited provision is made in the *Evidence Act* for a Court to take into account the reliability of evidence in connection with its admissibility. One of the matters to be taken into account by a trial judge under s 65(2)(c) and (d), in determining whether the hearsay rule is not to apply in the circumstance where the maker of the statement is not available to give evidence, is whether the representation in question was made in circumstances that make it highly probable (in the case of par (c)) or likely (in the case of par d)) that "the representation is reliable". Similarly, s 85(2) requires consideration to be given as to whether the circumstances in which an admission was made were such as to "make it unlikely" that the truth of the admission was adversely affected.
>
> 18 Section 165, which appears in Ch 4 of the *Evidence Act*, is concerned with evidence which "may be unreliable". A non-exhaustive list is provided of evidence of this kind, including: hearsay evidence and admissions; identification evidence; evidence the reliability of which may be affected by factors such as giving rise to the proceeding; and evidence from prison informers. Section 165(2) provides that, on the request of a party, a judge is to warn the jury that such evidence may be unreliable and warn the jury of the need for caution in determining whether to accept in and the weight to be given to it.

[28] Later in the judgment, the majority in *IMM v The Queen* confirm the only occasions for a trial judge to consider the reliability of evidence in connection with admissibility, is provided by s 65(2)(c) and (d) and s 85. The policy of the *Uniform Evidence Act* is that, generally speaking, questions as to the reliability or otherwise of evidence are matters for a jury,

[4] *IMM v The Queen* [2016] HCA 14, 62 – 63.
[5] [2016] HCA 14 at [17] – [18] per French CJ, Keifel, Bell and Keane JJ.

however a jury would need to be warned by the trial judge about evidence which may be unreliable pursuant to s 165.

[29] The majority in *IMM v The Queen* confirm evidence which is inherently incredible, fanciful or preposterous would not appear to meet the threshold requirement of relevance by s 55 and it would not seem necessary to resort to an assessment of evidence of that kind under s 137.[6] Although there are serious issues of reliability and credibility with some of the evidence proposed to be admitted under s 65(3), it would be an error to regard it as inherently incredible or fanciful or preposterous. There is also some supportive evidence in the form of the telephone interceptions for parts of the evidence having the capacity to strengthen the probative value of some of the challenged evidence of Mr Mawson.

[30] The evidence of the representations made at the preliminary examination, aside from the acknowledgement of the record of interview of 16 October 2014, are relevant to a number of issues in the trial. Along with the evidence of phone interceptions from 12 December 2013 to the date of arrest, the evidence is capable of showing the accused was a party to distributing drugs with or for Mr Mawson, or that she was supplied with cannabis by Mr Mawson and that money was provided. Information was also given about police activities. The evidence is also probative of the reason or motivation for the accused's presence at Mataranka on the day of

[6] *IMM v The Queen [2016]* HCA 14 at [58].

the arrest. The totality of the evidence has the capacity to negate an innocent explanation for her presence at Mataranka.

Evidence Sought to be Admitted as Tendency Evidence

[31] The tendency sought to be proved is of the accused to act in a particular way, namely:[7]

a) to engage in the supply of cannabis in the Katherine area; and

b) to assist Wayne Mawson in the transport of cannabis to Katherine for supply.

[32] The particulars of the conduct in the Tendency Notice are:

> The accused had received six to seven pounds of cannabis from Mawson who was sourcing the drugs from a supplier in South Australia. She sold that cannabis in the Katherine area and paid Mawson the wholesale price for about five pounds of those drugs. She misrepresented to Mawson that one pound had been seized by the police. She provided information to Mawson about the presence of police road blocks and organized meetings with him to collect cannabis.
>
> This conduct occurred in the months prior to arrangements taking place between Mawson and the accused for the transportation of the eight pounds of cannabis seized from Mawson by the police on 24 December 2013.

[33] The first consideration is relevance. Section 55(1) provides evidence is relevant that if it were accepted, could rationally effect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceedings. The Court is required to assess the capacity of the evidence to effect the assessment of probability of the existence of a fact in issue – it is not required to assess whether the evidence would have this

[7] Notice: Tendency evidence 27 June 2016.

effect.[8] The Court does not embark on an exercise in assessing the weight of the evidence.

[34] The series of telephone intercepts that commenced on 12 December 2013 are clearly relevant either directly or indirectly to the charge. Evidence of the accused and Mr Mawson discussing drugs, price, use of vehicles, persons who they have supplied drugs to and a tip off about police road blocks at Mataranka are relevant to the evidence of the charged conduct.

[35] Although some of the telephone intercepts are sought to be led for tendency purposes, in my view, as indicated to counsel during the hearing, the evidence of their activities that is close in time to the alleged offending may well be considered relevant to the proof of the charge.[9] It seems to me that if the evidence has the capacity to establish that Mr Mawson and the accused are engaged in cannabis supply together at a time close to the date of the conduct the subject of the charge, it is strongly arguable it is relevant and admissible on the basis of cases such as *Harriman v The Queen.*[10] It is not however clear to me that such an approach survived the *Uniform Evidence Act*, although the establishment of a history of drug transactions between the accused and Mr Mawson on or around December 2013 has the capacity to show it was less likely that the accused's presence and association with Mr Mawson on 24 December 2013 was innocent. On that basis, those parts of Mr Mawson's Statutory Declaration of 16 October 2014 that are relevant

[8] *R v Shamouil* (2006) 66 NSWLR 226.
[9] Telephone intercepts the Crown submits are relevant to Tendency are 035, 045, 135, 168 and 174. Telephone intercepts relevant to the conduct charged are 080, 100, 104, 123, 174, 180, 184 and 400.
[10] (1989) 167 CLR 590.

to the activities of December 2013, his oral evidence at the preliminary hearing and the telephone interceptions on the same subject are relevant to the proof of the charge, either directly or indirectly. In a broad sense, it might be seen to be evidence of conduct which forms part of a relevant transaction or capable of rebutting a defence and therefore outside of the scope of the tendency rule. No matter which way it is characterised, the proposed evidence of activities of the accused in December 2013 possesses significant probative value. The proposed evidence identified as tendency evidence of the accused's activities commencing on or about December 2013 is admissible on that basis.

[36] What is not so clear is whether the evidence of representations by Mr Mawson about earlier drug distributions and contact between the two has the capacity to rationally effect the assessment of the probability constituting the facts of the offending in December 2013. That conclusion requires drawing an inference of continuing illicit activity from some time prior to December 2013.

[37] There is evidence in Mr Mawson's statutory declaration that the accused approached him about supplying cannabis to her.[11] Mr Mawson told police that when she approached him, he organised more for her and then "did a couple more myself over the 12 months."[12] In his statutory declaration and in evidence at the committal Mr Mawson said that he supplied the accused with six or seven pounds and he received payment for about five pounds. It

[11] Transcript, Statutory Declaration of Wayne Mawson, page 3.
[12] Transcript, Statutory Declaration of Wayne Mawson, page 5.

is unclear when he did this, or when certain other elements of overall alleged history of supply occurred, other than it was sometime in the 12 months preceding the subject offending. The evidence relating to the earlier activities of the accused is less probative of the charged conduct.

[38] In relation to one alleged incident, the interviewing police officer asked Mr Mawson about seizing cannabis "mid to late last year", which it may be inferred, relates to middle to late 2013.[13] After some discussion of another incident of supply, and Mr Mawson suggesting Rosie told them to "piss off", Officer Bradshaw told Mr Mawson that the incident he is talking about "is quite several [sic], a couple of months, a few months before that."[14] The recorded statutory declaration refers to a conversation about the accused saying that police were waiting for a Georgina and that she lost a pound. If this correlates with the telephone intercept of a conversation on 22 December 2013,[15] that part of the statutory declaration is clearly relevant for the reasons already discussed. It is much closer to the subject offending than activities that are alleged to have taken place up to a year before. By itself however, the evidence in Mr Mawson's statutory declaration relevant to the earlier misconduct is less clearly relevant to the subject offending. Taken together with the other evidence he gave at the preliminary examination even when he stated that over a 12 month period, they probably "did six or seven pound",[16] it assumes stronger probative value. In terms of relevance, it possesses the capacity to rationally affect facts in issue. The

[13] Transcript, Statutory Declaration of Wayne Mawson, page 6.
[14] Transcript, Statutory Declaration of Wayne Mawson, page 7.
[15] Transcript Number 00168.
[16] Preliminary Examination transcript of 29/04/2015, at 9.

Court must proceed on the basis the evidence "could" have an effect on proof, if accepted by the jury.[17]

[39] The evidence of the drug dealing that is more remote from December 2013 or not tied to a date close to the subject offending is less probative, however taken at its highest, it remains relevant in terms of s 55 and s 56.[18]

[40] The tendency evidence sought to be led by the Crown, by virtue of s 97(1) of the *Uniform Evidence Act*, is presumptively not admissible unless the Court thinks that the evidence either by itself or having regard to the other evidence adduced or to be adduced, has "significant probative value". A further restriction is s 101 of the *Uniform Evidence Act* that provides the tendency evidence cannot be used against a defendant unless the probative value "substantially outweighs any prejudicial effect it may have on the defendant".

[41] The adjective "significant" in the context of s 97(1) has been held to mean "important" or "of consequence".[19] It must be more than mere relevance to meet the threshold of significant probative value. It has been held it is necessary "that the disputed evidence should make more likely, to a significant extent, the facts that make up the elements of the offence charged".[20]

[17] *IMM v The Queen* [2016] HCA 14 at [38].
[18] *IMM v The Queen* [2016] HCA 14 at [40].
[19] *Lockyer* (1996) 89 A Crim R 457, 459 (Hunt CJ at CL); *IMM v The Queen* at [46].
[20] *R v Ford* (2009) 201 A Crim R 451 at [125].

[42] As explained in *IMM v The Queen*[21] the "significance" of the probative value of the tendency evidence depends on the nature of the facts in issue to which the evidence is relevant and the importance the proposed evidence may have in establishing those facts. The evidence must be "influential" in the context of fact finding in the particular case.

[43] Reviewing the available evidence, the phone intercepts from mid-December, 035, 047, 135, 168, and 174, together with those parts of the evidence given by Mr Mawson at committal that relate to the activities of Mr Mawson and the accused of December 2013 and the parts of his statutory declaration of 16 October 2014 that relate to that same time frame, clearly possess the required significant probative value to be admitted as tendency evidence. Those parts of the evidence in my view may also be relevant proof of the charge, in addition to being admitted as tendency evidence.

[44] It is not clear however that the evidence in the statutory declaration and the limited amount of evidence given at committal concerning more generally drug dealings at an earlier time could be regarded as having significant probative value in the sense contemplated.

[45] Although there are some particular instances identified, and a description of how dealing may have taken place between them, the proposed evidence is not specific to dates. In my view it is not so specific or closely related to the charged acts or at least the later activities of the accused with Mr Mawson in December 2013 to possess the quality "significant probative

[21] *IMM v The Queen* [2016] HCA 14 at [46].

value". I accept it is relevant, but not significantly so. Unlike the evidence of their activities on or around December 2013, there is no supporting or independent phone intercept evidence of the earlier more general evidence of their alleged activities.

[46] It must be remembered Mr Mawson's evidence will be subject to challenge on numerous bases. Those that are obvious have been outlined above. Unlike the independent evidence of the phone conversations available at around the time of the offending, there is none throughout the earlier period described in Mr Mawson's statutory declaration. It is difficult to see how a co-accused's evidence to be subject to challenge, without more, as opposed to the phone intercept evidence coinciding with the later conduct, can in a real or rational way add to the probative force of the evidence towards proof of the charge.

[47] Turning then to s 101, in my view this is a case requiring the exercise of the discretion in respect of Mr Mawson's evidence of earlier drug dealing activity between them. Under s 101, tendency evidence must not be used unless the probative value substantially outweighs any prejudicial effect. In this assessment I must be concerned with the prejudicial impact of the evidence against the accused over and above its probative value. Given the sweeping nature of that part of the evidence, not tied to particular times, and confusing in parts, there is a real and substantial risk the accused would be convicted on the basis of past misconduct and association with Mr Mawson,

even in the face of giving the jury directions to the effect that she can only be convicted on the established evidence relevant to the charge.

[48] It is of course accepted that jurors comply with directions, however, in this case, if the tendency evidence of the accused's activities well before the charged acts were to be admitted, I would be required to warn the jury under s 165(1) of the evidence being hearsay, not subject to cross examination and therefore unreliable. Secondly the jury would be warned in the strongest possible terms in respect of Mr Mawson being criminally concerned under s 65(1)(d). This necessarily will require the jury being told of the need for caution in determining whether to accept the evidence and what weight to give it. Unlike the evidence to be admitted of the activities in December 2013, the direction would need to point out that there is not the level of supportive evidence of the earlier alleged activity, aside in a bootstraps manner, if one were to infer or work backwards from the activities of December 2013. As well as these warnings, if the evidence were admitted, a tendency direction and warning would be required. Mr Mawson's record of interview made at the time of arrest also tends to detract from the overall probative value of the statutory declaration of October 2014. While it is the case that all sorts of directions of this kind may be given, there is real potential for confusion and misunderstanding. This is also a situation where cross examination on the proposed tendency evidence is of course not possible.

[49] As acknowledged above, although evidence admitted pursuant to s 65(3) should not as a matter of course be excluded because of an inability to cross examine at trial, the combination of circumstances with the evidence concerned here leads me to the conclusion that this is an instance where the probative value of the evidence does not substantially outweigh its prejudicial effect. It is accepted lack of procedural fairness by way of being unable to cross examine, does not in itself automatically establish unfair prejudice.

[50] In *Galvin v The Queen*,[22] concerning an application for exclusion under s 137 where a witness, the victim of sexual assaults, had committed suicide, Howie J categorised different parts of the proposed evidence, the direct evidence of one charge having "no prejudicial effect other than to prove the allegation",[23] however other parts of the evidence amounting to admissions that may have gone to prove sexual interest were vulnerable to discretionary exclusion in respect of evidence produced from an unavailable witness.

[51] In *R v A* (No 3)[24] Bellew J held that where an accused has informed the Court of the issues that go to credit with respect to the unavailable witness, the unfair prejudice arising from being unable to cross examine may be greater resulting in exclusion under s 137.

[52] In my view this is a case where the discretion under s 101 should be exercised to exclude the evidence of the earlier alleged drug dealings or

[22] (2006) 161 A Crim R 449.
[23] Ibid at [22].
[24] [2015] NSWSC 79 at [12].

activities of the accused as tendency evidence. To some extent this ruling is influenced by the inability to cross examine the unavailable witness in circumstances that given the issues with the evidence amount to serious prejudice. The occasion for exercise of the discretion to exclude does not arise with respect to the evidence about the activities of December 2013 as that evidence possesses substantially higher probative value.

[53] In conclusion, my view of the evidence would seem to require the following more particular rulings.

The Statutory Declaration of 16 October 2014

a) The only parts that may be admitted are those that are relevant to the activities of the accused of December 2013, save that introductory material not referencing the accused's activities with drugs may be admitted (e.g. pages 2-3).

b) The parts that relate to activities of the accused in December 2013, reflected also in the telephone intercepts may be admitted on the basis of tendency and where relevant, proof of the charge.

c) Broad and general statements as to the accused's overall involvement are to be excluded (e.g. pages 15-16: she's a reasonable player in this whole investigation; she would have delivered 90 per cent of it).

d) The parts that are directly relevant to the charge may be admitted (e.g. pages 9-11).

e) Although not all of the content is clear in terms of time frame, I request the parties attempt to agree on appropriate editing of the statutory declaration consistent with the ruling that the evidence concerning the accused's alleged illicit activities before December 2013 be excluded.

Evidence from the Preliminary Examination

a) Primarily admissible, including the telephone intercepts and the evidence of Mr Mawson explaining the language etc.

b) Exclude references to selling over a 12 month period, the second half of June, selling six, maybe seven pound (page 9).

c) Otherwise the evidence is admissible, although the parties should consider if there are further edits required, consistent with these reasons.

Telephone Intercepts

a) 035, 047, 135, 168, 174 are relevant to tendency and indirectly to proof of the charge and admissible.

b) 080, 100, 104, 123, 174, 180, 184 and 400 are relevant to proof of the charge.

[54] Through prior arrangement with counsel, this ruling will be forwarded by email and not published until after the trial.
