CITATION:	*The King v Cameron; The King v Wunta* [2024] NTSC 64
PARTIES:	THE KING
	v
	CAMERON, Thesilannias and WUNTA, Melissa
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory Jurisdiction
FILE NOs:	22234099 & 22234101
DELIVERED:	29 July 2024
HEARING DATE:	25 July 2024
JUDGMENT OF:	Grant CJ

REPRESENTATION:

Counsel:

Crown:	T Grealy
Accused Cameron:	M Whelan
Accused Wunta:	A McCowan

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Accused Cameron:	Michael Whelan & Associates
Accused Wunta:	North Australian Aboriginal Justice Agency
Judgment category classification:	C
Judgment ID Number:	GRA2411
Number of pages:	20

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The King v Cameron; The Queen v King [2024] NTSC 64
Nos 22234099 & 22234101

BETWEEN:

THE KING

-V-

THESILANNIAS CAMERON

AND

MELISSA WUNTA

CORAM: GRANT CJ

REASONS FOR DECISION
(Delivered 29 July 2024)

[1] The accused are charged jointly with unlawfully causing serious harm to the first victim. The accused Cameron is also charged with the aggravated assault of a second victim and the aggravated assault of, and engaging in conduct that gave rise to a danger of serious harm to, a third victim. The accused Wunta is also charged with engaging in conduct that gave rise to a danger of serious harm to the second victim. Wunta is Cameron's mother.

[2] Those offences are alleged to have been committed on 2 November 2022. By notices dated 13 May 2024, the Crown has advised of its intention to adduce hearsay evidence of previous representations made

by two now deceased witnesses pursuant to s 65(2) of the *Evidence (National Uniform Legislation) Act 2011* (***ENULA***). The medical certificate annexed to the first notice certifies that the deceased John O'Keefe Snr died on 27 February 2023 of coronary artery disease. The letter from the Coroner's Constable annexed to the second notice certifies that the deceased Gabriel O'Keefe died on 17 October 2023 and that his death is the subject of a continuing coronial investigation.

[3] The preliminary question for determination is whether the representations made by those now deceased witnesses are admissible under s 65(2) of the *ENULA*; and, if they are, whether the evidence must nevertheless be excluded under s 137 of the *ENULA*.

The Crown case

[4] The Crown case is that on the day in question the first, second and third victims, together with the deceased Gabriel O'Keefe, drove to Wunta's residence in the Minyerri community in pursuance of an inter-family grievance. Wunta and Cameron came into the front yard of the premises on their arrival. The first victim got out of the vehicle and challenged Cameron to a 'fair fight'. Wunta and Cameron threatened to kill the first victim, and ran out of the yard towards the opposing group. Cameron was armed with a tomahawk and a hammer.

[5] The first victim attempted to hide behind the third victim. Wunta took the tomahawk from Cameron and approached the first victim. Cameron

then swung the hammer over the third victim's shoulder and hit the first victim with it. Wunta then struck the first victim to the right side of his face with the tomahawk. The first victim fell to the ground and Wunta and Cameron struck him to the head and face multiple times using those same weapons.

[6] The second victim then approached Wunta telling her to stop assaulting the first victim. The second victim took hold of the tomahawk and a struggle ensued. Cameron then threw the hammer at the second victim striking him in the chest. As a consequence, the second victim lost his grip on the tomahawk, whereupon Wunta threw it at him with force causing it to fly over the top of his head. Wunta then struck the second victim to the back and attempted to strike him in the head with a tent pole. The second victim deflected the second blow with his right forearm. Wunta then struck him in the stomach with the tent pole.

[7] At some point that morning, the deceased John O'Keefe Snr had heard that an altercation was taking place and attended the location. When he arrived, he saw the first victim being assaulted by Wunta and Cameron and saw the first victim lying on the ground gravely injured. With the assistance of other family members, the deceased John O'Keefe Snr placed the first victim in a vehicle and took him to the community clinic. The first victim was subsequently evacuated to the Royal Darwin Hospital due to the severity of his injuries.

[8] A short while later the third victim went back to Wunta's residence and chased Wunta and Cameron. Cameron ran inside his house, armed himself with a knife and spear and threw the spear at the third victim narrowly missing him. Cameron then approached the third victim and swung the knife at him. During the course of the ensuing struggle the third victim received a laceration to his left bicep.

The representations

[9] The Crown case is that the first, second and third victims drove to Wunta's residence at about 10 o'clock on the morning in question. The dispute and the infliction of the injuries on the first victim took place at some indeterminate time after that. What can be said in terms of timing is that the emergency call reporting the injury to the first victim was made at 11 o'clock that morning, and police at the Ngukurr Police Station received a report of a disturbance in the Minyerri community at 12:30 that afternoon. Police at the Ngukurr Police Station received a further report at 1 o'clock that afternoon that a young male was being treated for major head injuries inflicted during the course of the disturbance. Police attended at the scene just after 2 o'clock that afternoon.

[10] An attending police officer spoke to the deceased John O'Keefe Snr at the community clinic shortly after his arrival at the scene. The deceased John O'Keefe Snr was the father of the first victim. That conversation was recorded on the police officer's body worn video and

was approximately nine minutes in duration. So far as is relevant for these purposes, the deceased John O'Keefe Snr said that the people who had hit the first victim were Wunta, Cameron and Abraham Riley, that all three were on top of the first victim, and that Riley had started the whole thing after he had returned to the community the previous day. By way of context, Riley had a grievance against the first victim resulting from an altercation which had taken place approximately one month previously, and had challenged the first victim to a fight the previous day.

[11] The attending police officer then arranged for the deceased John O'Keefe Snr to provide a statement at the Minyerri Police Station later that afternoon. That statement took the form of a statutory declaration which was signed by the deceased on that same day. In that statutory declaration, the deceased John O'Keefe Snr said relevantly that:

(a) there was a long-standing animosity between the first victim and Cameron;

(b) about two weeks previously the first victim had been involved in an altercation with Cameron and Riley during which the first victim had inflicted an injury on Riley which required him to be medically evacuated to Darwin;

(c) while in hospital in Darwin, Riley had been threatening revenge on social media platforms;

(d) on his return to the community the previous day, Riley had challenged the first victim to a fight, but a relative of the first victim had fought Riley instead because the first victim was too young;

(e) the deceased John O'Keefe Snr had hoped that the fight would settle the matter, but matters were inflamed when Wunta and Cameron were abusive to the first victim and his brothers in the aftermath of the fight;

(f) the deceased John O'Keefe Snr heard that morning that there was further trouble at Wunta's place and attended at the scene;

(g) on arrival he saw Wunta, Cameron and Riley fist fighting with the first and third victims and another relative, and the two groups throwing stones at each other; and

(h) during the fight the first victim tripped over, whereupon Wunta armed herself with an axe and Cameron and Riley armed themselves with hammers and began hitting the first victim in the head and face with those weapons on multiple occasions before the deceased ran in and pushed them away.

[12] A second attending police officer had been called in from the Mataranka Police Station. After the first victim had been evacuated by Care Flight from the Minyerri community clinic, she drove the deceased John O'Keefe Snr to the Minyerri Police Station to provide a statement to the first attending police officer. She then attended at a

house in the Minyerri community to pick up the deceased Gabriel O'Keefe for the purpose of taking a witness statement from him. She took the deceased Gabriel O'Keefe to the undercover area behind the Minyerri Police Station and took a statement from him. After she had recorded the statement she read it back to the deceased Gabriel O'Keefe and explained the declaration to him. The deceased Gabriel O'Keefe agreed that the contents of the statement was correct and signed the declaration. In that statutory declaration, the deceased Gabriel O'Keefe said relevantly that:

(a) on that morning the first and third victims had come to his house to pick up him and the second victim to go and sort things out 'in a good way' with Cameron;

(b) when they arrived at Wunta's house, she and Cameron ran out of the front door armed with a hammer and an axe and threatened to kill the first victim;

(c) the first victim was hiding behind the third victim when Cameron ran towards them and hit the first victim between his shoulder blades with a hammer while he was looking down;

(d) at about the same time, Wunta ran behind the first victim and hit him to the right side of his face with the axe with great force;

(e) the deceased Gabriel O'Keefe ran in with the intention of fighting Cameron, but ran back to the vehicle after Cameron threatened to kill him while still holding the hammer; and

(f) somebody picked up the first victim and took him to the community clinic.

[13] After making further inquiries, and locating a tomahawk and a knife during a search of Wunta's residence, Wunta and Cameron were arrested at 8 o'clock that night.

The statutory exceptions

[14] The Crown relies on ss 65(2)(b) and (c) of the *ENULA*, which provide:

> 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:
>
> (a) …
>
> (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;

[15] Both deceased are inarguably unavailable to give evidence about the matters contained in the relevant representations. The attending police officers heard and saw the representations being made. The representations made by the deceased John O'Keefe Snr were recorded by way of body worn video and statutory declaration respectively. The representations made by the deceased Gabriel O'Keefe were recorded by way of statutory declaration. Assuming that at least one of the conditions in s 65(2) of the *ENULA* is satisfied, evidence of the

representations may be adduced by tendering the body worn video and the statutory declaration through the relevant attending police officer.[1]

[16] As extracted above, ss 65(2)(b) of the *ENULA* provides an exception for representations made 'shortly after' the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication. The representations by the deceased John O'Keefe Snr were recorded on the body worn video within four hours of the incident occurring, and most probably approximately three hours after its occurrence, and then repeated and formalised by way of statutory declaration approximately two hours after that. The representations by the deceased Gabriel O'Keefe were recorded by way of statutory declaration at or about the same time as the statutory declaration made by the deceased John O'Keefe Snr. There is no doubt that these representations were made 'shortly after' the asserted fact occurred in the relevant sense.[2] The defence concedes that to be so.

[17] There is nothing in the bare surrounding circumstances or in the representations themselves which would suggest that they were a fabrication. The initial representations recorded on the body worn video were made shortly after the incident when the memory of the events was likely to be clear in the deceased's mind. The

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1 *Conway v R* (2000) 98 FCR 204 at [154]; *R v Mrish* (unreported, NSWSC, 4 October 1996).

2 *R v Mankotia* [1998] NSWSC 295; *Conway v R* (2000) 98 FCR 204*; Williams v R* (2000) 119 A Crim R 490; cf *Harris v R* (2005) 158 A Crim R 454, [39]; *R v Gover* (2000) 118 A Crim R 8, [33]; *R v Ryan* (2013) 33 NTLR 123, 131-132 [27].

representations in the statutory declarations were also made upon the very recent memory of the incident when the matter was fresh in the mind of the witnesses making those statements. The representations made by the deceased John O'Keefe Snr on each of those separate occasions are broadly consistent, and details in those representations are corroborated to some degree by observations subsequently made by police in the course of their investigations and by the nature of the injuries sustained by the first victim. The representations made by the deceased Gabriel O'Keefe were similarly corroborated.

[18] The defence point to a number of contextual or extraneous matters which it is said preclude the Crown from satisfying the test that circumstances make it unlikely that the representations were a fabrication. Those factors include that: (a) the alleged offending occurred in the context of an inter-family dispute in which both deceased were members of one of the families involved; (b) all three victims were also members of that family; (c) the representations recorded on the body worn video were made by the deceased John O'Keefe Snr when he was in a distressed state and under no obligation to tell the truth; (d) the representations made by the deceased John O'Keefe Snr identify Riley as one of the antagonists in circumstances where no other witness does so and the Crown does not presently press charges against him; (e) the deceased Gabriel O'Keefe made his statement approximately seven hours after the events in question in

circumstances where he had been in company with the second victim during the intervening period; and (f) the deceased John O'Keefe Snr made his statement in the outside undercover area of the Minyerri Police Station while the deceased Gabriel O'Keefe was making his statement to the second attending police officer at a distance of approximately 10 metres away.

[19] None of those factors, either individually or in combination, preclude a finding that the circumstances made it unlikely that the representations were a fabrication. The bare suggestion of some apprehension of bias due to the familial relationship between the victims and the deceased witnesses does not suggest fabrication. It is beyond doubt that the first victim suffered extensive injuries to his head as the result of being hit with weapons. There is no suggestion that those injuries were inflicted by any member of the O'Keefe family or its allies. As the Crown has submitted, neither of the deceased witnesses had a motive to lie because they were not criminally concerned in the offending and had a clear interest in seeing that the correct person or persons were identified by police and brought to justice.

[20] Although the deceased Gabriel O'Keefe indicated that he wanted the written statement to be read back to him, neither of the deceased witnesses had difficulties communicating orally in English, both had given their statements to investigating police officers with a clear understanding of that context, and both witnesses signed the statutory

declarations in the understanding that it would be an offence to make a false statutory declaration. The suggestion that the statements may have been the product of collusion or contamination is entirely speculative. There is no basis on which to conclude that the physical proximity of the two deceased witnesses while they were giving their statutory declarations to two different police officers in two separate interviews gave rise to fabrication or contamination, and in fact the differences between the two statutory declarations in terms of detail tell against any such conclusion. For similar reasons, there is no basis on which to conclude that the deceased Gabriel O'Keefe in any way colluded with the second victim in relation to the account given.

[21] So far as the deceased John O'Keefe Snr's identification of Riley is concerned, that does not necessarily or compellingly suggest fabrication. Riley was present at the scene, the incident was in the nature of a melee, and in the mind of the deceased witness Riley was integrally involved in the ongoing dispute following his release from hospital and return to the community the previous day. The fact that he has identified Riley as an antagonist in those circumstances does not suggest that his identification of Wunta and Cameron is a fabrication. As juries are routinely directed, a witness may be mistaken in relation to one matter without undermining his or her reliability in relation to other matters. The fact that charges have not been proffered against

Riley reflects only that he is not implicated in the other witness accounts as they presently stand.

[22] Accordingly, I conclude that the representations were made 'shortly after' the event in the sense that they were made 'under the proximate pressure of the asserted fact'[3], and in circumstances that make it unlikely that they are a fabrication.

[23] That conclusion makes it unnecessary to determine whether the representations are also admissible pursuant to s 65(2)(c) of the *ENULA*. The relevant question under that provision is whether the representations were made in circumstances making it 'highly probable' they are reliable. As the discussion in *Ryan* notes,[4] the focus of that inquiry is reliability rather than the unlikelihood of fabrication having regard to the surrounding circumstances. They are quite different considerations, and the test in s 65(2)(b) of the *ENULA* is less stringent than that in s 65(2)(c).[5] However, there are circumstances presenting in this case which are properly taken into account in both those assessments.

[24] In addition to the matters identified in relation to s 65(2)(b) of the *ENULA*, the defence says: (a) the statements of the deceased John O'Keefe Snr and the deceased Gabriel O'Keefe are inconsistent in

3 See *R v Ryan* (2013) 33 NTLR 123, 131-132 [27].

4 *R v Ryan* (2013) 33 NTLR 123, 131-132 [27].

5 See generally, *Priday v R* [2019] NSWCCA 272, [29]–[37].

relation to how the fighting commenced on the day in question; (b) the statement of the deceased Gabriel O'Keefe downplays the commencement of the violence and does not record that the first and third victims were also armed at the time they attended Wunta's house; (c) the statement of the deceased John O'Keefe Snr makes no reference to the violence subsequently inflicted on Wunta and Cameron; and (d) the deceased Gabriel O'Keefe's statutory declaration contains a paragraph stating that it was a hot day and he was feeling dizzy which was subsequently crossed out.

[25] As I have already found, the representations by the deceased John O'Keefe Snr were made in temporal proximity to the incident in question, there is objective evidence and circumstances which corroborate his account, and the relevant representations are materially consistent across both accounts. There is no suggestion that the deceased John O'Keefe Snr was intoxicated, unwell or suffering from any other condition which might have affected the reliability of his accounts as given to the attending police officer. As I have already found in relation to s 65(2)(b) of the *ENULA*, the familial relationship with the first victim and the implication of Riley does not suggest fabrication, and for the same reason does not necessarily bear on reliability in the absence of some further objective basis on which the conclusion might be drawn.

[26] It is also unremarkable that the deceased John O'Keefe Snr may have focused his attention on the first victim given the relative severity of his injuries and the deceased John O'Keefe Snr's involvement in the transportation of the first victim to the clinic, and makes no reference to the alleged assaults on the second and third victims. The defence criticisms of the deceased John O'Keefe Snr's failure to make reference to the commencement of the fighting or the subsequent assaults on Wunta and Cameron are misconceived. The first matter is explicable by the fact that the deceased John O'Keefe Snr did not arrive at the scene until after the fighting had commenced, and the second matter is explicable by the fact that the deceased John O'Keefe Snr was at the clinic with his stricken son when the assaults on Wunta and Cameron are alleged to have taken place. Neither matter has anything to say about the reliability of the deceased John O'Keefe Snr's account in relation to the conduct of Wunta and Cameron in relation to the first victim.

[27] So far as the criticism of the deceased Gabriel O'Keefe's reliability is concerned, it would not appear that he was directed by the interviewing police officer specifically to the question of what the first, second and third victims were or were not carrying when they arrived at Wunta's house. The fact that he made no reference to that matter does not give rise to an inconsistency with the statements by those witnesses who do make reference to weapons in the possession of the first, second and

third victims. It is simply not a matter which is addressed in the statutory declaration made by the deceased Gabriel O'Keefe. The fact that the deceased Gabriel O'Keefe crossed out the particular paragraph in the statutory declaration making reference to dizziness indicates it was not something that he adopted and declared to be true and correct. In any event, the suggested bearing of that matter on the question of reliability is unclear.

[28] It is significant in assessing the probability of reliability that both statutory declarations were given to police on oath. It is also significant that the accounts given by the deceased John O'Keefe Snr and the deceased Gabriel O'Keefe are consistent in their essential respects with the accounts given by other witnesses. Six of those witnesses make reference to Wunta and Cameron being armed with weapons, and most of those other witnesses identify the weapons as a hammer and an axe. All of those witnesses give evidence in one form or another consistent with Wunta and/or Cameron striking the first victim with those weapons.

[29] Of those six witnesses, two are family to Wunta and Cameron rather than being allied to the O'Keefe family. The first of those witnesses recalls Wunta carrying an axe and Cameron carrying a hammer, and Wunta striking the first victim twice with that axe. The second of those witnesses gives an account in which the first, second and third victims dropped their weapons in order to participate in a fair fight,

and the first victim then being hit by Cameron with the hammer and Wunta holding an axe while the first victim was lying on the ground. That evidence runs entirely counter to any suggestion that the implication of Wunta and Cameron by the deceased witnesses is unreliable.

[30] Although strictly unnecessary to do so, I would also conclude that the representations were made in circumstances making it 'highly probable' they are reliable. Of course, that is a judicial assessment concerning admissibility which is based upon the material as it is presented at this preliminary stage. The assessment of the reliability of these representations, and of the other evidence led at trial, will ultimately be a matter for the jury. There is nothing in that conclusion which precludes the defence from attacking the reliability of the deceased's representations at trial and making submissions in the closing addresses that the jury should find them unreliable.

Unfair prejudice

[31] I turn then to consider the defence submission that the probative value of this evidence is outweighed by the danger of unfair prejudice to the accused, and must therefore be excluded by operation of s 137 of the *ENULA*.

[32] There is no doubt that the representations have substantial probative value in the sense that they could significantly and rationally affect the assessment of the probability of the existence of facts essential to proof

of the charges against the accused involving the first victim. Moreover, for the reasons already given, it cannot be accepted that the probative value of the evidence is properly assessed as slight because the circumstances are such that its reliability is fatally undermined or it is plainly a fabrication.

[33] The potential prejudice in admitting these hearsay statements which inculpate the accused is that they are deprived of the forensic advantage of being able to cross-examine the deceased witnesses. The relevant question is whether there is a danger that the jury may use the evidence in some manner that goes beyond the probative value or weight it may properly be given.[6] However, the fact that an accused may be unable to cross-examine a witness, even a crucial witness, is not decisive in balancing probative value against unfair prejudice.[7] Something more will be required to demonstrate a danger of the evidence being misused. Any assertion of unfair prejudice will be somewhat speculative in the absence of some reasonable basis on which to contend or suppose that the deceased witnesses would have resiled from the representations or otherwise contradicted their statutory declarations in evidence.

[34] In the ordinary course, and in the absence of some particular consideration, an accused's inability to test the evidence of a deceased

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6 *Festa v The Queen* (2001) 208 CLR 593, [22]; *The Queen v Dickman* (2017) 261 CLR 601, [48].

7 *R v Suteski* (2002) 137 A Crim R 371, [126].

witness in cross-examination does not give rise to such a danger of unfair prejudice as to outweigh the probative value of the evidence.[8] It is an inevitable consequence of the application of s 65(2) of the *ENULA* that the accused will not be able to cross examine the person who has made the previous representations. It will always be the case that the representations relate to disputed facts on which cross examination could have occurred if the witness had been available.[9] The discretionary exclusions cannot be applied in a manner to render s 65(2) of the *ENULA* effectively inoperative.[10]

[35] The hearsay representations in question are not of low probative value due to vagueness or generality, and in making an assessment of unfair prejudice it is not open to this court to engage in any assessment of the credibility or reliability of those representations. This is also not a case in which the hearsay representations made by the deceased witnesses form the only direct evidence going to the elements of the offending conduct concerning the first victim. The fact that there are other witnesses reduces the potential prejudice to the accused. This is not an 'oath on oath' case in which the only inculpatory evidence comes from a deceased witness no longer amenable to cross-examination. To the extent that defence counsel say the receipt of the hearsay representations deprives them of an opportunity to interrogate

8 *Priday v R* [2019] NSWCCA 272.

9 *Prasad v R* [2020] NSWCCA 349.

10 *R v Ashley* (2014) 253 A Crim R 285, [10].

the detail of what was described as a ‘complicated morass of moving parts’, that interrogation may be conducted with a multiplicity of other witnesses.

[36] Moreover, the fact that there are other witnesses speaking to the same incident does not reduce the probative value of the hearsay representations. The availability to the Crown of other evidence going to the same issues does not bear upon the cogency of the hearsay representations in the assessment of the probability of the existence of the relevant facts. It simply means that the hearsay representations are not essential in the sense of being the only evidence in support of the Crown case. That is a matter which goes to the importance or significance of the hearsay representations in the matrix of the Crown case, rather than their intrinsic probative value. Any potential prejudice or injustice to the accused can be ameliorated by appropriate directions in relation to the assessment of the hearsay representations such that it does not outweigh the probative value of the evidence.

Ruling

[37] The ruling on the matter for preliminary determination is that the representations particularised in Table A of each of the Crown’s notices of intention to adduce hearsay evidence dated 13 May 2024 are admissible pursuant to s 65(2) of the *ENULA*.
