Miles v The Queen [1999] NTCCA 105

PARTIES:	Brett Vernon Miles
	v
	The Queen
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERITORY
JURISDICTION:	APPEAL FROM SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	CA24 of 1998
DELIVERED:	8 October 1999
HEARING DATES:	11 and 12 August 1999
JUDGMENT OF:	GALLOP, MILDREN AND THOMAS JJ

REPRESENTATION:

Counsel:

Appellant:	J. Tippett and S. Cox
Respondent:	J. Adams

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Director of Public Prosecutions

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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA

Miles v The Queen [1999] NTCCA 105

No. CA24 of 1998

BETWEEN:

Brett Vernon Miles
Appellant

AND:

The Queen
Respondent

CORAM: Gallop, Mildren and Thomas JJ

REASONS FOR JUDGMENT

(Delivered 8 October 1999)

THE COURT

[1] This is an appeal against conviction. The appellant was charged with three counts against the *Misuse of Drugs Act*, viz:

(1) that on 17 January 1997 at Darwin he unlawfully supplied heroin, a dangerous drug, to another;

(2) that on 18 January 1997 at Darwin he unlawfully supplied heroin, a dangerous drug, to another;

(3) that between 16 and 20 January 1997 he unlawfully did possess a trafficable quantity of heroin, a dangerous drug.

[2] The appellant was acquitted (by a majority) of count (1) above, but convicted (by a majority) of counts (2) and (3). The learned trial judge imposed an effective sentence of imprisonment for 8 years, with a non-parole period of six years. There is also an application for leave to appeal against severity of the sentences imposed. That application has been adjourned pending the outcome of this appeal.

[3] The allegations against the appellant arose in the context of an operation conducted by the Combined Drug Enforcement Unit, code-named "Operation Bravo Yankee" which had been in progress for some three months prior to the appellant's arrest on 19 January 1997. On 17 January 1997, an operative code-named "Informant 29", who was fitted with a listening device, went to a certain apartment in the Narrows, a suburb of Darwin, where he met one Fraser. Subsequently, at about 8:45 p.m. that evening, Informant 29 met Fraser again at a service station on the Stuart Highway, Darwin, where he discussed purchasing some heroin from Fraser. Two one hundred dollar notes were given to Fraser in return for two small Alfoil packets of a substance later identified as being heroin. The police had kept a record of the serial numbers of these notes which they had supplied to the informant.

[4] On 18 January 1997, the police provided the informant with eight $100 notes, the serial numbers of which were also recorded. Following a telephone call, the informant met Fraser at a service station in Daly Street, Darwin at a little after 8:00 p.m. The money was given to Fraser, who said he would go and get the heroin. Fraser departed, returning twenty minutes

later with three "balloons", one of which he handed to Informant 29. This "balloon" also contained a quantity of heroin. Police, having "staked out" the area, attempted to intercept Fraser after he left the service station in a motor vehicle. The police were unsuccessful; later they located Fraser's vehicle abandoned in the carpark of the University's Myilly Point campus. A search for Fraser was undertaken, but he managed to escape detection.

[5] At 5:15 p.m. on 19 January 1997, the police executed a search warrant at a unit at an address in Stuart Park. Four persons were present at the premises at the time the police arrived, including the appellant and his girlfriend, Susan Bunker. During the search, $3,100 in cash was found in a drawer in an upstairs bedroom, and $490 in cash was located downstairs. Included in the cash so found, were the $100 notes the serial numbers of which had been recorded by the police. The appellant was spoken to by Detective Senior Constable McDonagh in the presence of Detective Leo. This conversation was recorded on a hand-held tape recorder. The appellant claimed that the money found in the bedroom was money saved by his girlfriend and himself and that they had had the money for "ages, well had it for a while". Shortly after this conversation, the appellant was shown the money which was counted out, and he agreed that the amount found in the drawer in the upstairs bedroom amounted to $3,100. He was told that the money was seized, and would be taken to the Berrimah Police Centre, and would be the subject of further enquiries. This conversation was also taped.

[6] A sniffer dog and a number of police were employed during the search, which included the grounds to the unit and some nearby vehicles. No drugs were found.

[7] At 6:33 p.m. whilst still at the flat, Detective McDonagh, in the presence of Detective Senior Constable Klingsporn, arrested the appellant upon two counts of supplying heroin. He was cautioned and advised of his rights pursuant to s140 of the *Police Administration Act*. This conversation was also taped. The appellant was also handcuffed.

[8] Shortly after this conversation, and whilst the appellant was still in the upstairs bedroom, the Crown alleged that a further conversation took place between the appellant and Detective McDonagh in the presence of Detective Klingsporn which was not recorded. An account of this conversation was given by Detectives McDonagh and Klingsporn at the trial. The accounts are not identical, although they are very similar. Detective Klingsporn's account given during a *voir dire* hearing (which will suffice for these purposes) was as follows (AB147):

> What was the conversation, as accurately as you can recall at this stage?—Well, we were in the upstairs bedroom. We had just completed the search or getting to the stage where we had completed the search, certainly of the upstairs portion of the unit. Mr Miles asked us what was going to happen now and we told him we had finished – or finished the search of the unit, we were going to continue the search into the yard and beyond because we believed there was heroin located there and then he asked us – or told us, you know, what would happen if we located the heroin or the gear we were seeking and we said we'd collect it, we were tired and wanted to go home; we had other things to do that night. It was then he – he said to us in the – in terms of, 'What if someone was to say where the

> – where the gear was, what would you do?' We'd collect it and if we could trace it back to someone then that person would be charged and he said, 'Hypothetically, if someone was to show you where it was, what would happen then?' and basically we said, yeah, that we – that we'd collect the gear, that's what we were all about there; that's what we were there for. And then he asked us hypothetically if someone was to show us exactly where it was, we said that's be good information or very helpful to us, and then the next – the next phase of it was - was where we came into no tapes, definitely no tapes, and we waited for a while. There was a bit of a pause. We – we told him there was no tapes. He could see Detective McDonagh had his tape recorder in his hand. He probably wouldn't have been aware I had one, and then Detective McDonagh asked him, 'Well, where is the gear?' We were standing towards the end of the bed and we could see out through – out through the window, out to the – towards the – overlooking the carpark, out towards the swimming pool area and that was when he told us where the gear was, so to speak.
>
> What did he say about the position?---well, he said it was near the – near the swimming pool, in the swimming pool area where the filter hose came out or the hose came out of the filter. It was buried in the ground.

We will hereafter refer to this conversation as the "alleged admission".

[9] The police, doubting whether the warrant they had already obtained extended to this area, applied to a Magistrate for a further warrant. This was obtained at 7:29 p.m. Thereafter an area of disturbed ground near the skimmer box was searched and a container holding nine balloons of what was later shown to be heroin, was located. The heroin found at the scene was later analysed by gas chromatography mass spectrometry and found to be identical to that found in the balloon obtained from Fraser on 18 January, but not precisely identical with that found in the Alfoil packets on 17 January and in respect of which the appellant was acquitted.

[10] At 7:45 p.m., Detective McDonagh again spoke with the appellant in the presence of Detective Klingsporn, in a recorded conversation. The container in which the heroin was found was shown to the appellant, who denied any knowledge of it, or its contents, or how it came to be buried near the pool. No attempt was then made to electronically record the substance of the alleged admission.

[11] Subsequently, the appellant was taken to the Berrimah Police Centre where an electronically recorded interview took place between 9:21 p.m. and 9:38pm. The interview was conducted by Detective McDonagh in the presence of Detective Klingsporn. During the course of leading the appellant to the point where Detective McDonagh started to question the appellant about the heroin supplied to Fraser and found near the swimming pool, Detective McDonagh referred briefly to the recorded conversations which preceded the finding of the container as well as the recorded conversations he had with the appellant after the container was found. No attempt was made to verify the substance of the alleged admission. The appellant again denied any knowledge of the container found near the swimming pool or of its contents, but otherwise declined to answer any questions. It is apparent that the interview was terminated because the appellant had indicated that he was not going to answer any further questions. Later that evening, the appellant was charged and bailed.

[12] At about 11:55pm after the appellant had left the police station, Detective McDonagh completed an internal police department "Chronology of Events"

form, in which *inter alia* he made notes of the alleged admission. The police did not subsequently attempt to show the notes to the appellant in order for him to verify them. The first the appellant knew of the notes was at the committal hearing which was conducted in May 1997. Similarly, the first time that the appellant knew that the police alleged that the bank notes found in the flat had identical serial numbers to those used by Informant 29 was at the committal.

[13] At the trial, the appellant represented himself. There are no grounds of appeal which are directed towards showing that the appellant's lack of legal representation affected the fairness of his trial in any way. So far as the alleged admission is concerned, the appellant's position at the trial was that no such conversation ever occurred, and that the police evidence was totally fabricated. The learned trial judge conducted a *voir dire* hearing at the appellant's request to inquire into the admissibility of a number of matters, including the admissibility of the alleged admission. The appellant did not give evidence on the *voir dire*. The learned trial judge, whilst noting that whether or not the alleged admission was made was a matter for the jury, nevertheless held that that question was inextricably bound up in the question of whether or not the Court ought to exercise its discretion to admit that evidence under s143 of the *Police Administration Act*. Under s142 of the Act, admissions made before or during questioning must be electronically recorded in order to be admissible in evidence, but s143 permits the court to admit the evidence nevertheless, if "having regard to the

nature of and the reasons for the non-compliance....and any other relevant matters, the court is satisfied that, in the circumstances of the case, admission of the evidence would not be contrary to the interests of justice". His Honour found that the reason why the alleged confession was not recorded at the time was because of the appellant's specific request. His Honour noted that, beyond indicating where the drugs might be found, there was no other statements made which implicated the appellant. His Honour appears to have accepted also the explanation offered that the police did not seek to confirm the alleged admission later, because that would have been as unfair to the appellant as recording the original statement without his knowledge. His Honour concluded that good reason had been shown for not recording or confirming the alleged admission and that as the question of whether or not the alleged admission was made at all was a question for the jury, and it was not suggested that there were any grounds for excluding the alleged admission, assuming it to have been made, on the grounds of involuntariness or on discretionary grounds, the admission of the evidence would not be contrary to the interests of justice, and accordingly the alleged admission would be admitted into evidence.

[14] The appellant appeals to this Court on a number of grounds:

(a) Grounds 1 and 2 challenge the admissibility of the evidence relating to the cash found by the police during the search.

(b) Grounds 3 and 4 challenge the admissibility of the alleged confession.

(c) Grounds 5 and 6 were abandoned.

(d) Grounds 7, 8 and 10 challenge the learned trial judge's summing up in relation to certain pieces of circumstantial evidence which it was asserted the learned trial judge should have, but did not, advised the jury required to be proven beyond reasonable doubt.

(e) Ground 9 relates to alleged errors in the learned trial judge's directions as to lies.

(f) Ground 11 (for which leave is required), alleges that the verdicts are unsafe and unsatisfactory.

(g) Ground 13, challenged the learned trial judge's directions to the jury on the alleged confession.

There was no ground 12.

We will deal with the grounds in the same order as they were argued by the appellant's counsel, Mr Tippett.

Grounds 3 and 4

[15] These grounds were argued together. Assuming that the alleged admission amounted in law to a "confession or admission" made to the police prior to or during "questioning" by the police, that evidence was inadmissible, *vide*

s142, unless the trial judge in the proper exercise of his discretion, decided to nevertheless admit the evidence pursuant to s143. It was not contended by Mr Adams, for the Crown, that s142 had been complied with; nor did he suggest that the alleged admission did not in law amount to a "confession or admission". Consequently, the burden of proof fell upon the Crown to persuade the learned trial judge that the alleged admission ought to be admitted pursuant to s143. Mr Tippett submitted that his Honour erred in the exercise of his discretion. This was ground 3 of the appeal.

[16] Before dealing with ground 3, it is necessary to mention briefly ground 4 which relates independently of s143 (and in further support of ground 3) to certain matters which it was submitted should have given rise to the exercise of the judicial discretion to exclude evidence which was otherwise admissible, and which it was suggested, the learned trial judge did not consider. To the extent that these matters are relevant to ground 3 (as "any other relevant matters") it is difficult to see how, having taken them into account in deciding to admit the evidence under s143, it can then be said that as a separate exercise, they should be considered as reasons for excluding the evidence.

[17] Mr Tippett submitted that his Honour erred in focusing on the reason why the alleged admission was not recorded at the time rather than on why the alleged admission was not subsequently confirmed and that confirmation electronically recorded. Whether or not the conversation according to the alleged admission was made "during questioning" is very debatable; if so, it

should have been recorded at the time; if not, the alleged admission required to be confirmed electronically. However, it is clear that the reason given by the police for not confirming the admission, was inextricably bound up in the reason why they did not record it at the time. It is also clear that his Honour directed his attention to both why the alleged admission was not recorded at the time it was made and also as to why it was not subsequently confirmed. We do not accept Mr Tippett's submission that no explanation was advanced for failing to electronically confirm the alleged conversation. Further, on the facts of this case, the inference can be drawn that, because the appellant refused to answer questions not long after the record of interview commenced, the police had little opportunity to obtain confirmation of the alleged admission, and in any event, the appellant's denial of any knowledge of the existence of the container in the recorded interview at the scene, made any confirmatory recorded admission most unlikely. On the other hand, there was no unfair disadvantage to the appellant in admitting the evidence. As the appellant's position was that no such conversation occurred at all, there was no disadvantage in not being able to accurately recall events. The matters which the appellant wished to agitate as going to the probability of the conversation occurring depended upon the other conversations he had with the police which were recorded and to which the appellant had access for the purpose of cross-examination, and which the appellant could prove, if necessary, through the Crown's own witnesses. In the circumstances of this case, there was no forensic

disadvantage shown by the fact that the accused was not made aware until the committal that the Crown intended to rely on the alleged admission. The failure to attempt to confirm the confession electronically was not illegal conduct by the police; nor was it done with any improper motive. In conclusion, it has not been demonstrated that the learned trial judge was wrong to have admitted the alleged admission, and we would therefore dismiss grounds 3 and 4 of the appeal.

Grounds 1 and 2

[18] Mr Tippett submitted that because the appellant was not made aware until the committal that the serial numbers of the notes had been recorded, he was deprived of the opportunity to provide any explanation of how the money came into his possession, and of corroborating how the money in fact came into his possession. The appellant's explanation at the trial was that the money had been given to him by one Scott on the morning of the 19 January. It appears to have been accepted by the Crown that Scott has since disappeared.

[19] The appellant sought to have the evidence excluded during the *voir dire* hearing. The learned trial judge refused to do so. His Honour appears to have concluded that there were no grounds upon which he could exercise his discretion to exclude this evidence, and that the only matters raised by the appellant went to the weight of the evidence.

[20] First, it is clear that the appellant was asked, at the flat, where the money had come from. The substance of his replies we have noted in paragraph [5]. Later in the formal record of interview he was asked a number of specific questions relating to the money. He declined to answer those questions, as was his right. As a matter of fact, he was twice given an opportunity to explain to the police how he came by the money. The police were not obliged to inform him that they had recorded the serial numbers of the money given to Informant 29. In *The Queen v. Szach* [1980] 23 SASR 504 at 582-3 King CJ said that, up to the stage of an investigation where the police are satisfied that a crime has been committed and believe it was committed by a particular person, the police are not obliged to divulge anything to anyone whom they may question. However, this does not justify falsehood or trickery. But once this stage has been reached, "the dictates of fairness differ from those applying to the earlier stage of the investigation... Fairness to the suspect, in those circumstances, requires that he be made aware of the nature of the crime concerning which he is to be investigated". Except in special circumstances, an example of which is *The Queen v. Sharp* [1984] 33 SASR 366 at 375, there is still no obligation on the police to reveal information in their possession before asking the accused for his explanation, so long as there is no deception or trickery and the accused knows the charge he is facing.

[21] At the time when the police first asked the appellant about the money, he was not under arrest and had not been charged. The evidence does not

disclose that the stage had yet been reached when it was necessary for the police to inform him of the nature of any charge, but in any event, the appellant well knew that the search was for drugs. By the time of the record of interview, the appellant had been formally arrested and knew of the nature of the charges. If the Crown had sought to tender the record of interview at the trial it could not have been refused admission on this ground. In our opinion, it has not been shown that the police acted unfairly to the appellant in not revealing to him that the police had recorded the numbers on the notes.

[22] The second limb of Mr Tippett's submission related to the inability of the appellant to produce the witness Scott. It was put that this somehow resulted from the failure to inform the appellant about the recording of the money. It is difficult to see how one flows from the other, but, if the appellant was at a disadvantage because of Scott's disappearance, his remedy was to have sought an adjournment of the trial. No complaint is made in this connection.

[23] In conclusion, there is no substance to grounds 1 and 2 of the appeal, which must be dismissed.

Ground 9

[24] At the trial, the appellant gave evidence that he had met Fraser and Scott at a party about seven months before the "raid". He said he had seen Fraser once or twice after that at Squires but had not seen or spoken to him for at

least four months prior to the raid. He said that about five or six months before the raid, a friend had brought Scott around to his home, in order to sell a blue Kawasaki motor cycle. The appellant said that he later agreed to purchase the bike for $2,000 and he gave $1,200 to Scott on account. Later, he changed his mind and sought to get his money back. Scott brought him the $1,200 that morning. This money was part of the money found by the police in his unit. He claimed that Scott had "set him up" and had to have been the police informant. The appellant was cross-examined at some length by the prosecutor about this story. Suffice it to say that the account he gave lacked credibility.

[25] During his address to the jury, the prosecutor said:

> I suggest to you that what Mr Miles said from the witness box was largely – on all the significant events – just a pack of lies.

It was not suggested by the prosecutor that the jury could, if satisfied that the appellant had lied on his oath, use this to draw an inference of guilt.

[26] Nevertheless the learned trial judge, in his summing up to the jury, decided to give a direction in accordance with *Edwards v The Queen* [1993] 178 CLR 193 in relation to lies from which an inference of guilt might be drawn, and his Honour identified as "the lie" the appellant's evidence concerning how he came in to possession of some of the money later found in the flat from, so he said, Rick Scott.

[27] Counsel for the appellant, Mr Tippett, submitted that his Honour erred in giving a lies direction at all, because the Crown had not asserted that an inference of guilt could be drawn from the alleged lie. Nevertheless, it was incumbent upon his Honour to have so directed the jury if the evidence was such that it was open to the jury to conclude that the appellant had lied, and that it was open to the jury to conclude that the lie could give rise to an inference of guilt. In our view the evidence did fit that description, and there was no error by the learned trial judge in the giving of that direction.

[28] Mr Tippett complained about his Honour's directions to the jury in three respects. First, it was suggested that his Honour's directions placed an evidentiary onus on the accused to call evidence in support of his story as to how he came to be in possession of the money. We do not accept this contention. Secondly, it was submitted that his Honour erred in not drawing to the attention of the jury the evidence of the appellant's girl friend, Susan Bunker, who it was submitted corroborated the appellant's evidence concerning the money being brought around by Scott. Ms Bunker did give evidence that Scott had come to the unit that Sunday morning and that she heard the appellant and Scott talking about the sale of a motor bike, and involving a sum of money of about $1,000. However she did not see Scott give any money to the appellant. Nevertheless Ms Bunker's evidence was some support for the appellant. However, his Honour referred the jury to her evidence in some detail (AB652-3). We do not consider that there is any substance to this complaint. Thirdly, it was suggested that the trial judge

failed to tell the jury that, before concluding that the appellant had lied, the jury had to be satisfied that he had lied beyond reasonable doubt. However, in this case, such a direction would have been in error. In *Edwards v. The Queen, supra,* Deane, Dawson and Gaudron JJ said at 210:

> Although guilt must ultimately be proved beyond all reasonable doubt, an alleged admission constituted by the telling of a lie may be considered together with the other evidence and for that purpose does not have to be proved to any particular standard of proof. It may be considered together with the other evidence which as a whole must establish guilt beyond reasonable doubt if the accused is to be convicted. If the lie said to constitute the admission is the only evidence against the accused or is an indispensable link in a chain of evidence necessary to prove guilt, then the lie and its character as an admission against interest must be proved beyond reasonable doubt before the jury may conclude that the accused is guilty. But ordinarily a lie will form part of the body of evidence to be considered by the jury in reaching their conclusion according to the required standard of proof. The jury do not have to conclude that the accused is guilty beyond reasonable doubt in order to accept that a lie told by him exhibits a consciousness of guilt. They may accept that evidence without applying any particular standard of proof and conclude that, when they consider it together with the other evidence, the accused is or is not guilty beyond reasonable doubt.

In this case, the evidence against the appellant in relation to both counts upon which he was convicted was circumstantial. The existence of a lie as an admission was not the only evidence of guilt; nor was it an indispensable link in a chain of evidence necessary to prove guilt. The Crown relied upon a number of pieces of separate evidence, none of which individually proved the appellant's guilt beyond reasonable doubt, but when combined together gave rise to inferences of a stronger character; the presence of the money in the appellant's flat; the presence of heroin in the ground near the swimming pool; the evidence of the appellant's admission that he knew where the

heroin was to be located; and the evidence as to the identical chemical characteristics of the heroin sold to Informant 29 in the balloon and the heroin found near the pool. The lies by the appellant merely added further weight to the conclusion that he was guilty beyond reasonable doubt of both charges. We would therefore reject this argument.

[29] Mr Tippett's other complaints about his Honour's directions concerning lies are also without substance. It was put that the jury should have been instructed that in assessing whether a lie had been told, the jury could have regard to the fact that the appellant was not told of the "marked money" until the committal at which time the appellant had become forensically disadvantaged due to the fact that Scott was unavailable. There is no substance to this submission. The appellant is no fool. It must have been obvious to him that he would be called upon to account for the money very soon after the time of his arrest. Next, Mr Tippett complained that the learned trial judge should not have suggested to the jury that acceptance of the police evidence might clearly show that the appellant was telling a lie. In fact, his Honour went on to say why, (in some detail) such an inference might not be able to be drawn. However, leaving that aside, we do not consider that any error has been shown. Acceptance of the Crown's evidence could well give rise to the inference that the appellant had lied on his oath. In any event, as the jury had the opportunity to see and hear the appellant's evidence, this was a matter of assessing the appellant's credibility: see *Edwards, supra* at 200 per Brennan J.

[30] Mr Tippett submitted that the inference of guilt flowing from a lie about the money could only go to the charge relating to supply and not to possession. We reject that submission as, in our opinion, all of the pieces of circumstantial evidence were relevant to both charges. In this respect, the case is very different from that of *Qian Li Zheng* [1995] 83 A Crim R 572 to which we were referred, where the only evidence that a lie had been told was by a process of circular reasoning. In that case, the Crown did not rely upon circumstantial evidence of the kind relied upon by the Crown in this case, so that no process of circular reasoning is here involved.

[31] We would therefore dismiss this ground of appeal.

Ground 13

[32] This ground raised the adequacy of his Honour's directions concerning the alleged admission. In accordance with *McKinney v The Queen; Judge v The Queen* [1991] 171 CLR 468, the learned trial judge was required to warn the jury of the danger of convicting the appellant on the basis of that evidence alone, and to draw to the jury's attention the matters referred to by Mason CJ, Deane, Gaudron and McHugh JJ at p476.

[33] Mr Tippett for the appellant submitted, that the learned trial judge's directions were inadequate for the following reasons. First, it was said that his Honour should have told the jury that police witnesses are often practised witnesses and it is not easy to determine whether a practised witness is telling the truth. There is no substance to this submission; such a

direction was in fact given: AB643. Next, it was submitted that a number of matters which brought the reliability of the alleged admission into question were not drawn to the jury's attention. His Honour did draw to the jury's attention the fact that the appellant was under arrest in a room on his own with the two detectives and therefore that he had no opportunity to have available any corroboration of his evidence. Otherwise, there was no specific direction as to any other matter which might have cast doubt on whether the confession was or was not made. But, to be blunt about it, there was nothing else that his Honour could have pointed to which cast any such doubt. To our minds, none of the matters to which Mr Tippett referred, whether considered individually or separately, advance a case casting any doubt on this question; rather, they are either neutral or at best argumentative. His Honour, during his charge, did draw attention to the evidence relating to some of these matters, albeit not in the specific context of the reliability of the evidence of the alleged admission. None of the matters to which Mr Tippett referred were made the subject of submission by the appellant in his address to the jury. Mr Tippett suggested, for instance, that his Honour ought to have directed the jury that the police had departed significantly from standard procedures in failing to electronically confirm the substance of the admission (see *Black v. The Queen* [1993] 179 CLR 44 at 54), but there was no evidence of this. At best, the position was that the police had failed to comply with s142 of the Act. Had his Honour told the jury of that, the jury would also have had to have been told that this

meant that the evidence was inadmissible unless the trial judge decided nevertheless that the admission of the evidence would not be contrary to the interests of justice. It is difficult to see how such a direction could have assisted the appellant. In all the circumstances, there is no substance to this ground of appeal which must be dismissed.

Grounds 7, 8 and 9

[34] These were not pursued at the hearing, and we take them to have been abandoned.

Ground 11

[35] Leave is required for this ground: see *Rostron v. The Queen* [1991] I NTLR 191 at 205. In order to obtain leave, the appellant must show that he has at least an arguable case. The appellant has not complied with the rules of this Court regarding leave. We venture to repeat what was said in *Rostron* at 195-196. However, no point is taken by the Crown which has been content to argue this ground as if leave had been granted. In those circumstances, we consider leave (and any extension of time necessary) should be granted.

[36] The appellant put three main submissions in support of this ground. First, it was submitted that the verdicts were unsafe and unsatisfactory because of the "misdirections and non-directions" earlier ruled upon, and because there was evidence admitted (viz the alleged admission) which ought to have been

excluded. As there is no substance to any of these matters, this submission must be rejected.

[37] Next it was submitted that "on an examination of the whole of the evidence and the conduct of the trial of the appellant as an unrepresented accused the verdicts were unsafe and unsatisfactory". Having considered the whole of the evidence and made our own independent assessment of it, we are unable to conclude that the jury, acting reasonably, ought to have entertained a reasonable doubt. Mr Tippet did not advance any specific line of argument to support this ground along the lines, for example, of that suggested in *M v The Queen* [1994] 181 CLR 487 at 494. Nor is the fact that the accused was unrepresented a factor in this case to weigh in the balance, it not being suggested that there was any unfairness to him in the trial proceeding in the absence of his having legal representation, or in the learned trial judge failing to provide him with appropriate assistance.

[38] Mr Tippett drew our attention to some specific matters in aid of this ground which need special mention. The first is that the record of interview was not put into evidence at the trial, although the appellant wanted it to go before the jury. There is no basis to this complaint. The prosecutor was not obliged to tender the record, which contained no admission, and which in some respects contained prejudicial material. It is, to say the least, doubtful whether the record was admissible as it contained no admissions against interest. Be that as it may, the record was clearly inadmissible at the behest of the accused. The accused apparently wanted the record to be admitted to

prove certain matters raised by the police with him during the record. It was open to the accused to put those matters to the police in cross-examination, and, if they were not admitted, to put the record of interview (or the tape recording of it) to the witness with a view, if necessary, to tendering the tape if the matters thereon were denied (a highly unlikely scenario). The appellant well knew he could cross-examine on the contents of the record of interview and he in fact did so during the trial. There is therefore no substance to this submission.

[39] Mr Tippett's second complaint was that the learned prosecutor was allowed, in re-examination of Detective Klingsporn, to read into evidence the contents of the notes of the alleged admission. It is difficult to see how this could be justified, and in the end, Mr Adams for the Crown did not attempt to do so. Mr Adams' submission was that his purpose was to counteract a suggestion made in cross-examination that no notes of the alleged admission were made at all. Assuming that such a suggestion had been made by the appellant, the proper course would have been to tender the notes rather than read the contents of the notes to the jury, and the trial judge should then have directed the jury as to the limited use which could be made of the notes. This did not happen. Nevertheless, we do not consider that the verdict is for this reason unsafe or unsatisfactory; or to put it another way, we are satisfied that no substantial miscarriage of justice has thereby actually occurred. It was never suggested by either the trial judge or the prosecutor that the existence of the notes added any weight to the Crown's

submission that the alleged admission had in fact occurred. The matter of the notes was not made the subject of any further comment. It is difficult to see how the evidence of the contents of the notes may have been of any forensic assistance to the Crown.

[40] Another small point referred to by Mr Tippett is an apparent mistake in the trial judge's summing up about whether or not the witness Susan Bunker knew Fraser. His Honour, according to the transcript, referred to two passages, one in examination-in-chief where she said she did not know Fraser, and one in cross-examination, where she said she did know Fraser. In fact Miss Bunker maintained in both cross-examination and in evidence-in-chief that she had never met Fraser. No point was made by either the learned trial judge or by anyone else that this was a discrepancy which affected the quality or cogency of her evidence. We are satisfied that if the learned trial judge did mistakenly tell the jury that Ms Bunker had said in cross-examination that she knew Fraser, that this error is of no consequence. Accordingly, we would dismiss this ground as well.

Conclusion

[41] We order as follows:

1. leave to appeal against conviction on the grounds that the verdicts were unsafe and unsatisfactory be granted;

2. the appeal be dismissed;

3. the application for leave to appeal against sentence be adjourned to a date to be fixed.