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| CITATION: | *The King v Downs* [2024] NTSC 2 |
| PARTIES: | THE KING<br><br>v<br><br>DOWNS, Silvagni |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | SUPREME COURT exercising Territory jurisdiction |
| FILE NO: | 22300621 |
| DELIVERED: | 5 January 2024 |
| HEARING DATES: | 12 and 13 September 2023 |
| JUDGMENT OF: | Burns J |

*Evidence (National Uniform Legislation) Act 2011* s 56, 85, 90, 138, 139
Northern Territory Law Society's Indigenous Protocols for Lawyers
*Police Administration Act 1978* (NT) s 137, 140

*Downes v DPP* [2000] NSWSC 1054; *Edwards v The Queen* (1993) 178 CLR 193; *EM v The Queen* [2007] HCA 46; *Gudabi v The Queen* (1984) 1 FCR 187; *Parker v Comptroller-General of Customs* (2009) 83 ALJR 494; *R v Anunga* (1975) 11 ALR 412; *R v Deng* [2001] NSWCCA 153; *R v Esposito* (1998) 45 NSWLR 442; *R v GP* [2015] NTSC 53; *R v Lawrence* [2016] NTSC 65; *R v Lee* [1950] HCA 25; *R v McNiven* [2011] VSC 397; *The Queen v BL* [2015] NTSC 85; *The Queen v BM* [2015] NTSC 73, *The Queen v Bonson* [2019] NTSC 22, referred to.

**REPRESENTATION:**

*Counsel:*

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| Crown: | D Dalrymple |
| Accused: | T Collins |

*Solicitors:*

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

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

*The King v Downs* [2024] NTSC 2
No. 22300621

BETWEEN:

**THE KING**

AND:

**SILVAGNI DOWNS**

CORAM: BURNS J

REASONS FOR RULING

(Delivered 5 January 2024)

[1] The accused is awaiting trial on one count alleging that on 12 December 2020 he had sexual intercourse with ZB without her consent and knowing about or being reckless as to the lack of consent. The trial of the accused was listed to commence on 4 December 2023, but I understand it did not proceed due to the unavailability of an interpreter.

[2] It is the Crown case that the accused participated in an electronic record of interview ('EROI') on the night of Friday 6 January 2023 during which he made statements which the Crown alleges constitute admissions for the purposes of the *Evidence (National Uniform Legislation) Act 2011* (NT) ('*ENULA*'). In short, while the accused denied the alleged offending, he

made statements which the Crown alleges are lies evidencing a consciousness of guilt.

[3] The accused objected to the admission into evidence at his trial of the EROI or its contents, and sought a preliminary ruling on the admissibility of this proposed evidence before the commencement of his trial. On 22 November 2023 I handed down my ruling that the evidence was admissible, indicating at that time that I would publish my reasons at a later time. These are those reasons.

[4] The accused's objections were based on ss 85, 90, 138 and 139 of the *ENULA*. I will refer to those provisions later in these reasons. The Crown called Constable Sandeep Singh and Senior Constable Alexander Munro to give evidence on the voir dire and tendered multiple documents.

**The Crown Case**

[5] The Crown Case Outline states:

1. As at Saturday 12 December 2020 Silvagni Downs ('the accused') was 20 years old and was staying in Alice Springs.

2. As at 12 December ZB was a 28-year-old woman who was living in supported care accommodation at [an address known to police] in Alice Springs.

3. The accused and ZB were not known to each other.

4. ZB was living in supported care accommodation because she has an intellectual disability. She contracted meningitis as a child and suffers cognitive impairment as a result.

5. At about 5:40 PM on 12 December 2020 ZB's professional carer MLB dropped her at the Araluen Park, Araluen. This was requested by the victim so that she could visit family.

6. ZB then sat down in the park for a period of time and left the park on foot, walking in the general direction of her care accommodation. As she walked she was approached by the accused in the area of Gillen near the Flynn Drive IGA supermarket. The accused was driving a Black Ford Utility with SA registration S412APA.

7. The accused slowly drove past ZB twice and then called out next to her. He forcefully said to ZB that she should get into the car, and also said to her that he had something to tell her.

8. ZB got into the passenger seat of the vehicle and the accused repeatedly instructed her to duck down under the dashboard as they were driving and said to her 'don't mention anything and don't say anything'.

9. The accused drove the vehicle to the Alice Springs Telegraph Station and parked in the car park. The accused and ZB got out of

the car. They walked away from the car park to an area with rocks and sand.

10. The accused exposed his penis and grabbed ZB's right hand forcing her to hold his penis. ZB protested saying '[n]o I don't want to, I don't feel like touching no one's penis'. The accused then pulled his pants down.

11. The accused pulled ZB's skirt and underwear down to her knees, and then placed his hands on her neck and shoulders so that the top half of her body bent down forwards as he was behind her. ZB again protested telling the accused 'don't do that, 'cause I'm not in the mood'.

12. The accused then commenced having penile vaginal intercourse with ZB.

13. When the intercourse started, ZB told the accused to stop, but he kept on going.

14. After the accused had ejaculated, he told ZB '[d]on't say anything, don't say anything to anybody at all". They then both returned to the vehicle, with the accused again instructing ZB to duck under the dash as he was driving. The accused dropped ZB off near Bromley Street in Gillen.

15. ZB walked towards the residence of her boyfriend, WA, and called her carer MLB at 7:30 PM.

16. MLB arrived at 7:35 PM and immediately observed ZB to be in a state of distress, crying and hunched over and attempting to fix her skirt that was inside out. ZB told MLB ‘he raped me by the creek’.

17. MLB took ZB to the Alice Springs Police Station. AB (semble, ZB) later that evening attended the Alice Springs Sexual Assault Referral Centre where she underwent a forensic examination.

18. As a result of that examination a high vaginal swab containing semen was located along with a mixed DNA profile. That part of the mixed DNA profile not attributable to ZB was attributed to a male person who was at that time unidentified.

19. On Friday 14 October 2022 The Northern Territory Police Forensic Biology Laboratory advised that the unidentified sample was a match for the DNA profile of the accused.

20. At 5:25 PM on 6 January 2023 the accused was arrested in Alice Springs by Constable Dylan Hart and Constable Rachel Spratling and taken to the Alice Springs Watch House.

21. The accused later participated in an EROI in which he confirmed that he recognised and had been inside the black utility vehicle, but denied that he had ever driven it. The accused also denied that

he had had sex with anyone other than his partner, KB, on 12 December 2020, and said that he was in the Balgo Community at the time.

[6] In the EROI the accused stated:

a) he wasn't in Alice Springs on 12 December 2020 and was in Balgo Community in Western Australia;

b) he was there with his partner and her family;

c) the black Ford Utility the Crown alleges was used in the commission of the offence was owned by his cousin, VS;

d) he had never borrowed VS's car, nor had he driven it;

e) a photograph shown to him of VS's vehicle and said to have been taken at about 6:20 PM on 19 December 2020 showed that the vehicle was being driven by someone who looked 'exactly like' the accused. The accused suggested the driver may have been his nephew, TN. The accused said that TN 'looks exactly like me'; and

f) he had not engaged in sex with any woman other than KB around 12 December 2020.

[7] At the time that the accused made the above statements in the EROI, he was unaware that it was alleged that sperm with a DNA profile matching his profile had been found on a swab taken from ZB's vagina. After the accused

made these statements, police asked him if there was any reason that his sperm would be found ‘inside ZB’. The accused continued to deny that he knew ZB and that he had had sexual intercourse with her. He said that there was no reason why his sperm would be found inside ZB’s vagina.

[8] After being informed by police that a swab taken from inside ZB’s vagina contained sperm ‘belonging to’ the accused, the accused asked police why they had proceeded with the interview knowing that ‘that DNA test was already done’.

[9] The accused was again asked if there was any reason his sperm would be found ‘inside’ ZB, and he offered the proposition that he and KB had had sex in the car, and some of his sperm may have found its way onto the seat and been ‘picked up’ by the eventual perpetrator of the offence. Thus, the accused seemed to suggest that the DNA result from the sperm located on the vaginal swab may be explicable by secondary or tertiary transfer of his genetic material.

[10] Before continuing any further, it is important to note how the accused became a suspect in the police investigation into the allegations made by ZB. As part of their investigation, police lawfully obtained DNA samples from a number of males who were known to have an association with ZB or with the vehicle which police suspected had been used in the offence. All of those persons were eliminated as suspects by a comparison of their DNA profiles with that taken from the swab taken from ZB.

[11] In July 2022 police made an application to the Northern Territory Forensic Science Branch for the unknown offender DNA sample to be processed for familial DNA. This application was approved. On 18 August 2022 police were advised that there was a significantly higher likelihood that the unknown offender had a parent/child relationship with another person, MR. As I understand it, MR is the mother of the accused.

[12] On 27 August 2022 an application was approved for a suspect non-intimate procedure in the form of a buccal swab to be carried out on the accused. This procedure was carried out on 9 September 2022. The DNA sample obtained from the accused on 13 September 2022 was the sample which was then compared with the DNA sample located on the swab taken from ZB. The accused's DNA profile was found to be consistent with the profile taken from the swab of ZB's vagina.

[13] In the course of the EROI it was explained to the accused that the DNA profile obtained from the sample taken from the swab taken from ZB had been compared with the profile taken from the accused by buccal swab. The accused appeared to suggest in the EROI that he had provided the sample by buccal swab for 'a COVID test or something'. It is unnecessary to consider whether the accused experienced any real confusion in the EROI about this issue, but it is highly unlikely that at the time the buccal swab was taken he was confused about the purpose of the procedure. There was uncontested evidence that before the buccal swab was taken on 13 September 2022, police clearly explained the purpose of the procedure to the accused. Police

explained to the accused that his name had come up as a suspect in the rape of a woman in December 2020 and they were going to take a sample of his DNA. The accused responded ‘it’s shocking that’. The accused also asked police for ‘the name of the victim’. There can be no real doubt that the accused understood that the buccal swab procedure was for the purpose of obtaining his DNA as part of a process of investigating an allegation of rape in December 2020 in which he was a suspect. In any event, no objection was raised in the present application concerning the circumstances in which the accused’s DNA was obtained by police.

[14] The focus of the accused’s objection were the events that occurred on 6 January 2023 prior to the EROI being conducted.

*The events of 6 January 2023*

[15] On the evening of 6 January 2023 the accused was arrested when police attended a reported family altercation at an address in Alice Springs. The accused was upset and shouting at a female person. Police asked those present to identify themselves, and when the accused identified himself as Silvagni Downs police arrested him and placed him in the rear of a caged police vehicle. The accused was informed by arresting police that he was being arrested for ‘sexual assault, sexual intercourse without consent’. At this time the accused was shouting loudly and apparently very upset such that the Crown accepts that he may not have ‘properly processed’ that information at that time.

[16] Shortly following these events, the accused appeared to calm down and police again informed him of the reason for his arrest. By this time, the accused's partner KB had approached the rear of the caged vehicle and became involved in the conversation. She asked police what the sexual assault charge was about. The accused shouted from the rear of the caged vehicle 'I'm going to gaol for sexually assaulting somebody (inaudible) rape somebody'.

[17] KB then said to the accused, 'who you been rape Silvagni, you was with me for a long time'. The accused replied 'hey, I'm an innocent man. I didn't sexually assaulted anybody'. Later, the accused said 'somebody fucking framed me'. It is alleged that in this conversation the accused accuses police of disrespecting Aboriginal people and of being racist.

[18] The accused was conveyed by police to the Alice Springs Watch House where he was again informed that he was under arrest for sexual intercourse without consent. At this point the accused was being held in custody, the Crown says, by virtue of the provisions of s 137(2) of the *Police Administration Act 1978* (NT) which permits police to hold a person in custody, without taking them before a court, for a reasonable period to enable the person to be questioned ('s 137 custody').

[19] As the accused is Aboriginal, in accordance with police protocols police contacted the Custody Notification Service ('CNS') by telephone and spoke to an employee of the North Australian Aboriginal Justice Agency

(‘NAAJA’) who identified themselves as ‘Natalie’. I understand that person to be Natalie Hunter, a person without qualifications as a lawyer but who was employed by NAAJA. As I understand it, Ms Hunter spoke to the accused privately over the telephone while he was in a cell in the Watch House. The accused was then taken to the reception area of the Watch House where the Watch House Keeper Acting Sergeant Singh and Senior Constable Alexander Munro engaged in a further conversation with Natalie over the telephone. The telephone was on speaker during that conversation so that all parties, including the accused, could hear what was being said.

[20] It is important to consider the terms of that conversation and the sequence of events. To that end, the following is a transcript of the conversation in which Ms Hunter is identified by the letters “CNS”, Acting Sergeant Singh is identified as “SS” and Senior Constable Munro is identified as “AM”:

> *Phone on speaker - recorded message from NAAJA / CNS*
>
> CNS: Natalie speaking
>
> SS: Hey Natalie this is Singh from the Alice Springs Watch House, I believe that you are the one that disconnected the phone, so what are the concerns for him
>
> CNS: Okay for him very very (inaudible) in reference to the charge, he has been with his partner for over 3 years and they have a two month old baby um and he would never done anything like this, that is against his morals, he would not be brave enough to do this and yeah he wants to know where how where has this case come from (inaudible) did this case come from his partner or where did it come from um yeah so he is urn yeah so he wants me to get in contact with his grandmother, he is quite, quite frustrated about the charges, he would never ever do such a thing.
>
> SS: Urn so just send me the email like stating all the information and I will put through on the (inaudible). In terms of the, in terms of the

charges I am waiting on the file um once we get the file then once we can um if you need an update we can give you a call and

CNS: Yes yes thank you very much officer um I mean the bit about where his grandmother lives or his family cause he said just see family in reference to this charge um his grandmother he said she lives um lives at Obitja Court in Larapinta

SS: Yeah

CNS: O..B..I..T..J..A

SS: Yep we know where that is

CNS: Court, oh you know where that is, yeah, so if someone can go to the house, to house four (4) or fourteen (14), one of those houses yeah, grandmothers s someone can let her know where he is at, where he is at and yeah..but the other thing is he is concerned about his few month old child

AM: Sorry Sargeant

SS: Hey Natalie

CNS: I said you have to be careful who you know as he cannot go back to that house or as I understand there is no order but you got to be mindful of what you are doing if you get to leave

SS: Hey Natalie sorry to interrupt you but the officer who is dealing with it, the detective who is dealing with this charge, this matter wants to have a chat with you so I will just pass over the phone to him yep

CNS: Oh okay thank you very much

SS: No problem

AM: Hey Natalie it is Alex from CIB, how are you?

CNS: Not too bad, how are you?

AM: Good, good, um basically Silvagni is good to go the only thing stopping us from preparing the file is um whether or not he wants to do an EROI um he was picked up, he was arrested at four (4) Obitja this afternoon

CNS: Yes

AM: For a separate matter um

CNS: okay

AM: Um there is no charges relating to that matter um he is um now under 137 um for the um the sexual intercourse without consent

CNS: What he is saying detective is that him and his partner have been together for three (3) years

AM: Yep

CNS: They have a two month old child and he is quite taken back with the charges, that he would never do such a thing in his life (inaudible) and certainly not to do that stuff he said, he is really quite upset over the charges, he is in shock um and he has a two month old baby with her um yeah he just wanted me to try and get hold of his family as he wants his family

AM: No worries

CNS: He is quite yeah quite disturbed about the charges

AM: So in a nutshell is Silvagni looking to do a um an interview with police?

CNS: No because he has asked for a, you said he was on a 137 for quite serious charge

AM: Yep

CNS: Um that he has agreed to wanting to speak to his lawyer first

AM: Yep

CNS: Before he gives a police officer an interview

AM: Okay

CNS: Because of how serious this is regarding it

AM: Um so can I...

CNS: So he is refusing to give an interview, that's what he is saying.

AM: He is refusing?

CNS: He is refusing, yep

AM: Okay

CNS: To give an interview as he wants to speak with lawyers as the charge is quite serious.

AM: No worries, do you want us to hold him on S137 until he has spoken to his lawyer or do you want us to just ...

CNS: The trouble is the lawyers are not going to speak with him now because he is an adult, it is a Friday evening um I can either send it to (inaudible) to find out but that will keep him incarcerated until Monday, wouldn't it?

AM: Well that is correct, if he wants to hold off and talk to a lawyer he can by all means, it is his choice, I cannot force his hand um but

CNS: Yeah that's fine, you have the opportunity to ask him again, haven't, don't you?

AM: Of yeah if he if he elects not to do it now he can elect to do it at a later date, that's, that's perfectly fine

CNS: Alright yeah because he said that, which I am going to send to the Sergeant that he refuses to speak, yeah because he is concerned on those charges, those charges, those charges

AM: Okay

CNS: that's why he said he didn't want to give an interview but you have the option to ask him again anyway

AM: Yep okay so we will just put him as refused at this stage but if he changes his mind once he has spoken with his lawyer

CNS: Yep

AM: Yep, happy with that?

CNS: You can ask him if he wants to but he won't be able to speak with his lawyer until Monday

AM: Yeah that is right, that's right

CNS: You you need to tell him that as well so..

AM: Okay

CNS: offer him (inaudible) about the charge absolutely

AM: Yep not a problem, alright I will have a chat with Silvagni um and will let you get back to your day

CNS: Right thank you and what was your name officer?

AM: Senior Constable Alex Munro

CNS: Thank you officer, thank you very much

AM: No worries thank you Natalie

CNS: Thank you have a good day bye

SS: Hey Natalie

CNS: Will he do a judge review tonight?

SS: Um

CNS: Silvagni

SS: So so I am waiting on the paperwork, once I receive the file now before nine-thirty (9.30pm) or nine (9.00pm) then I can go over Judge bail or if not will have to stay here until tomorrow morning

CNS: Okay not a problem, I will send an email to confirm, yeah (inaudible)

SS: Send me the email with all the information

CNS: (inaudible) even if it's a partner (inaudible)

SS: That's right, um just send me the email Natalie (inaudible) in the morning

CNS: One more thing officer, who is the Sergeant that I send the RDO to?

SS: Urn that's me, that's myself, yep

CNS: Sundeep Singh

SS: That's correct yep

CNS: Not a problem thank you very much, I will send it to you now. Do you have others wanting to chat or are they intoxicated?

SS: At the moment they are not my priority, we need to deal with that we can accommodate that phone call in the sort of next half an hour Natalie

CNS: That's okay you just ring me when you are ready

SS: Yep

CNS: Not a problem

SS: Cheers thank you, call you, bye

CNS: Thank you very much, bye

AM: So Silvagni my name is Alex Munro I work for CIB. I have been told, told you come and talk to you about this matter alright. So you have spoken to your lawyer

SD: Yep

AM: Yep, um so I just need to caution you, so you do not have anything but anything you say is going to be recorded by my body worn camera and there are also listening devices in this reception area and cameras okay. Um now you have been arrested for sexual intercourse without consent, in a nutshell that is urn the allegation is that you have raped someone and that someone is, her name is [ZB].

SD: [ZB], I don't even know anyone by that name

AM: Okay so that is the allegation that we got, we got evidence to suggest that that maybe the case as well. From what your lawyer is tell me is that you are refuting the allegations. You didn't do it?

SD: No I didn't

AM: So would you to sit down and do an interview and tell us your side of the story

SD: Yes

AM: And tell us your side of the story?

SD: Um I would like to find out where this has happened

AM: Okay yeah like I said we we can do that in an interview um now do you want to talk to your lawyer first or do you want to do interview off the information you have been given from CNS on the phone?

SD: How long am I going to be here?

AM: So as Natalie said if you want a lawyer which is totally up to you and you can if you want to um but it is probably not going to be until Monday. Today is Friday.

SD: Okay I will do that interview

AM: You want to do interview? Okay. Do you understand you don't have to.

SD: I know, I understand

AM: Okay, alright, we let me, so give me say twenty (20) minutes thirty (30) minutes to set up and I'll come and grab you out of the cell and we will do that interview, hey. Alright. No worries. Um do you want anyone? You said you wanted your grandmother brought in?

SD: Ah yeah

AM: Was she with you when you were arrested?

SD: Ah yeah that was all back home, my mother and my partner was there when I got arrested

AM: Okay so they know you have been arrested. Are you happy that they know you have been arrested or do you want us to pick your grandmother up to sit with you in interview?

SD: I would like to let them know as well

AM; You want to let me them know

SD: Could you just let them know about the charges as well

AM; Okay and do you want them brought in for interview or not

SD: No I just want (inaudible)

AM: Okay I can make that happen. Alright mate we get you back in your cell

[21] An email confirming the accused's instructions that he did not want to participate in an interview at that time was sent from CNS to the Watch House but it appears that it was not immediately seen by Senior Constable Munro. It is apparent that in the above conversation Ms Hunter does not inform police that she is not a lawyer. The only importance attached to this fact is that Senior Constable Munro gave evidence on the voir dire that he had assumed that she was a lawyer, which explained

his reference to the accused having spoken to a lawyer in the above conversation. I accept the evidence of Senior Constable Munro on that issue.

[22] The EROI then commenced at 9:57 PM and concluded at 11:16 PM. In accordance with the accused's wishes, KB was present during the interview to provide the accused with support. At the commencement of the interview, the accused was advised that the 'incident under investigation' was an allegation of sexual intercourse without consent or, 'in layman's terms, rape'. KB was then informed that she was present to provide support to the accused and that she had the right to speak to the accused at any time. The accused was then reminded that he was in custody and was not free to leave. He was cautioned that he did not have to answer questions unless he wanted to do so. Senior Constable Munro questioned the accused to satisfy himself that the accused understood the caution. In the process of that questioning the accused gave some answers that may suggest that he did not understand the effect of the caution, but I am satisfied that in the end his responses established that he understood that he was not obliged to participate in the EROI.

### The relevant provisions of the *ENULA*

[23] The following provisions of the *ENULA* are relevant:

> **85 CRIMINAL PROCEEDINGS – RELIABILITY OF ADMISSIONS BY DEFENDANTS**
>
> (1) This section applies only in a criminal proceeding and only to evidence of an admission made by a defendant:

(a) to, or in the presence of, an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence; or

(b) as a result of an act of another person who was, and who the defendant knew or reasonably believed to be, capable of influencing the decision whether a prosecution of the defendant should be brought or should be continued.

(2) Evidence of the admission 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.

(3) Without limiting the matters that the court may take into account for the purposes of subsection (2), it is to take into account:

(a) any relevant condition or characteristic of the person who made the admission, including age, personality and education and any mental, intellectual or physical disability to which the person is or appears to be subject; and

(b) if the admission was made in response to questioning:

(i) the nature of the questions and the manner in which they were put; and

(ii) the nature of any threat, promise or other inducement made to the person questioned.

## 90 DISCRETION TO EXCLUDE ADMISSIONS

In a criminal proceeding, the court may refuse to admit evidence of an admission, or refuse to admit the evidence to prove a particular fact, if:

(a) the evidence is adduced by the prosecution; and

(b) having regard to the circumstances in which the admission was made, it would be unfair to a defendant to use the evidence.

## 138 EXCLUSION OF IMPROPERLY OR ILLEGALLY OBTAINED EVIDENCE

(1) Evidence that was obtained:

(a) improperly or in contravention of an Australian law; or

(b) in consequence of an impropriety or of a contravention of Australian law;

is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

(2) Without limiting subsection (1), evidence of an admission that was made during or in consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been obtained improperly if the person conducting the questioning:

(a) did, or omitted to do, an act in the course of the questioning even though he or she knew or ought reasonably to have known that the act or omission was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning; or

(b) made a false statement in the course of the questioning even though he or she knew or ought reasonably to have known that the statement was false and that making the false statement was likely to cause the person who was being questioned to make an admission.

(3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account:

(a) the probative value of the evidence; and

(b) the importance of the evidence in the proceeding; and

(c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and

(d) the gravity of the impropriety or contravention; and

(e) whether the impropriety or contravention was deliberate or reckless; and

(f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and

(g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and

(h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

## 139 CAUTIONING OF PERSONS

(1) For the purposes of section 138(1)(a), evidence of a statement made or an act done by a person during questioning is taken to have been obtained improperly if:

(a) the person was under arrest for an offence at the time; and

(b) the questioning was conducted by an investigating official who was at the time empowered, because of the office that he or she held, to arrest the person; and

(c) before starting the questioning the investigating official did not 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.

(2) For the purposes of section 138(1)(a), evidence of a statement made or an act done by a person during questioning is taken to have been obtained improperly if:

(a) the questioning was conducted by an investigating official who did not have the power to arrest the person; and

(b) the statement was made, or the act was done, after the investigating official formed a belief that there was sufficient evidence to establish that the person has committed an offence; and

(c) the investigating official did not, before the statement was made or the act was done, 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.

(3) The caution must be given in, or translated into, a language in which the person is able to communicate with reasonable fluency, but need not be given in writing unless the person cannot hear adequately.

(4) Subsections (1), (2) and (3) do not apply so far as any Australian law requires the person to answer questions put by, or do things required by, the investigating official.

(5) A reference in subsection (1) to a person who is under arrest includes a reference to a person who is in the company of an investigating official for the purpose of being questioned, if:

(a) the official believes that there is sufficient evidence to establish that the person has committed an offence that is to be the subject of the questioning; or

(b) the official would not allow the person to leave if the person wished to do so; or

(c) the official has given the person reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so.

(6) A person is not treated as being under arrest only because of subsection (5) if:

(a) the official is performing functions in relation to persons or goods entering or leaving Australia and the official does not believe the person has committed an offence against a law of the Commonwealth; or

(b) the official is exercising a power under an Australian law to detain and search the person or to require the person to provide information or to answer questions.

[24] While the accused denied sexually assaulting ZB, the Crown submits that he told lies in the course of the EROI which the Crown intends leading as implied admissions by the accused.[1] The definition of an admission, as set out in the Dictionary to the *ENULA* is a previous representation made by a party to a proceeding which is adverse to the person's interest in the outcome of the proceeding. While the accused denied the offending, those aspects of the EROI where the Crown alleges he lied may, if otherwise admissible, be led as admissions against the interest of the accused.

**The accused's submissions**

*Section 85 of the ENULA*

[25] With regard to the submission that the EROI should be excluded under s 85 of the *ENULA*, the accused submitted that:

a) the section applies only in criminal proceedings and only to evidence of an admission made by an accused in the circumstances set out in s 85(1)(a) or (b);

b) where those circumstances exist, evidence of the admission is not admissible unless the circumstances in which the admission was

1 See *Edwards v The Queen* (1993) 178 CLR 193.

made was such as to make it unlikely that the truth of the admission was adversely affected;[2]

c) the onus is on the Crown to establish that the evidence is admissible;[3]

d) the circumstances relevant to the operation of the provision need not pertain solely to the motive questioning of the accused, or circumstances affecting the accused at the time of interview. The circumstances relevant to the operation of the provision are not confined to those known to the interrogator;[4] and

e) the category of circumstances relevant to the operation of the provision is not circumscribed by the operation of the provision, but certain matters must be taken into account including any relevant condition or characteristic of the accused.[5]

[26] The accused submitted that his relevant characteristics at the time it is said that he made the admissions include:

a) he is a young Walpari man from Mulga Bore Community who was 21 years of age at the time that he participated in the EROI;

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**2** s 85(2) *ENULA*.

**3** *R v Esposito* (1998) 45 NSWLR 442 at 460.

**4** *R v McNiven* [2011] VSC 397 at [65].

**5** s 85(3)(a) *ENULA*.

b) this was the second time that the accused had been in custody and his ‘first substantive interaction with the justice system’;

c) he is not proficient in the English language.

[27] It was submitted that the accused is not a fluent English speaker, and it is not enough that his English may appear to be reasonable for social conversations. The accused referred me to the Northern Territory Law Society’s Indigenous Protocols for Lawyers which states:

> People who are not trained interpreters tended to significantly underestimate the amount of miscommunication that occurs when communicating in English with a person who speaks another language as their first language. Deciding how well a person speaks English (usually called ‘assessing English proficiency’) is a complex task that is ideally done by an appropriately trained linguist. A good starting assumption is that if a person speaks English as a second language and has had limited education in English, it is likely that you should work with an interpreter. This is especially true when you are dealing with specialised legal language, such as bail, contracts, conditions, operational periods and unfamiliar situations, such as court and police interviews. In some cases, it is obvious that an interpreter is needed for effective communication. In many cases, however, you will need to think carefully to identify people who can communicate in English about every day, familiar situations but who may need the assistance of an interpreter to communicate in unfamiliar situations with technical language (e.g. court).

[28] The accused submitted that the lack of an interpreter during the EROI, notwithstanding that he had agreed to proceed without one, ‘clearly adversely effects [sic] the reliability of the admissions contained within the interview.’

[29] The accused referred me to the decisions of Blokland J in *The Queen v BM*[6] and *The Queen v BL*[7] in support of his submission. I will refer to those decisions later.

[30] The accused referred me to the *Anunga* Rules (*R v Anunga*),[8] and in particular to Rule 4, which states:

> Great care should be taken in formulating questions so that so far as possible the answer which is wanted or expected is not suggested in any way. Anything in the nature of cross-examination should be scrupulously avoided as answers to it have no probitive [sic] value. It should be borne in mind that it is not only the wording of the question, which may suggest the answer, but also the manner and tone of voice which are used.

[31] Reference was also made to the observations of Forster J in *Anunga* concerning the need for interpreters. Rule 1 as promulgated in *Anunga* states:

> When an Aboriginal person is being interrogated as a suspect, unless he is as fluent in English as the average white man of English descent, an interpreter able to interpret in and from the Aboriginal person's language should be present, and his assistance should be utilised whenever necessary to ensure complete and mutual understanding.

[32] The accused submitted that all the circumstances in which the interview took place were such as to make it likely that the truth and accuracy of the admissions have been adversely affected and as such evidence of the EROI should be excluded pursuant to s 85 of the *ENULA*.

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**6** [2015] NTSC 73.

**7** [2015] NTSC 85.

**8** 1975 11 ALR 412 at 414 ('*Anunga*').

*Sections 90, 138 and 139 of the ENULA*

[33] The accused accepted that he bears the onus of demonstrating that evidence has been obtained improperly or in contravention of Australian law.[9] If he is successful in discharging that onus, the obligation then falls on the Crown to satisfy the Court that the desirability of admitting the evidence outweighs the undesirability of admitting it given the way it was obtained.[10]

[34] The accused submitted in this case that there had been a lack of compliance with the Police General Orders ('PGO') such that the evidence of the EROI was obtained improperly. In particular, the accused submitted that police should have given him the opportunity to speak to the CNS worker Natalie Hunter (who Senior Constable Munro had assumed was a lawyer) on the telephone before commencing the EROI. In support of that submission, the accused referred to the confusion regarding whether Ms Hunter was a lawyer and suggested that her status had been inaccurately described to the accused by Senior Constable Munro. The accused submitted that in these circumstances, and in the light of his obvious concern about the length of the period he would remain in custody, he should have been given another opportunity to speak to Ms Hunter, or some other NAAJA employee, before police acted on his expressed decision to participate in the EROI.

[35] It was further submitted that the accused was 'extremely confused' about the 'nature' of the charges, having been provided with limited information. The

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**9** *Parker v Comptroller-General of Customs* (2009) 83 ALJR 494.

**10** *Downes v DPP* [2000] NSWSC 1054.

accused pointed in particular to the fact that police had not told him where or when the offence was alleged to have been committed until after the EROI had commenced. The accused had requested particulars of the complainant and the alleged offence at the time of his arrest. Immediately before the accused agreed to participate in the EROI he had said to Senior Constable Munro 'I would like to find out where this has happened' and Senior Constable Munro replied 'okay, yeah like I said we can do that in an interview, um, now do you want to talk to your lawyer first or do you want to do the interview off the information you have been given from CNS on the phone?'.

[36] The accused submitted that irrespective of the lack of detail given to him regarding the charge, the police were aware by the end of the telephone call with Ms Hunter that the accused was, at that time, refusing to participate in an interview until he had the opportunity to speak to a lawyer, after which he may change his mind.

[37] Some criticism was directed towards Senior Constable Munro's evidence that he believed Ms Hunter was a lawyer, primarily because Ms Hunter had said in the course of the above conversation that the accused wanted to see a lawyer before deciding whether to participate in an interview. It was submitted that this indicated that Ms Hunter was not a lawyer. Senior Constable Munro's response was that he thought the reference to speaking to a lawyer on Monday was a reference to the accused speaking to a lawyer in person, as opposed to over the telephone.

[38] The accused submitted that there were a number of issues relating to the EROI itself which would affect its admissibility. First, it was submitted that it was unclear whether the accused understood the caution given by Senior Constable Munro at the beginning of the EROI, particularly as during the EROI the accused said that he speaks 'Pidgin English and Walpari'. It was submitted that this response clearly indicated to the police that they were not dealing with a person who spoke Standard English. It was further submitted that it is unclear whether the accused ultimately understood his right to decline to participate in the EROI, or whether he was just 'repeating back to the officer what he wants to hear'.

[39] It was submitted that the accused's responses to a number of the questions from Senior Constable Munro suggested that the accused believed he was obliged to answer the questions which were put to him by the police officer. It was submitted that the interview should have been terminated at that point or further steps taken to ensure that the accused did understand his rights. It was submitted that Senior Constable Munro had simply repeated the same caution which did not meet the requirements of the *Anunga* Rules or police guidelines.

[40] When the accused was asked if he understood who 'will hear… what we are saying' the accused responded 'Judge'. When he was then asked what the judge could do with that evidence the accused responded 'not sure'. Senior Constable Munro did not pursue the matter any further. It was submitted on

behalf of the accused that this indicated that the accused had no real understanding of who a judge is and what a judge does.

[41] The accused submitted that in the present case the prosecution seeks to lead the EROI for the purpose of establishing lies and consciousness of guilt. Thus, the accused submitted, the probative value and importance of the evidence are less than a police interview containing confessional material. It was submitted that this is to be weighed against the alleged impropriety constituted by non-compliance with the *Anunga* Rules and the failure to facilitate the accused communicating further with CNS before commencing the EROI.

[42] With regard to the provisions of s 139 of the *ENULA*, the accused submitted that the effect of the provision in the present case was to deem the evidence of the EROI to have been improperly obtained because the accused had not been properly cautioned in a language in which he was able to communicate with reasonable fluency.[11]

[43] In the alternative to the above, the accused submitted that the Court has the discretion to reject evidence of the EROI pursuant to s 90 of the *ENULA* if the Court considers that the evidence was obtained in circumstances that would render it unfair to use it against the accused. The accused described s 90 as a 'safety net provision' which will only fall to be considered after applying the other, more specific, provisions found in ss 85, 138 and 139 of

**11** s 139(3) *ENULA*.

the *ENULA*.[12] The accused accepted that he bears the onus of establishing unfairness on the balance of probabilities.[13]

[44] In *Lawrence*, Grant CJ said, concerning the exercise of the discretion found in s 90 of the *ENULA*:

> When considering the exercise of the "fairness" discretion, the relevant focus in this enquiry is not whether the police have acted unfairly or unlawfully. It is whether it would be unfair to the accused to admit the statement. Secondly, that assessment will depend upon the particular circumstances of the case and in which the admission was made, and is guided ultimately by the question whether the admission of the evidence would be unacceptable having regard to contemporary community standards of fairness.[14]

[45] The accused submitted that these observations reflect the fact that voluntariness, reliability, unfairness to the accused and public policy considerations concerning the minimum standards expected of law enforcement authorities are not discrete issues. They tend to overlap both in the factual circumstances that may be considered in determining whether to exercise a particular discretion to exclude evidence. Thus, in The *Queen v Bonson*,[15] Hiley J said, after referring to the above passage from *Lawrence*:

> The Court can take into account the circumstances of the admissions where there was no meaningful caution, no interpreter and no occasion for a prisoner's friend such that it would be unfair to rely upon such admissions, in conjunction with public policy considerations where police officers should adhere to minimum standards of police

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**12** *EM v The Queen* [2007] HCA 46 at [109].

**13** *R v Lawrence* [2016] NTSC 65 at [134] ('*Lawrence*').

**14** Ibid at [121].

**15** [2019] NTSC 22 at [66].

questioning of suspects on all occasions. The combination of these factors should lead to the exclusion of the admissions.

[46] It was submitted that the accused is an unsophisticated young Aboriginal person who had limited prior contact with police or the criminal justice system. While he was given the opportunity to speak to a CNS officer he wanted to speak to a lawyer prior to participating in an EROI. This was communicated both in writing and orally to police, including Senior Constable Munro. Within two minutes of being advised by Ms Hunter that the accused wanted to speak to a lawyer prior to participating in an EROI, Senior Constable Munro approached the accused and again asked him whether he wanted to participate in an interview. These matters should lead to the exclusion of evidence of the EROI.

**The Crown's submissions**

[47] The Crown submitted that by the time the accused had provided the buccal swab on 13 September 2022, he was aware that a police investigation was underway into an alleged offence of engaging in sexual intercourse without consent said to have occurred in 2020 and that he was a suspect. The Crown further submitted that by the time the accused was conveyed to the Watch House after being arrested on 6 January 2023, he must have been aware that he was being arrested for the alleged sexual offence for which he had been required to provide a buccal swab on 13 September 2022.

[48] At the Watch House the accused was again informed in a short conversation under s 140 of the *Police Administration Act* that he was under arrest for an

offence of sexual intercourse without consent. Arrangements were made for the accused to speak privately to the on-call CNS representative by telephone. After that call was concluded, the CNS representative (Ms Hunter) spoke to Acting Sergeant Singh (and subsequently with Senior Constable Munro).[16] The telephone was on speaker during this conversation so that the accused and Senior Constable Munro were able to hear what was said.

[49] The Crown submits that in this conversation, Ms Hunter:

a) effectively states that the accused denies the allegation;

b) says that the accused wants to speak to a lawyer before participating in an interview;

c) states that because the accused is an adult he will not be able speak to a lawyer that evening, and won't be able to speak to a lawyer until Monday; and

d) invites police to again ask the accused if he wants to take part in an interview 'but he won't be able to speak to his lawyer until Monday'.

[50] The Crown submitted that in these circumstances there was no impropriety in Senior Constable Munro approaching the accused immediately after the conversation and asking him whether he wanted to engage in an interview.

**16** See [20] above.

*Section 85 of the ENULA*

[51] The Crown submitted that this section applies to admissions made in the course of interactions with investigating officials, and has regard to the circumstances in which such admissions are made and whether those circumstances may have adversely affected the truth of the admission. The Crown further submitted that the enquiry to be undertaken for the purposes of this section is not directly concerned with whether the evidence has been improperly obtained, or general considerations of fairness, but misconduct or other circumstances resulting in an impairment of the person making the admission to make a rational decision may be relevant.[17] The Crown reiterated its position that there had been no misconduct or impropriety in the way in which the evidence of the EROI was obtained.

[52] The Crown submitted that the three matters raised by the accused in support of the submission that evidence of the EROI should be excluded pursuant to s 85 were either inaccurately expressed or simply factually wrong.[18] First, the Crown submitted that the accused was not 21 years old at the time that he participated in the EROI, but was 23. There was no evidence that the accused was from Mulga Bore Community. The Crown submitted that KB told police in the EROI that she was from Mulga Bore. The accused told Senior Constable Munro in the EROI that he had been born in Alice Springs and was currently living at a nominated address in Alice Springs. The

**17** *Lawrence* (n 10) at [42]-[43].

**18** See [25] above.

accused stated he had family from Wula and Yuendumu. The Crown submitted that the reference to "Wula" should be understood as a reference to Willowra, but that is not a significant issue.

[53] Secondly, the Crown submitted that the accused's submission that his interactions with police on 6 January 2023 was the second time that the accused had been in custody, and his first substantive interaction with the justice system, was inaccurate. The accused had previously been arrested for breaching a Domestic Violence Order in September 2022 and had also dealt with police as a witness when they were investigating violence in Alice Springs by members of the accused's extended family. The accused had also been spoken to by police in Alice Springs on 27 October 2020 in relation to an incident said to have occurred at Alice Springs Hospital on 17 September 2020.

[54] Thirdly, the Crown disputed the accused's submission that he is not proficient in the English language. The Crown pointed to evidence that the accused attended middle school in Ali Curung and high school in Tennant Creek and Yirara College in Alice Springs. The accused completed his secondary school education, and told police in the EROI that he could read and write English. The Crown also submitted that at a number of points in the EROI the accused articulated in 'advanced and elegant English' a number of complex propositions. For example, during the EROI the accused asked how old the complainant was, and Senior Constable Munro said that he was not aware of her exact age, but believed her to be in her late 20s or

early 30s. The accused noted that this would make her older than him, and then said 'how would anybody consider that rape?' Another example referred to by the Crown was when the accused said "there's no justice in DNA' after having been informed that his DNA profile matched the profile taken from the swab taken from ZB's vagina.

[55] The Crown submitted that although the accused is a young man he is not unsophisticated and attempted to use the EROI process to exonerate himself. The Crown submitted that the situation was analogous to that of the alleged offender in *R v GP*[19] where Barr J said:

> He was alive to the purpose of the police interview, and used the occasion to try and place responsibility for the complainant's pregnancy onto another person, and in that way to divert attention from himself.

*Sections 138 and 139 of the ENULA*

[56] The Crown noted that there was no assertion that the evidence of the EROI had been obtained 'in contravention of an Australian law'. The Crown identified the following three matters as having been relied upon by the accused in his submission regarding ss 138 and 139:

a) the failure of Senior Constable Munro to facilitate a further telephone conversation between the accused and CNS before proceeding with the EROI;

**19** [2015] NTSC 53 at [32].

b) non-compliance or inadequate compliance with the *Anunga* guidelines;

c) an alleged non-compliance with s 139(3) of the *ENULA*.

[57] The Crown submitted that in her conversation with Senior Constable Munro, as set out at [20] above, Ms Hunter effectively invited Senior Constable Munro to raise again with the accused whether the accused wanted to participate in an interview. The potential outcomes for the accused at that time were, the Crown submitted:

a) A clear refusal to participate in an interview which would result in the accused's s 137 custody coming to an end, a file being finalised and a formal bail consideration being undertaken;

b) Deferral of the question of the accused participating in an interview until the following Monday when the accused could speak to his lawyer, which would result in his s 137 custody continuing; or

c) Proceeding with an interview.

[58] The Crown submitted that there is nothing in the CNS "Standard Operating Procedures" which requires or obliges police to arrange a second call to CNS if, after a first CNS call results in the accused declining to immediately participate in an interview, the accused changes their mind and decides to participate in an interview. The Crown pointed to evidence given by

Senior Sergeant Potts on the voir dire confirming that there was no obligation to re-contact CNS before proceeding to interview in such circumstances.

[59] The Crown submitted that the police procedures permitted an adult Aboriginal person in custody the right to make their own personal choice or decision about participating in an interview after having consulted CNS. The Crown submitted that there was no impropriety in Senior Constable Munro not re-contacting CNS once the accused changed his mind and agreed to participate in an interview.

[60] The Crown submitted that the rules promulgated by Forster J in *Anunga* are not binding legal precedent in relation to the admissibility of evidence of a police interview with an accused person of Aboriginal descent. In the context of s 138 of the *ENULA*, the ultimate focus of any enquiry concerning impropriety is whether the conduct in question was inconsistent with the minimum standards which our society should expect and require of those entrusted with the powers of law enforcement.[20] The Crown submitted that the guidelines pronounced in *Anunga* were formulated taking into account social conditions that existed in the mid-1970s.

**20** *Lawrence* (n 10) at [99].

[61] In *Gudabi v The Queen*[21], the Federal Court of Australia (Woodward, Sheppard and Neaves JJ), then sitting as the court of appeal from decisions of this Court, after noting that the Rules are not rules of law, said, at 199:

> Secondly, it must be recognised that the Anunga guidelines were formulated in 1976 in a social climate which differed markedly, in many respects, from that which has prevailed in the Northern Territory for the last two or three years at least. Social conditions and values, and community standards and expectations, have changed and are continuing to change and, while the basic principles underlying the Anunga guidelines remain valid, their application must reflect the changes in society.

[62] In *R v GP*,[22] Barr J said:

> The effect of s 56(1) *Evidence (National Uniform Legislation) Act 2011* (NT) 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. 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.

[63] The Crown submitted that in the present case the accused had failed to demonstrate that evidence of the EROI had been obtained through impropriety. To the extent that the accused submitted that the impropriety was to be found in a failure to comply with the *Anunga* guidelines, the Crown submitted that even if there was some failure to fully comply with the guidelines it could not be said that such a failure was clearly

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**21** (1984) 1 FCR 187.

**22** [2015] NTSC 53 at [25].

inconsistent with the minimum standards required of law enforcement officers in that situation so as to constitute an impropriety.

*Section 139 of the ENULA*

[64] The Crown submitted that s 139(3) of the *ENULA* is 'a more contemporary and satisfactory vehicle than the *Anunga* guidelines for ensuring that when law enforcement authorities caution a person in custody the caution is linguistically effective'. With regard to the provisions of s 139(3), the Crown drew my attention to the decision of *R v Deng*[23] where Greg James J (Handley and Ipp JJA agreeing) said:

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

[65] The Crown submitted that when all of the material is considered, there can be little doubt that the accused did understand the caution that was given to him, and that he was not obliged to participate in an interview with police. The Crown submitted that the fact that pursuing that course may, in hindsight, be seen as forensically unwise, does not render the evidence of the EROI inadmissible.

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**23** [2001] NSWCCA 153 at [17].

*Section 90 of the ENULA*

[66] It was observed by Gleeson CJ and Hayden J in *EM v The Queen*,[24] that the language of s 90 'is so general that it would not be possible in any particular case to mark out the full extent of its meaning.' In the same case, Gummow and Hayne JJ said, at [109]:

> When it is 'unfair' to use evidence of an out-of-court admission at the trial of an accused person cannot be described exhaustively. 'Unfairness', whether for the purposes of the common law discretion or for the purposes of s 90 [of the Uniform Evidence Acts], may arise in different ways. But many cases in which the use of evidence of an out-of-court admission would be judged, in the exercise of the common law discretion, to be unfair to an accused are dealt with expressly by particular provisions of the Act[s] other than s 90. Thus although the discretion given by s 90 is generally similar to the common law discretion considered in [*R v Lee* [1950] HCA 25; (1950) 82 CLR 133], it is a discretion that will fall to be considered only after applying the other, more specific, provisions of the Act[s] referred to at the start of these reasons. The questions with which those other sections deal (most notably questions of the reliability of what was said to police or other persons in authority, and what consequences follow from illegal or improper conduct by investigating authorities) are not to be dealt with under s 90. The consequence is that the discretion given by s 90 will be engaged only as a final or "safety net" provision.[25]
>
> (Footnotes omitted)

[67] The Crown acknowledged that courts must be vigilant and protective in relation to the interviewing of a person in custody whose bail or remand status has not yet been determined. An individual who finds themselves in that situation is likely to be stressed and may be vulnerable to the temptation of participating in an interview for the sole reason that they think that

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**24** [2007] HCA 46; 232 CLR 67 [56].

**25** Ibid [109].

participation may assist with getting bail. In the present case, the Crown made the following two submissions:

a) first, it is an inescapable reality of the process of arrest and investigation that arrested suspects will be held in investigating custody pursuant to s 137 of the *Police Administration Act* prior to decisions being made about charging and bail. This, of itself, does not constitute unfairness, and nor does the associated exercise of choice by an arrested person to participate in an interview in the hope that it may assist that person's chances of getting bail. This is so whether that hope proves to be well-founded or mistaken in any individual case;

b) secondly, the accused's conduct and communication with police and others, both at the time of his arrest and then in the EROI, indicated that while getting bail was a matter of importance for him, his decision to proceed with an interview was motivated not only by a desire to be granted bail but also by a desire to put on record his denial of the allegation against him.

[68] The Crown submitted that the accused's engagement with police by participating in the EROI was the product of rational and context-relevant decision-making factoring in the information he had been given by Ms Hunter privately, information conveyed to the police by Ms Hunter in his presence, and the following conversation with Senior Constable Munro.

The Crown submitted that the police conduct was fair and transparent, and the accused made a choice without being overborne, tricked or misled.

**Reasons for decision**

[69] My starting point was to consider the accused's proficiency in the English language. As one might expect, there were instances in the accused's conversations with police which demonstrated a lack of immediate understanding of the proposition or propositions that were being put to him. I am satisfied, however, that when police persevered and continued to explain matters to the accused, the accused ultimately came to understand them. An example is found in the following conversation between police and the accused in which the accused was cautioned:

> Munro: Can you understand what I am saying to you in English?
>
> Downs: Yes.
>
> Munro: Yep. Um – and if there's any time that you don't understand – um – feel free to – to say "I don't understand" and I'll – I'll see if I can word the question in a – in a different way.
>
> Downs: Yes.
>
> Munro: Um – are you happy to continue this interview in – in English?
>
> Downs: Ah – yes, yes.
>
> Munro: Yep. And you – ah – just confirm that you don't need an interpreter, you understand what I'm saying?
>
> Downs: Yes.
>
> Munro: Yep, excellent. Um – so what I'd like to talk to you about today is your involvement in the sexual intercourse without con – consent of – um – a lady by the name of [ZB]. This occurred at the Telegraph Station on the twelfth of December two thousand and twenty, okay. And – ah – it was around six pm, all right. But before we do that I'll just show that – um – do you understand that you're under arrest for that offence…
>
> Downs: Yep.

Munro: … the sexual intercourse without consent?

Downs: Yep.

Munro: and that – um – you're in police custody and you're not free to leave. Do you understand that?

Downs: Yeah.

Munro: Yep. Um – before either I or – ah – my co-interviewers – my co – colleagues asks you any questions I must inform that you're not obliged to say or do anything – um – unless you wish to do so. Um – so do you understand what that means?

Downs: Yes.

Munro: Um – can you explain to me in your words what that means?

Downs: Um – not to say (inaudible) – um – (inaudible).

Munro: You don't have to say anything?

Downs: Mm.

Munro: Yep. Um – and do you have to answer my questions?

Downs: (Inaudible).

Munro: Sorry?

Downs: Yes, I (inaudible) for you.

Munro: No. So – um – so you – you – you don't have to say or do anything unless you want to, okay. So if I ask you a question do you have to answer it?

Downs: [No audible response]

Munro: No? Do you have to answer my questions?

Downs: Ah – yes.

Munro: You – um – so basically you're here of your own free will, so – um – you don't have to be here unless you want to.

Downs: (Inaudible)

Munro: Um – so whose decision is it to do interview?

Downs: Um – mine.

Munro: Yep. And do you have to answer my questions if you…

Downs: (Inaudible)

Munro:…if you don't want to?

Downs: Yeah. I don't have – um – I don't have to answer anything, yeah, (inaudible) if I don't like (inaudible) the questions.

Munro: Okay, excellent, all right. Um – so – um – whatever you say or do will be recorded and may be given in evidence to – um – a judge.

Downs: Yes.

Munro: And then shown in court, okay. Um – do you understand what I mean by that?

Downs: Yep.

Munro: Yep. Um – so where can – this recording when making right now where can this be played?

Downs: In the court.

Munro: Yep. And – and who can see it, who will hear the – what we're saying?

Downs: Judge.

Munro: The judge?

Downs: Yeah.

Munro: Okay. Um – and with that evidence what can the judge to?

Downs: Not sure.

Munro: Not sure?

Downs: Yeah.

[70] The above demonstrates that police went to some lengths to ensure that the accused understood that he did not have to answer any questions, and that if he did participate in an interview, what he said may be placed before a court. The accused was already aware of the fact that he was under arrest with respect to an allegation of engaging in sexual intercourse without consent. I am satisfied that by the end of the process set out in the preceding paragraph, the accused understood his right to refuse to answer questions and that if he did answer questions his answers may be used in court. I am satisfied that he was effectively aware of his rights. The fact that the accused was unsure what a judge could do with the evidence does not change that fact.

[71] Considering all of the material, and in particular the contents of the EROI, I was satisfied that the accused had a reasonable proficiency in the English language. In the course of the EROI he was able to effectually express his position that he was not in the Northern Territory on the day that the offence was alleged to have occurred. He answered questions responsively, with no real indicators that he did not understand the questions that were being put to him in the English language. The accused was able to volunteer information relevant to police enquiries and to give reasons why he could not have been the driver of the vehicle which police suspected was involved in the offence. At the time of his arrest, the accused was also able to clearly deny the allegation of sexual assault, to proclaim himself an innocent man, and to assert that he was being 'set up'.

[72] The accused's willingness to challenge the allegation of sexual assault at the time of his arrest, together with his willingness to accuse police of disrespect and racism, make it inherently unlikely that the accused would simply agree with whatever police put to him in the EROI out of courtesy. The willingness of Aboriginal people to answer questions put to them by 'white people' in a way which they perceive the questioner wants, referred to by Forster J in *Anunga,*[26] is not apparent in the accused's responses in the EROI. It should not be overlooked that the accused consistently denied the allegation of sexual assault.

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**26** *Anunga* (n 8) at 414.

[73] I am fortified in my finding regarding the accused's proficiency in English by his educational achievements which include completing high school. Additionally, the accused's conversations with Senior Constable Munro regarding DNA reveal an understanding that it will be difficult to challenge the DNA evidence ('there's no justice in DNA') and that this is an important piece of evidence against him.

[74] Turning to the accused's submission that evidence of the EROI should be excluded by operation of s 85 of the *ENULA*, I accepted that the accused was 23 years old at the time he participated in the EROI. The evidence regarding his background was meagre, but what evidence there was suggested that he was born in Alice Springs and had spent considerable time being educated in Tennant Creek and Alice Springs. I accepted that he had had limited prior interactions with the police. I did not accept that he was insufficiently proficient in the English language to enable him to understand what he was being charged with and what his rights and options were in the circumstances in which he found himself. The EROI was not conducted in a manner that could be described as harassing or aggressive. I was satisfied that the circumstances in which any admission (as defined in the *ENULA*) was made were such as to make it unlikely that the truth of the admission was adversely affected. The accused's challenge pursuant to s 85 failed for these reasons.

[75] With regard to the accused's challenge pursuant to ss 138 and 139 of the *ENULA*, the onus fell on the accused to establish that the impugned evidence

was obtained improperly or in consequence of an impropriety (there being no allegation that it had been obtained in contravention of an Australian law). I was not satisfied that this was the case. The accused was very properly given an opportunity to speak privately to CNS at the Watch House before he agreed to participate in the EROI. The accused's conversation with Ms Hunter was relatively lengthy and, of course, neither the police nor this Court know what was said in that conversation.

[76] What we do know is that the accused was privy to the conversation between Ms Hunter, Acting Sergeant Singh and Senior Constable Munro that followed closely upon the accused's private conversation with Ms Hunter. In that open conversation, Ms Hunter expressed the accused's rejection of the charge and gave reasons why the accused would not have committed the alleged offence. Presumably, what Ms Hunter said was based on what the accused had told her in their private telephone conversation. Ms Hunter conveyed to police in the open conversation that the accused had told her that he wanted to speak to a lawyer before participating in an interview.

[77] The accused did not give evidence on the voir dire so whether the accused understood that Ms Hunter was not a lawyer is unknown. What is apparent, however, is that the accused was aware:

a) That police were aware that he had told Ms Hunter that he did not agree to participate in an interview until he saw a lawyer;

b) That he would not be able to see a lawyer until Monday morning;

c) That he may be held in s 137 custody until he spoke to the lawyer on Monday morning; and

d) That police had said to Ms Hunter 'so we will just put him as refused at this stage but if he changes his mind once he has spoken with his lawyer', indicating that his matter may be placed "on hold" until Monday; and

e) That Ms Hunter had invited police to speak to the accused again 'to ask him if he wants to', which in context could only be an invitation to ask the accused again if he wants to participate in an interview.

[78] There could be no impropriety in these circumstances in police then speaking again to the accused and giving him the opportunity to participate in an interview. The fact that this second approach to the accused occurred within minutes of police being initially advised by Ms Hunter that he did not want to participate in an interview until he spoke to a lawyer is not to the point; indeed, it is precisely what would be expected in the circumstances.

[79] There was also no impropriety in police not arranging for the accused to again speak to CNS over the telephone before commencing the EROI. Police complied with their obligations by facilitating the accused's telephone conversation with Ms Hunter. There was no obligation placed on police to notify Ms Hunter, or CNS, if the accused changed his mind and decided to participate in an interview, much less to insist that he seek further advice before doing so. There was no evidence that the accused had any cognitive

deficits or mental impairments, such that it would have been unfair to approach the accused on the second occasion to ask if he wanted to participate in an interview. The accused did not request an opportunity to speak to CNS again. There would have been no point in contacting Ms Hunter again as she had only minutes before invited police to renew their offer to the accused of the opportunity of participating in an interview.

[80] My finding that the accused had a reasonable proficiency in English sufficient to enable him to understand the caution given to him by police on multiple occasions that he was not obliged to participate in an interview disposed of the submission that police had not complied with the provisions of s 139(3) of the *ENULA*.

[81] I was satisfied that there was otherwise no basis for a finding that the circumstances in which the EROI took place made it unfair to the accused for the Crown to adduce evidence of the EROI.[27]

[82] The accused's decision to participate in the EROI was not irrational. If what he said to police about him being in Western Australia at the time of the alleged offence was true, there was every reason for putting that on the record as soon as possible. If there had been no DNA evidence and had police been able to confirm that the accused had been in Western Australia at the time, the case against the accused may not have proceeded. The fact that the accused was not aware of the DNA evidence at the time he agreed to

**27** s 90 *ENULA*.

participate in the EROI makes no difference; the accused's decision to participate in the EROI was rational.

[83] It is highly probable that the accused's decision to participate in the EROI was motivated in large part by a desire to be released from custody. It is clear that the issue of how long he would be required to remain in custody until he spoke to a lawyer about participating in an interview was a matter exercising the accused's mind immediately before he agreed to participate. In the absence of evidence from the accused, his precise process of thought in that regard must remain unknown, but it is tolerably clear that the desire to be released from custody was a factor in the accused's decision.

[84] This fact, in itself, does not render the accused's participation in the EROI involuntary, any more than would his desire to place on the record his denial of the accusation. It does not render the Crown's use of the EROI at the accused's trial unfair. If anything, it demonstrates an understanding on the part of the accused that he could use the interview process for his own benefit.

[85] It follows from the above that I was satisfied that there was no impropriety on the part of police arising from the alleged breach of the *Anunga* guidelines. In the context of modern social conditions in this Territory and the evidence of the accused's level of education and proficiency in English, it could not be said that the impugned evidence was obtained improperly.

[86] For these reasons I ruled that the evidence of the EROI was admissible.

[87] This decision is not to be published to anybody except the parties until the conclusion of the Trial.

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