CITATION:	*The King v Wasaga* [2024] NTSC 89
PARTIES:	THE KING v WASAGA, Eliasoa Thomas
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	22211644
DELIVERED:	25 October 2024
HEARING DATE:	21 October 2024
JUDGMENT OF:	Brownhill J

CATCHWORDS:

EVIDENCE – Criminal law – Murder trial – Hearsay – Exceptions to the hearsay rule – Crown application to adduce evidence of representations made by the deceased as context/relationship evidence – Representations by the deceased (an unavailable witness) to family and friends about conduct of the accused – Application of exceptions contained within ss 65(2)(b) and 65(2)(c) – Whether representations were made when or shortly after the asserted facts occurred and in circumstances making fabrication unlikely – Whether representations were made in circumstances making reliability highly probable – Meaning of 'circumstances' within the application of s 65(2) – 'Broad view' of 'circumstances' must be applied.

EVIDENCE – Criminal law – Exceptions to the hearsay rule – Application of exception contained within s 66A – Whether contemporaneous representations are about the feelings and state of mind of deceased – Broad interpretation of s 66A should not be applied – Such a representation must contain more than a narrative about the occurrence of an event.

EVIDENCE – Criminal law – Danger of unfair prejudice – Balancing exercise as to whether the probative value of the evidence is outweighed by any prejudicial effect it may have – Dominant consideration is whether the accused is deprived, by prejudice, of a fair trial – Some risks of unfair prejudice can be remedied by directions in the circumstances of this case – Evidence that tends to invite the jury to engage in tendency or rank propensity reasoning cannot be remedied by directions in this case and is not admissible.

EVIDENCE – Criminal law – Crown application to adduce evidence of lie made by the accused as consciousness of guilt evidence – Evidence sought to be admitted in accordance with the principles in *Edwards v The Queen* (1993) 178 CLR 193 – Lie contained within a statutory declaration attested to by the accused – Lie also contained in body worn footage of the statement being taken – Whether the statutory declaration was obtained improperly or in consequence of an impropriety within the meaning of s 138 – Police officer treating a suspect as a witness when taking a statement – Accused was not provided the opportunity to obtain legal advice or engage in a formal record of interview – Statutory declaration was obtained in consequence of an impropriety – Desirability of admitting the statutory declaration does not outweigh the undesirability of admitting it – Statutory declaration to be excluded – Body worn footage is admissible up to the point where the accused informed the police officer that he had been cautioned.

EVIDENCE – Criminal law – Crown application to adduce evidence of the accused's state of mind at a period of hours after the alleged offence – Whether evidence should be excluded pursuant to s 137 – Evidence has significant probative value – Probative value is not outweighed by the danger of unfair prejudice – Appropriate directions can ameliorate any risks in the circumstances of the case – Evidence of the accused's state of mind is admissible and should not be excluded.

Azizi v The Queen [2012] VSCA 205, *Conway v The Queen* (2000) 98 FCR 204, *Director of Public Prosecutions (Vic) v Paulino* [2017] VSC 343, *Dupas v The Queen* (2012) 40 VR 182, *Edwards v The Queen* (1993) 178 CLR 193, *Festa v The Queen* (2001) 208 CLR 593, *Kadir v The Queen* (2020) 267 CLR 109, *Karam v The Queen* [2015] VSCA 50, *Moore (a pseudonym) v The King* (2024) 98 ALJR 1119, *Parker v Comptroller-General of Customs* (2009) 83 ALJR 494, *Sio v The Queen* (2016) 259 CLR 47, *The Queen v Ambrosoli* (2002) 55 NSWLR 603, *The Queen v AW* [2018] NTSC 29, *The Queen v Bond (No 4)* [2011] VSC 536, *The Queen v Doolan* [2019] NTSC 53, *The Queen v Gehan* [2019] NTSC 91, *The Queen v Hannes* (2000) 158 FLR 359, *The Queen v Jennings* [2020] NTSC 71, *The Queen v Mankotia* [1998] NSWSC 295, *The Queen v Polkinghorne* (1999) 108 A Crim R 189, *The Queen v Ryan* (2013) 33 NTLR 123, *Thomas v Director of*

Public Prosecutions (Vic) [2021] VSCA 269, *Williams v The Queen* (2000) 119 A Crim R 490 referred to.

Evidence (National Uniform Legislation) Act 2011 (NT) ('ENULA') ss 59, 65(2)(b), 65(2)(c), 66, 66A, 137, 138, 192A.

S Odgers, Uniform Evidence Law (Thompson Reuters, 19th ed, 2024).

REPRESENTATION:

Counsel:

Crown:	D. Jones
Accused:	G. Chipkin

Solicitors:

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

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

The King v Wasaga [2024] NTSC 89
No. 22211644

BETWEEN:

THE KING

AND:

ELIASOA THOMAS WASAGA

CORAM: BROWNHILL J

REASONS FOR JUDGMENT

(Delivered on 25 October 2024)

[1] By an indictment dated 5 October 2023, the accused was charged with one count of murder of Henry Asera ('the deceased'), contrary to s 156 of the *Criminal Code 1983* (NT), alleged to have been committed on 13 April 2022.

[2] The trial is listed to commence on 28 October 2024.

[3] The Crown sought advance rulings under s 192A of the *Evidence (National Uniform Legislation) Act 2011* (NT) ('ENULA') with respect to evidence it intends to adduce at the trial. The evidence comprised:

(a) evidence from nine witnesses as to representations made to them by the deceased about:

(i) the deceased wanting the accused and his partner to move out of the deceased's home; and

(ii) the accused physically assaulting the deceased or bullying him; and

(b) a lie told by the accused to a Police officer after the deceased's death was discovered about the deceased being away from unit 10 until 4 am on 8 April 2022, which largely encompassed the time during which the accused is alleged to have assaulted the deceased causing his death. The lie was recorded in a statutory declaration made by the deceased on 8 April 2022 and in body worn footage of the process of taking the statutory declaration.

[4] The Crown intends to rely on the evidence referred to in paragraph (a) above as context or relationship evidence, and the evidence referred to in paragraph (b) above as evidence of the accused's consciousness of guilt, in accordance with the principles in *Edwards v The Queen* (1993) 178 CLR 193 ('*Edwards*').

[5] The Defence conceded that the evidence referred to in paragraph [3](a)(i) above is relevant and admissible, but argued that the evidence referred to in paragraphs [3](a)(ii) and (b) above is inadmissible and/or should be excluded under various provisions of the ENULA. In addition, the Defence argued that other evidence intended to be adduced by the Crown was also

inadmissible and/or should be excluded under various provisions of the ENULA. That evidence comprised:

(a) evidence relating to an argument over 'the price of bread' between the accused and a console operator at a service station on the morning of 8 April 2022, when the deceased was lying injured and bleeding in his home after it is alleged that the accused assaulted him; and

(b) the body worn footage of Police officers when they first arrived at the deceased's home, which show the deceased, the accused and the scene, and also convey the reaction of those officers to what they saw.

[6] Ultimately, the Crown agreed not to play that body worn footage at the trial, and to rely instead upon oral evidence from those Police officers, stills from the body worn footage and photographs of the scene. No issue was taken by the Defence about that.

Crown case

[7] The Crown case against the accused is as follows.

[8] The accused was a 51 year old man from Thursday Island, who had a stocky build and weighed around 120kg. The deceased was a 54 year old man from Thursday Island, who was 164cm tall and weighed 56kg. He was frail and in poor health. He was taking anti-convulsive medication. The accused and the deceased were cousins – their mothers were sisters. The deceased was the

lessee of a public housing unit in Darwin city (‘unit 10’) and had been since April 2019.

[9] In around 2021, the accused and his de facto partner, AL, moved into unit 10. The accused took over unit 10 and would bully, belittle and physically assault the deceased. No formal complaints of violence were made by the deceased to Police, but he had routinely told family members or friends that he did not want the accused or AL staying at unit 10.

[10] In September 2021, the deceased also told the public housing authority that he had two people staying with him and he wanted them removed and given other accommodation.

[11] On the afternoon of 7 April 2022, the accused and AL went to a bar and a bottle shop in Darwin city. They walked back to unit 10 at about 3.50pm with a carton of beer. The deceased went to the same bar, leaving at about 6.17pm. He was sober when he arrived and drank only a small amount of alcohol. While at the bar, the deceased told a witness that he was having problems with the accused, and that he wanted the accused and AL to ‘fuck off out of his unit’. The deceased left the bar and walked back to unit 10, arriving nearby at about 6.43pm.

[12] When the deceased arrived at unit 10, the accused and AL were there. The accused was intoxicated, having drunk numerous cans from the carton of beer. He was playing loud music which was heard by witnesses in the unit below unit 10, being unit 9.

[13] At about 6.53pm, the accused phoned a man, Mr Luta. Mr Luta thought the accused was drunk. The accused told Mr Luta that the deceased had told someone what the accused was doing to him and now that person wanted to 'bash' the accused. Mr Luta asked where the deceased was and the accused said 'we're trying to get him off the road'. One minute later, the accused said the deceased was on the balcony with the accused.

[14] One of the occupants of unit 9, Mr Higgins, arrived home that night at around 7.30pm and fell asleep. He woke up at around 10pm, hearing arguing coming from unit 10. At about 11pm, he heard what he described as 'someone getting their head stomped in' and someone else crying and asking them to stop. These noises went on for about 30 minutes. At around midnight, Mr Higgins went to unit 10 to ask for a cigarette. AL asked him to call an ambulance. The accused told him not to. The accused was sitting on a chair in the doorway to unit 10, blocking the entry. Mr Higgins went downstairs and the accused started yelling and abusing everyone.

[15] Another of the occupants of unit 9, Ms Giddings, heard a lot of yelling by the accused (directed at the deceased) from around 8-8.30pm, telling him what to do. She heard a whipping sound or something that sounded like a belt. She also heard the accused say 'look at me, look at me' and count down.

[16] The Crown case was that between 8pm and 4am or 5am, the accused intermittently violently assaulted the accused, by punching, kicking or

stomping on him and striking him with an aluminium crutch, which was found broken and scattered in the lounge area with one piece having blood and the deceased's DNA on it. The deceased suffered at least 23 separate blunt force impacts during the assault.

[17] The accused and AL went to sleep some time in the early morning. They left the deceased unconscious, lying in a pool of blood, on the lounge room floor. They did not assist him in any way or call an ambulance.

[18] Sometime before 7.30am on 8 April 2022, the accused and AL woke up. The deceased was still unconscious on the floor. The accused told AL to go to the service station across the road to get some bread for breakfast. She went to the service station at around 7.30am and tried to buy a loaf of bread, but had insufficient money to do so. She returned to unit 10. At around 7.55am, the accused went to the service station incensed about the inflated price of bread. He screamed, swore at and abused the console operator about the price. When he was not served, he returned to unit 10. The console operator called 000 to report the incident.

[19] At about 8.23am, Police officers Hawken and Mayers went to the service station, spoke to the console operator and viewed CCTV footage of AL and the accused. The officers took a still image of both the accused and AL, and went to the unit complex to investigate. They showed the images to residents and were directed to unit 10. On the way there, they spoke to Ms Giddings. While speaking to her, they heard the accused yelling to the deceased to get

up and loud music coming from unit 10. They went to unit 10 and went inside. They saw the deceased unconscious on the lounge room floor in a pool of blood, snoring. The accused was sitting in a chair next to the deceased, wearing only shorts, holding a mop and trying to mop up the blood from around the deceased's head area. AL was standing in the kitchen. This was recorded on Officer Hawken's body worn camera.

[20] Officer Hawken spoke to the accused and this was also recorded on his body worn camera. In this conversation, the accused was asked what happened to the deceased. The accused told Police that the deceased fell down, he was drunk last night, came around last night and they tried to wake him up. When asked why he did not call for assistance, the accused said he thought the deceased was just sleeping, he just fell over now, the accused was just cleaning up, and was going to ring an ambulance. He also said he had no blood on him and did not hit the deceased. The accused also told Police that the deceased had come home in the early morning and gone to sleep in the lounge room, and that he had found the deceased bleeding on the floor when he woke up. The accused said he had a phone. When asked if he tried to call 000, he said he did not have a chance as he just woke up himself. Officer Hawken said to him: 'No you didn't, you've been across the road'. The accused agreed saying he went to get bread. When asked if he just left the deceased bleeding, the accused said the deceased was asleep. When told there was blood everywhere, the accused said that the deceased does that every time.

[21] The accused was cautioned by officer Dunne.

[22] Later, the Officer in Charge, Detective Russell, attended unit 10. After looking around inside unit 10, he spoke to the accused downstairs. The accused agreed to provide a statutory declaration about what had happened to the deceased. Detective Russell wrote out the statutory declaration as he spoke to the accused. Near the end of preparing the statutory declaration, the accused told Detective Russell he had been cautioned by the other Police officers upstairs. Detective Russell continued with the process of taking the accused's statement, and the accused signed the statutory declaration. All of this process was caught on Detective Russell's body worn camera. Amongst other things, the accused repeated, and in the statutory declaration attested to, his assertion that the accused had been out until 4am and then gone to sleep on the floor in the lounge room.

[23] At 9.08am, an ambulance arrived to attend to the deceased. Shortly after, he was taken to the hospital and placed on life support with a non-survivable brain injury. A crime scene was declared at unit 10.

[24] The deceased died at 12.15am on 13 April 2022 as a result of blunt force trauma. The Crown case is that the deceased died as a result of the assault on him by the accused and being left unconscious, bleeding and without any medical assistance.

[25] An autopsy was performed and numerous recent injuries were found, including defensive injuries, as well as historical injuries said by the Crown to have been inflicted by the accused.

Previous representations – context / relationship evidence

[26] On 7 October 2024, the Crown gave notice pursuant to s 67 of the ENULA of its intention to adduce hearsay evidence from nine witnesses as context / relationship evidence.

[27] The Crown invoked ss 66A and 65(2)(b) and (c) of the ENULA. Section 66A provides that the hearsay rule does not apply to evidence of a previous representation made by a person if it was a contemporaneous representation about their health, feelings, sensations, intention, knowledge or state of mind. Section 65(2)(b) and (c) provide that the hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation:

(b) was made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication; or

(c) was made in circumstances that make it highly probable that the representation is reliable.

The representations

[28] The evidence referred to in the hearsay notice is as follows ('the representations'):

(a) Statement of James Montgomery dated 22 April 2022:

> [13] [The deceased] told me he wanted them out of there, so he could go back to Queensland and go back home, he told me they wouldn't go.
>
> [14] [The deceased] told me he told family to ask [the accused] to leave, but [the deceased] would always stop family from telling them because I think he was frightened of repercussions.
>
> (together, item 1, Table A, Crown's hearsay notice)

(b) Statement of Ngrupai Jimmy Luta dated 13 April 2022:

> [4] [The deceased] use to complain to me and tell me that he wanted [the accused] and [AL] to leave his unit. [The deceased] liked his own company and all of a sudden [the accused] and [AL] were camping for a bit and then they had all their clothes in the unit. I use to tell [the deceased] to call the Police and get them two removed, but he never did. He sounded upset about those two staying in his unit, but he never did anything about it.
>
> (item 2, Table A, Crown's hearsay notice)

(c) Statement of Joseph Wasaga Jnr dated 11 April 2022:

> [8]* [The deceased] told me, every day I saw him, 'I gotta kick them out', he was talking about [AL] and [the accused]. I don't know why they stay there, but [the deceased] told me they didn't pay rent & [the deceased] always did the shop for food. [The deceased] told me that he don't like them. Sometimes they would do a shop but they would only cook for themselves, not everybody. [*second occurring]

[10] [The deceased] didn't tell me anything else about [the accused] and [AL] except that they didn't pay rent & he didn't want them staying there.

(together, item 3, Table A, Crown's hearsay notice)

(d) Statement of Kara Eileen Asera dated 21 April 2022:

[18] [The deceased] told me about two people who had moved into his house, he called their names, [the accused], I know [the accused] is our cousin, our mums are sisters, we grew up together.

[19] [The deceased] said [the accused's] wife was there as well [AL] I think her name was.

[20] [The deceased] always told them to leave, he couldn't make them move, he said they always drink and ask for shouting, he didn't talk about fighting. [The deceased] told me they kicked him out of his bed and he slept in the lounge, other people would come and drink and stay too.

(together, item 4, Table A, Crown's hearsay notice)

(e) Statement of Karni Wigness dated 11 April 2022:

[7] ...[A]bout three to four years ago [the deceased] told me that [the accused] had hit him. He told me at John Stokes Square where he use to have a unit, I can't remember the number. I saw [the deceased] had a split upper lip and this made me feel really angry and upset. [The deceased] didn't really say how [the accused] had hit him and didn't really show any emotion because he always had a poker face on.

(item 5, Table A, Crown's hearsay notice)

(f) Statement of McFarlane Stephen Paul Wasiu dated 9 April 2022:

[4] About a month ago, [the deceased] told me that he was having problems with [the accused]. He told me on about three or four occasions that [the accused] was bashing him up, getting jealous and accusing him of being with his wife [AL]. He told me on one occasion that [the accused] used his fists on him, [the deceased]

didn't provide any further description of where he was hit or how many times.

(item 6, Table A, Crown's hearsay notice, together with italicised passage from [5] below)

[4] [The deceased] explained to me that [the accused] and [AL] had taken over the unit and that he wanted them out. I told [the deceased] that he should speak to the Housing Security Officers and ask for their help to have them removed. I don't think he ever spoke to the Housing Officers.

[5] *I think [the deceased] was scared of [the accused], on those few occasions that [the deceased] told me that he was getting 'beltings' from [the accused],* he would just say he wanted them out of his unit. I had never seen any injuries on him when he told me about his problems with [the accused]. ...

[6] I would often see [the deceased] walking around in the Smith Street Mall at 2 or 3am in the morning looking for bumpers. I often sleep in the mall. I come across him and asked him why he was out walking around. [The deceased] told me that he was stressing out about [the accused] and [AL], again because they were taking over his unit and he was scared of [the accused], he is too bossy. [The deceased] was always really stressed out about [the accused].

(together but excluding italicised passage from [5], item 7, Table A, Crown's hearsay notice)

(g) Statement of Sem Tom dated 1 June 2022:

[9] [The deceased] told me he was going to Cairns, talking about it all the time, he said he couldn't go because [the accused] and [AL] were staying there.

(item 8, Table A, Crown's hearsay notice)

[10] When [the accused] moved in, he kicked [the deceased] out of his room and slept in it. [The deceased] was in the lounge sleeping.

(item 9, Table A, Crown's hearsay notice)

[12] [The deceased] told me he wanted [the accused] out. I gave him advice to go to Housing & Police to get them out.

(item 10, Table A, Crown's hearsay notice)

(h) Statement of Stella Paul dated 14 April 2022:

> [18] [The deceased] has told me that [the accused] has hurt him more than one time, I don't know how many times, a couple of times. [The deceased], he won't say much, he was scared.
>
> (item 11, Table A, Crown's hearsay notice)
>
> [19] One time [the deceased] came to me, he had a black eye and a cut on his forehead near his eye. I asked him what happened and he told me he walked into the door. I told [him] he wasn't fooling me, and asked him what really happened. He turned around and said '[the accused] whacked me'. I told him [the accused] was gonna get a hiding when his sons heard about this. He didn't say anything else about it. He was scared, he didn't want to tell me all the truth. He would let it out when he was drinking. I was his pillow to lean on when he needed it. [The deceased] never told me why [the accused] whacked him, but I think most of the trouble was from jealousing. This time that I saw his black eye and the cut was sometime last year, before Christmas.
>
> (item 12, Table A, Crown's hearsay notice)
>
> [22] One time, in his own flat, I saw [the accused] give [the deceased] a hot slap. This time was before Poppa Jimmy, Jimmy Sherbert, moved out from next door to [the deceased] at [the unit complex].
>
> [23] A 'hot slap' is when someone really big hits someone really small, like a knock out. [The deceased] was small like me and [the accused] is really massive.
>
> (together, item 13, Table A, Crown's hearsay notice)
>
> [26] [The deceased] used to tell me 'I hate these two', talking about [the accused] and [AL]. He used to ask me where I could. [The deceased] has been saying things like this or that he wanted them two to leave for the last year, but the trouble there started when [the accused] and [AL] moved in. [The deceased] would complain to me every time I bumped into him.
>
> (item 14, Table A, Crown's hearsay notice)
>
> [38] The only thing [the deceased] told me about anyone was that he wanted them two, [the accused] and [AL] to fuck off out of his unit.
>
> (item 15, Table A, Crown's hearsay notice)

(i) Statement of Tammy Wasaga dated 27 July 2022:

> [5] I used to speak to [the deceased] all the time, he used to tell me he was sick of [the accused] and [AL], [the accused] was jealous him for his wife, and was violent to [the deceased] ... [The deceased] said [the accused] took over the flat and the main bedroom, [the accused] would invite people to the unit to drink.
>
> [7] [The deceased] always wanted [the accused] to leave and had a plan to go back to Cairns and leave the unit, he didn't like [the accused] and [AL] living there.
>
> (item 16, Table A, Crown's hearsay notice)

Context/relationship evidence

[29] The Crown argued that the representations comprised context or relationship evidence, and were relevant to a fact in issue in the trial because they disclosed a source of conflict between the deceased and the accused, giving rise to a motive for the accused to have committed the assault on the deceased which caused his death, they disclosed the accused's state of mind towards the deceased, namely of hostility and callous disregard for his welfare, they disclosed the deceased's state of mind towards the accused, namely that he was scared of the accused, and they would prevent the jury from assuming that the assault on the deceased that caused his death was an isolated, one-time incident which came out of the blue.

[30] The Defence conceded that the representations in items 1, 2, 3, 4, 7, 8, 10, 14, 15 and 16 of Table A in the Crown's hearsay notice were admissible pursuant to s 66A of the ENULA as context evidence as they constitute contemporaneous representations made by the deceased about his feelings,

intention and state of mind in relation to wanting the accused and AL to leave unit 10.

[31] The Defence objected to the remainder of the representations on the bases that they fail to meet the tests specified in ss 66A and 65(2)(b) and (c) of the ENULA and, if they do meet those tests, they should be excluded under s 137 of the ENULA because they are highly prejudicial and would prevent the accused from having a fair trial.

[32] I note here that the representation in item 13 of Table A of the Crown's hearsay notice (about the accused giving the deceased a 'hot slap') is not hearsay evidence, it is a direct observation by the witness of the accused's conduct. However, the Defence said it should be excluded under s 137 of the ENULA for the same reason as the representations.

[33] Otherwise, the representations are hearsay evidence within the hearsay rule in s 59(1) of the ENULA. They are relied on to prove the existence of the fact that it can reasonably be supposed the deceased intended to assert by the representation ('the asserted fact').

[34] It has been held that, in a trial of murder by a husband of a wife, evidence of a poor relationship between the accused and a deceased may be relevant to the probability of the existence of the fact in issue whether the accused killed the deceased and also the issue of whether the accused had a motive

to do so.[1] It has also been held that, in a trial for murder, prior acts or words of the accused which show he held feelings of enmity towards the deceased, are relevant to prove the fact of killing of the deceased by the accused and the issue of motive.[2]

[35] It was not in dispute here that evidence about the nature of the relationship between the accused and the deceased was relevant to prove whether the accused had a motive to kill, and did in fact kill, the deceased by assaulting him and the issue of the accused's state of mind, namely whether he had a motive, and whether he intended to kill or cause serious harm to the deceased.

[36] There have been cases in which evidence has been admitted of the subjective fear of a deceased person of the person accused of their murder.[3] It has also been held that the subjective fear held by a deceased of the accused does not, by itself, tend to prove that the accused killed the deceased, but the acts which engender the fear or show that it was well-founded may do so.[4] Because the authorities differed as to the admissibility of this class of evidence, in *Paulino*, Bell J held (at [57]) that it is necessary to consider the

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1 See, for example, *Plomp v The Queen* (1963) 110 CLR 234 at 242 per Dixon CJ (Kitto and Taylor JJ) agreeing and *The Queen v Heath* [1991] 2 Qd R 182 at 194-5 per Shepherdson J and 204 per Cooper J, both cited in *Director of Public Prosecutions (Vic) v Paulino* [2017] VSC 343 ('*Paulino*') at [40] per Bell J.

2 See, for example, *The Queen v Ball* [1910] AC 47 at 68 per Lord Atkinson and the other authorities cited in *Paulino* at [42]-[49] per Bell J.

3 See the authorities cited in *Paulino* at [53]-[54] per Bell J.

4 See, for example, *The Queen v Frawley* (1993) 69 A Crim R 208 at 221 per Gleeson CJ (Sheller JA and Carruthers J agreeing) and *The Queen v Hillier* [2004] ACTSC 81 at [23], [25] per Gray J, cited in *Paulino* at [55]-[56] per Bell J.

circumstances of the particular case and identify how, in those circumstances, the evidence of fear might be relevant in the necessary sense. Bell J held that, in the circumstances of that case (alleged murder of a wife by her husband), evidence of the deceased's fear of the accused was not admissible or should be excluded as a specific subject but was admissible and not to be excluded when it formed a natural part of other evidence that was admissible.

Section 65(2)

[37] Section 65 specifies exceptions to the hearsay rule applying in criminal proceedings where the maker of the representation is not available to give evidence about an asserted fact. As the deceased is dead, he is not available to give evidence (Dictionary, cl 4(1)(a)).

[38] The party seeking to lead evidence in reliance upon the exceptions in s 65(2)(b) or (c) has the onus of establishing satisfaction of the conditions there set out.[5] Here, that is the Crown.

[39] Sections 65(2)(b) and (c) are enlivened by different matters.[6] The matter in s 65(2)(b) is the unlikelihood of fabrication, while the matter in s 65(2)(c) is

5 *Azizi v The Queen* [2012] VSCA 205 ('*Azizi*') at [51] per Bongiorno JA (Buchanan JA and Hollingworth AJA agreeing).

6 Ibid at [48].

the high probability of reliability. The test in the former creates a significantly lower threshold of admissibility than the latter.[7]

[40] As to the reference in s 65(2)(b) and (c) to 'circumstances', there was a narrow view and a wider view in the authorities as to what those circumstances may be. Under the narrow view, it had been held that 'circumstances' means the circumstances in which the representation was made, i.e. its factual setting at the time it was made, which excludes from consideration events subsequent to the representation being made and other representations made by the same person on other occasions, notwithstanding that such considerations might logically fortify the unlikelihood of concoction or have the opposite effect (in the case of inconsistent representations).[8] Under the wider view, it is legitimate to have regard to evidence of what the maker of the representation said on other occasions when determining whether or not the test in the provision is met, and it is wrong to exclude reference to events outside the time and place of the making of the representation itself from the range of circumstances capable of reflecting the unlikelihood of it being a fabrication when made or the high probability of it being reliable when made, although prior or later statements or conduct of the maker of the representation are only to be considered to the extent that they touch the reliability of the circumstances of the making of that representation, with the effect that, if they do no more

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7 *Conway v The Queen* (2000) 98 FCR 204 ('*Conway*') at 243-244 per Miles, von Doussa and Weinberg JJ.

8 *The Queen v Mankotia* [1998] NSWSC 295 ('*Mankotia*') at 5-6 per Sperling J; *The Queen v Polkinghorne* (1999) 108 A Crim R 189 ('*Polkinghorne*') at [40] per Levine J.

than tend to address the asserted fact or the ultimate issue, they have no bearing on the issues presented by s 65(2).[9] The wider view was endorsed by the High Court in *Sio v The Queen*,[10] and must now be accepted. In particular, the High Court held (at [71]) that, when one focuses upon the particular representation which conveys the asserted relevant fact, it can be seen that the circumstances in which that representation was made may include other representations which form part of the context in which the relevant representation was made.

[41] It has been held that repetition in similar terms of representations at different times and to different people is not probative of whether the circumstances in which a particular representation was made were such that the representation was (in a case relying on s 65(2)(b)) unlikely to be a fabrication.[11]

Highly probable it is reliable: s 65(2)(c)

[42] Unlike s 65(2)(b), a temporal element is not included in relation to the exception in s 65(2)(c). The exception applies where the representation was made 'in circumstances that make it highly probable that the representation

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9 *Conway* at [145] per Miles, von Doussa and Weinberg JJ; *Williams v The Queen* (2000) 119 A Crim R 490 ('*Williams*') at [54], [58] per Whitlam, Madgwick and Weinberg JJ; *The Queen v Ambrosoli* (2002) 55 NSWLR 603 at [36]-[37] per Mason P (Hulme and Simpson JJ agreeing); *Azizi* at [50].

10 *Sio v The Queen* (2016) 259 CLR 47 ('*Sio v The Queen*') at [69]-[70] per French CJ, Bell, Gageler, Keane and Gordon JJ.

11 *Thomas v Director of Public Prosecutions (Vic)* [2021] VSCA 269 ('*Thomas v Director of Public Prosecutions*') at [35] per Beach, Niall and Walker JJA.

is reliable'. However, the longer ago the representation was made, the harder it may be to establish the high probability that it is reliable.[12]

[43] Because the exception in s 65(2)(c) has the potential to operate unfairly against an accused person, the requirement that it be 'highly probable' that the representation is reliable is considered to be an onerous one and the reliability of the representation must be not just probable but *highly* probable.[13] Further, as satisfaction of the condition must be established as a fact, there must be evidence of the circumstances that make it so highly probable.[14]

[44] It is necessary to focus on the particular representation that asserts the relevant fact sought to be proved by the representation, and then to consider the circumstances in which the representation was made to determine whether the conditions of admissibility are met.[15]

[45] It may be accepted that s 65(2)(c) may, but not necessarily will, be satisfied where the circumstances are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification could be formed. That is, the circumstances tend to negative motive and opportunity for the representor to lie.[16]

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12 *Paulino* at [22] per Bell J.

13 Ibid at [24] per Bell J, citing *Conway* at [146] and *Azizi* at [48]-[49].

14 Ibid, citing *Azizi* at [49].

15 *Sio v The Queen* at [56]-[58].

16 Ibid at [64]. The Court was referring to s 65(2)(d)(ii), which requires a trial judge to be satisfied that the circumstances make the representation likely to be reliable. The test in

[46] I will now address the representations the admissibility of which is objected to by the Defence.

Item 5, Table A: Karni Wigness

[47] Mr Wigness was 33 years old and the grandson of the deceased and the nephew of the accused. He had known them both his whole life. He had also known AL his whole life.

[48] About three to four years before he made his statement on 11 April 2022, the deceased told him that the accused had hit him. The deceased made this representation at John Stokes Square where he used to have a unit. Mr Wigness saw that the deceased had a split upper lip. The deceased did not really say how the accused had hit him and did not really show any emotion because he 'always had a poker face on'.

[49] Mr Wigness also referred to a time some 13 years prior to giving his statement when he was told by another family member that the accused would beat the deceased. This is inadmissible hearsay not relied on by the Crown. Mr Wigness said these were the only two times he remembered clearly about the accused bashing up the deceased.

[50] The conduct of the accused towards the deceased some three to four years prior to the deceased's death is not relevant, or is barely relevant to the

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s 65(2)(c) is expressly higher, requiring a 'high probability' that the representation is reliable. However, the considerations referred to by the High Court have equal application to s 65(2)(c) (and (b)).

issues in the trial because it is simply not proximate enough[17] to the death of the deceased to be probative of the accused's state of mind at that time, or the nature of the relationship between the accused and the deceased at that time. In other words, it was made too long before the deceased's death to have been made in circumstances that make it highly probable that the representation is reliable. (In any event, for reasons similar to those below, the very low probative value of this evidence is outweighed by the danger of unfair prejudice.

Item 6, Table A: McFarlane Stephen Paul Wasiu

[51] Mr Wasiu was the deceased's nephew. About a month before he made his statement on 9 April 2022, the deceased told him that he was having problems with the accused. On three or four occasions, the deceased told Mr Wasiu that the accused was bashing him up, getting jealous and accusing him of being with his wife. The deceased told Mr Wasiu on one occasion that the accused used his fists on him. The deceased did not provide any further description of where he was hit or how many times he was hit. Mr Wasiu thought the deceased was scared of the accused. On the few occasions the deceased told Mr Wasiu he was getting beltings from the accused, he would say he wanted them out of his unit. Mr Wasiu had never seen any injuries on the deceased when he told Mr Wasiu about his problems with the accused.

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17 See *Wilson v The Queen* (1970) 123 CLR 334 at 339 per Barwick CJ (Walsh and McTiernan JJ agreeing); *The Queen v Serratore* [2001] NSWCCA 123 at [37]-[40] per Beazley JA (Grove and Whealy JJ agreeing); *Paulino* at [61] per Bell J.

[52] The only circumstances in which the representations were made described in Mr Wasiu's statement are that the deceased was his uncle, the deceased told him about 'problems' a month before, the deceased told him about being bashed up on three or four occasions, and Mr Wasiu did not see any injuries on the deceased on those occasions.

[53] There is therefore little evidence about the nature of Mr Wasiu's relationship with the deceased (how close they were, how much time they spent together, and whether it was a relationship of trust and confidence[18]). Mr Wasiu's statement only refers to him 'often' seeing the deceased walking around the Mall at 2-3am, and to drinking with him on 6 April 2022 when they 'had a yarn and were laughing, having a good time'.

[54] There is no evidence about the context in which the representations were made, the occasions on which they were made, what was being discussed when the representations were made, or how the representations arose. The information disclosed in the representations is bare and lacks detail.

[55] While it may be reasonably inferred that the three or four occasions on which the deceased said he was bashed up by the accused were at and after the time a month before when the deceased said he was having problems with the accused, there is insufficient evidence to find that the circumstances in which the representations were made make it highly probable that the representations are reliable.

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18 See *Paulino* at [106], [109], [114], [123].

Item 9, Table A: Sem Tom

[56] Mr Tom said that when the accused moved into unit 10, he kicked the deceased out of his room and slept in it and the deceased was sleeping in the lounge. That is not a representation. It is not expressed as an asserted fact that Mr Tom was told by the deceased.

[57] If it was something Mr Tom directly observed or inferred from his own direct observations, the hearsay rule would not make it inadmissible.

[58] If the source of Mr Tom's knowledge or belief that the accused 'kicked the deceased out of his room' is a representation made by the deceased, there is no evidence as to when that representation was made, what was said or the context in which the representation was made. While Mr Tom said that the deceased was his 'close cousin' and he went to see him once or twice a week, he also said that the last time he saw the deceased was in January (some three months before making the statement). This makes it difficult to assess the nature of the relationship between them. Further, the assertion that the accused kicked the deceased out of his room is inconsistent with the statement of Stella Paul (a witness referred to below) that the deceased kept his own room and the accused and AL slept in the lounge room. I consider that there is insufficient evidence to find that the circumstances in which the representations were made make it highly probable that the representation is reliable.

Items 11 and 12, Table A: Stella Paul

[59] Ms Paul said that she had known the deceased for about 20 years, his family were like her family and he was her 'good family'. Her husband was family with the deceased's family too and when her husband passed away in 1996, the deceased and his brother were there for her and picked her up when she was down. She and the deceased were buddies and could not be pulled apart. If something happened to him, he went to her to complain and she was the one that 'barks for him'. They would walk around until they found each other and sit with each other, she could sleep at his place and be safe, and he only trusted her to take money to do his shopping with. When the deceased lived at John Stokes Square, she would see the deceased every day and sometimes would stay with him.

[60] Ms Paul said that the deceased had told her that the accused had hurt him more than one time, she did not know how many times, but a couple. The deceased would not say much because he was scared. She said that one time in 2021, before Christmas, the deceased came to her and had a black eye and a cut on his forehead. She asked him what happened and he told her he walked into the door. She told him he was not fooling her and asked what really happened. He said that the accused had 'whacked' him. She told him the accused would get a hiding when his sons heard about this. He did not say anything else about it as he was scared and did not want to tell her all the truth. The deceased would let it out when he was drinking. She was his 'pillow to lean on' when he needed it. The deceased did not tell her why the

accused whacked him, but she thought most of the trouble was from 'jealousing'.

[61] As to Ms Paul's evidence about a specific representation made by the deceased (item 12, Table A), it includes: a time at which the representation was made, albeit broad (sometime in 2021), which was reasonably proximate to the deceased's death given that, at that time, the accused and AL were living at unit 10; a context (her observation of injuries to his face); and details about what was said between them.

[62] Ms Paul's evidence also goes to the close and long-standing nature of their relationship, which demonstrates that she was a trusted friend who had the deceased's confidence.[19] I consider it to be highly probable that the deceased would reliably describe the conduct of the accused to a person he trusted and with whom he had regular contact.[20]

[63] The Defence argued that Ms Paul's evidence showed that the deceased was intoxicated when he made the representation, so the known effects of intoxication make the representation inherently unreliable. Whilst it may be accepted that intoxication can affect a person's observation and memory of events and make them unreliable, whether intoxicated represenations are actually unreliable depends on factors such as how much alcohol the person has consumed and their tolerance for alcohol. It is apparent from the nine

19 See *Paulino* at [106], [109], [114], [123].

20 Ibid, particularly at [123].

witness statements relied on by the Crown that the deceased regularly drank alcohol to the point of significant intoxication. It may also be accepted that some events are inherently more memorable than others. It is a reasonable proposition that being 'whacked' by your cousin such as to cause a black eye and a cut to your forehead is a memorable event, particularly within the time period when those injuries are still observable. Furthermore, it may be accepted that intoxication can lead some people to be more frank and open about matters they might not otherwise discuss; to 'let their guard down'. I consider that, given the subject matter of the conversation, such was the case for the deceased here.

[64] The Crown argued that there was no motive for the deceased to lie to his family or friends that he had been assaulted by the accused. The Defence argued that there was an incentive for the deceased to be untruthful, namely that he wanted the accused and AL out of unit 10 and needed to justify that to family and friends because the accused was his cousin to whom he owed cultural obligations. I reject this submission for three reasons.

[65] First, as is attested in the statement of Karni Wigness, the deceased told her before he lived in unit 10 with the accused that the accused had hit him. The asserted motive or incentive to lie was absent then, but a similar representation was made. It is therefore highly unlikely to have been operative when he told Ms Paul that the accused had whacked him.

[66] Secondly, it is apparent from the nine statements relied on by the Crown that the deceased did not tell all family members or friends that the accused physically assaulted him. He only told a select few (Ms Wigness, Mr Wasui, Ms Paul and Ms Wasaga). If the asserted motive or incentive was actually operating, one would expect him to tell as many of his family and friends as possible.

[67] Thirdly, Ms Paul's evidence was that the deceased first told her he walked into the door and it was only when she pressed him that he told her he was whacked by the accused. If the asserted motive or incentive was actually operating, one would expect him to tell her immediately that his injuries were caused by the accused.

[68] The Defence also argued that the deceased's initial preparedness to lie to Ms Paul about what happened demonstrated a risk of fabrication and thus that the representation was not made in circumstances that make it highly probable that it was reliable. I do not accept that. The conversation was about an incident of domestic violence against the deceased by his cousin and Ms Paul said the deceased was scared of the accused. The obvious inference is that he feared retribution if the accused were to discover that the deceased had told people about the assault. That context readily explains why the deceased would initially lie about how he came to be injured. That conclusion is supported by Ms Paul's subsequent statement that the accused would get a hiding for it because it shows that the deceased's fear of the accused discovering what he had said was well founded. Rather than raise

the risk of fabrication, the passage of the conversation, coupled with the matters referred to above, comprise circumstances which make it highly probable that the representation is reliable.

[69] As to Ms Paul's more general evidence about other times, or the other time, the deceased had told her the accused had hit him (item 11, Table A), there is no evidence about the circumstances of this conversation and, consequently, there is insufficient evidence about that to find that the circumstances in which the representations were made make it highly probable that the representation is reliable.

Item 16, Table A: Tammy Wasaga

[70] Tammy Wasaga was the niece of the deceased. She had been to unit 10 a few times to visit. She said she used to speak to the deceased all the time and the deceased used to tell her he was sick of the accused and AL, the accused would 'jealous him for his wife', *and was violent to the deceased*.

[71] The asserted fact is that the accused was violent to the deceased. This is a general representation without any details as to the circumstances in which it was made save that Ms Wasaga was the deceased's niece. There is insufficient evidence to find that the circumstances in which the representations were made make it highly probable that the representation is reliable.

Multiple representations to different people/at different times

[72] The Crown submitted that the deceased had made similar representations to different people at different times and, when taken together, they confirmed the reliability of each of the representations to a high probability.

[73] The Defence submitted that the fact that the maker of the representations repeated similar representations at different times or to different people is not relevant, relying on the decision in *Thomas v Director of Public Prosecutions* referred to above. In that case, the Court held (at [35]) that repetition of representations in similar terms at different times to different people was not probative of whether the circumstances in which a particular representation was made were such that the representation was unlikely to be a fabrication. One can extrapolate from that that such repetition is also not probative of whether the circumstances in which a particular representation was made were such as to make it highly probable that the representation is reliable.

[74] It seems to me that, consistent with the High Court's repeated exhortations in *Sio v The Queen,* to focus upon the particular representation which conveys the asserted fact, and the circumstances in which that particular representation was made, that representations made to other people in similar terms are not to be taken into account. Equally, repetition of a representation to the same person on another occasion or other occasions are

not to be taken into account because they do not form part of the circumstances in which a particular representation is made.

[75] Consequently, I do not accept that the repetition of similar representations to the four witnesses or the repetition of similar representations at different times to any of them bears upon the assessment required by s 65(2)(b) in respect of each of the representations considered above.

Conclusions

[76] Paragraph [19] of the Statement of Stella Paul of 14 April 2022 (item 12, Table A) is admissible pursuant to s 66(2)(c) of the ENULA.

[77] Paragraph [10] of the Statement of Sem Tom of 1 June 2022 (item 9, Table A) is not evidence excluded by the hearsay rule unless the source of the statement that the accused kicked the deceased out of his bedroom is a representation by the deceased. If it is, it is not admissible pursuant to s 66(2)(c) of the ENULA.

[78] The other evidence referred to above is not admissible pursuant to s 66(2)(c) of the ENULA.

<u>Section 62(2)(b): When or shortly after and unlikely a fabrication</u>

[79] The requirement that the representation was made ‘when’ the asserted fact occurred involves the notion of strict contemporaneity, while the

requirement that the representation was made 'shortly after' that occurrence involves something less.[21] It has been held that:[22]

> The phrase 'shortly after' is not defined. The legislature has chosen not to specify a time. That implies that a normative judgment is to be made dependent on the circumstances of the case. For a judgment to be made, considerations of some kind or other have to be taken into account but – as in the case of normative judgments generally – it may be difficult or impossible to articulate in a precise way what they are. I think that the predominant factor in the phrase 'shortly after' must be the actual time that has elapsed and whether that fits the ordinary usage of the expression 'shortly after' in the circumstances of the case. The judgment should, however, be influenced by the policy behind the provision. That is to put a brake on evidence being given of a recollection which may have faded in its accuracy with the passage of time. The judgment may therefore be influenced by the subject matter of the event and by how long the memory of such an event is likely to have remained clear in the mind.

[80] In *Conway*, the Court similarly emphasised (at [133]) that the purpose of the 'shortly after' requirement was to allow evidence to be admitted where a narrative of asserted facts occurs when the matters conveyed are either strictly contemporaneous or, if narrative of a past event, still fresh in the mind of the person recounting the narrative. In that case (involving a charge of murder by the accused of his wife by having others administer an overdose of heroin), the Court held (at [132]) that a statement made by the deceased at 5pm about the accused having put something in her coffee that morning and she had been 'off her face' for hours was plainly 'shortly after' the event in question.

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21 *Conway* at [123], [133]; *Azizi* at [47].

22 *Mankotia* at [5]-[6] per Sperling J, cited with approval in *Polkinghorne* at [39] per Levine J and *Conway* at [134]-[135].

[81] In *Williams*, the Court, while not disagreeing with this approach, stated (at [48]) that the rationale should not be over-emphasised because the provision was primarily concerned with the unlikelihood of fabrication, and was not based only upon the necessity to ensure that the events in question may be easily recalled.[23] In that case (involving a charge of armed robbery), the Court held (at [49]) that a statement made to Police by a deceased witness, in whose yard a sawn-off shotgun had been found recently buried as well as burnt fibres, that, on the morning of the robbery the accused had told him that he 'had done a rort' and asked whether the witness had an incinerator was not made 'shortly after' those events. The Court said that, despite having been made within a time in which the witness may be considered to have retained a good recollection of events generally, the lapse of five days takes the representations outside the likely temporal realm of statements that may be considered to be reliable because made spontaneously during, or under the proximate pressure of, events. The Court said it would seem to be an unusual case in which a representation made five days after the occurrence of the asserted fact might be regarded as having been made 'shortly after' it.

[82] In *The Queen v Hoffman*,[24] (a case involving four counts of murder and other charges) Grant CJ held that a statement of a deceased witness about hearing

23 *Williams* at [48].

24 *The Queen v Hoffman* [2021] NTSC 31 ('*Hoffman*').

men arguing, hearing a gun shot and then finding a body, made to Police five days after the events in question was not 'shortly after' those events.

[83] I note the analysis and summary of the relevant principles relating to s 65(2)(b) provided by Kelly J in *The Queen v Ryan* (2013) 33 NTLR 123 at [27].[25] I consider that analysis and summary to be consistent with the authorities referred to above.

[84] Satisfaction of the requirement that the representation be made when or shortly after the asserted fact occurred must be established as a fact and accordingly, there must be some evidence that the representation was so made. Without that evidence, s 65(2)(b) cannot be applied.[26]

[85] The second limb of the test in s 62(2)(b) is directed to the unlikelihood of deliberate concoction, not the unlikelihood of honest mistake.[27]

[86] The Crown argued that the representations made by the deceased about the accused assaulting or bullying him are admissible pursuant to s 65(2)(b) of the ENULA.

[87] The Defence argued that they are not because they were not made 'when or shortly after' the asserted fact occurred or 'in circumstances that make it unlikely that the representation is a fabrication'.

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25 Adopted by Grant CJ in *Hoffman* at [56].

26 *Azizi* at [47].

27 *Paulino* at [21], citing *Mankotia* at 5-6, *Polkinghorne* at [39]-[45]; *Conway* at [138] and *Williams* at [47].

Item 5, Table A: Karni Wigness

[88] I have already decided that Ms Wigness's evidence was not sufficiently proximate to the deceased's death to be relevant, or was no more than barely relevant and outweighed by the danger of unfair prejudice to the accused.

[89] In addition, the only evidence as to the time period between the representation and the asserted fact that the accused hit the deceased was that the deceased had a visible injury, comprised of a split lip, at the time he made the representation. Such an injury can be visible for a number of days, perhaps a week or more, after it is inflicted. It is unknown how fresh the injury was (there is no evidence, for example, that it was bleeding), or how recently Ms Wigness had seen the deceased before this time or how often she saw him. It is not possible to say, on the basis of no more than the visible injury, whether or not the representation was made under the proximate pressure of, i.e. shortly after, the asserted fact that the accused had assaulted the deceased. This evidence does not satisfy the requirements of s 65(2)(b).

Item 6, Table A: McFarlane Wasui

[90] There is no evidence about the period of time between the three or four representations made by the deceased and the asserted fact that the accused assaulted the deceased. Section 65(2)(b) cannot apply.

Item 9, Table A: Sem Tom

[91] If the source of Mr Tom's knowledge or belief that the accused 'kicked the deceased out of his room' is a representation made by the deceased, there is no evidence about the period of time between the representation and the asserted fact that the accused kicked the deceased out of his room. Section 65(2)(b) cannot apply.

Items 11 and 12, Table A: Stella Paul

[92] As to Ms Paul's general evidence that the deceased told her a couple of times that the accused hurt him (item 11, Table A), there is no evidence about the period of time between those representations and the asserted fact. Section 65(2)(b) cannot apply to that evidence.

[93] As to Ms Paul's more specific evidence about the representation made in 2021 (item 12, Table A), the only evidence as to the time period between the representation and the asserted fact that the accused whacked the deceased and caused the injury was that the deceased had a visible injury comprised of a black eye and a cut on his forehead at the time he made the representation. It is unknown how fresh the injury was (for example, whether it was bleeding), or how recently Ms Paul had seen the deceased before this time or how often she saw him. While Ms Paul said that she used to see the deceased every day, that was said in the context of a narrative about where the deceased lived before he lived in unit 10 with the accused.

It cannot be inferred that she meant she saw him every day whilst he was living at unit 10.

[94] Such injuries can be visible for a number of days, perhaps a week or more, after they are inflicted. It is not possible to say, on the basis of no more than the visible injuries, whether or not the representation was made under the proximate pressure of, i.e. shortly after, the asserted fact that the accused had assaulted the deceased. This evidence does not satisfy the requirements of s 65(2)(b).

Item 16, Table A: Tammy Wasaga

[95] There is insufficient evidence about the period of time between the representations that the accused was violent to the deceased and the asserted fact. Ms Wasaga's evidence that she spoke to the deceased 'all the time' does not provide any indication about the relevant period of time. Section 65(2)(b) cannot apply.

Conclusions

[96] Paragraph [10] of the Statement of Sem Tom of 1 June 2022 (item 9, Table A) is not evidence excluded by the hearsay rule unless the source of the statement that the accused kicked the deceased out of his bedroom is a representation by the deceased. If it is, it is not admissible pursuant to s 66(2)(b) of the ENULA.

[97] The other evidence referred to above is not admissible pursuant to s 66(2)(b) of the ENULA.

Section 66A

[98] Section 66A must be read with the requirement that, under s 55(1) of the ENULA, the representation of the state of mind concerned must be relevant to the probability of the existence of a fact in issue.[28]

[99] It may be accepted that contemporaneous representations of a deceased person's feelings, intentions and state of mind as regards their relationship with the accused may be relevant to the probability of the existence of facts in issue such as whether the accused killed the deceased, had a motive to kill the deceased, and had the requisite state of mind for murder, and therefore may be admissible under s 66A. For example, in *Paulino*, representations about the deceased's fears of seeking a divorce from the accused and the Family Court proceedings, and representations about the deceased being scared following threats made by the accused that he would kill her were ruled by Bell J (at [113] and [119]) to be admissible under s 66A.

[100] As a further example, *The Queen v Bond (No 4)*[29] concerned representations made by the deceased to a bar keeper that the accused was 'hassling her', he had asked her out, she had refused, he would not take no for an answer, she had told him she had a boyfriend but that did not worry him and she asked

28 *Paulino* at [15], citing *Conway* at [109] and *The Queen v Hannes* (2000) 158 FLR 359 at [480] per Studdert J.

29 *The Queen v Bond (No 4)* [2011] VSC 536.

what she should do. The Court accepted (at [3]) that the representations were relevant because they are evidence that, before her disappearance, the accused had a romantic interest in the deceased which was not reciprocated. Forrest J held (at [19], [21]) that the representations were admissible under s 66A as being about the deceased's feelings, intentions, knowledge and state of mind, namely of her intention to tell the accused to stop hassling her, and her feelings and state of mind that she did not welcome his advances.

[101] Similarly, in *Azizi,* the Court held (at [57]) that evidence of a representation made by the deceased that she was very worried and something might happen from the accused to her was admissible under s 66A as evidence of the deceased's feelings.

[102] The Crown argued that the representations made by the deceased referred to in items 5, 6, 9, 11 and 12 of Table A in the Crown's hearsay notice (about the accused assaulting or bullying him) are admissible pursuant to s 66A of the ENULA.

[103] The Defence argued that they are not admissible because they are representations about the physical conduct of the accused, not about the deceased's health, feelings, knowledge or state of mind.

[104] In his text, *Uniform Evidence Law,* the author identifies a difficulty with construing the reference in s 66A to a person's 'knowledge' or 'state of mind' to include their belief or memory about the occurrence of an event,

namely that it would effectively abrogate the hearsay rule as contained in s 59 of the ENULA because it would permit hearsay evidence of the occurrence of an event, separate from any representation about the person's feelings, sensations, intention, knowledge or state of mind related to that event, to be admitted as evidence of the truth of the asserted fact.[30]

[105] That is effectively what the Crown submitted was permitted by s 66A, namely that representations about being physically assaulted or bullied by the accused are admissible under that provision to establish that asserted fact because those actions 'would have likely caused fear, anxiety or distress' and sensations such as pain.

[106] A connected problem is also identified in the text *Uniform Evidence Law* which arises where the representation refers to an event that created the state of mind, for example, the making of a threat leading to a state of fear (as was the case in *Paulino* referred to above).[31]

[107] The broad interpretation of s 66A (any memory or belief of an event is within a person's state of mind) has not been adopted.[32] It has been said that the potential absurdity of construing the provision that way is a reason for not adopting a construction of that breadth.[33] I agree that, if a representation

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30 S Odgers, *Uniform Evidence Law*, (Thompson Reuters, 19th ed, 2024), [EA.66A.60].

31 Ibid, [EA.66A.60], citing the Australia Law Reform Commission Report No 102, para 8.165-8.166.

32 See, for example, *Karam v The Queen* [2015] VSCA 50 at footnote 11 per Weinberg JA, Priest and Beach JJA.

33 S Odgers, *Uniform Evidence Law*, (Thompson Reuters, 19th ed, 2024), [EA.66A.60], citing the Australia Law Reform Commission Report No 102, para 8.163.

contained no more than a narrative about the occurrence of an event, even if that event was likely to cause feelings or sensations for the maker of the representation, it would not be caught by s 66A. I adopt the view of the author of the text *Uniform Evidence Law* that s 66A will include a reference in a representation about a person's health, feelings, sensations, intention, knowledge or state of mind to some event that created the person's feelings, sensations, intention, knowledge or state of mind existing at the time of the making of the representation, but not to a discrete representation about such an event that does not satisfy that requirement.

[108] For brevity, in what follows I will use the term 'state of mind' to mean 'heath, feelings, sensations, intention, knowledge or state of mind' in s 66A as applicable.

Item 5, Table A: Karni Wigness

[109] I have already decided that the representation in Ms Wigness's evidence was not sufficiently proximate to the deceased's death to be relevant, or was only barely relevant and outweighed by the danger of unfair prejudice.

[110] In addition, Ms Wigness's evidence does not contain any representation by the deceased about his state of mind. It is no more than a narrative of an event, namely that he was hit by the accused causing a split upper lip.

Item 6, Table A: McFarlane Wasiu

[111] Mr Wasiu's evidence does not contain any representation by the deceased about his state of mind. While the first part of paragraph [5] says Mr Wasiu thinks the deceased was scared, that was not a representation made to Mr Wasiu, but a conclusion of Mr Wasiu as to how the deceased was feeling, based on the fact that the deceased would only say to him he wanted the accused and AL out of unit 10.

[112] This evidence may be contrasted with the evidence in paragraph [6] of Mr Wasiu's statement (part of item 7, Table A) which the Defence accepts is admissible under s 66A, namely that the deceased told Mr Wasiu that he was stressing out about the accused and AL because they were taking over his unit and he was scared of the accused. That is clearly evidence of a contemporaneous representation made by the deceased about his state of mind.

Item 9, Table A: Sem Tom

[113] If the source of Mr Tom's knowledge or belief that the accused 'kicked the deceased out of his room' is a representation made by the deceased, that is not a representation about the deceased's state of mind.

Items 11 and 12, Table A: Stella Paul

[114] As to Ms Paul's general evidence that the deceased had told her the accused had hurt him a couple of times and he was scared (item 11, Table A), this is

not a contemporaneous representation about the deceased's state of mind. While 'hurt' is a feeling, the 'hurt' was not contemporaneous with the representation. The reference to the deceased being scared was not a representation made to Ms Paul, but a conclusion of Ms Paul as to how the deceased was feeling, based on the fact that the deceased would not say much.

[115] As to Ms Paul's more specific evidence about an assault in 2021 (item 12, Table A), again this was not a representation about the deceased's state of mind; it was a narrative about an event, namely the accused assaulting him and causing a black eye and a cut to his forehead. Again, the reference to the deceased being scared was not a representation made to Ms Paul, but her conclusion as to how he was feeling.

Item 16, Table A: Tammy Wasaga

[116] By contrast with the other evidence, Ms Wasaga's evidence in paragraph [5] is of contemporaneous representations as to the accused's state of mind (being sick of the accused and AL), along with the cause of that state of mind (the accused would 'jealous' him and was violent to him).

[117] It is admissible under s 66A. The Defence conceded its admissibility under s 66A.

Conclusions

[118] Paragraph [10] of the Statement of Sem Tom of 1 June 2022 (item 9, Table A) is not evidence excluded by the hearsay rule unless the source of the statement that the accused kicked the deceased out of his bedroom is a representation by the deceased. If it is, it is not admissible pursuant to s 66A of the ENULA.

[119] Paragraph [5] of the Statement of Tammy Wasaga of 27 July 2022 (item 16, Table A) is admissible pursuant to s 66A of the ENULA.

[120] The other evidence referred to above is not admissible pursuant to s 66A of the ENULA.

[121] Turning to the representations conceded by the Defence to be admissible, I accept that the representations relating to the deceased wanting the accused and AL out of unit 10 (items 1, 2, 3, 4, 7, 8, 10, 15 and 15) are relevant as context/relationship evidence and are contemporaneous representations about the deceased's state of mind within s 66A of the ENULA and admissible under that provision. To the extent that the representations include reference to an event or events which created that state of mind, that evidence is also admissible.

The representations - danger of unfair prejudice: s 137

[122] Section 137 of the ENULA is restricted in its operation to criminal proceedings, and requires the Court to refuse to admit evidence adduced by

the Crown 'if its probative value is outweighed by the danger of unfair prejudice to the defendant'. In order for there to be a danger of unfair prejudice to the accused '[t]here must be a real risk that the evidence will be misused by the jury in a way that the risk will exist notwithstanding the proper directions which it should be assumed the Court will give'.[34] In *Festa v The Queen*,[35] McHugh J described (at [51]) the test as follows:

> It is only when the probative value of the evidence is outweighed by its prejudicial effect that the Crown can be deprived of the use of relevant but weak evidence. And evidence is not prejudicial merely because it strengthens the prosecution case. It is prejudicial only when the jury are likely to give the evidence more weight than it deserves or when the nature or content of the evidence may inflame the jury or divert the jurors from their task.

[123] In *Dupas v The Queen*,[36] the Victorian Court of Appeal described the test as being that there is a real risk that the evidence will be misused by the jury in some unfair way, and may arise, for example where there is a danger that the jury will adopt an illegitimate form of reasoning or misjudge the weight to be given to particular evidence, such as where there is an inability to test the reliability of the evidence, but evidence is not unfairly prejudicial because it inculpates the accused.

[124] What is involved is a balancing exercise of assessing and weighing the probative value of the evidence against any prejudicial effect it may have.

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34 *The Queen v Jennings* [2020] NTSC 71 at [20] per Grant CJ, citing *The Queen v Shamouil* (2006) 66 NSWLR 228 at [72] per Spigelman CJ (Simpson and Adams JJ agreeing).

35 *Festa v The Queen* (2001) 208 CLR 593.

36 *Dupas v The Queen* (2012) 40 VR 182 at [175] per Warren CJ, Maxwell P, Nettle, Redlich and Bongiorno JJA.

When undertaking this balancing exercise, the dominant consideration is to ensure that the accused is not deprived by prejudice of a fair trial.[37]

[125] The 'probative value' of evidence refers to the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue (Dictionary, ENULA).

[126] While it may be assumed that, as a general rule, juries understand and follow the directions they are given by trial judges, that assumption is not immutable and it is possible that unfair prejudice in the form of the jury misusing evidence might not be alleviated in some circumstances by directions.[38]

What is in issue?

[127] The Defence argued that the representation evidence pressed by the Crown over the objection of the Defence (the evidence about acts of physical violence or bullying of the deceased) should be excluded under s 137 because its probative value is low and the risk of unfair prejudice to the accused is high.

[128] As to the representation evidence regarding the deceased wanting the accused and AL out of unit 10, which the Defence conceded is admissible, the Defence argued that any representation evidence about what created that

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37 *The Queen v AW* [2018] NTSC 29 at [30] per Grant CJ.

38 *Moore (a pseudonym) v The King* (2024) 98 ALJR 1119 at [41] per Gageler CJ, Edelman, Steward, Gleeson and Beech-Jones JJ.

state of mind which comprises evidence that the accused was physically violent or bullying to the deceased should be excluded under s 137.

Probative value

[129] Of the representation evidence pressed by the Crown over the objection of the Defence, I have only found the evidence of Stella Paul (item 12, Table A) and Tammy Wasaga (item 16, Table A) to be admissible.

[130] The probative value of Ms Paul's evidence is relatively low given that it relates to a single act of violence against the deceased which occurred sometime in 2021. Similarly, the probative value of Ms Wasaga's evidence is relatively low because the representation was merely that the accused was violent to the deceased, with no further details or explanation given.

[131] Of the representation evidence conceded by the Defence to be admissible, only the following contain reference to a representation about the accused bullying or being violent to the deceased:

(a) Kara Asera, paragraph [20] (part of item 4, Table A): The deceased told her the accused and AL kicked him out of his bed and he slept in the lounge.

(b) McFarlane Wasui, paragraph [6] (part of item 7, Table A): The deceased told him the accused and AL were taking over his unit and he was scared of the accused, he is too bossy.

[132] Again, the probative value of this evidence is significant but relatively low. It does not have a high capacity to rationally affect the assessment of the probability of the existence of a fact in issue, namely whether the accused assaulted the deceased, causing his death, or had the requisite state of mind for murder. Essentially, the evidence is about the deceased's state of mind and the nature of the relationship between the deceased and the accused. It only bears on the accused's state of mind to the extent that it demonstrates a source of conflict between the deceased and the accused, which could only weakly affect the assessment of the probability of the facts in issue, and permits the jury to appreciate that the assault on the deceased alleged by the Crown did not come 'out of the blue'.

[133] In addition, there is the evidence of Stella Paul that, once in unit 10, she saw the accused give the deceased a 'hot slap' which is 'like a knock out' (item 13, Table A). Again, the probative value of this evidence is significant but relatively low. It does not have a high capacity to rationally affect the assessment of the probability of the existence of a fact in issue, namely whether the accused assaulted the deceased, causing his death, or had the requisite state of mind for murder because it relates to a single act of violence against the deceased, which occurred sometime in the two or so years prior to his death, and there is no evidence about the circumstances surrounding the slap or its consequence.

Danger of unfair prejudice

[134] As observed in *Dupas v The Queen* referred to above, that the Defence is unable to cross-examine the deceased about the representations is a matter which raises a risk that the jury may place more weight upon the evidence than it deserves. As observed by Kelly J in *The Queen v Ryan*, that prejudice is not determinative because it is always the case when statements are let in under s 65 of the ENULA.[39] Unlike the case of *The Queen v Doolan*,[40] where Graham AJ observed (at [8]) that the principle that an accused should generally be given the opportunity to test contrary evidence in cross-examination has particular force in a case where there are no independent witnesses to the alleged incidents and the case largely rests on assessment of the two conflicting versions of what occurred, this case rests on circumstantial evidence. As such, I consider that this risk can be adequately addressed by a direction that informs the jury that they are to bear the inability of the Defence to cross-examine the deceased and the difficulties associated with that in mind when deciding what weight to give to the evidence.

[135] I do not accept, as the Defence submitted, that the representation evidence is likely to provoke a strong emotional response from the jury of repulsion and disgust towards the accused if they hear evidence of him assaulting or bullying the deceased. The jury will hear evidence that, when Police arrived

39 *The Queen v Ryan* (2013) 33 NTLR 123 at [34].

40 *The Queen v Doolan* [2019] NTSC 53.

at unit 10 on 8 April 2022, the accused was sitting in a chair next to the deceased, mopping up the pool of blood from around the deceased's head, and had not tried to assist him or call for assistance as he lay injured and bleeding on the floor. I do not see how evidence that he assaulted the deceased on one occasion in 2021, and another occasion within the two or so years before his death, or bullied the deceased, would provoke some stronger emotional response which would lead them to reason in an improper way, particularly if firmly directed that they must put their emotions to one side.

[136] I do accept, however, that a real risk of unfair prejudice arises because the Crown has not made an application to adduce tendency evidence, meaning the representation evidence about acts of violence against the deceased cannot be used to reason that the accused had a tendency to have a particular state of mind or act in a particular way (namely, a preparedness to be physically violent to the deceased or to commit acts of violence against him). Even in the face of a strong direction not to engage in rank propensity or tendency reasoning, it seems to me almost inevitable that the jury would do so. Where the deceased's death is said to be caused by acts of assault against him by the accused, evidence of prior acts of assault against him by the accused is highly likely to give rise to reasoning that 'he had done it before, he must have done it then', particularly where there is an absence of detail about the circumstances in which the prior assaults occurred and an

inability to cross-examine the deceased about them. Such reasoning would comprise a misuse of the evidence.

[137] Consequently, the representation evidence of Stella Paul (item 12, Table A) and Tammy Wasaga (item 16, Table A), about the deceased saying the accused was violent to him, should be excluded pursuant to s 137 of the ENULA. Equally, the evidence of Stella Paul about the hot slap (item 13, Table A) should be excluded pursuant to s 137 of the ENULA.

[138] I do not consider the same risk arises in relation to the representation evidence about the accused bullying the deceased. To bully someone (e.g., take over their home without paying rent or for food, or kick them out of their bedroom, or shout at them or demand that they go shopping) is a far cry from physically assaulting them. It does not give rise to a significant risk of reasoning that 'he had done it before, he must have done it then'. Consequently, the other representation evidence is not excluded pursuant to s 137 of the ENULA.

Exclusion of evidence – Lie in accused's written statement to Police

[139] On 8 April 2022, the accused signed a statutory declaration which included the following:[41]

> ... [W]e [the accused and AL] just came home.
>
> Only us two were drinking, it was about 6 o'clock night time, sitting on the balcony.

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41 Exhibit P3: Statutory declaration made by the accused on 8 April 2022.

> [The deceased] came about 4 in the morning, Friday, we were inside.
>
> We sat down and talked stories. He just lay down where he sits, he always does that.
>
> [The deceased] was telling us stories where he was drinking, he was with Pellan that man.

[140] Constable Joel Hawken attested[42] that Police had been called to the service station across the road from the unit block after the accused had attended and been aggressive and abusive to the console operator. After speaking to the console operator at around 8.20am, Constable Joel Hawken and another officer went to the unit block, spoke to an occupant of unit 9, Ms Giddings, and then went to unit 10, where Constable Hawken observed the deceased lying face down in a pool of blood, unconscious and snoring loudly and the accused sitting in a chair mopping blood from around the deceased's head. Constable Hawken placed the deceased in the recovery position and called an ambulance. He saw injuries on the deceased's head, a large amount of blood on the ground, another patch about a metre away and a blood spatter up the wall. The accused told him the deceased fell but he did not call an ambulance as he just woke up and had to get bread. Constable Hawken said the accused's story seemed to change many times. He requested assistance from more senior officers and, shortly after, Sergeant Peter Dunne arrived at unit 10.

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42 Exhibit P6: Statutory declaration made by Constable Hawken on 8 April 2022.

[141] Sergeant Dunne attested[43] that he arrived at unit 10 at 9am. He saw the deceased lying in a recovery position and the accused sitting in a chair next to the deceased. The accused told him that the deceased had come home early that morning, sat down and went to sleep. Sergeant Dunne saw blood around the deceased, that he was unconscious, snoring and that someone had begun mopping up blood around the deceased's head and a mop and bucket next to the accused. When the ambulance arrived and moved the deceased, Sergeant Dunne could see injuries to the deceased's face consistent with being assaulted. At about 9.21am, he explained to the accused that Police would be investigating a possible assault on the deceased and would be asking him questions in relation to the incident. He told the accused he was not obliged to say anything and that anything he said or did would be recorded and could be used as evidence in court. The accused acknowledged that he understood. After the paramedics could not rouse the deceased, Sergeant Dunne determined that his condition was serious and, after the deceased was moved out, declared unit 10 a crime scene at 9.48am. The accused and AL were asked to wait downstairs for Police to talk to them about the incident.

[142] Detective Russell attested[44] that, at 10am, he was tasked to attend and assess a crime scene at unit 10 where there were two witnesses and a man had been taken to hospital. When he arrived at the unit block, he was directed by

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43 Exhibit P2: Statutory declaration of Sergeant Dunne made on 9 April 2022.

44 Exhibit P1: Statement of Detective Russell made on 24 October 2022.

officers to two witnesses in the car park, AL and the accused. He activated his body worn camera then went to unit 10. Crime scene examiners were present. He saw what appeared to be blood on the floor and several other areas where blood appeared to be, and a steel crutch with blood on it. He went downstairs and took the statutory declaration from the accused referred to above. His body worn camera recorded that process. The accused then left, to go stay with family.

[143] The Crown intends to adduce both Detective Russell's body worn footage of the process of taking the statutory declaration from the accused and the statutory declaration. The Crown argued that this evidence is relevant because it contains a lie told by the accused to Police, namely that the accused and AL were alone at unit 10 until the deceased came home at 4am. The Crown intends to prove that was a lie via CCTV footage of the deceased walking back to unit 10 at about 6.43pm and the CCTV footage which shows that he did not leave after that. The lie is said to be a lie told in consciousness of guilt and admissible as evidence of guilt in accordance with the principles in *Edwards*.

[144] The Defence conceded that what the accused said about the deceased's whereabouts could, if it was established as a lie, evidence consciousness of guilt in accordance with the principles in *Edwards*. The Defence argued that the statutory declaration is inadmissible because it was obtained improperly or in consequence of an impropriety within s 138 of the ENULA, and should be excluded pursuant to that section. The Defence also argued that it should

be excluded pursuant to s 90 of the ENULA because, having regard to the circumstances in which it was obtained, it would be unfair to the accused to use the evidence.

[145] The Defence argued that Detective Russell's treatment of the accused as a witness, and taking a statement from him, when Detective Russell was aware that the accused was actually a suspect, because he was aware that the accused had already been cautioned by Sergeant Dunne, was clearly inconsistent with the minimum standards which society should expect and require of law enforcement officers and, consequently, that comprised an impropriety within s 138(1) of the ENULA, bringing the evidence within its terms.

Section 138: Obtained in consequence of an impropriety

[146] Section 138 of the ENULA provides, in essence, that evidence obtained improperly or in consequence of an impropriety 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.

[147] There is no definition of 'impropriety' in the ENULA. The method of obtaining the evidence or the conduct involved will be 'improper' within the meaning of s 138 if it is not in accordance with truth, fact, reason or rule; it

is abnormal, irregular, incorrect, inaccurate, erroneous or wrong.[45] The method or conduct must be clearly and significantly inconsistent with the minimum standards which a society such as ours should expect and require of those entrusted with powers of law enforcement.[46] The impropriety need not be deliberately or intentionally improper.[47]

[148] 'Desirability' reflects the public interest in the admission of reliable evidence for the conviction of wrongdoers.[48] 'Undesirability' recognises the public interest in not giving curial approval or encouragement to illegally or improperly obtaining evidence generally.[49] Section 138(3) sets out matters that the Court may take into account under s 138(1).

[149] The burden is on the party seeking exclusion of the evidence to establish that it was improperly obtained.[50]

Treating a suspect as a witness and taking the statement

[150] Seven pages in to the eight page statutory declaration by the accused, Detective Russell recorded that the accused said the Police told him they had declared a crime scene, he was to move downstairs and:

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45 *The Queen v Gehan* [2019] NTSC 91 at [8] per Grant CJ.

46 Ibid at [8]-[9] per Grant CJ, citing *Robinson v Woolworths Ltd* (2005) 158 A Crim R 546 at [23] per Basten JA.

47 Ibid.

48 *Kadir v The Queen* (2020) 267 CLR 109 at [48] per Kiefel CJ, Bell, Keane, Nettle and Edelman JJ.

49 Ibid at [13].

50 *Parker v Comptroller-General of Customs* (2009) 83 ALJR 494 at [28] per French CJ.

> The Sgt gave me a caution, like I'm not obliged to say anything, uniform Sgt.
>
> I'm doing this story out of my own freedom. I understood it. I wanted it on record I was cautioned, I waived my rights.

[151] The body worn footage of this process,[51] shows that the accused told Detective Russell that he had been cautioned by another officer earlier, and Detective Russell replied that he was not worrying about that and was treating the accused as a witness.

[152] At the preliminary examination hearing in the Local Court,[52] Detective Russell gave evidence that he was surprised when the accused told him that he had been cautioned. Detective Russell denied that he did know the accused had been cautioned before speaking with him. Detective Russell said that, when the accused told him he had been cautioned, that started 'tingling bells' then, which was near the end of the statement. Detective Russell agreed that the fact the accused had already been cautioned was a significant warning bell that, in accordance with the rules about taking witness statements and when a person is a witness or a suspect, the accused was not an appropriate person to take a statement from. Detective Russell agreed that he was made aware that the accused had been cautioned before the accused signed the statutory declaration. He said he did not caution the accused because the accused 'wasn't a suspect for me'. Detective Russell said, when the accused told him he had been cautioned by Sergeant Dunne,

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51 Exhibit P4, Body Worn Footage of Detective Russell of 8 April 2022.

52 Exhibit P5, Transcript of evidence of Detective Russell, 20 April 2023.

he did not know what Sergeant Dunne's suspicions about the accused were, he was going on his own state of mind, so he finished the statement with the accused. He agreed that he could have asked the accused to stop at the point where the accused told him he had been cautioned and spoken to Sergeant Dunne to find out what the basis for the caution was and, with the benefit of hindsight, that is what he should have done.

[153] As is depicted on the body worn footage, during, and near the end of, the process of preparing the statutory declaration with Detective Russell, the accused told Detective Russell that he had been cautioned. Detective Russell asked the accused about that, including what had been said to him by Sergeant Dunne. The accused repeated that he had been cautioned and had been told that he did not have to say anything, and said that he had 'no worries' because he had not done anything wrong. He also said he wanted it put on record that he had been cautioned, he understood his rights, he was making the statement out of his 'own freedom' and he 'waived his rights' in doing the interview with Detective Russell.

[154] The Defence argued that the impropriety was the continuation of the process of taking the statutory declaration, and having the accused sign it, after Detective Russell became aware that the accused was a suspect. Consequently, it was argued, the statutory declaration was obtained in consequence of an impropriety.

[155] The Crown argued that the statutory declaration was not obtained in consequence of an impropriety when the accused had made clear to Detective Russell that he was aware of his right to silence, understood it, and waived it and wished to provide the statutory declaration because he had done nothing wrong.

Was the statutory declaration obtained in consequence of an impropriety?

[156] The Defence argued that the proper course was that once Detective Russell was told by the accused he had been cautioned, he should have ceased the statutory declaration process, spoken to Sergeant Dunne about the reason for the caution, whereupon he would have been told the accused had been cautioned because he was a suspect, and the accused should then have been asked if he wished to participate in a formal electronic record of interview, which would have involved him being told that, in addition to his right to silence, he also had the right to speak to a lawyer and to have a support person present.

[157] I accept that proceeding with the statutory declaration process and having the accused sign the statutory declaration after Detective Russell was aware that the accused had been cautioned and was, therefore, a suspect or at least a person of interest in relation to the incident, and not a witness, was clearly and significantly inconsistent with the minimum standards which a society such as ours should expect and require of those entrusted with powers of law enforcement. The rights of people suspected of criminal activity and the

procedures for questioning them are well-established, legislatively entrenched,[53] and strenuously guarded by the law. While the accused was aware of and understood his right to silence and nevertheless wished to provide his version of events to Police, he had not been told of his right to receive legal advice, which he would have been if he had engaged in a formal electronically recorded interview. The receipt of legal advice may have caused the accused to decide not to provide his version of events to Police.

[158] Consequently, I am satisfied that the statutory declaration was obtained in consequence of an impropriety within s 138(1) of the ENULA.

The balancing exercise: s 138(3)

[159] I turn now to whether the desirability of admitting the statutory declaration outweighs the undesirability of admitting it, taking into account the relevant matters in s 138(3) of the ENULA.

[160] The probative value of the statutory declaration is reasonably high. In addition to other lies relied upon by the Crown as credibility evidence, it contains the *Edwards* lie relied on as evidence of consciousness of guilt. To have lied to Police about when the deceased arrived home, telling them that the deceased was out of unit 10 at the time when the assault upon him is alleged to have occurred, is quite strong consciousness of guilt evidence.

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53 See, for example, ss 121-127, 137-138, 139-143 of the *Police Administration Act 1978* (NT). Whether or not the accused was in lawful custody at the time he provided the statutory declaration was not the subject of argument and need not be decided for present purposes.

This factor points in favour of the desirability of admitting the statutory declaration.

[161] The importance of the statutory declaration is low, because the Crown intends to play Detective Russell's body worn footage of the process of taking the statutory declaration. That footage clearly depicts (with both vision and audio) the accused telling Detective Russell that the deceased came home at 4am and the other things written by Detective Russell in the statutory declaration. This factor points strongly against the desirability of admitting the statutory declaration.

[162] The Defence initially argued that the body worn footage of the process of taking the statutory declaration was inextricably linked with the statutory declaration such that if the statutory declaration was inadmissible, so too was the body worn footage of that process. The difficulty with that argument is that the impropriety asserted by the Defence was in Detective Russell proceeding with the statutory declaration process, and having the accused sign the statutory declaration, after he became aware that the accused had been cautioned. While, as I have found, that demonstrates that the statutory declaration (the written document signed by the accused) was obtained in consequence of an impropriety, it does not demonstrate that the things said by the accused to Detective Russell prior to his awareness that the accused had been cautioned were obtained in consequence of an impropriety. In my view, that evidence (the things said prior to Detective Russell's awareness) was not obtained in consequence of an impropriety. Ultimately, the Defence

conceded that the impropriety giving rise to the statutory declaration had no effect in relation to the things said by the accused to Detective Russell as recorded on the body worn footage, at least to the point where the accused told Detective Russell he had been cautioned. That was a proper concession to make. I consider that, after that point, the evidence in the body worn footage was obtained in consequence of an impropriety in the same way as the statutory declaration.

[163] The offence for which the accused is charged is murder, the highest charge that can be laid, and concerns allegations of a brutal and prolonged assault on the deceased by the accused, causing his death. This factor points strongly in favour of the desirability of admitting the statutory declaration.

[164] As to the gravity of the impropriety, I do not consider it to be particularly grave. It does not rise anywhere near as high as falsifying evidence or coercing an accused to make an admission, but it does impact upon the well-guarded rights of a person suspected of a crime. It is relevant here that the accused expressly waived his right to silence and wanted to give his version of events to Police, but it is also relevant that his right to silence was not the only potentially applicable right. This factor does not strongly point one way or the other as regards the desirability and undesirability of admitting the statutory declaration.

[165] There is no suggestion the impropriety was deliberate. At the highest, it involved reckless conduct on the part of Detective Russell. Reckless conduct

points less in favour of the undesirability of admitting the statutory declaration than deliberate conduct.

[166] On the evidence before me, no other proceeding has been or is likely to be taken in relation to the impropriety.

[167] It may have been possible to obtain the accused's version of events including the lie without the impropriety by offering him the opportunity to participate in a recorded interview. Given that the accused's statements to Detective Russell were recorded on body worn footage, including the lie, prior to the impropriety, this factor has little weight.

[168] On balance, I consider that the desirability of admitting the statutory declaration does not outweigh the undesirability of admitting it. Consequently, pursuant to s 138(1), the statutory declaration may not be admitted. For the same reasons, the body worn footage of Detective Russell is not admissible after the accused told him that he had been cautioned by another Police officer.

[169] It is therefore unnecessary to consider the Defence argument that admission of the statutory declaration should be refused under s 90 of the ENULA.

Exclusion of evidence – The argument over the price of bread

[170] The Crown intends to adduce evidence of the accused's attendance at the service station on the morning of 8 April 2022 after AL had returned to unit 10 and told him she could not buy bread, and his conduct there, namely

aggressively abusing the console operator about the price of bread to such an extent that she called the Police ('price of bread evidence'). This evidence is said to be relevant because it shows the accused in an aggressive and abusive state of mind and permits the inference (along with other evidence) that he was in an aggressive and abusive state of mind during the period when the deceased was assaulted, which bears on the probability that he assaulted the deceased causing his death and had the requisite state of mind for murder. It is also said to be relevant because it shows the accused had a callous disregard for the deceased's suffering and welfare, consistent with the state of mind of a person who had viciously beaten the deceased in the hours before and left him lying on the floor without trying to help him or seek any medical assistance for him.

[171] The Defence argued that the price of bread evidence is irrelevant because it shows the accused's state of mind at 8am, when the Crown alleges the deceased was assaulted hours earlier, namely between 8pm and 1am. Consequently, the Defence said that the evidence is not relevant to the accused's state of mind towards the deceased in that earlier period. Further, the Defence argued that the evidence should be excluded pursuant to s 137 of the ENULA.

[172] The Crown pointed to evidence that the yelling and abuse and noises consistent with a beating ebbed and flowed throughout the night and did so until 4am or 5am, only a few hours before the accused went to the service station.

[173] I accept that the price of bread evidence is relevant for the two purposes outlined by the Crown. Given the ebb and flow of the sounds coming from unit 10 during the night until 4am or 5am, I accept that the accused's aggressive and abusive state of mind at 8am can rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding, namely the accused's state of mind towards the deceased in the period between 8pm and 4am or 5am. Further, given the evidence that the accused was found by Police sitting in a chair next to the deceased mopping the blood around his head, and had not sought any medical assistance for him, I accept that the accused's decision to leave the unit at a time when (it may be inferred) the deceased was lying unconscious on the floor bleeding, walk to the service station and argue with the console operator about something as trivial as the price of bread can rationally disclose a callous disregard for the suffering and welfare of the deceased and can therefore rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding, namely whether the accused assaulted the deceased such as to cause his death and the accused's state of mind towards the deceased in the period between 8pm and 4am or 5am.

[174] As to the application of s 137 of the ENULA, the Defence argued that the probative value of the price of bread evidence is extremely low. I disagree. It has considerable capacity to rationally affect the probability about the accused's states of mind, giving it significant probative value.

[175] The Defence argued that the danger of unfair prejudice to the accused is very high because the price of bread evidence is likely to provoke an irrational and strong emotional response from the jury of repulsion and disgust because he was willing to cross the road to argue about the price of bread while the deceased lay seriously injured on the floor. I do not accept that there is a real risk of 'inflaming the passions' of the jury to any significant extent beyond the same risk associated with the other evidence they will hear in the trial, particularly the circumstances in which the deceased and the accused were found by Police.

[176] Nor do I consider that there is a real risk that, on the basis of the price of bread evidence, the jury will engage in rank propensity reasoning to any significant extent beyond the same risk associated with the other evidence they will hear in the trial. It is not of the same character as the evidence of prior assaults as discussed above. Nor do I accept that there is a real risk that the jury will give the price of bread evidence undue weight or be improperly distracted from their task by it. It is relevant and contemporaneous evidence about the accused's state of mind towards the deceased.

[177] I consider that appropriate directions to the jury will ameliorate whatever risks of this nature may arise.

[178] The price of bread evidence is admissible and should not be excluded pursuant to s 137.

Disposition

[179] For the above reasons, my rulings are as follows:

1. Items 5, 6, 9, and 11 of Table A in the Crown's hearsay notice are not admissible under s 65(2)(b) or s 65(2)(c) or s 66A of the ENULA.

2. Item 12 of Table A in the Crown's hearsay notice is admissible under s 65(2)(c) (but not under s 65(2)(b) or s 66A), but is excluded pursuant to s 137 of the ENULA.

3. Items 1, 2, 3, 4, 7, 8, 10, 14, 15 and 16 of Table A in the Crown's hearsay notice are admissible under s 66A of the ENULA. Of those, only that part of item 16 which refers to the deceased telling Ms Wasaga the accused was violent to him is excluded pursuant to s 137 of the ENULA.

4. Item 13 of Table A in the Crown's hearsay notice is admissible under s 66A of the ENULA, but is excluded pursuant to s 137 of the ENULA.

5. The statutory declaration made by the accused on 8 April 2022 is inadmissible pursuant to s 138 of the ENULA. The body worn footage of Detective Russell of the process of taking that statutory declaration from the accused is admissible and not excluded pursuant to s 90 or s 137, up to the point where the accused told Detective Russell that he had been cautioned by another Police officer.

6. The price of bread evidence is admissible and is not excluded pursuant to s 137 of the ENULA.
