CITATION:	*The Queen v Doolan* [2019] NTSC 53
PARTIES:	THE QUEEN, v DOOLAN, Sharon
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	21757771
DELIVERED:	28 June 2019
HEARING DATES:	27 June 2019
JUDGMENT OF:	Graham AJ

CATCHWORDS:

CRIMINAL LAW - EVIDENCE – HEARSAY EVIDENCE – Evidence (National Uniform Legislation) Act 2011 (NT) – s65(2)(b) – s137 – exceptions to hearsay rule – admissibility – maker unavailable – whether probative value outweighs danger of unfair prejudice to defendant – risk of prejudice – whether statement made is considered to be shortly after asserted fact – temporal connection – whether statement is unlikely to be a fabrication.

The Queen v Ryan [2013] NTSC 54; *Azizi v The Queen* (2012) 224 A Crim R 325; *Sio v The Queen* (2016) 334 ALR 57; *Williams v The Queen* (2000) 119 A Crim R 490; *Lee v The Queen* (1998) 195 CLR 594; *The Queen v Davis* [2008] 1 AC 1128.

Evidence (National Uniform Legislation) Act 2011 (NT) s 65(2)(b), s137.

REPRESENTATION:

Counsel:

Appellant:	M Penman
Respondent:	D Cooper

Solicitors:

Appellant:	Director of Public Prosecutions
Respondent:	North Australian Aboriginal Justice Agency

Judgment category classification:	B
Judgment ID Number:	Grah1905
Number of pages:	7

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

The Queen v Doolan [2019] NTSC 53
No.21757771

BETWEEN:

THE QUEEN
Appellant

AND:

SHARON DOOLAN
Respondent

CORAM: GRAHAM AJ

REASONS FOR JUDGMENT

(Delivered 28 June 2019)

Introduction

[1] The accused is charged with causing serious harm to Kerriane Malbunka ('the victim'). The trial is due to commence before Hiley J on 2 July 2019 however the victim died from unrelated causes on 19 June 2019. An application has been brought before me on 27 June 2019 by the Crown to admit into evidence a statement made by the victim a few days after the incident in which she allegedly was seriously harmed by the accused ('the incident'). The application is opposed by the defence.

[2] The victim made a statement to police on 3 July 2017, seven days after the incident which occurred on 26 June 2017. The statement describes the assault.

[3] At the voir dire on 27 June 2019 the Crown called evidence from Constable Zendeli, a police officer who obtained the statement from the victim. It appears from the statement that the victim had difficulty with the English language and she stated that she could not read or write English very well and the statement was read to her by officer Zendeli.

[4] The issue that confronts me is whether the statement would be admissible under s 65(2)(b) of the *Evidence (National Uniform Legislation) Act 2011* (NT) ('ENULA'). The Crown submit that although a period of seven days had elapsed between the incident and the making of the police statement, the signed statutory declaration should be viewed as being given 'shortly after' the incident. I was referred to *The Queen v Ryan*[1] by the Crown, in which Kelly J held that an oral statement made four days after an event could be categorised as 'shortly after' for the purposes of s 65(2)(b). In that case, the statement which was the subject of the application was that of a witness to an assault. Her Honour noted that the emphasis in the section is on admitting evidence that was unlikely to have been fabricated. For that reason the section required the statements be made at the time the asserted fact occurred or 'shortly after' the asserted fact occurred. It would seem to me

1 [2013] NTSC 54.

that one needs to carefully examine the facts of each particular case to conclude whether the evidence falls within the section and though the temporal aspect of the evidence is clearly highly significant, one must view the time period in the light of the particular circumstances. The Crown pointed out that the statement was made in a hospital to a police officer, after a further contretemps with the accused. It was argued that in these circumstances the statement was unlikely to have been fabricated. I was referred to two 000 calls made on 26 June 2017 by the victim, where in one call she said she was hit by a walking stick on the arm and in the other call said she was hit with crutches on the elbow. The Crown as part of the voir dire also tendered statements from two police officers, an officer Parbs and an officer Watson. The former had attended the home of the victim on 26 June 2017 and the latter attended the Alice Springs Hospital on 2 July 2017 where the victim had been admitted.

[5] The defence submitted that the burden rests with the person seeking to adduce hearsay evidence, in this case the Crown. I accept that this submission is correct.[2] I also accept that a court has to reach a state of positive satisfaction as to the preconditions of the section before it can rule evidence as admissible.[3] The High Court in *Sio v The Queen*[4] made it clear that a court should act in a cautionary way when considering whether or not to admit hearsay statements inculpating an accused.

2 *Azizi v The Queen* (2012) 224 A Crim R 325 at 338.

3 *Sio v The Queen* (2016) 334 ALR 57 at 72.

4 Ibid at 69.

[6] I conclude that in considering the phrase ‘shortly after’, the foremost consideration is simply temporal. In this case, there was a delay of seven days between the incident and the statement. I was referred to the full Federal Court decision of *Williams v The Queen*[5] where the court stated ‘indeed, 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 ‘soon after’ it’. I conclude that the provision is not based only upon the necessity to make sure the events in question may easily be recalled. More significantly the provision in the *Evidence Act* is intended to allow evidence to be called that is unlikely to be fabricated. In support of this aim, statements are to be admitted that are made spontaneously or under proximate pressure. Hence the term is ‘shortly after’. It was pointed out in submissions by defence counsel that in the 000 calls the victim stated she was struck on the elbow and not the hand. In the statement of officer Parbs he did not recall the victim having any visible injuries or complaining of assault on the night the assault is alleged to have occurred. I was also referred to the statement of officer Watson who noted that his attendance at Alice Springs Hospital was regarding threats made against the victim and that during that conversation the victim raised the earlier assault. I accept that bearing in mind the above circumstances, the seven day delay has removed the statement of the victim from inside the temporal realm of

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5 (2000) 119 A Crim R 490 at 502.

statements that may be considered to be reliable because they are either spontaneous or during the proximate pressure of events.

[7] Notwithstanding my conclusion that the temporal element of the section has not been satisfied I will look to whether the Crown has established that it is unlikely that the representation is a fabrication. I conclude the inconsistency, minor though it is, made to the 000 operators and, more significantly, the lack of complaint of assault to Officer Parbs on the night of the incident point to circumstances suggesting fabrication. It is up to the Crown to satisfy the court that the representation is made in circumstances that make it unlikely that the representation is a fabrication. It is not up to the accused to prove this. In the circumstances of this case I conclude that the Crown has not discharged its onus and the consequence is that the evidence will not be permitted to be adduced.

[8] Notwithstanding my above finding I will go on and deal with the issue of likely prejudice. Pursuant to s 137 of the ENULA in criminal proceedings a court must refuse to admit evidence adduced by the prosecution if the probative value of the evidence is outweighed by the danger of unfair prejudice to the defendant. On one hand, clearly the statement is of prime importance to the Crown case. I am told that without that statement the case would collapse and a nolle prosequi will be entered. On the other hand, the prejudice to the accused of having a statement from an alleged victim

tendered to a jury is very great indeed. The High Court in *Lee v The Queen*[6] has stated that 'confrontation and the opportunity for cross examination is of central significance to the common law adversarial system of trial'. Lord Bingham in the House of Lords case of *The Queen v Davis* [7] said 'it is a long established principle of the English common law that, subject to certain exceptions and statutory qualifications, the defendant in a criminal trial should be confronted by his accusers in order that he may cross-examine them and challenge their evidence'. Since the introduction of ENULA more out-of-court statements tend to be admitted as a consequence of the watering down of the common law rules relating to hearsay. There are however, some important fundamental principles that apply to criminal trials. In the first place, as previously noted, an accused person should generally be given the opportunity to test contrary evidence in cross-examination. This is particularly so in a case where there are no independent witnesses to the incident itself and the case would largely rest on an assessment of the two conflicting versions of what occurred. In this case, the various inconsistencies that I previously referred to would have provided fodder for a cross-examiner. In addition, the victim told one of the 000 operators that she did not know who the accused was. I refer to this matter simply as another issue that a cross-examiner may have raised with the victim if she had been alive and able to give evidence. In this case, there has been no cross-examination at an earlier date either at committal or a Basha inquiry.

6 (1998) 195 CLR 594 at 32.

7 [2008] 1 AC 1128, [5].

It is also important that a jury have the opportunity to observe the demeanour of witnesses. Thirdly, it is a basic right of an accused to confront the accuser and this is denied in these circumstances.

[9] I would add there are other matters that support exclusion. It would be an exercise in futility to warn the jury about the danger of relying on untested evidence in circumstances when that evidence is almost the only focus of the Crown case. Also to admit the evidence would be, for practical purposes, to reverse the burden of proof, as the accused would inevitably have to give evidence.

[10] It is my conclusion that the prejudice to an accused person in these circumstances is very great indeed and outweighs the substantial probative value of the evidence. I would therefore exclude the evidence of the statement on the grounds of s 137 of the ENULA.

[11] For the above reasons the evidence is excluded.