CITATION:	*The Queen v Nadjowh* [2018] NTSC 71
PARTIES:	THE QUEEN
	v
	NADJOWH, Elonda
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	21555555
DELIVERED:	11 October 2018
HEARING DATES:	26 June 2018
JUDGMENT OF:	Barr J

CATCHWORDS:

CRIMINAL LAW – VOIR DIRE – accused charged with unlawfully causing serious harm – admissions made by accused at scene to responding police officers – accused admitted striking the complainant with a stick – accused gave explanation for conduct in response to further question – admissions made in response to open questions – admissions made in circumstances that were not likely to adversely affect the truth of the admissions made – admissions not rendered inadmissible by s 85 (2) *Evidence (National Uniform Legislation) Act 2011* (NT).

CRIMINAL LAW – VOIR DIRE – admissibility of admissions made by accused to police – accused initially not a suspect – no caution given – accused admitted striking the complainant with a stick – no caution given after first admission – accused then gave explanation for conduct in response to further question – second admission – explanation adverse to foreshadowed defence of defensive conduct – held accused was a suspect after first admission – objective test of ‘suspect’ – second admission not

admissible – substance of admission not confirmed and confirmation electronically recorded – s 142(1) *Police Administration Act* – second admission nonetheless admitted in evidence – court satisfied admission of evidence not contrary to the interests of justice – s 143 *Police Administration Act*.

CRIMINAL LAW – VOIR DIRE – accused remaining at scene of serious assault in presence of alleged victim when police arrived – admissions by accused in response to police questions – accused not under arrest – whether accused deemed to be under arrest – s 139(5)(a) *Evidence (National Uniform Legislation) Act 2011* – whether police obliged to caution accused before starting questioning – held accused not deemed to be under arrest – accused not "in the company of an investigating official for the purpose of being questioned" – accused in company of police because she was and had been with complainant – the fact of being asked and answering one or more questions did not convert the purpose of her presence – held accused's admissions not deemed to have been obtained improperly because of failure to caution – consideration of s 138(1) *Evidence (National Uniform Legislation) Act 2011* in the alternative – probative value of admissions significant – if impropriety, not deliberate or reckless – evidence should be admitted – desirability of admitting evidence outweighs the undesirability of admitting evidence obtained in the way it was obtained.

Evidence (National Uniform Legislation) Act 2011 (NT) s 85, s 90, s 137, s 138, s 139, Dictionary, Pt 1, Definitions: "admission".

Criminal Code (NT) s 29, s 181

Police Administration Act (NT) s 142(1), s 143

Edwards v The Queen (1993) 178 CLR 193; *R v Grimley* (1994) 121 FLR 236; *Lai v The Queen* (2003) 13 NTLR 139; *Bin Sulaeman v R* [2013] NSWCCA 283; *Parker v Comptroller-General of Customs* (2009) 83 ALJR 494, applied

R v Layt [2018] NTSC 36, followed

R v Swaffield (1998) 192 CLR 159; *Papakosmos v R* (1999) 196 CLR 297; *Festa v R* (2001) 208 CLR 593; *Em v The Queen* (2007) 232 CLR 67; *R v FE* [2013] NSWSC 1692, referred to.

REPRESENTATION:

Counsel:

Crown:	D Jones
Defendant:	G Chipkin

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Defendant:	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 Queen v Nadjowh [2018] NTSC 71
No. 21555555

BETWEEN:

THE QUEEN

AND:

ELONDA NADJOWH

CORAM: Barr J

REASONS FOR DECISION ON VOIR DIRE

(Delivered 11 October 2018)

Introduction

[1] A hearing of a preliminary question about whether admissions made by the accused should be admitted into evidence was held on 26 June 2018. Written submissions were received subsequently from the Crown on 3 July 2018 and defence submissions in reply on 9 July 2018.

[2] The accused is charged with an offence contrary to s 181 *Criminal Code* that, on or about 10 November 2016, she caused serious harm to Joseph Deegan.

[3] The prosecution case is that, in the overnight period of 9 and 10 November 2016, the accused became angry with the victim and struck him to the face

and body a number of times with a heavy stick. Mr Deegan's injuries included a right radial fracture at the wrist, a fracture of the fourth metacarpal, a fracture of the fibula (just below the knee) and a tibial fracture in the upper shin area, with an associated laceration wound.

[4] Counsel for the accused concedes that the accused hit Mr Deegan with a stick,[1] and by implication that she caused his injuries. However, the defence will contend at trial that the accused's conduct was justified as defensive conduct, pursuant to s 29 *Criminal Code*.

[5] In that context, defence counsel objects to the admission into evidence of statements made by the accused to the police officers who first attended the crime scene: Senior Constable Antoine Meijer ("Meijer") and Constable Camille McLean ("McLean"). While there are several versions of the accused's statements and of the precise context and circumstances in which they were made, there is no doubt that (1) the accused admitted that she had hit Mr Deegan with a heavy stick (which she identified), and that (2) she had done so because Mr Deegan had been "talking shit" to her.[2]

[6] Of obvious significance to the foreshadowed defence, the accused did not refer to having had any belief as to the necessity to defend herself (or anyone else) from Mr Deegan.

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1 Outline of Defence Submissions, 26 June 2018, par 4.

2 Counsel for the accused refers to the admission of having hit the victim as "the first admission" and the explanation as "the second admission" – see Submissions in Reply, par 26.

[7] The alleged offending came to light when Meijer and McLean responded to a police radio message to the effect that a passer-by had reported that a person appeared to have been assaulted during the night and that the alleged victim was at the Palmerston Senior College oval. Both Meijer and McLean said in evidence in chief that they did not have any information about who was responsible for causing Mr Deegan's injuries.[3] However, when Meijer was cross-examined in relation to the PROMIS record, he was reminded that the original report to police had stated: "The offender is gone, location unknown." He agreed that he and McLean would have received that information over the police radio.[4]

[8] When police attended, the injured man was lying on the ground and, in the words of Meijer, was in "a pretty bad shape". His face was swollen, his hand was deformed and he had blood all over his shirt.[5] Sitting next to him, cross-legged, was the accused. She was approximately 20 to 50 cm away from him. There was no evidence of any aggression being shown by the accused to Mr Deegan at the time police attended. There was no apparent tension between the two. The accused was sitting calmly.

[9] McLean gave evidence that she observed obvious blood splatter to Mr Deegan's white shirt and injuries to the right side of his eye and cheek area.

Evidence of the admissions

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3 Meijer T 6.2; McLean T 31.8.

4 Exhibit D5, p 2; Evidence of Meijer at T 21.7.

5 T 6.5.

[10] Meijer had a deal of difficulty communicating with the injured man because he was mumbling or speaking incoherently. Meijer was not sure whether the injured man's ability to communicate was because of intoxication or because of his injuries. Meijer said in evidence that the only words he heard were a complaint by Mr Deegan that his legs were hurt. He could not see any injuries because Mr Deegan was wearing long pants. In the circumstances, Meijer turned to the accused and asked her, "What happened?" The accused then stated that she had hit Mr Deegan with a stick, pointing to an area about 20 metres away from where she was sitting, where there was a long stick, quite thick, lying on the oval. When Meijer asked the accused why she had hit Mr Deegan, she replied (I quote from the transcript of Meijer's evidence, in which he used indirect speech, as follows):

> She said, apparently, he was saying that she was off drinking with other females, younger females. And getting drunk with them. And just talking, in her words, shit.

[11] Meijer's evidence was substantially consistent with his contemporaneous notes, made in his police notebook.[6] In cross-examination, he agreed that the accused's exact words were, "I did that to him. I hit him with that stick".[7]

[12] Meijer agreed in cross examination, after reading his statement, that Mr Deegan had told him that he could not walk because he had been hit across

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6 Exhibit P3, Notebook, p 16.

7 T 14.6.

the legs.[8] However, he denied that Mr Deegan had pointed at the accused and said "she hit me".[9]

[13] Meijer said in cross-examination that he was "pretty shocked" by the accused's admission and also "a little bit uncertain" as to how he was going to proceed.[10] Given the matters referred to in [7] and [8], this response on his part was not surprising.

[14] Although Meijer initially compressed the evidence of the first and second admissions into a close sequence, the cross-examination established that a relatively short period of time elapsed between the initial admission made by the accused and her subsequent explanation. During that time there was some further brief conversation between Meijer, Mr Deegan and the accused. Meijer asked the accused for her details and asked Mr Deegan how long he and the accused had been together. Meijer was asked by defence counsel about his police statement, which was put to him as follows: "Elonda says that he was accusing her of going off with younger girls and drinking and speaking lies".[11] Meijer agreed that the information provided by the accused "in relation to the accusation of the younger girls" occurred after he had asked Mr Deegan how long he and the accused had been in a relationship.

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8 T 13.3.

9 T 14.5.

10 T 15.1.

11 T 18.5.

[15] McLean's evidence was somewhat different to that of Meijer:[12]

> … We walked up to both of the people and said, "What's happened?"
>
> Okay. And what was the response?---The response was, the male pointed towards the female and was mumbling. The female said, "I hit him with a stick".
>
> Okay. When the male pointed to the female and you said that he was mumbling, could you work out what he said?---No.
>
> And sorry – what was the female's response?---The female said "I hit him with that stick because he was talking shit to me".
>
> Right. When she said that where were you?---I was squatting down beside her and the other person. … [*Asked to repeat*] I was squatting down while I was speaking to them because they were both down low on the ground.

[16] McLean added that she observed that the accused was intoxicated. That observation was inconsistent with the evidence of Meijer. Meijer said that he did not think that the accused was at all intoxicated.[13] McLean appears to have been influenced by the strong smell of alcohol coming from the accused.[14] However, in a more or less contemporaneous PROMIS entry, McLean had described the accused female as "sober". I am satisfied on the balance of probabilities that the accused was sober when spoken to by police, although she may have smelled strongly of alcohol consumed the previous evening. It is quite possible that she was hung over to some extent.

[17] In cross-examination, McLean agreed that it was Meijer who had asked Mr Deegan what had happened.[15] She said that, although Mr Deegan's reply was

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12 T 32.

13 T 7.5.

14 T 32.5.

15 T 36.2.

very muffled, she made out what sounded like, “She hit me”, although she could not be 100 per cent certain about what was said.[16] McLean was then reminded of an entry made by her in PROMIS in which she had noted that Mr Deegan had pointed to the accused and said the words, “She did it”, before the accused was asked what had happened.[17] Mc Lean agreed that her PROMIS note was consistent with Mr Deegan having said, “She hit me”, before police spoke to the accused.

[18] I am quite satisfied that Meijer did not hear Mr Deegan make an accusation of assault against the accused before asking the accused what had happened. In making that finding, I also accept the evidence of McLean that she may well have heard the victim make that accusation. There is no inconsistency in my findings. McLean was squatting in order to speak to people who were “both down low on the ground” and, logically, was in a better position to hear or interpret the indistinct mumbling of the victim.

Grounds argued for exclusion of evidence of the accused’s admissions

[19] The accused’s representations to police, summarized in [5] above, are properly characterized as “admissions” as defined in the *Evidence (National Uniform Legislation) Act 2011* (NT). An “admission” means a previous representation, made by a person who is or becomes a party to a proceeding, “adverse to the person’s interest in the outcome of the proceeding.”[18] The

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16 T 36.9.

17 T 38.2.

18 *Evidence (National Uniform Legislation) Act 2011*, Dictionary, Pt 1, Definitions: “admission”.

accused's statements to police are also properly characterised as a "confession or admission" for the purposes of s 142 *Police Administration Act*.

[20] Defence counsel argues that the admissions should be excluded, pursuant to s 85 *Evidence (National Uniform Legislation) Act 2011* (NT).

[21] Under s 85(2), relevantly, evidence of an admission made to a police officer investigating the possible commission of an offence is not admissible unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected. The prosecution must satisfy the court on the balance of probabilities that the admissions relied on were made in circumstances that were not likely to affect their truth adversely.[19] I need to consider whether the reliability of the admissions may have been impaired by the way in which they were obtained. In this exercise, I need to consider all the circumstances. Those circumstances include the characteristics of the accused person making the admission, including age, personality, education and any mental, intellectual or physical disability affecting her. The circumstances would also include, where they exist, misconduct by those interrogating, the procedural safeguards adopted, and whether there was any impairment of the ability of the person making the admission to make a rational decision.

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

[22] Defence counsel argues that the admissions were recorded slightly differently between the two police officers, and that there is a "critical difference" in the evidence of the two police officers in terms of sequencing of conversation content, specifically that on one version the victim identified the accused as the person responsible for his injuries before the police spoke to the accused. With respect, I do not see that difference as relevant or critical to a consideration of s 85. Defence counsel further argues that the accused is an Aboriginal female, 45 years old, who was sitting on the ground looking up at two uniformed police officers who were standing above her, and that she may have felt compelled to answer the question, "What happened?" in circumstances where she was not cautioned. The submission overlooks the evidence of McLean that she was crouching down, and not "standing above" the accused. Further, while it may be accepted that the accused was not cautioned before being asked what had happened, the answers she gave were in response to *open questions* asked by Meijer. I am satisfied that Meijer was simply trying to find out what had happened. As to the contention that the accused "may have felt compelled to answer", there was no evidence from the accused (or anyone) that the accused was overborne by the nature of the questions or by the manner in which they were put, or that she felt compelled to answer, let alone that she felt compelled to give a wrong answer to satisfy the authority figures who were standing over her. Defence counsel also argues: "It is unclear if the defendant was sober at the time of the admission", and that "even if she

were sober, she would still have likely been feeling the after-effects associated with heavy alcohol consumption including dizziness, loss of concentration and possibly even an impaired ability to make rational decisions". In light of my finding at [16], that the accused was probably sober when she spoke to police officers, I am not prepared to speculate (in the absence of evidence from the accused) as to the quantity of alcohol consumed by her on the previous evening and the after-effects of such alcohol consumption at the time she spoke to police. I do note that the accused had her wits about her to the extent that, when Mr Deegan told Meijer that he had been in a relationship with the accused for three years, she spoke over him and said four years.[20]

[23] In relation to s 85, it is not the task of the trial judge to assess the reliability of admissions made, but rather to consider the circumstances in which the admissions were made. In my assessment, the most significant aspect of 'the circumstances' was the fact that the accused responded to open questions asked by Meijer. The fact that they were not 'spontaneous admissions', as argued by defence counsel, is not to the point. Moreover, I consider that the absence of a formal caution is a circumstance which actually makes it more likely that the admissions were true: unguarded but true statements. I am satisfied on the balance of probabilities that the accused's admissions were made in circumstances that were not likely to affect their truth adversely.

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20 T 8.6.

[24] Defence counsel next contends that, because the accused was "under arrest for an offence" at the time Meijer questioned the accused, attending police officers should have cautioned the accused before starting the questioning of the accused, so as not to breach s 139(1)(c) *Evidence (National Uniform Legislation) Act 2011* (NT). The argument proceeds that, because police did not caution the accused, evidence of the accused's admissions was "obtained improperly" and therefore, pursuant to s 138(1) *Evidence (National Uniform Legislation) Act 2011* (NT), should not be admitted.

[25] A party seeking to exclude evidence pursuant to s 138 *Evidence (National Uniform Legislation) Act 2011* (NT) has the burden of showing that the conditions for its exclusion are satisfied, namely that it was obtained improperly or in contravention of an Australian law. The burden then falls upon the party seeking the admission of the evidence to persuade the court that it should be admitted. There is thus a two stage process. The party seeking the admission of evidence obtained improperly or in contravention of an Australian law has the burden of proof of facts relevant to matters weighing in favour of admission. That party also has the burden of persuading the court that the desirability of admitting the evidence outweighs the undesirability of admitting evidence obtained in the way in which it was obtained.[21]

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

[26] As a matter of fact, the accused was not under arrest for any offence at the time Meijer first questioned her. However, a person "who is in the company of an investigating official for the purpose of being questioned" is deemed by s 139(5)(a) to be under arrest "if 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".[22]

[27] I very much doubt that, at the time police spoke to the accused and Mr Deegan, the accused was in the company of police officers "for the purpose of being questioned". The situation was very different from that in which a person agrees, without being arrested, to accompany police investigators to a police station to assist with police inquiries.[23] It is true that Meijer asked the accused what had happened. However, the context in which questions were asked was that Meijer and McLean had walked over to the injured man. I refer to [7], [8], [10] and [13] above. The injured man's companion (the accused) was there seated on the ground. Meijer unsuccessfully tried to communicate with the injured man, before asking the accused what had happened. The situation was not one in which the accused was in the company of police officers for the purpose of being questioned. The fact that

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22 There are two other circumstances of deemed arrest in s 139(5) of the Act: if "the official would not allow the person to leave if the person wished to do so" [s 139(5)(b)], and if "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" [s 139(5)(c)].

23 Another example is the fact situation in *R v FE* [2013] NSWSC 1692. The accused had presented herself to the Police Station after seeing a media release from which she had been led to believe that the police were looking for her. She was taken to an upstairs office at the Police Station and was told, "Don't leave the office" and "Stay in the office", such that she believed that she was not allowed to leave. This is an example of a s 139(5)(c) situation, that is where the official gave the accused reasonable grounds for believing that she would not be allowed to leave if she wished to do so. However, once questioning by one of the investigating detectives commenced, it also became a situation where FE was in the company of an investigating official for the purpose of being questioned.

she was asked and answered one or more questions does not artificially convert the purpose of her presence.

[28] Therefore, I am not satisfied on the balance of probabilities that the accused was in the company of police officers "for the purpose of being questioned". It follows that she cannot be deemed by any paragraph of s 139(5) to have been under arrest for an offence at the time Meijer started to ask her questions. Moreover, as mentioned in [26], she was not under actual arrest. The consequence is that the accused's admissions are not deemed to have been obtained improperly through the suggested failure to caution. The accused has not established the condition for exclusion of the evidence on the balance of probabilities.

[29] If my findings and conclusions in [28] were in error, I would nonetheless admit the evidence pursuant to s 138(1) *Evidence (National Uniform Legislation) Act 2011* (NT) because I consider that the desirability of admitting the evidence outweighs the undesirability of admitting evidence obtained in the way in which it was obtained. Although there has been no formal concession, I apprehend that the evidence at trial will show that the injuries sustained by Mr Deegan amounted to serious harm. The offence with which the accused stands charged is serious, carrying a maximum penalty of imprisonment of 14 years. I consider that evidence of the accused's admissions has significant probative value in relation to the foreshadowed issue of defensive conduct, and thus will be important evidence at trial. Moreover, I consider that the police officers at all times

acted in a reasonable manner, bearing in mind they were first responders to a serious assault, and had been led to believe that the offender had left the scene. If there was any impropriety on the part of either police officer (and I do not believe that there was), it was at most negligent, and not deliberate or reckless.

[30] In light of my findings and conclusions in relation to the first part of s 139(5) *Evidence (National Uniform Legislation) Act 2011* (NT), it is not necessary to make a finding for the purpose of the statutory provision under consideration as to whether, and if so at what particular stage, Meijer and McLean may have come to believe that there was sufficient evidence to establish that the accused had committed an offence against Mr Deegan.[24]

[31] Defence counsel next contends that the evidence should be excluded pursuant to s 137 *Evidence (National Uniform Legislation) Act 2011* (NT). The contention is that the explanation given by the accused for hitting Mr Deegan could be interpreted in a number of different ways, and that, given the multiple ways in which the statement could be interpreted, there is significant potential for the jury to become confused and place undue weight upon the statement, resulting in a real risk of unfair prejudice to the defendant which could not be cured by directions given by the trial judge.

[32] In my opinion, there is no danger of unfair prejudice to the accused. The probative value of the admission lies only in the fact that the accused did

24 *Evidence (National Uniform Legislation) Act 2011* (NT), s 139(5)(a).

not, apparently, mention any matters of defensive conduct when answering Meijer's question as to why she had hit the accused with a stick. As a matter of law, "unfair prejudice" does not simply mean a greater risk of conviction.[25] It is concerned with the manner in which the jury might misuse evidence.[26] In my assessment, although the jury may have to decide the significance of the admissions, there is little or no possibility that the jury would misuse the evidence in some unfair way, or a way which could not be cured by an appropriate direction at trial.[27]

[33] Defence counsel also submits that the court should refuse to admit evidence of the accused's admissions, pursuant to s 90 *Evidence (National Uniform Legislation) Act 2011* (NT) because, having regard to the circumstances in which the admissions were made, it would be unfair to the accused to use the evidence. The accused bears the onus of establishing such unfairness. Defence counsel contends that the admission or admissions were obtained in circumstances where the accused was "expressly questioned" by the police officer (Meijer) without being cautioned. Accordingly, the argument proceeds, the Crown has gained an unfair forensic advantage because of the failure to caution the defendant.

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25 *Papakosmos v R* (1999) 196 CLR 297, per McHugh J at [91] - [92].

26 *Festa v R* (2001) 208 CLR 593 per Gleeson CJ at [22], per McHugh J at [51].

27 See *Edwards v The Queen* (1993) 178 CLR 193, per Deane, Dawson and Gaudron JJ at 209 - 210.

[34] I have already determined that the accused's admissions were not made in circumstances which were likely to affect the truth of admissions made.[28] To the extent it is relevant, I have no doubt that the admissions were made voluntarily, in response to open questions. In terms of fairness to the accused, there was no evidence called at the voir dire to suggest that the admissions were not made or that they were not true. The provision in s 90 is concerned with the right of an accused to a fair trial and whether there is a risk of improper conviction.[29] It has been described as a final or "safety net" provision after the more specific exclusionary provisions of the Act have been considered and applied. The questions with which those other sections deal (questions of the reliability of what was said to police, and as to what consequences flow from illegal or improper conduct by investigating authorities) are not to be dealt with under s 90.[30]

[35] The accused has failed to satisfy me that admission of the contested evidence would render her trial unfair. In my assessment, the matters argued by Mr Chipkin, referred to in [33], do not result in any forensic disadvantage and would not otherwise render the trial unfair. I therefore decline to refuse to admit the evidence on this ground.

[36] Defence counsel's final submissions were in relation to s 142(1) *Police Administration Act* (NT), which provides that evidence of a confession or

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28 [22] and [23] above.

29 *R v Swaffield* (1998) 192 CLR 159.

30 *Em v The Queen* (2007) 232 CLR 67 at [109] per Gummow and Hayne JJ. See also per Gleeson CJ and Hayne J at [56].

admission made to a member of the Police Force by a person suspected of having committed a 'relevant offence'[31] is not admissible as part of the prosecution case in proceedings for a relevant offence unless, where the confession or admission is made before the commencement of questioning, the substance of the confession or admission is confirmed by the person and the confirmation electronically recorded.[32] Where the confession or admission is made during questioning, the questioning and anything said by the person must be electronically recorded.[33] If an applicable requirement has not been complied with, the court retains a discretion to admit the evidence pursuant to s 143 *Police Administration Act* if "admission of the evidence would not be contrary to the interests of justice".[34]

[37] In the present case, the substance of the admissions was not later confirmed by the accused and such confirmation electronically recorded. Defence counsel contends that it is therefore inadmissible.

[38] I am satisfied that the accused was not a suspect at the time Meijer first spoke to her at the scene. I refer to my findings in [7], [8], [10], [12], [13] and [18] above, including that Meijer did not hear the victim make any allegation of assault against the accused before Meijer asked the accused

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31 A 'relevant offence' is defined in s 139 *Police Administration Act* as "an offence the maximum penalty for which is imprisonment in excess of 2 years".

32 *Police Administration Act* s 142(1)(a).

33 *Police Administration Act* s 142(1)(b). In the case of both exceptions, the electronic recording must be available to be tendered in evidence.

34 *Police Administration Act* s 143: A court may admit evidence "… if, having regard to the nature of and the reasons for the non-compliance or insufficiency of evidence and any other relevant matters, the court is satisfied that, in the circumstances of the case, admission of the evidence would not be contrary to the interests of justice."

what had happened. If Maclean heard the accusation uttered by the victim, as described in [17] above, then she may well have suspected that the accused had committed a relevant offence.[35] However, she was not the officer who asked the accused the relevant questions which elicited the admissions.

[39] In [38] above, I considered the situation when Meijer first spoke to the accused. However, once the accused had replied, admitting that she had hit Mr Deegan with the stick, Meijer had sufficient information to suspect that the accused had committed a 'relevant offence'. The concept of 'suspicion' is a state of mind which falls short of belief but which requires an apprehension based on a consideration of known facts that the person might possibly have committed the relevant offence. That interpretation is taken from the observations of Kearney J in *R v Grimley*,[36] in the passage set out below, which was cited with approval by the Court of Criminal Appeal in *Lai v The Queen*:[37]

> … I do not consider that to suspect the person he is questioning, in terms of s 142(1), the police officer must at that time believe that he is probably guilty of the offence. Suspicion in general lies somewhere between mere speculation that the person committed the offence, without any factual foundation – a mere idle wondering – and a belief based on reasonable grounds that he committed it. It is a state of mind which arises from a consideration of known facts less than those required for a belief, resulting in an apprehension that the person might possibly have committed the offence. It requires a

35 McLean said in cross-examination at T36.6 that the victim pointed towards the accused, and was mumbling, and so she thought that the accused must be involved. She agreed that she then started to formulate a suspicion that the accused was involved.

36 *R v Grimley* (1994) 121 FLR 236 at 258.9.

37 *Lai v The Queen* (2003) 13 NTLR 139 at [21].

> degree of conviction which is beyond mere speculation, and based upon some factual foundation.

[40] Although Meier said in cross-examination that the accused was not "an offender or a suspect at that time",[38] I consider that he ought to have reached the conclusion that the accused was a suspect, based on her first admission (or the first part of her admission). The objective test referred to by Grant CJ in *The Queen v Layt* should be applied.[39]

[41] It should be noted that the *Police Administration Act* did not require that a caution be given in the circumstances that morning at the Palmerston Senior College oval. Rather, s 142 *Police Administration Act* renders the second admission inadmissible if it were not confirmed subsequently by an electronic recording (which it was not).

[42] The consequence is that, although the accused's first admission is admissible, the accused's second admission is not admissible.[40]

[43] I therefore turn to consider s 143 *Police Administration Act*.

[44] As a preliminary matter, I note that there was no subsequent electronic recording because, although police commenced a formal interview with the accused, which was to be recorded, they did not proceed with the interview

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38 T14.8.

39 *The Queen v Layt* [2018] NTSC 36 at [36].

40 My reference to the 'first admission' and the 'second admission' derives from [5] above.

because the accused was too tired to continue. They did not then seek to conduct a further interview.

[45] For the purposes of s 143, I have had regard to the probable reason for the caution not being given. I find that the most likely reason was that Meijer was shocked and very surprised by the accused's admission. I consider that he was truthful in giving this evidence. I am satisfied that he did not suspect that the accused had caused Mr Deegan's injuries, at any time prior to her making the first admission. There were other factors as well. Meijer and McLean were General Duties Police Officers, responding to a situation in which Mr Deegan had been seriously injured. A priority was to make some assessment of his injuries and facilitate his transport by ambulance to seek medical assistance. Unlike detectives, who might be called in at a somewhat later stage, Meijer and McLean had duties to perform other than investigation.

[46] Neither Meijer nor McLean was cross-examined to suggest that their conduct vis-a-vis the accused was opportunistic or deceitful, or that they deliberately flouted proper procedures in their dealings with her.

[47] Defence counsel contends that there is a "critical divergence" between the record made of the admissions as between the two police officers, which, it is submitted, undermines the reliability of the admissions. I reject that contention. In my opinion, the differences in the evidence of the two police officers were minor. Indeed, there was substantial consistency in their

evidence, essentially as summarised in [5] above. Moreover, apart from cross-examination on peripheral aspects of the content of the admissions, and matters of fine chronology, there was no challenge to the substance of their evidence.

[48] For reasons mentioned in [6] and [29] above, I consider that evidence of the accused's admissions has significant probative value and relevance to the foreshadowed defence at trial.

[49] In all the circumstances, I am satisfied that the admission of evidence of the second admission would not be contrary to the interests of justice having regard to the nature of the non-compliance, and the reasons for it.

Conclusion

[50] I rule that the Crown is permitted to lead evidence of the admissions referred to in [5] above.