R v GP [2015] NTSC 53

PARTIES:	THE QUEEN
	v
	GP
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	21448001
DELIVERED:	1 September 2015
HEARING DATE:	19 August 2015
JUDGMENT OF:	BARR J

CATCHWORDS:

CRIMINAL LAW – Voir dire – admissibility of record of interview – accused charged with having sexual intercourse with underage female – interviewing detective referred to the intended comparison of accused's DNA with that of the complainant and her baby – accused admitted having sex with complainant – child's DNA samples later excluded the accused as the biological father – accused's admissions made in circumstances that were not likely to adversely affect the truth of the admissions made – admissions not rendered inadmissible by s 85(2) of the Act.

CRIMINAL LAW – Voir dire – admissibility of record of interview – non-compliance with the *Anunga* rules and Police General Orders in relation to cautioning the accused – accused asked to, but did not explain caution in his own words – caution in substantial compliance with s 139(1)(c) of the Act – caution given in the English language in which the accused is able to

communicate with reasonable fluency – onus on accused to satisfy court that conditions for exclusion met – court not satisfied that accused did not have sufficient fluency in English to understand the caution and its underlying concept and function – accused did not establish that evidence of admissions to police were obtained improperly or in contravention of an Australian law – evidence of accused's admissions in police interview admissible.

CRIMINAL LAW – Voir dire – admissibility of record of interview – non-compliance with the *Anunga* rules and Police General Orders in relation to cautioning the accused – accused asked to, but did not explain caution in his own words – evidence of admissions held not to have been improperly obtained under s 138(1) of the Act.

CRIMINAL LAW – Voir dire – admissibility of record of interview – non-compliance with the *Anunga* rules and Police General Orders in relation to cautioning the accused – accused asked to, but did not explain caution in his own words – probative value of the accused's admissions high – admissions important in Crown case because of potential unreliability of complainant – breach of the relevant *Anunga* guideline more negligent than reckless or deliberate – desirability of admitting the evidence outweighs undesirability of admitting evidence obtained in the way in which it was obtained.

Evidence (National Uniform Legislation) Act 2011 (NT) s 56, s 85, s 90, s 137, s 138, ss 139
Evidence Act (Cth) s 138

International Covenant on Civil and Political Rights Article 14

R v Deng [2001] NSWCCA 153, *Gudabi* (1984) 12 A Crim R 70 at 81, applied.

Bin Sulaeman v R [2013] NSWCCA 283 , *R v Echo* (1997) 136 FLR 451, *Em v The Queen* (2007) 232 CLR 67, *Festa v R* (2001) 208 CLR 593, *R v Nagawalli* [2009] NTSC 25, *Papakosmos v R* (1999) 196 CLR 297, *R v Rooke* (1997), unrep NSW Ct of Crim app, Newman, Levine and Barr JJ, No 60550/96, 2 September 1997, *The Queen v RR* [2009] NTSC 44, *R v Sophear Em* [2003] NSWCCA 374, *R v Swaffield* (1998) 192 CLR 159, referred to.

R v Anunga (1976) 11 ALR 412, *Parker v Comptroller-General of Customs* (2009) 83 ALJR 494, followed.

Les McCrimmon: The Uniform Evidence Act and the Anunga Guidelines: Accommodation or Annihilation? (2011) 2 NTLJ 91, p 102.

REPRESENTATION:

Counsel:

Crown:	M Chalmers
Defendant:	D Woodroffe

Solicitors:

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

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

R v GP [2015] NTSC 53
No. 21448001

BETWEEN:

THE QUEEN
Plaintiff

AND:

GP
Defendant

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 1 September 2015)

[1] The accused is charged with one count of sexual intercourse with an underage female child, alleged to have taken place in the [remote community], between 1 January 2014 and 1 July 2014. The Crown has particularised the date of offending as on or about 9 March 2014 (Crown submissions on the voir dire, par 16).

[2] The complainant initially told Police she got pregnant "from GP" (CFI 2 July 2014, p 9). She referred to being "humbugged" by him. She was otherwise non-specific. In a subsequent interview with police, the complainant said that the accused called out to her one Sunday and said "come on, we gunna have sex". She was 13 years old at the time. The

accused suggested that they go to the complainant's house, which they did. There they had penile-vaginal sexual intercourse, and the accused ejaculated (CFI 11 Aug 2014, pp 9-16). The complainant told police that she had had sexual intercourse with the accused on some 10 occasions. (CFI 11 Aug 2014, p 19). She attributed her pregnancy to the accused. She told police that she had not had sex with any boys other than the accused (CFI 11 Aug 2014, p 23 - 24).

[3] The complainant gave birth. DNA samples obtained from the complainant's baby were tested. The results excluded the accused as the biological father of the child.

[4] The complainant maintained that she had not had sex with any boys other than the accused, even when informed by police, after the birth of her child, that DNA testing showed that the accused was not the father of the child. Her immediate response was, "How come he look like him?", followed by another denial that she had had sex with anybody else (CFI 5 March 2015, p 20).

[5] In relation to the complainant's statements to police, I have relied on the transcripts provided to me as part of exhibit P1. I have not watched or listened to the audio-visual recordings.

[6] The complainant's evidence is potentially unreliable, insofar as she maintained she had not had sex with any boys other than the accused in

circumstances where, if the DNA evidence is accepted, she must have had sex with a male person other than the accused.

[7] In the context of the facts set out in [2], [3] and [4], the Crown case relies significantly on admissions made by the accused to Federal agents Robert Hall and Fran Adams in the course of a formal police interview on 20 October 2014. The accused admitted to agent Hall that he had had sex with the complainant, albeit only once. In response to further questions, the accused provided additional details. The audio visual recoding of the interview is contained in the folder, exhibit P1. A transcript of the interview prepared by the Office of the DPP is at Tab 4 of exhibit P1. The most relevant transcript page (in relation to the core admission) is p 14.

[8] I now set out extracts from the transcript,[1] which show the context in which the accused made a series of admissions relied on by the Crown. The extract starts with agent Adams summarizing a number of things the accused had just said about his relationship with the complainant:

ADAMS:	- - - everybody was in the community was saying that you two were together, her mum and her aunty asked you if you were together and you growled.[2]
ACCUSED:	Yeah.

[1] Transcript, Tab 4 of exhibit P1, pp 13 - 17.
[2] The accused had used the word “growled” as the past tense of the transitive verb “to growl”, meaning to tell someone off. He said he had growled the people who were making up the story that he was going out with the complainant: transcript, Tab 4 of exhibit P1, p 7.

ADAMS: Yeah, and then – um – she got – KK got pregnant and people were blaming you for that, is that correct?

ACCUSED: People blame me and like her she blame me.

ADAMS: KK blame you to?

ACCUSED: Yeah.

ADAMS: Okay.

ACCUSED: She thought – she thought I was the father, but like - - -

ADAMS: Why would she think that?

ACCUSED: I don't know they don't tell me they ran out on them – ran out on that lie she just tell the truth that's the truth, tell - - -

ADAMS: And what did she - - -

ACCUSED: - - - the family and tell – tell the mother I'm the father, and then anyone tell all them straight, like tell them straight, like she went out on that – that fella they (inaudible) just blame me.

ADAMS: And what did she say when you told her that?

ACCUSED: She said like, "Nah, nah, you", she said, she said me [*accused points to his own chest area with left hand*] and then I said, "I seen you with him" seen her – seen her with him.

ADAMS: Okay.

ACCUSED: And then start blaming – put blame on me.

ADAMS: Alright. I don't have anything further.

HALL: Alright. Do you know the statement from KK - - -

ACCUSED: Yeah.

HALL: - - - saying that when she was thirteen you used to go to her house and you guys would have sex, okay. Now earlier I got that DNA from you, do you remember how you got that swab – you gave me that swab, so we're going to do that and we're going to send that to the labs and we're going to get some from that baby that KK's about to have that she says is yours and we'll get some from her too, and that will tell us if you're the father, okay.

ACCUSED: Like this (inaudible), yeah.

HALL: That's so - - -

ACCUSED: Like she – like she put the blame on me for that – for that kid.

HALL: Okay. But did you have sex with her because when we do that DNA it will tell us, mate, it will tell us if that baby is yours.

ACCUSED: Yeah, yeah.

HALL: Okay. So did you have sex with KK?

ACCUSED: Only, yeah, one time.

HALL: Okay, one time.

ACCUSED: But I didn't like – but I didn't like (inaudible), you know.

HALL: Well tell me – well, okay, tell me all about that one time, tell me what you did that one time?

ACCUSED: Only one time (inaudible) I didn't want to, like.

HALL: Yep, alright. How long – how long ago was this one time?

ACCUSED: Just one time.

HALL: That's – that's fine, I don't want to talk about that now because you said that you did - - -

ACCUSED: Yeah.

HALL: - - - you did have sex with her, I want you to tell me about that time you had sex with her remembering that you said it was only a few weeks ago, but she's about to have a baby so that's nine months ago, mate.[3]

ACCUSED: Yeah, she like – I went out with her once.

HALL: Okay, once.

ACCUSED: Yeah.

HALL: Where was it – where was it, tell me where it was, let's focus?

ACCUSED: Yeah, in that house.

HALL: Okay. Whose house?

ACCUSED: Her house.

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[3] Agent Hall appears here to be questioning the accused on the basis of Hall's misconception that the accused was the father of the complainant's child, and hence that the admitted act of sexual intercourse must have happened some nine months previously. However, the accused resisted Hall's suggestion, here re-stating that he had had sex with the complainant only once, and later telling Hall that he could not remember when it was.

HALL: But you're saying that it happened just once, but she's saying at least – at least ten times, mate, and she's pregnant now, so was it more than – was it one time or more than one time?

ACCUSED: One time, bruss. I know – I know myself bruss.

HALL: Okay.

ACCUSED: One time.

HALL: Where did it happen in the house?

ACCUSED: (inaudible)

HALL: It's okay. Ah – you had sex at her house, whereabouts in the house was it, like whose room was it in, was it in the kitchen, was it in the bathroom, was it in her room, was it in the lounge room?

ACCUSED: No, her room.

HALL: Her room, okay. And did she want to have sex?

ACCUSED: Yeah.

HALL: Was it consensual, so consensual, did she want to or did you make her?

ACCUSED: No, she want to.

HALL: Okay. She wanted to, okay. Can you remember for me when this happened?

ACCUSED: I can't remember.

HALL: Okay, can't remember.

ACCUSED:	Like one for (inaudible) like – like for (inaudible), but I didn't like thing, you know.
HALL:	Okay. So did you wear a condom?
ACCUSED:	Yeah.

Issues on voir dire

[9] On the voir dire, defence counsel seeks to have evidence of the accused's interview excluded on several grounds. Defence counsel submits that -

1 There was non-compliance with the *Anunga* rules and Police General Orders, specifically General Order Q2, par 3.1.3, in relation to the caution.

2 There was non-compliance with s 139(1) and (3) *Evidence (National Uniform Legislation) Act*.

3 The accused was not aware of his right to silence.

4 There was an inducement to confess that amounted to an impropriety.

5 The admission is not reliable.

6 The admission is of low probative value.

[10] The focus of counsel's submissions 1, 2 and 3 is on that part of the police interview in which the caution was administered and explained to the accused.

[11] I set out below an extract from the transcript of that part of the conversation in which the caution was administered to the accused,[4] into which I have inserted my own observations, in italics in brackets:

HALL:	Okay. Mate, do you understand that you are under arrest and you're not free to leave, okay.
ACCUSED:	[No audible response]
HALL:	What I want to talk to you about is your sexual relationship with a child under sixteen. Do you know what I wish to talk to you about?
ACCUSED:	Yeah, yeah
HALL:	Okay. But before either myself or Federal Agent Adams asks you any questions in relation to that matter I must inform you that you're not obliged to say or do anything unless you wish to do so. This means that it's your choice to speak to me. Do you understand that?
ACCUSED:	Yeah.
HALL:	Okay. Can you explain that to me?

[*Before responding to this request, the accused paused for about five or six seconds, rubbing his eyes or forehead under the peak of his cap]*

ACCUSED:	No, no.

[*The accused here shook his head, consistent with the negative answer just given*]

ACCUSED:	That's alright. [*concession that the accused had not explained the caution*] So if I ask

[4] Transcript, Tab 4 of exhibit P1, pp 5-6.

you a question, do you have – do you have to tell me – like if you don't want to – if you don't want to talk to me when I ask you a question, do you have to answer me?

ACCUSED: [No audible response]

[*Although "no audible response" appears in the transcript, the accused shook his head, apparently indicating an answer in the negative. However, it is equally possible that the negative indication was a reflection of the same inability to explain involved in the "No, No" answer a short while earlier*[5]]

ACCUSED: That's right. [*response based on Hall's understanding that the accused had indicated that he understood that he did not have to answer questions*]. I must also inform you that anything you do say or do will be recorded and may be later given in evidence. Do you understand that?

ACCUSED: [No audible response]

[*Although "no audible response" appears, the accused nodded his head apparently indicating an answer in the affirmative*]

HALL: Okay. Explain that to me?

ACCUSED: [Inaudible]

[*Here the accused made a grunting noise. It is possible that he said 'yeah', but it is unclear*]

HALL: Okay. So what that means, mate, is that anything you tell me will be recorded on this machine and the magistrate or jury or other people might be able to hear it, okay. Do you understand that?

ACCUSED: Yeah, yeah.

[5] This is discussed further in [18] below.

[*Here the accused nodded his head, apparently indicating an answer in the affirmative*]

HALL: So explain it back to me, so if it gets recorded, what happens to it then, who might hear it?

ACCUSED: Yeah, people who get that, yeah - - -

[*The accused probably said "… people <u>will</u> get that", rather than "… people who get that". At the same time he spoke those words, the accused directed his head, in a demonstrative way, to a point behind agents Hall and Adams, in the direction of the audiovisual recording machine to which the accused's attention had been directed earlier in the interview. The recording machine is not seen on screen, for obvious reasons*]

HALL: And people are going to hear your words and stuff?

ACCUSED: Yeah.

HALL: Are you happy with that?

[*This question was directed at the corroborating officer, Federal Agent Fran Adams*]

ADAMS: Yep.

HALL: Alright, mate, as I said I would like to talk to you about the sexual relationship with a child under sixteen, name KK. Can you tell me about your relationship with KK?
…….

[12] I make some observations in [13] to [16] below in relation to the statements made and questions asked by agent Hall in that part of the accused's police interview extracted in [11]. I will refer also to the manner in which they were made or asked.

[13] Agent Hall was polite, but quite informal. He often addressed the accused (and the interpreter) as “mate”. Agent Hall spoke briskly. The manner in which he explained matters and asked questions was not slow or deliberate. Although at times he seemed somewhat rushed himself, he allowed sufficient time for the accused to respond to the questions asked.

[14] On one occasion, agent Hall spoke several sentences before asking for a response. On another, one of his questions was disrupted as he corrected himself midstream and re-phrased the question. On two occasions, although agent Hall apparently understood the need to have the accused explain the caution in his own words, Hall gave up trying to have the accused do that at the first indication the accused may have been unable to do so. Instead, Hall explained the caution himself, but still did not have the accused explain in his own words the caution as repeated or clarified by Hall.

[15] Notwithstanding the presence of an interpreter, no attempt was made by agent Hall to have the caution interpreted into the [indigenous language] by the interpreter. Rather, agent Hall went about explaining the caution himself, for example: “This means that it’s your choice to speak to me”, or “So what this means, mate, is that anything you tell me will be recorded …”.

[16] In administering and explaining the caution, agent Hall broke the caution into two parts: (1) he told the accused that he did not have to say anything in answer to questions (and then explained that part), and (2) he told the accused that anything he did say would be recorded and “may be later given

in evidence" (which he then explained). Although Hall's explanations were reasonable, the accused was not asked to, and did not explain, in his own words, phrase by phrase, his understanding of the two parts of the caution.

[17] Notwithstanding the inadequacies apparent on the face of the transcript and commented on by me, I am satisfied that the accused understood the second part of the caution, that his answers would be recorded and would (or could) be given in evidence against him in court. Counsel for the accused contends that it was never satisfactorily explained to the accused that his interview might be used against him in evidence in the sense that a jury might use it to determine if he had done something wrong.[6] However, I do not accept that submission. I consider that it was made very clear to the accused that an audio visual record of the interview was being made, and that it might be heard "by the magistrate or jury", or by other people. This was an obvious reference to possible criminal court proceedings. The accused had been arrested, was being held in police custody and was to be questioned about his relationship, such as it was, with the complainant. I am satisfied that the accused understood that evidence of his police interview would or might be used in court. My satisfaction is reinforced by the fact that, later in his interview, the accused made a number of attempts to exculpate himself by placing responsibility for the complainant's pregnancy onto another male.

[18] The accused's understanding of the first part of the caution is less clear. I am not satisfied that the accused properly understood his right to silence,

[6] Defence (written) Submissions on the Voir Dire, par 20.

notwithstanding the attempts by agent Hall to help him to understand. When giving evidence on the voir dire, Hall said that he was comfortable with the accused's understanding of Hall's explanation of the accused's right to silence. However, I do not attach much weight to agent Hall's evidence in this respect, not because I do not accept that he was 'comfortable', as he said, but because the accused's understanding of his right to silence has not been demonstrated on all the evidence. The evidence in the audio visual record of the police interview is inconclusive.[7] Agent Hall's level of comfort may well have been completely misplaced. At the same time, I could not be satisfied that the accused did not properly understand his right to silence. This apparent ambivalence on my part will become relevant to my consideration of various provisions of the *Evidence (National Uniform Legislation) Act 2011* (NT) under which evidence, otherwise admissible, may be excluded by one of the exclusionary rules, by exercise of judicial discretion, or under one of the procedural provisions in the Act.

The *Anunga* guidelines

[19] Given the accused's submissions 1, 2 and 3, referred to in [9] and [10] above, it is necessary to refer to the relevant guideline which counsel for the accused argued had not been complied with (or not fully complied with) by agent Hall.

[7] See the inserted comments in italics at [11] above.

[20] The third of the guidelines laid down by Forster J in *R v Anunga*[8] required care in the administration by police of the pre-interview caution, to ensure proper understanding by Aboriginal interviewees. The guideline reads as follows:

> (3) Great care should be taken in administering the caution when it is appropriate to do so. It is simply not adequate to administer it in the usual terms and say, "Do you understand that?" or "Do you understand that you do not have to answer questions?" Interrogating police officers, having explained the caution in simple terms, should ask the Aboriginal to tell them what is meant by the caution, phrase by phrase, and should not proceed with the interrogation until it is clear the Aboriginal has apparent understanding of his right to remain silent. Most experienced police officers in the Territory already do this. The problem of the caution is a difficult one but the presence of a "prisoner's friend" or interpreter and adequate and simple questioning about the caution should go a long way towards solving it.

[21] That guideline has been incorporated into Northern Territory Police General Order Q2, exhibit D4, at par 3.1.3, which provides that the suspect should be asked to explain what is meant by the caution, phrase by phrase, and that questioning should not proceed until it is apparent that the suspect understands the right to remain silent.

[22] The *Anunga* guidelines are not rules of law. The status of the *Anunga* guidelines, as complemented by Police General Order Q2, was referred to by the Federal Court in *Gudabi* in the following terms:

> In dealing with arguments based upon an alleged breach of the *Anunga* rules two matters must be borne in mind. The guidelines, which have as their object the assistance of investigating officers in

[8] *R v Anunga* (1976) 11 ALR 412 at 414 - 5.

> conducting their inquiries in such a manner as to be fair to the person interviewed while at the same time serving the public interest by not unduly inhibiting the investigating process, are not rules of law. It would be wrong to treat what is said in *Anunga* as laying down principles or rules the breach of which in any respect will result in confessional material being rejected as inadmissible. Equally, it cannot properly be said that evidence of a confessional statement will always be admissible if it can be shown that the investigating officers did not in any way contravene those guidelines. The legal question will always be whether the confessional statement was voluntary in the sense in which that expression is used in the relevant authorities.[9]

[23] Although the *Anunga* rules may not have been "rules of law", courts in the Northern Territory over many years excluded evidence of admissions on the basis of non-compliance with the *Anunga* guidelines, if such non-compliance resulted in confessions being involuntary,[10] or a breach of the common law discretions relating to fairness.[11]

[24] The *Anunga* guidelines have thus helped to ensure that an indigenous defendant is accorded a fair trial by assisting the courts in their assessment as to whether the questioning of an indigenous defendant, resulting in a confession, was fair.[12]

[25] The effect of s 56(1) *Evidence (National Uniform Legislation) Act 2011* (NT)[13] is to displace Northern Territory law relating to the admissibility of evidence, unless the law is preserved elsewhere within the Act. The subsection provides that, if evidence is relevant, then it is admissible.

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[9] *Gudabi* (1984) 12 A Crim R 70 at 81; see also *The Queen v RR* [2009] NTSC 44 at [48].
[10] See, for example, R *v Echo* (1997) 136 FLR 451 at 452.8, 457.5.
[11] See, for example, *R v Nagawalli* [2009] NTSC 25 at [53], [72].
[12] See Les McCrimmon: *The Uniform Evidence Act and the Anunga Guidelines: Accommodation or Annihilation?* (2011) 2 NTLJ 91, p 102.
[13] To be referred to as "ENUL" or "the Act".

Admissible evidence may, however, be excluded (1) by one of the exclusionary rules, (2) by exercise of judicial discretion, or (3) under one of the procedural provisions in the Act. Thus, although the *Anunga* guidelines for the conduct of police in the interrogation of indigenous persons will still apply via Police General Order Q2, *R v Anunga* is no longer (if it ever was) binding legal precedent in relation to the admissibility of evidence in court.

[26] In the context of admissions, the focus of the relevant provisions of ENUL is not on whether the accused's will was overborne in some way – the voluntariness rule at common law – but rather on the likely reliability or truth of any admissions obtained, in light of all the circumstances in which they were made.[14]

[27] My findings in [14], [15] and [16] identify a failure on the part of agent Hall to comply or fully comply with *Anunga* guideline 3, extracted in [20]. Agent Hall did not wait until the accused had explained the caution, phrase by phrase, such that it was clear that the accused had understood his right to remain silent, before proceeding with the questioning of the accused.

[28] The issue for my determination is the extent to which less-than-complete compliance with the relevant guideline by agent Hall affects the admissibility of the admission referred to in [7] and [8] above. It will also be necessary to consider other aspects of the process by which the accused's admissions were obtained.

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[14] McCrimmon *The Uniform Evidence Act and the Anunga Guidelines: Accommodation or Anihilation?* (2011) 2 NTLJ 91 at 102 - 103.

Reliability of admissions

[29] The starting point for my consideration is s 85 ENUL. Under s 85(2), relevantly, evidence of an admission made to a police officer investigating the possible commission of an offence is not admissible unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected.

[30] The prosecution in the present case must satisfy the court on the balance of probabilities that the admissions relied on were made in circumstances that were not likely to affect their truth adversely.[15] As trial judge, I must determine whether the reliability of the admissions may have been impaired by the way in which they were obtained. In this exercise, I need to consider all the circumstances. Those circumstances include the characteristics of the accused person making the admission, including age, personality, education and any mental, intellectual or physical disability affecting him. The circumstances would also include, where they exist, misconduct by those interrogating, the procedural safeguards adopted, and whether there was any impairment of the ability of the person making the admission to make a rational decision.

[31] The reference in s 85(2) to "the circumstances in which the admission was made" means the circumstances of and surrounding the making of the admissions, not the general circumstances of the events said to form part of the offence to which the admissions are relevant. I have to examine the

[15] *Bin Sulaeman v R* [2013] NSWCCA 283 [81].

process by which police questioning has produced evidence proposed to be used at trial.[16]

[32] The accused is a young Aboriginal man from [a remote community]. He speaks [indigenous language] and English. His English is Aboriginal English, with an obvious accent. In the course of his police interview, he demonstrated reasonable English language proficiency, although there were some misunderstandings in communication, mainly in relation to time. He was born on 6 November 1994, and so was almost 20 years old at the time of his police interview.[17] He attended secondary school at [school] to year 11. When asked if he could read and write English, he answered "little bit". At the time of his police interview, he was in good health, suffering no apparent disability, and appeared alert and responsive. He was not apparently affected by drugs or alcohol. He had not been in police custody for an unreasonable period of time. He was alive to the purpose of the police interview, and used the occasion to try to place responsibility for the complainant's pregnancy onto another person, and in that way to divert attention from himself. Notwithstanding the matters mentioned by me in [13] to [16] above, agent Hall did not question the accused in an overbearing way, or in a manner which was likely to place the accused under unnecessary stress. Although some of the questions asked by Hall were a little complicated, the questions overall were not improper or unfair. In

[16] *R v Rooke* (1997), unrep NSW Ct of Crim app, Newman, Levine and Barr JJ, No 60550/96, 2 September 1997.

[17] I note that in the earlier, preliminary, interview (the "section 140 interview), the accused told police that he was born on 6 November 1995. Transcript, Tab 3 of exhibit P1, p 1. If that were correct, he was almost 19 years old at the time of his police interview.

particular, the series of questions leading up to the crucial admission made by the accused, that he had had sex with the complainant "one time", were proper questions. The accused's answers to subsequent questions, in which he elaborated on the one occasion on which he admitted to having sex with the complainant, appeared confirmatory of the initial admission.

[33] Counsel for the accused contends that the questioning of the accused, in which agent Hall referred to the intended comparison of the accused's DNA (obtained by buccal swab taken earlier) with that of the complainant and her baby, was designed to induce a confession. Specific reference was made to the statement by agent Hall: "… we're going to get some from that baby that KK's about to have that she says is yours and we'll get some from her"; and to the question Hall asked shortly afterwards: "But did you have sex with her because, when we do that DNA it will tell us, mate, it will tell us if that baby is yours".[18]

[34] Defence counsel complains that no interpreter was used to convey the complex concept of DNA, and that the way the question was asked was "to engender a confession and to make a denial unavailable or implausible". I disagree. The questioning would have been effective only if the accused had had sexual intercourse with the complainant and thus thought that he might be the father of her child. Otherwise, the accused could have plausibly maintained his denials. The purpose of the questioning was to induce the accused to tell the truth, if he had not been telling the truth to that point of

[18] Defence submissions on the voir dire, par 28 and par 29.

the interview. That is not an improper purpose. It is unlikely that the particular questioning would have induced the accused to tell an untruth. Things would have been quite different if Agent Hall had represented to the accused that DNA testing would establish whether or not the accused had had sexual intercourse with the complainant,[19] but that did not occur.

[35] I therefore reject the accused's submission that "the nature of the forceful questioning concerning the effects of the swabs and DNA was likely to produce a false confession to have sex only the once."

[36] There is no evidence in this case of any threat, promise or other inducement made to the accused by agent Hall or any other police officer.

[37] I am satisfied on the balance of probabilities that the accused's admissions were made in circumstances that were not likely to adversely affect the truth of the admissions he made. In other words, there was nothing about the circumstances in which the admissions were made which would lead me to conclude that the admissions were not true. I add that the identified shortcomings on the part of agent Hall in relation to his compliance with the third *Anunga* guideline is not a circumstance, or does not constitute circumstances, which would adversely affect the truth of the admissions made. It is most unlikely that the truth of the admissions made by the accused was adversely affected by the manner in which agent Hall administered and explained the caution.

[19] See s 138(2)(b) ENUL.

[38] It follows that evidence of the accused's admissions are not rendered inadmissible by s 85(2) of the Act.

[39] My understanding is that s 85(2) does not require me to make findings as to the truth of the accused's admissions. It is therefore not relevant that, in the present case, I may find it difficult to accept that the accused had sexual intercourse with the complainant on one occasion only, as he asserts and admits. However, to the extent that the content of the admission may support a conclusion that the admission is reliable, I have no reason to doubt the truth of the admission by the accused that he had sexual intercourse with the complainant on the one occasion he described.

Improperly or illegally obtained evidence

[40] Counsel for the accused argues that agent Hall failed to caution the accused in accordance with the requirements of s 139(1) and (3) ENUL. Counsel therefore contends, in reliance on s 138(1) of the Act, that evidence of the admissions made by the accused should not be admitted, because such evidence was obtained improperly or obtained in contravention of an Australian law.

[41] A party seeking to exclude evidence pursuant to s 138 ENUL has the burden of showing that the conditions for its exclusion are satisfied, namely that it was obtained improperly or in contravention of an Australian law. The burden then falls upon the party seeking the admission of the evidence to persuade the court that it should be admitted. There is thus a two stage

process. The party seeking admission of the evidence has the burden of proof of facts relevant to matters weighing in favour of admission. It also has the burden of persuading the court that the desirability of admitting the evidence outweighs the undesirability of admitting evidence obtained in the way in which it was obtained.[20]

[42] There is no definition of "improperly", "contravention", or "impropriety" in the Act. In *Parker*, French CJ said as follows:

> [30] Without essaying an exhaustive definition, the core meaning of "contravention" involves disobedience of a command expressed in a rule of law which may be statutory or non-statutory. It involves doing that which is forbidden by law or failing to do that which is required by law to be done. Mere failure to satisfy a condition necessary for the exercise of a statutory power is not a contravention. Nor would such a failure readily be characterised as "impropriety" although that word does cover a wider range of conduct than the word "contravention".

[43] Pursuant to s 139(1) of the Act, evidence of a statement made by a person during questioning is deemed ("taken") to have been obtained improperly if the person is under arrest and the "investigating official" does not, before starting the questioning, caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence.

[44] Before starting to question the accused, agent Hall cautioned him in terms of s 139(1)(c) of the Act; that is, he told the accused that he did not have to say or do anything but that anything he did say or do may be used in evidence.

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[20] *Parker v Comptroller-General of Customs* (2009) 83 ALJR 494 at [28], per French CJ. See also *R v Sophear Em* [2003] NSWCCA 374 at [63].

Hall said to him, "I must inform you that you're not obliged to say or do anything unless you wish to do so"; and shortly afterwards said, "I must also inform you that anything you do say or do will be recorded and may be later given in evidence".[21] There was substantial compliance by agent Hall with the requirements of s 139(1)(c) of the Act in terms of what Hall said. Moreover, although the caution was not interpreted into the [indigenous language], I am satisfied that it was given in a language (English) in which the accused was "able to communicate with reasonable fluency", at least in terms of his general language ability.

[45] My assessment that the accused was able to communicate in the English language with reasonable fluency was based not so much on the accused's responses at the time the caution was administered, but on statements made by the accused and answers given by him to questions later in his police interview.

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

> In my view the section is purposive. It does not operate on an accused's general language ability. It operates on the ability to understand the concept underlying the caution and the function of a caution. The caution is meant to convey to an arrested person that he/she has the right to choose to speak or to remain silent. It is meant

[21] For the more complete context, see [11].

> to ensure that the person is aware that if he/she speaks, what he/she says may be given in evidence.[22]

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

> In my opinion that the phrase "reasonable fluency" in s 139(3) of the Evidence Act 1995 means fluency sufficient to enable the person concerned to understand the caution.[23]

[48] I am not satisfied that the accused properly understood his right to silence, for reasons explained in [18] above. At the same time, I am not satisfied that the accused did not properly understand his right to silence. I simply do not know. Before s 138 may come into play, via s 139(1)(c) read with s 139(3), the accused has to satisfy me that the condition for exclusion is met, namely, that evidence of his admissions was obtained improperly, in the deemed sense, because the caution was not given in a language in which he had sufficient fluency to understand the concept underlying the caution and the function of the caution. The accused did not give evidence on the voir dire as to whether he did, or did not, have a proper understanding of the caution. No other witness gave evidence to describe any relevant limitation in the accused's English language fluency or comprehension. Notwithstanding the presence of an interpreter, the accused 'fielded' nearly all relevant questions asked by the police and answered without reference to the interpreter and without seeking an interpretation. In the end, I have not been able to determine whether the accused's fluency in English was, or was not,

[22] *R v Deng* [2001] NSWCCA 153 at [17].
[23] *R v Deng* [2001] NSWCCA 153 at [34].

sufficient to enable him to understand the caution and its underlying concept and function.

[49] The accused has therefore not established that evidence of admissions made by him during his police interview was "obtained improperly" within the meaning of s 139(1) of the Act. Nor has the accused established that evidence of admissions made by him during his police interview was obtained "in contravention of an Australian law", that is, by a contravention of s 139(1)(c) of the Act.

[50] To the extent that a breach of the third *Anunga* guideline is relied on, the guideline is not "an Australian law", or a rule of law.[24] Therefore, there was no contravention of an Australian law - no relevant disobedience of any law or rule of law - involved in the particular breach identified and discussed by me in [14], [16] and [27].

[51] That still leaves unresolved the issue as to whether that breach of the third *Anunga* guideline resulted in the evidence of the accused's admission being "improperly obtained" within the meaning of s 138(1)(a) of the Act.

[52] Apart from specified circumstances or situations in which evidence is deemed to have been obtained improperly, the Act does not define the meaning of "improperly". In *Parker*,[25] French CJ considered the meaning of

[24] *Gudabi* (1984) 12 A Crim R 70 at 81.
[25] *Parker v Comptroller-General of Customs* (2009) 83 ALJR 494 at [29].

"improper", with reference to "improperly" in s 138(1) *Evidence Act* (Cth), and said:

> The relevant ordinary meanings of "improper" include "not in accordance with truth, fact reason or rule; abnormal, irregular; incorrect, inaccurate, erroneous, wrong".

[53] It is arguable that the evidence of the accused's admissions was improperly obtained in that the admissions were made in the course of a police interview which was "not in accordance with … [a] rule", or "irregular", in that the interview was not conducted in full conformity with the third *Anunga* guideline, as reflected in Police General Order Q2, par 3.1.3. However, I consider that would be an overly wide interpretation of the word "improperly" in context, and that there must be more than non-compliance with a rule of somewhat uncertain status, or more than an irregularity. In all the circumstances, I am not prepared to find that the evidence of the accused's admissions was improperly obtained.

[54] If I were wrong in my several conclusions summarised in [49], [50] and/or [53], I would still admit the evidence of the accused's admissions, because I am satisfied that the desirability of admitting the evidence outweighs the undesirability of admitting evidence obtained in the way in which the evidence was obtained. The Crown has satisfied me that the evidence should be admitted, on the balancing exercise required by s 138 ENUL. In this respect, I have taken into account the matters for consideration set out in

s 138(3), in particular the matters referred to in [55] - [60] below, which I consider are determinative.

[55] The probative value of the accused's admission is high. The admission itself followed a number of answers in which the accused denied having had sex with the complainant. The accused's denial of sexual intercourse was closely connected with his contesting paternity of the complainant's child.

[56] Although the sexual act which the accused admitted was not specified as penile/vaginal intercourse by him, the admission was made in the context of knowledge of the complainant's pregnancy, and there was reference to the accused having worn a condom. An inference may properly be drawn that the admission was an admission of penile/vaginal intercourse. Although the accused was unable to remember exactly when sex had taken place, he told police that it was at the complainant's house, and in her room. He described the act as consensual: "No, she wanted to". Of somewhat lesser probative value, the accused told police that he had worn a condom, which is consistent with his not being the father of the complainant's child.

[57] Evidence of the admission is particularly important in the Crown case because of the potential unreliability of the complainant, referred to in [6] above.

[58] The offence alleged to have been committed by the accused is relatively serious on account of the age of the complainant, and the disparity in age

between the complainant and the accused (about five years, depending on whether the accused was 18 or 19 at the time).

[59] If the breach of the third *Anunga* guideline were (contrary to my decision in [53]) an impropriety, I consider that it was as a result of negligence more than recklessness or deliberate disregard of the requirements of the *Anunga* guidelines. Agent Hall generally proceeded in accordance with the *Anunga* guidelines; for example, at the request of the accused, he had arranged for the presence of a [indigenous language] interpreter. Moreover, as mentioned, agent Hall made reasonable attempts to have the accused understand the caution, and his failure was in not waiting until the accused had explained the caution phrase by phrase so as to make it clear that he, the accused, had understood his right to remain silent (if he had understood). The effect of the breach is ultimately unclear, because although I am not satisfied that the accused properly understood his right to silence, I am also not satisfied that the accused did not properly understand his right to silence.

[60] In this context I repeat my observation in [37] above, that there was nothing about the circumstances in which the admissions were made by the accused which would lead me to conclude that the admissions were not true.

[61] Counsel for the accused argues that the contended impropriety was contrary to Article 14, par 3(a) of the International Covenant on Civil and Political Rights ("ICCPR"), which requires that everyone is entitled "to be informed

promptly and in detail in a language which he understands of the nature and cause of the charge against him". With respect, I fail to see the relevance of Article 14 Par 3 ICCPR to the present case. Article 14 sets out a number of minimum guarantees to which everyone is entitled in full equality "in the determination of any criminal charge against him". Article 14 is concerned with the process of the hearing and determination of criminal charges, not with the investigation process which may precede the laying of criminal charges. My conclusion is demonstrated by reference to the various paragraphs of Article 14. Article 14 par 1 states, relevantly, that, in the determination of any criminal charge, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. Article 14 par 2 states the presumption of innocence. Article 14 par 3 states a number of "minimum guarantees": to have adequate time and facilities to prepare the defence case and communicate with counsel; to be tried without undue delay; to be present at the trial; to defend either in person or through counsel; to examine or have examined opposing witnesses and call witnesses for the defence; to have the free assistance of an interpreter if the accused cannot understand or speak the language used in court, and not to be compelled to testify against oneself or to confess guilt.

[62] In the circumstances of this case, the accused has not established that any impropriety was contrary to or inconsistent with his rights recognised by the ICCPR.[26]

Discretion to exclude admissions – the unfairness discretion

[63] Counsel for the accused has also submitted that evidence of the accused's admissions should be refused pursuant to s 90 ENUL because, having regard to the circumstances in which the admissions were made, it would be unfair to the accused to use the evidence.

[64] The provision in s 90 is concerned with the right of an accused to a fair trial and whether there is a risk of improper conviction.[27] 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.[28]

[65] The accused bears the onus of establishing unfairness. Essentially for the same reasons given in paragraphs [37], [39], [49] and [55] - [60], I am not satisfied that admitting evidence of the accused's admissions would be unfair. I therefore decline to refuse to admit the evidence.

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[26] See s 138(3)(f) ENUL.
[27] *R v Swaffield* (1998) 192 CLR 159.
[28] *Em v The Queen* (2007) 232 CLR 67 at [109] per Gummow and Hayne JJ.

[66] Counsel for the accused also argues that s 137 ENUL requires the Court to refuse to admit evidence of the accused's admissions because their probative value is outweighed by the danger of unfair prejudice. As a matter of law, however, "unfair prejudice" does not mean a greater risk of conviction.[29] It is concerned with the manner in which the jury might misuse the evidence.[30] In my opinion, there is no danger of unfair prejudice to the accused in this case.

Conclusion

[67] In conclusion, I have ruled that the Crown may lead evidence of the accused's conversation with police officers on 20 October 2014, contained in the audio visual recording at Tab 4 of exhibit P1.

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[29] *Papakosmos v R* (1999) 196 CLR 297, per McHugh J at [91] - [92].
[30] *Festa v R* (2001) 208 CLR 593 per Gleeson CJ at [22], per McHugh J at [51].