CITATION:	*The King v Ashley* [2024] NTSC 14
PARTIES:	THE KING
	v
	ASHLEY, Brando
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	22329260
DELIVERED:	15 March 2024
HEARING DATE:	11 March 2024
JUDGMENT OF:	Brownhill J

CATCHWORDS:

EVIDENCE – Admissibility and relevance – *Evidence (National Uniform Legislation) Act* s 137 – post-offence conduct – evidence of flight - flight evidence as evidence of consciousness of guilt – probative value outweighs any danger of unfair prejudice to the accused – assessment of probative value – assessing the risk of evidence being given undue weight

Aytugrul v The Queen (2012) 247 CLR 170, *Byrd v The Queen* [2018] VSCA 42, *DAO v The Queen* [2011] NSWCCA 63, *Decision restricted* [2016] NSWCCA 92, *DSJ v The Queen* (2012) 84 NSWLR 758, *Edwards v The Queen* (1993) 178 CLR 193, *HML v The Queen*; *SB v The Queen; OAE v The Queen* (2008) 235 CLR 334, *IMM v The Queen* (2016) 257 CLR 300, *McKey v The Queen* (2012) 219 A Crim R 227, *McDonough v The Queen* [2021] NTCCA 9, *Melrose v The Queen* [1989] 1 Qd R 572, *Mol v The Queen* [2017] NSWCCA 76, *Power v The Queen* (1996) 87 A Crim R 407, *Smart v Tasmania* [2013] TASCCA 15, *The Queen v Burton* (2013) 237 A Crim R 238, *The Queen v Cook* [2004] NSWCCA 52, *The Queen v Grant*

[2016] NTSC 54, *The Queen v Hoeksema* [2018] NTSC 59, *The Queen v Ngatikaura* (2006) 161 A Crim R 329, *The Queen v Sood* [2007] NSWCCA 214, *The Queen v XY* (2013) 84 NSWLR 363, referred to.

Evidence (National Uniform Legislation) Act 2011 (NT) ss 137, 192A.

REPRESENTATION:

Counsel:

Crown:	D Castor
Accused:	C Dane

Solicitors:

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

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

The King v Ashley [2024] NTSC 14
No. 22329260

BETWEEN:

THE KING

AND:

BRANDO ASHLEY

CORAM: BROWNHILL J

REASONS FOR JUDGMENT

(Delivered 15 March 2024)

[1] The parties sought an advance ruling pursuant to s 192A of the *Evidence (National Uniform Legislation) Act 2011* (NT) ('ENULA') regarding the admissibility of evidence about the accused travelling from Katherine, where the alleged offending took place, to Mataranka, five days after the alleged offending and giving a false name to a Police officer who gave him a lift, as evidence of the accused's consciousness of guilt.

[2] On 11 March 2024, I ruled that the evidence is admissible for that purpose, and is not excluded by s 137 of the ENULA, with reasons to follow. These are my reasons.

Crown case

[3] The accused is charged with one count of sexual intercourse without consent or, in the alternative, one count of an act of gross indecency without consent, in relation to the complainant, a 16 year old girl.

[4] The Crown alleges that the accused and victim were well known to each other. She called him ‘uncle’. The accused was staying in a unit in Katherine with his wife and three children. On 14 June 2023, the accused was home with his wife and family. He drank alcohol and became intoxicated. The complainant and two of her friends were also drinking alcohol and smoking cannabis at the unit. The complainant became heavily intoxicated. At about 3am on 15 June 2023, the complainant’s friends left the unit. She was asleep on a mattress in the bedroom of the unit. The accused told his wife that he wanted to go for a walk outside. They both went out leaving the unit unlocked and their three children sleeping in the lounge area. Some distance away, the accused told his wife he was going back to the unit and to wait for him. He went back to the unit, locked the front door and went into the bedroom where the complainant was asleep. He removed her shorts and underwear, lowered his own clothing, and lay between the complainant’s legs. She remained asleep or unconscious. The accused’s wife felt she had waited long enough. She went back to the unit and found the front door locked. She called out to the accused but he did not answer. She went into the unit through the back door. She pushed

the bedroom door open and saw the accused engaging in what appeared to be penile/vaginal intercourse with the non-responsive complainant. When the accused stood up, his wife could see both his and the complainant's genitals. The accused pulled up his shorts, which were on the floor, and tried to cover his groin. He said to his wife: 'What are you doing here? What are you doing?' She said to him: 'What are you doing? Look what you done.' He grabbed her by the shirt, punched her, accused her of calling the Police, and told her he would kill her. The accused's wife woke the complainant and helped her with her clothing. The complainant was crying and saying that she did not know what was happening, she was too drunk. The accused's wife told the complainant that the accused had been there with her and had been doing 'stupid things' to her. The complainant called 000. The accused left the unit. Police and ambulance arrived and a crime scene was established. The complainant was taken to the hospital, her clothing was seized, she was then taken to the Sexual Assault Referral Centre and a Sexual Assault Investigation Kit examination was completed. No DNA linking the accused to the complainant was identified by the forensic testing.

[5] The accused was not seen or heard from by his wife after that time. She did not know his whereabouts until she was told that he had been arrested.

The evidence objected to

[6] Five days later, on Christmas Day, at about 9.30am, the accused was seen by a Police officer, Constable McPhail, walking south down the Stuart Highway away from Katherine and about 200 metres beyond a broken down car, which had been travelling south, away from Katherine. Constable McPhail offered the accused a lift to Mataranka. During the drive, he asked the accused his name and, three times, the accused told him a false name, Justin Kingsley. The accused told Constable McPhail he was going to see family in Mataranka.

[7] The next day, when Constable McPhail reported this encounter to another officer, he was told the stranded traveller could have been the accused. Constable McPhail did some checks and confirmed that the person he had picked up was the accused. The accused was then arrested in Mataranka the following day. He had the keys to the abandoned car with him.

[8] The Crown intends to rely, at trial, on the evidence of Constable McPhail about his interactions with the accused on Christmas Day ('the McPhail evidence'), as well as the accused's wife's evidence that the accused threatened and struck her when she found him with the complainant, accused her of calling the Police, left the unit immediately after the complainant called 000, and that she did not hear from him or see him again, as evidence of post-offence conduct

comprising flight from justice which evidences the accused's consciousness of guilt.

[9] The Defence has argued that the McPhail evidence is not capable of being seen as evidence of the accused's consciousness of guilt as it has no particular connection to the alleged offending. Further, the Defence has argued that if the McPhail evidence is admissible for that purpose, it must be excluded pursuant to s 137 of the ENULA because it has low probative value which is outweighed by the danger of unfair prejudice to the accused.

Admissibility of the evidence

[10] Defence counsel argued that the McPhail evidence was not capable of being seen as evidence of consciousness of guilt because: (a) the accused's travelling from Katherine to Mataranka five days after the alleged offending to see his family for Christmas was not capable of being characterised as evidence of 'flight'; and (b) the accused's giving of a false name was not a lie which related to a material issue in accordance with the requirement from *Edwards v The Queen*[1] that the telling of it must be explicable only on the basis that the truth would implicate him in the offence with which he is charged.

1 (1993) 178 CLR 193.

[11] In *McKey v The Queen*,[2] Latham J (with whom Whealy JA and Hislop J agreed) observed (at [26]) that:

> The law has always recognised the legitimacy of reliance upon post-offence conduct in support of a prosecution case. The most common example of such post-offence conduct is lies told by an accused, although an accused's silence in response to an allegation which he/she might reasonably be expected to deny, the destruction of evidence and attempts to influence the evidence of witnesses all fall into the same category. Similarly,
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> > Flight from justice, and its analogous conduct, have always been deemed indicative of a consciousness of guilt. ... It is universally conceded today that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself...
> >
> > [citations omitted]

[12] In *The Queen v Cook*,[3] Simpson J (Ipp JA and Adams J agreeing) observed (at [25]) that evidence of flight may be admitted where the jury may legitimately infer that the flight was occasioned by consciousness in the accused person of guilt – that is, of guilt of the offence with which he/she is charged.

[13] The fact that the accused's travel to Mataranka occurred five days after the alleged offending does not necessarily deny that conduct its potential characterisation as 'flight'.[4]

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2 (2012) 219 A Crim R 227.

3 [2004] NSWCCA 52 ('*R v Cook*').

4 See *R v Cook* where the evidence of flight held to be admissible related to the conduct of the accused six days after the alleged offending, and *Power v The Queen* (1996) 87 A Crim R 407 where the evidence of flight held to be admissible related to the conduct of the two accused five days after the alleged offending.

[14] In response to the Crown's submission that the accused had 'gone to ground' and had not been seen by his wife and children after the alleged offending, the Defence emphasised that, prior to this alleged offending, the accused, his wife and his children lived in Minyeri community, which is south of Katherine and Mataranka, so he could not be understood to be fleeing from anywhere, but was simply heading in the direction of his home.

[15] The fact that the accused's explanation for the travel to Mataranka is that he was going to see some of his family for Christmas Day, and that his explanation is not ludicrous or obviously false, and may even be credible, does not necessarily deny to the conduct its potential characterisation as 'flight'. In *Power v The Queen*,[5] Doyle CJ (Millhouse and Williams JJ agreeing) held (at 409) as follows:

> There is adequate authority to support the view that evidence of flight ... is admissible as showing a consciousness of guilt ... It will not be often in such cases that the evidence is unequivocally indicative of guilt. There may, I suppose, be cases in which the evidence is intractably neutral, but I fail to see how the evidence in this case can be so regarded. Of course, the explanation advanced by the appellants was not a ludicrous or obviously false one, but to my mind that does not render the evidence incapable of supplying proof or evidence of guilt. If it did, then much circumstantial evidence which is routinely admitted would be rejected. ... In my opinion, the approach to be taken is that indicated by Sheperdson J in *Melrose*[6] ... (assuming that the evidence is not intractably neutral):
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> > I would however say that in my opinion, when there is evidence of flight before a jury whether there be one or more

5 (1996) 87 A Crim R 407 ('*Power v R*').
6 *Melrose v The Queen* [1989] 1 Qd R 572 at 579 per Sheperdson J.

> than one reason advanced for that flight, the jury should be told that it is for them to decide on the whole of the evidence relevant to the charge in which evidence of flight has been admitted what inference is to be drawn from the accused person's flight but if at the end of the day they decide to infer a consciousness of guilt in the accused person for the offence alleged, they must be satisfied beyond reasonable doubt of such an inference.

[16] The Defence argued that there must be a logical connection between the accused's conduct on 25 December 2022 and a matter material to the offending with which he is charged. The Defence instanced the case of *The Queen v Hoeksema*,[7] in which the accused ran from Police during a search of his vehicle for drugs. The Defence argued that the material issue was whether the accused knew there were drugs in the car, so his flight had a logical connection to a material issue in the alleged offending. In that case, Grant CJ held (at [27]) that the presence of drugs in the car and the apprehension by police founded a possible rational connection between the accused's flight and the assessment of the fact in issue, namely whether the accused knew of the presence of the drugs in the car. His Honour was not purporting to lay down any principle which requires a connection between the flight, and an element of the offending, or a particular fact in issue.

[17] It would be contrary to authority to hold that, in all cases, evidence can only be characterised as flight evidence where there is a logical connection between that conduct and an element of the charged offence or a particular fact in issue. It is sufficient to refer to *Power v R* by

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7 [2018] NTSC 59 ('*R v Hoeksema*').

way of example. In that case, five days after being spoken to by Police about a series of recent bank hold ups and being told that Police believed they were involved, the accused left Australia and travelled to the United Kingdom where they remained for some time. When they returned to Australia they were arrested and charged. The evidence was held to have been rightly admitted by the trial judge. In that case, unlike the case of *R v Hoeksema*, there was no connection between the flight and an element of the offence or a particular fact in issue.

[18] The logical connection which makes evidence of flight evidence capable of being accepted as an admission (by conduct) of guilt in such cases is the knowledge of the accused that they are suspected of having committed the crime with which they are charged. With that knowledge, an accused's conduct in fleeing the scene, fleeing from Police, or fleeing the jurisdiction, is logically capable of being accepted as having been occasioned by consciousness in the accused of guilt of the offence with which they are charged.

[19] The Defence argued that, were it not for the false name given by the accused to Constable McPhail, his conduct could not be characterised as flight, referring to *McDonough v The Queen*.[8] That case did not deal with evidence of flight. It was a case about lies. However, even if the Defence submission were accepted, the evidence is that the accused *did*

8 [2021] NTCCA 9 at [59].

give a false name to Constable McPhail, not once but three times during the journey.

[20] The Defence's argument that the giving of a false name is not a lie that satisfies the *Edwards* test of materiality was not supported by reference to any authority to the effect that an accused's lie in giving a false name to authorities can only be admitted if the lie is one that relates to a material issue. Again, if an accused has knowledge of an allegation of the offence with which they are charged, and they provide a false name to authorities, that conduct is logically capable of being accepted as having been occasioned by consciousness in the accused of guilt of the offence with which he or she is charged.

[21] For these reasons, I reject the Defence submission that the lie told by the accused to Constable McPhail about his name is inadmissible as evidence of guilt.

[22] In doing so, I should not be taken to accept as correct the Defence's approach of compartmentalising the evidence of the accused's post-offence conduct, and dealing separately with each compartment. The evidence about the accused's conduct on Christmas Day, when properly considered as a whole, is capable of being characterised as evidence of flight from justice. It is not, in the language used in *Power v R*, intractably neutral.

[23] Furthermore, the capacity of the McPhail evidence to be considered as evidence of consciousness of guilt must be considered in the light of all of the evidence to be relied on by the Crown, which includes evidence that, when she confronted him about his activity with the complainant, the accused punched his wife, threatened to kill her, accused her of calling the Police and, when the complainant called 000, fled the premises and was not seen again by his wife in the five days before he travelled from Katherine to Mataranka. The Defence accepts that that evidence is admissible as evidencing the accused's consciousness of guilt.

[24] When viewed in light of that consciousness of guilt evidence, the McPhail evidence has a greater capacity to be so considered than it otherwise would on its own, because the evidence as a whole could rationally show either an ongoing course of conduct or a pattern of behaviour of evading authorities to avoid being brought to justice for his offending.

[25] The McPhail evidence is admissible as evidence of the accused's consciousness of guilt of the offending with which he has been charged.

Danger of unfair prejudice

[26] The Defence argued that, if it is admissible, the McPhail evidence should be excluded because its probative value is outweighed by the danger of unfair prejudice to the accused within s 137 of the ENULA.

[27] The probative value of the McPhail evidence was said to be low, essentially because of the accused's explanation for his conduct, namely travelling to Mataranka to visit family for Christmas and giving a false name to avoid being arrested on a false charge.

[28] 'Probative value' of evidence means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.[9] Here, the fact in issue is whether or not the accused committed the offending as alleged.

[29] The Crown relied on the observations of the majority in *IMM v The Queen*,[10] in which the High Court held that the assessment of the probative value of evidence requires the assumption that the evidence is accepted (ie, that it is credible and reliable) and that the possible use to which the evidence might be put (ie, how it might be used) be taken at its highest.

[30] An issue arises as to how to make the assessment of probative value when the Crown relies on inferences to be drawn from the evidence,

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9 ENULA, Dictionary.

10 (2016) 257 CLR 300 (at [43]-[45]).

particularly whether, in assessing probative value, the Court is to take into account competing available inferences.

[31] There is a series of cases from the New South Wales Court of Criminal Appeal relating to consciousness of guilt evidence, in which it has been held that it is not part of the trial judge's function in assessing probative value under s 137 of the ENULA to have regard to competing explanations for the accused's conduct, other than that upon which the Crown relied (ie, the consciousness of guilt).[11]

[32] There is another series of cases from the New South Wales Court of Criminal Appeal and the Tasmanian Court of Criminal Appeal in which it has been held that, in assessing the probative value of circumstantial evidence under s 137, the availability of alternative inferences may be taken into account.[12]

[33] In the face of these divergent authorities, the author of the text *Uniform Evidence Law* states that the better view is that a trial judge should take into account competing inferences in assessing the probative value of circumstantial evidence, although the evidence must be taken at its highest in the sense that it is accorded the highest level of impact on the probability of the existence of a fact in issue that

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11 See *The Queen v Sood* [2007] NSWCCA 214 at [40] per Latham J (Ipp JA and Fullerton J agreeing); *The Queen v Burton* (2013) 237 A Crim R 238 at [198] per Simpson J (RA Hulme J and Barr AJ agreeing); *Decision restricted* [2016] NSWCCA 92 at [84] per Schmidt J (McCallum and RA Hulme JJ agreeing).

12 See *DSJ v The Queen* (2012) 84 NSWLR 758 at [10] per Bathurst CJ, [78] per Whealy JA; *The Queen v XY* (2013) 84 NSWLR 363 at [88] per Hoeben JA, at [205] per Blanch J, at [224]-[225] per Price J; *Smart v Tasmania* [2013] TASCCA 15 at [32] per Wood and Pearce JJ.

would be open to a rational tribunal of fact to give the evidence in the light of the competing inferences.[13]

[34] It is not necessary for the purposes of this case to decide which approach is the correct one. Even if I take into account the competing explanations for the accused travelling to Mataranka on Christmas Day to visit his family and giving a false name to Police to avoid being arrested on a false charge, I consider that the McPhail evidence has high probative value in establishing a consciousness of guilt. I reach that view because of the evidence of the accused's wife regarding the accused's conduct immediately and shortly after he was confronted by her (striking her, threatening to kill her, accusing her of calling the Police and leaving the scene when the complainant called 000), which is clearly capable of establishing a state of mind in which the accused was intent on avoiding justice for the alleged offending. Considered in the light of that evidence, even after taking into account the accused's explanations for his conduct on Christmas Day, the McPhail evidence is strongly probative of the accused continuing to have that state of mind five days after the alleged offending and confrontation with his wife.

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13 S Odgers, *Uniform Evidence Law* (Thomson Reuters, 16th ed, 2021) [EA.137.90], noting that the most recent decision re-affirmed the correctness of *Burton*, and noting that the Victorian Court of Appeal has touched on, but not resolved, the issue: see *Byrd v The Queen* [2018] VSCA 42 at [53] per Whelan JA (Beach and Kyrou JJA agreeing).

[35] The Defence argued that there is a danger of unfair prejudice because of the risk that the jury will give undue weight to the McPhail evidence. As I understood the submission, it was founded upon the Defence's characterisation of the McPhail evidence as evidence of travel and evidence of a lie having no connection to a material issue, and the Defence's assessment that the McPhail evidence has low probative value. The argument was that, if the jury were to hear the evidence, the risk was that they would give it undue weight by using it as evidence establishing the accused's consciousness of guilt.

[36] The flaws in this argument are numerous. First, the treatment of the McPhail evidence in this compartmentalising fashion is not appropriate. As set out above, the evidence of his conduct on Christmas Day must be considered as a whole. Second, for the reasons set out above, I have concluded that the McPhail evidence has high probative value. Third, in assessing the risk that evidence would be given undue weight, regard must be had to the whole of the evidence that is to be given.[14] The evidence will include the evidence about the accused's conduct immediately and shortly after being confronted by his wife, which is clearly capable of establishing a consciousness of guilt. In that context, I consider there to be little chance that the jury would give the McPhail evidence more weight than it deserves. Fourth, 'unfair prejudice' in this context does not mean the legitimate tendency

14 See *Aytugrul v The Queen* (2012) 247 CLR 170 at [26] per French CJ, Hayne, Crennan and Bell JJ.

of the evidence to inculpate the accused.[15] In other words, evidence is not unfairly prejudicial merely because it makes it more likely that the accused will be convicted.[16] Effectively, the Defence submission relies on the possibility that the jury would use the McPhail evidence as evidence of consciousness of guilt, which is the very reason the Crown seeks to rely on it. To use it that way would not constitute 'unfair prejudice' to the accused. Fifth, as part of the assessment, the Court must take into account the ameliorating effect of any directions that may be available to reduce the risk of prejudice.[17] The jury will be directed that there may be many reasons for the accused's travel to Mataranka on Christmas Day, and for giving Constable McPhail a false name. They must take those possibilities, and any explanation the accused gives, into account in assessing the evidence and it is a matter for the jury as to what inference is to be drawn from the accused's conduct.[18]

[37] The Defence also argued that there was a danger of unfair prejudice because the accused may have to give evidence to respond to the McPhail evidence, thereby impacting his right to silence. Again, no authority was cited in support of this argument.

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15 See *HML v The Queen; SB v The Queen; OAE v The Queen* (2008) 235 CLR 334 at [12] per Gleeson CJ.

16 *The Queen v Grant* [2016] NTSC 54 at [61] per Grant CJ.

17 See *DAO v The Queen* [2011] NSWCCA 63 at [172] per Simpson J (Spigelman CJ, Allsop P, Kirby and Schmidt JJ agreeing); *The Queen v Ngatikaura* (2006) 161 A Crim R 329 at [32] per Beazley JA; *Mol v The Queen* [2017] NSWCCA 76 at [36] per Payne JA.

18 *The Queen v Hoeksema* [2018] NTSC 59 at [28] per Grant CJ.

[38] As a matter of principle, it cannot be correct to say that the admission of evidence to which the accused may have to respond creates a danger of unfair prejudice within s 137 of the ENULA. One could say the same about almost all evidence upon which the prosecution relies in a trial.

[39] *R v Cook* is an example of a case in which the admission of evidence of flight was held to create a danger of unfair prejudice to the accused within s 137 which outweighed its probative value. The Court held that evidence of the appellant's flight should have been excluded, not because its admission placed him in the position of having to decide between leaving the evidence, with its obvious possibility that the jury would draw the adverse inference against him, and attempting through evidence given by him, or by witnesses called by him, or by cross-examination of Crown witnesses, to explain away his conduct in a manner that would exonerate him of the charged offence (noted at [25]), but because his explanation would expose him as a person with a criminal record, which included criminal offences with a disturbingly close relationship to the charged offending, and a person with a history of violence against women, when the charged offence was threatening a woman with a weapon with intent to have sexual intercourse (at [32], [48]).

[40] This argument is rejected.

[41] The probative value of the McPhail evidence is not outweighed by the danger of unfair prejudice to the accused.
