CITATION:	*The King v Poudel* [2024] NTSC 108
PARTIES:	THE KING
	v
	POUDEL, Rahul
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	22324858
DELIVERED:	20 December 2024
HEARING DATES:	17, 18, 19, 20 June 2024
JUDGMENT OF:	Blokland J

CATCHWORDS:

Evidence – DNA evidence – whether DNA evidence relevant in circumstances of mislabelled samples when samples could have been taken from perianal area or from penis alleged victim – where significant evidence of possibility of indirect transfer cannot be excluded – whether evidence should be excluded as irrelevant or of insufficient probative value – evidence admitted – Admissions – whether circumstances in which admissions made adversely affected reliability of admissions in EROI – whether *Police Administrations Act* complied with – EROI excluded.

Statutes:
Criminal Code 1983 (NT) s 241, 188, 127, 186AA
Evidence (National Uniform Legislation) Act 2011 (NT) ss 55, 85, 131, 138
Police Administration Act 1978 (NT), ss 140, 143

DPP v Wise (a Pseudonym) [2016] VSCA 173; *IMM v The Queen* (2016) 257 CLR 300; *R v Ali* [2015] NSWCCA 72; *R v GZ* [2015] ACTSC 229; *R v Joyce* (2002) 173 FLR 322; *R v XY* [2013] NSWCCA 121; 84 NSWLR 363; *Shamouil v The Queen* [2006] NSWCCA 112; 66 NSWLR 228; *The Queen v Bonson* [2019] NTSC 22; referred to.

REPRESENTATION:

Counsel:

Crown:	T. Grealy
Accused:	B. Wild/J. Stuchbery

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Accused:	Ward Keller

Judgment category classification:	B
Judgment ID Number:	BLO2413
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The King v Poudel [2024] NTSC 108
No.22324858

BETWEEN:

THE KING
Crown

AND:

RAHUL POUDEL
Accused

CORAM: BLOKLAND J

RULING ON VOIR DIRE

(Delivered 20 December 2024)

Background

[1] Rahul Poudel (the accused) is to be tried by a Supreme Court jury on 5 counts on an indictment dated 16 June 2024.

[2] On 17 June 2024 he entered pleas of guilty to 3 counts and pleas of not guilty on the 5 remaining counts. The pleas of **guilty** were entered to the following counts:

> Count 3, on 6 August 2023, cause damage to property belonging to another person, namely RR contrary to s 241(1) of the *Criminal Code*.

> Count 4, on 6 August 2023, unlawfully assaulted RR, with circumstances of aggravation, contrary to s 188(1)(2)(a)(b)(k) of the *Criminal Code*.
>
> Count 8, on 6 August 2023, cause damage to property belonging to another person, namely RR contrary to s 241(1) of the *Criminal Code*.

[3] He entered pleas of **not guilty** to the following 5 counts on the indictment referred to above:

> Count 1, on 6 August 2023, committed an act of gross indecency upon RP, a child under the age of 16 years; aggravated by circumstances that the child was under the age of 10 years, namely 6 years old contrary to s 127(1)(b)(3) of the *Criminal Code*.
>
> Count 2 being an alternative to count 1, on 6 August 2023, indecently dealt with RP a child under the age of 16 years; aggravated by circumstances that the child was under the age of 10 years, namely 6 years old contrary to s 132(2)(a)(4) of the *Criminal Code*.
>
> Count 5, on 6 August 2023, being in a domestic relationship with RR, intentionally choked, strangled or suffocated RR and RR did not consent (to the choking etc.) and Rahul Poudel was reckless as to the lack of consent contrary to s 186AA of the *Criminal Code*.
>
> Count 6, on 6 August 2023, with intent to cause fear made a threat to kill RR which threat was of such nature as to cause fear to any person of reasonable firmness and courage contrary to s 166 of the *Criminal Code*.
>
> Count 7, on 6 August 2023, unlawfully assaulted SB, aggravated by the circumstances that SB suffered harm pursuant to s 188(1)(2)(a) of the *Criminal Code*.

[4] The Crown case summarised from the Outline of Crown Case is as follows:

> The complainant in counts 3, 4, 5, 6 and 8 is the accused's wife. The child complainant in count one and the alternative count 2 is RP, the

biological son of the accused and RR. SB, the complainant in count 7, is the accused's housemate. The accused and the complainants lived at a share residence with the accused's and RR's two year old daughter, and another two males.

The Crown allege that the relationship between the accused and RR had been violent in the past.

On 6 August 2023, the accused, his family and a number of friends were celebrating the birthday of SB at the residence. The accused and the guests were consuming alcohol.

At approximately 9:30pm, RR decided to put their children to bed. She put them to bed in the downstairs section of the house, the family bedroom. She then also went to sleep with the two children on the mattress closest to the bedroom door.

At approximately 11:30pm, RR woke up from a noise, and decided to clean up after the party leaving the two children sleeping. She went to the kitchen and saw SB. He informed her that the accused was intoxicated and had been fighting someone outside SB and RR tidied the kitchen together.

It is alleged that while RR was in the kitchen, the accused went into the family bedroom, lay down on the bed and pulled down RP's shorts exposing his buttocks whilst RP was sleeping on his stomach. It is alleged that he put his mouth to RP's anus, alternatively that his mouth was above or in the vicinity of RP's anus.

RR returned to the bedroom and as she was walking in heard a sucking noise. Her view of the bed was obscured by a set of wire drawers so she went around to the mattress to see what was occurring.

As she got around the drawers, she saw the accused on the mattress, kneeling over RP who was still sleeping. She saw that RP's shorts were pulled down and his buttocks were exposed. (In the pre-recorded evidence RR said she could see the bottom half of RP's crack.)[1] The accused was bent with his head over the top of RP's buttocks but not touching him. The accused was looking down

1 Transcript, 18 June 2024 at 7.

towards RP's buttocks and making a sucking noise. (In in the pre-recorded evidence RR said she 'heard a licking kind of noise.' She could see 'the shadow, not exactly the person'.[2]

RR was shocked and said "what are you doing Rahul". The accused pulled RP's shorts up, then turned over, looked at RR and said "what?" RR said "what are you doing to RP I saw you with my own eyes". The accused said "did I do wrong? Sorry am I gay?"

RR became concerned for the safety of the children and attempted to drag the accused from the room, telling him to sleep on the couch until he sobered up. The accused cuddled RP who was still sleeping and said "I don't want to go".

The argument between the accused and RR was overheard by SB who called out to the accused to calm down and come outside. The accused alleged RR of having an intimate relationship with SB and refused to leave the room. Both of the children woke up.

RR told the accused that if he wasn't going to listen to her, she was going to call the police. RP started crying and told her not to send his dad to goal. RR walked out of the bedroom and the accused locked himself in the room with the children.

RR tried to dial 000 on her mobile phone. As it took time to connect, the accused grabbed the phone from her and ran with it. She followed after him. The accused then smashed the phone against the ground, breaking it in order to prevent her from calling the police.

The accused took RR by the hair and dragged her to the alfresco area. The accused punched her on three separate occasions whilst she attempted to flee from him, which caused her to fall to the ground. He pulled her shirt and made it come off which left her torso exposed. RR ran back into the bedroom to grab another shirt to cover herself.

The accused dragged her back out. He punched her at least once, which was seen by SB and the two children who had run after them. The children were crying and distressed.

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2 Transcript, 18 June 2024 at 6.

The accused grabbed RR around the throat with both hands and choked her. He dragged her back towards the house. He slapped her to the face a number of times whilst saying that he planned to kill her and SB. He said words to the effect of “okay I want to kill you”.

SB attempted to intervene and the accused punched him to the face while holding a mobile phone in his hand, which caused him immediate pain. During this time RR ran upstairs with her daughter.

SB fled to the back of the house and called police to report the incident. While he was waiting to be connected, the accused located him and asked who he was talking to. SB said he was talking to a friend. The accused punched SB twice to the chest causing him to end the call. SB then fled the residence to a safer location and later called police at 12:36am.

Upstairs, RR knocked on KK’s door who let her in. KK saw that RR looked scared and was bleeding from her mouth and on the left side of her face. When he asked what happened, RR only stated “I can’t be with him anymore” and asked that he call 000.

At 12:25am, KK called the police and passed the phone to RR. While she was talking to police, KK heard the accused come up the stairs so he closed and locked the door. The accused stood at the door swearing and telling KK to open the door. The accused punched the door four times, leaving two holes in the door.

KK eventually opened the door and tried to calm the accused down. The accused entered and tried to grab the phone from RR but KK took it from him saying it was his phone. The accused slapped RR but KK intervened and said he could not hit her.

The accused left the room to find SB saying “where is that motherfucker”. The accused left the room and threatened RR telling her that he would go to Nepal and that he would destroy her life in Nepal. He also told her that she would not be able to stay in Australia because he would find her there as well. He threatened to kill RR and her family.

The accused came in and out of the room a number of times and was followed out by RP. On one occasion, the accused told KK that he

was being accused of molesting his child and said "I am a man, I need sex, I am like a horse I need sex".

At some stage, the accused washed RP's bottom and the shorts that RP had been wearing, in an attempt to remove potential evidence from them because he knew it may implicate him in an offence. RP put on jeans instead.

At 12:52am the accused called police and told them that his wife was bashing him and his kids. While the accused was on the phone, police attended.

On 7 August 2023 at 1:00am the accused was arrested. RP was present and crying, asking when his father was coming back, the accused told him that he wasn't coming back. The accused was put into the back of a police cage and started to yell out swearing and saying that he was going back to Nepal.

Police arranged for RR and RP to attend the Royal Darwin Hospital and a crime scene was established where a crime scene examiner attended.

As a result of the choking, RR suffered scratching and bruising to her neck area. SB suffered facial bruising.

Application to exclude DNA evidence

[5] During the course of the SARC examination, three samples were taken from RP by Dr Gurmeet Singh. Those samples included a buccal swab, penile swab and 'perianal' swab, initially described as a 'perirectal' swab in the SAIK. It was collected from the perianal area.[3]

[6] Mallory McGuiness, a senior forensic biologist who reviewed the expert report by Helen Roebuck gave clarifying evidence that swabs previously

3 Statutory Declaration, Gurmeet Rajinder Singh, 22 October 2023 at [70].

identified ‘OIA’ and ‘OIB’ should read ‘OIB’ and ‘OIC’;[4] the visual description of ‘OIB’ was labelled ‘both penile and perianal swab’ and described as having light grey/brown staining on half of the swab; the swab now labelled ‘OIC’ was described as having light grey staining on about a quarter of the swab.[5]

[7] Ms McGinness’s findings are summarised as follows:

FBL: Sub-sample Description	**Screening/DNA Result and Interpretation**	**Statistical Weighting**
	Item listed as from RP **M2300956.01: SAIK [SARC ID 23-379, Exhibit 610187/001]**	
01A: FTA card	A DNA profile was recovered from a male individual. This profile was used as the reference profile for RP.	
01B: Penile/perianal swab	*Note: Swab was received with two affixed specimen identification labels – “penile swab” and “perianal swab”.* Sperm were not observed on a smear made from the sample. Tested positive to a presumptive test for salvia. A reportable	

4 Statutory Declaration, Mallory McGuinness, at 14.1, Transcript, 17 June 2024 at 8.

5 Forensic Science Branch, SAIK examination sheet, p26, Transcript, 17 June 2024 at 9.

	DNA profile was not recovered.	
01C: Unlabelled swab	*Note: Swab was received with no specimen identification label.* Sperm were not observed on a smear made from the sample. Tested positive to a presumptive test for saliva.	
FBL: Sub-sample Description	**Screening/ DNA Result and Interpretation**	**Statistical Weighting**
	The sample was analysed twice. Mixed DNA profiles were recovered. The profiles were interpreted as coming from two individuals. Assuming RP as a contributor to the profiles, RP could be the other contributor.	The DNA profiles are at least 100 billion times more likely to have occurred if they originated from RP and RP than if they originated from RP and an unknown individual selected at random from the population.

[8] Both samples were subject to a presumptive test for saliva, (the 'RSID' saliva test) a test which can also react with breast milk, urine, faeces and

menstrual blood. The SAIK examination sheet noted positive assay for saliva.

[9] Ms McGuiness also gave evidence about the factors which research has demonstrated may increase or decrease the likelihood of the presence of DNA and its transfer. She referred to a 'wide range of factors'[6] which include the amount of DNA deposited, the types of surfaces involved, and the nature of the contact between the surfaces. Whether or not transfer is likely and the means of detecting DNA after transfer is dealt with in Ms McGuiness's statutory declaration. There is no way to determine which of those factors resulting in transfer could be present.[7]

[10] In cross examination Ms McGuiness acknowledged RP was examined on 7 August 2023 and her observations were made a week later on 14 August 2023. She agreed she had not recorded any odour. As odour was not documented, she could state that it was not noted. Absence of odour was not indicative of a particular bodily fluid.[8] In some cases, an odour of urine or faeces may be detected.[9]

[11] Sample OIB was presumptive for saliva, but no reportable DNA was recovered. The sample was unreportable due to the complexity of the circumstances. Sample OIC was also presumptive for saliva. Neither test can

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6 Statuary Declaration, Mallory McGuiness, 14 June 2024, Transcript, 17 June 2024 at 10.

7 Statutory Declaration, Mallory McGuiness, 14 June 2024 at 11-12; Transcript, 17 June 2024 at 12.

8 Transcript, 17 June 2024 at 11-12.

9 Transcript, 17 June 2024, 13-14.

confirm the presence of saliva. The DNA profile for sample OIC was interpreted as coming from two individuals, at high statistical probability from RP and the accused. Although the error of mislabelling as described above means it cannot be ascertained whether the sample is from RP's penis or RP's perianal region, the Crown submits the evidence makes the impugned conduct more likely to have occurred and therefore is relevant to the Crown case.

[12] The principal objections to the DNA evidence are on the basis of relevance, given the myriad explanations for the presence of the accused's DNA on RP's body, when the part of RP's body which is the source of the accused's DNA cannot be ascertained. Alternatively, it is submitted that even if relevant, the evidence should be excluded under s 137 of the *Evidence (National Uniform Legislation) Act 2016* (NT) ('EUA').

[13] The labelling error was conceded by Dr Singh: 'I inadvertently applied the separate printed labels for the "penile" and "perirectal" swab to the same swab, and then sealed them into the Sexual Assault Investigation Kit. The listed "perirectal" swab was actually collected from the "perianal" area. *Due to the mislabelling, it would not be possible for the laboratory to distinguish the penile swab from the perianal swab*.[10] (emphasis added)

[14] Evidence is relevant under s 55 of the *UEA* if it is evidence that, if it were accepted could rationally affect (directly or indirectly) the assessment of the

10 Statutory Declaration, Gurmeet Singh, 22 October 2023 at 70.

probability of the existence of a fact in issue. Section 55 is concerned with the logical connection between the proffered evidence and its capacity to rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue.[11]

[15] Counsel for the accused contended the principal fact in issue was whether the accused put his mouth to RP's anus or near to his anus when he was making the 'slurping' or 'licking' sound. The Crown case is that the accused deposited his DNA on RP's perianal area. On its case the Crown would be asking the jury to accept sample OIC was taken from RP's perianal area.

[16] Counsel also emphasized a significant competing possibility or probability which arises with respect to the presence of the accused's DNA, namely given the circumstances of how the family lived, the accused's DNA could have equally been deposited by indirect transfer to the perianal area. There was evidence from RR consistent with such a scenario. RP would sleep between two mattresses which were pushed together. All members of the family, including the accused would sleep on those mattresses in close proximity with each other. RP preferred to sleep near the accused.[12] Further, there is evidence the accused at times helped RP to wash his bottom with his left hand, consistent with their cultural practice, after using the bathroom.[13]

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11 *DPP v Wise (a Pseudonym)* [2016] VSCA 173 at [68].

12 Transcript, 18 June 2024 at 24-27.

13 Transcript, 18 June 2024 at 41-42.

[17] The defence submission was that in order for the jury to act on the DNA evidence, the jury would in any event need to be satisfied swab OIC was taken from RP's perianal area in circumstances where it is not known whether the swab was taken from RP's penis or the perianal area. The jury would need to make an assumption about where the DNA was deposited in order to take the next step and find it was deposited by the accused in the perianal area. It was contended that as a matter of logic, a sample taken from RP's penis is entirely incapable of rationally affecting the jury's assessment of whether the accused put his mouth to RP's anus. It was suggested that the only way the jury could favour the Crown's case that the accused put his mouth on RP's anus would be to follow an impermissible chain of reasoning which would start with an assumption that the accused put his mouth on RP's anus. The jury would consequently reason that as there is no allegation that the accused touched RP's penis, swab OIC must be a swab taken from RP's perianal area.

[18] I agree that there are many alternative interpretations available on the evidence. However, that does not mean the evidence is irrelevant. There are certain weaknesses which may be perceived in both the direct evidence from RR and in the circumstantial case. Even that does not mean the evidence is irrelevant. The problem with the contention on behalf of the accused is that particularly on a small child, the penis and perianal area are likely to be in close proximity. DNA deposited in one intimate area may well be present in another intimate area which is in close proximity to an area of contact with

the person or their bodily fluids. The evidence of RR is that RP was lying on his stomach and the bottom half of his buttocks were exposed when the accused had his mouth on or near that area (admittedly taken at its highest). *If* there was DNA deposited through saliva, whether on the perianal area or the penis, that is some support for the Crown's circumstantial case. RR's evidence is that the accused was making a sucking or licking noise. This may support an inference of the presence of saliva. Given that evidence, the finding of the accused's DNA on either RP's penis or the perianal area provides some support for the Crown case.

[19] As acknowledged, this is a case which is likely to raise competing hypotheses. The jury will be told the presumptive tests cannot prove the samples are saliva, however the presumptive tests have the capacity to affect the probability of the facts in issue when considered with RR's evidence. There was no notable odour on the swabs, thus it might be inferred, with other evidence, that urine, faeces, breast milk and blood are excluded as sources of the DNA.

[20] It is the case that the accused's DNA may have been transferred by indirect means given the family sleeping arrangements or directly yet innocently through toileting assistance given by the accused to RP.

[21] The ALRC explained the rationale of s 55 in the following terms:[14]

14 ALRC 26, vol 1, para 641, as reproduced in Odgers at 318.

> The definition requires a minimal logical connection between the evidence and the "fact in issue". In terms of probability, relevant evidence need not render a "fact in issue" probable, or "sufficiently probable" – it is enough if it only makes the fact in issue more probable or less probable than it would be without the evidence – i.e. it "affects the probability". The definition requires the judge to ask "could" the evidence, if accepted, affect the probabilities. Thus, where a judge is in no doubt whether a logical connection exists between a fact asserted by evidence and a "fact in issue", he should hold that the evidence is relevant if satisfied that a reasonable jury would probably find such a logical connection. An indirect connection with a matter in issue is sufficient (eg evidence that an accused expressed an intention to kill the victim leads from the inference that he did in fact have such an intention to the inference that he is more likely than others who did not express such an intention to have killed the victim). The concept extends to evidence affecting the credibility of a witness (relevant because it affects the weight of testimony) and evidence which relates to the admissibility of other relevant evidence. To remove argument, specific mention is made of such evidence in the legislation. The definition embraces two concepts:
>
> (a) the logical connection between evidence and facts; and
>
> (b) the requirement that the matter on which the evidence ultimately bears is a matter in issue in the trial. Whether or not a matter is in issue is a question of law, determined by substantive law and pleadings. It is not necessary that it be disputed by the parties.

[22] Even with the variety of interpretations that may be made of the evidence, even the perceived 'faults' with the evidence, in my view the DNA evidence does 'affect the probability' of the principal allegation that the accused had his mouth on or near RP's bottom, making the sound described by RR.

[23] This conclusion is consistent with the reasoning in *R v Ali*[15] to the effect that provided the evidence is capable of bearing on the interpretation, or giving

15 [2015] NSWCCA 72.

rise to the inference contended for by the Crown, it is admissible, even if defence are able to suggest other inferences consistent with innocence or another interpretation. The evidence possesses the appropriate probative value to be relevant.

[24] In terms of exclusion under s 137 of the *UEA*, that section provides that in a criminal proceeding, 'the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant'.

[25] Counsel for the accused points out that s 137 has been described as requiring an 'evaluative judgement mandating exclusion'.[16] In assessing the probative value of the evidence, a court is required to evaluate the extent to which the evidence could rationally affect the assessment of the probability of a fact in issue. As above, although there may be perceived problems with some of the Crown evidence, or its interpretation, when seen as the circumstantial part of the case, it possesses a reasonable or rational basis towards proof of the Crown case.

[26] It is accepted that it will not be possible to find that swab OIC was taken from the perianal area. However, it may be, depending on how the jury view the direct evidence of RR, that it does not matter whether the swab was taken from the perianal area or the penis. So much has been discussed above in relation to relevance.

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16 *IMM v The Queen* (2016) 257 CLR 300 at [16].

[27] Counsel for the accused pointed out that the Principal Scientist Ms Roebuck's evidence supports the following propositions:[17]

- The shared environment of the accused and RP provides an opportunity for indirect transfer of DNA.
- In the absence of evaluative reporting or activity level assessment, it is impossible to conclude the likelihood or probability of direct transfer, as opposed to indirect transfer.
- The RSID presumptive test for saliva is not capable of confirming the presence of saliva because of the tests reaction to other bodily fluids including urine, faeces and sweat.
- Even if saliva was present, in the case of a mixed profile DNA result, it is not possible to confirm which of the contributors to the mixed profile deposited saliva at the sample site.

[28] Those propositions, when considered against the variables in this case and the potential competing interpretations, require careful consideration. As mentioned, the jury will never know whether swab OIC was taken from the penis or perianal area. The accused's DNA could have been deposited by direct or indirect transfer. The bodily fluid may or may not be saliva. The bodily fluid may or may not be from the accused. It is the case that the jury cannot speculate and simply accept one alternative. However, as with all circumstantial or partially circumstantial cases the jury will be required to consider the accumulative force of the evidence that they do accept or are prepared to act on.

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17 Outline of submissions of the accused on the voir dire, 10 June 2024 at [76].

[29] Section 137 requires the probative value of the evidence to be weighed against the danger of unfair prejudice to the accused.[18] In *Wise* the Court of Appeal (Victoria) was expressly concerned with the danger of admitting DNA evidence of low probative value because of the 'CSI effect':

> Moreover, one of the dangers associated with the DNA evidence, is what has come to be known as the 'CSI affect'. The 'CSI affect' is a reference to the atmosphere of scientific confidence evoked in the imagination of the average juror by descriptions of DNA findings. As we have explained, as a matter of pure logic, the DNA evidence has little or no probative value. By virtue of its scientific pedigree, however, a jury will likely regard it as being cloaked in an unwarranted mantle of legitimacy – no matter the directions of a trial judge – and give it weight that it simply does not deserve. The danger of unfair prejudice is thus marked, and any legitimate probate to value is, at best, small.

[30] In this case there is other evidence tending to show that the accused was close to RP's buttocks. The DNA evidence has some significance, but its weaknesses in this case will also need to be pointed out to the jury. As mentioned in *R v Ali*,[19] it is important not to overstate the difficulties of, for example, chain of possession and contamination. Relying on the approach taken in *Shamouil*[20] and *R v XY*,[21] the Court in *Ali* concluded in a case with relevant DNA evidence difficulties that if it was 'open to a jury' 'acting reasonably' to use the evidence in assessing whether the accused committed the offences, ordinarily s 137 would not bar admissibility. It is a question of

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18 *DPP v Wise* [2016] VSCA 173, considering also *R v Joyce* (2002) 173 FLR 322 and *R v GZ* [2015] ACTSC 229.

19 [2015] NSWCCA 72.

20 [2006] NSWCCA 112; 66 NSWLR 228.

21 [2013] NSWCCA 121; 84 NSWLR 363.

whether the evidence has the *capacity* to establish an issue, as distinct from the weight to be given to the evidence. Of the balancing exercise required in s 137 and the unfairness argument due to DNA being scientific evidence, their Honour's said:

> That has to be balanced against the capacity of the evidence to give rise to unfair prejudice, i.e the likelihood that the jury would give the evidence more weight than it deserved or that it might inflame the jury or divert from their task. For the reasons already given, such unfair prejudice is unlikely to arise given the relatively simple issues confronting the jury as to continuity, contamination and the possibility of secondary transfer. To the extent that there is such a risk, it can be adequately dealt with by appropriate directions. Directions of this kind relating to DNA evidence are frequently given by the judges. The proposition that DNA evidence carries with it the backing of science is true of all DNA evidence. This does not mean it is unfair. The issue of whether too much weight might be given to such DNA evidence can be adequately cured by appropriate directions depending upon the nature of the evidence.

[31] I have come to a similar conclusion. The arguments made about the alternative interpretations of the DNA evidence, including because of not knowing what part of the body the sample came from, are appropriately made as submissions and direction to the jury. I do not consider there is a danger of unfair prejudice. Despite valiant efforts made by counsel for the accused, in my view the DNA evidence should remain as a legitimate part of the Crown case, with directions to be given as to its use, its potential weaknesses and the requirement not to speculate.

The Electronic Record of Interview – Admissibility Issues

[32] After the arrest of the accused on 7 August 2023, he was taken to Palmerston Police Station and subsequently participated in an 'Electronic Record of Interview' (the EROI).

[33] Counsel for the accused objected to the admissibility of the EROI pursuant to s 85 of the *Evidence (National Uniform Legislation) Act* due to:

i. The accused's fatigue and possible intoxication.

ii. The unduly lengthy questioning by the interviewing member.

iii. The accused's English language ability.

[34] It is submitted the Court cannot be satisfied that any admissions made by the accused were made in circumstances in which it is unlikely that the truth of those admissions were adversely affected. The circumstances outlined were said to impact on the reliability of the admissions.

[35] Counsel also sought exclusion of the EROI pursuant to s 138 of the *UEA* on the basis that:[22]

a) Prior to commencement of the interview, the interviewing member presented the interview to the accused as a procedural step in his custodial episode. That is, he does not *offer* the accused the opportunity to participate in an interview but rather informs him that he *will* be interviewed.

b) The interviewing members failed to comply with s 140 of the *Police Administration Act 1978 (NT)* (PAA), in that they did not

22 Outline of submissions of the accused on the voir dire, 10 June 2024 at 2.

defer questioning until they had facilitated communication between the accused and his friend, as the accused indicated he wished to do at the commencement of the EROI.

c) The interviewing members failed to properly administer the caution to the accused in accordance with Police General Orders Q1 and Q2. Specifically, it was submitted that the defendant's inability to explain the second limb of the caution to the interviewing member in his own words made it inappropriate to continue questioning.

[36] It was further submitted that the EROI was unfair to the accused, specifically that the interviewing officers did not take adequate steps to ensure that the accused was aware of the seriousness of the allegations against him, nor of the use that could be made of any admissions against interest.

[37] The EROI was played to the Court. It is lengthy. It commenced at 5:16pm on 7 August 2023 and finished at 8:34pm. The main points including admissions or partial admissions are helpfully summarised in the Outline of the Crown Case:

a) He had consumed 15-20 standard drinks, but he has a high tolerance and drinks every day;

b) He tries to have sex with his wife but she refuses and he doesn't force her, they have only had sex twice in the last year or so;

c) He went into the room and asked his wife for sex but she refused;

d) He then passed out on the floor and woke to her kicking him saying he was abusing his kids;

e) When he woke up he was 90% on the floor with his head touching his kids ass;

f) He knew from the size that it was his son;

g) His wife had told him about touching RP's ass, he didn't see anything;

h) When challenged, that he had seen part of the body that was something like [gesturing to buttocks] but he isn't 100% sure that it was RP or RP's ass;

i) It was dark but he could feel it was RP;

j) His wife was kicking him;

k) He could not remember anything from when he went to sleep to when he woke up at the end of the bed;

l) He had given an IPhone 12 cell phone to his daughter to use Tik Tok but his wife took it and put her sim card in it;

m) He smashed the phone his wife was using because he was not happy, he thinks she was trying to take videos or something for proof;

n) He shouldn't have smashed the phone, that's nothing to do with the phone, he regrets that;

o) After he smashed the phone his wife went upstairs;

p) SB came close to him and he thought SB was going to kiss him, so he pushed back to create some space;

q) Something triggered him and he pushed that guy;

r) He went upstairs, smashed the door and said some bad words to his wife;

s) He called police and said that there had been a fight;

t) He remembered the things he did with force, but couldn't remember the things he felt;

u) He doesn't know if it is the devil inside him, sometime things aren't under his control, he was drunk;

v) He did not do anything to RP.

[38] As mentioned, the interview is lengthy, given the relatively short timeframe in which the alleged offending took place. Part of the reason the interview is so lengthy is that portions of some of the accused's answers are rambling, lengthy and at times sound incoherent or at the least delve into irrelevancies or are non-responsive. This is likely to be related to some of the factors relied on by his counsel in support of the application to exclude the record of interview. Some of the answers seem exceedingly strange in the context of this record of interview. Of course this is not a decisive point but does have some relevance to the overall question of the factors to be weighed when assessing whether the circumstances adversely affected the truth of the admissions.

[39] The accused's first language is not English. On many matters he was able to express himself well, and at least from (my) lay perspective, in terms of comprehension of conversational English, he appears to have similar language skills to many first language English speakers. However, there are

instances of actual or potential miscommunication.[23] It is impossible to know whether to put certain of the rambling nonsensical answers down to language or personality issues.

[40] Although there are some indications that his language skills are on a par with first language English speaker, there are factors which point to the opposite conclusion. There was clearly a need for caution as was fairly acknowledged by Detective Senior Constable Leivers. Detective Leivers said in his evidence that the circumstances gave rise to the application of General Order 2 of the Police Commissioner General Orders.

[41] On the one hand the accused can properly be seen as a highly educated person. He told police he completed a Diploma in Engineering in Nepal and commenced a Bachelor of Engineering in Nepal, but did not graduate. That partial degree was in English. He left those studies in the fourth year.[24] He confirmed he both reads and writes English[25] and demonstrated this when he wrote on the diagrams he was invited to draw and added labels and comments.[26] Before the EROI, and at the scene, while likely to be intoxicated, he made a 000 call and responded appropriately to enquiries. Similarly, at the point of arrest he appeared coherent and responsive, which

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23 (See eg. at Transcript, EROI 103 for a rambling, incoherent answer which he was then effectively cross examined on).

24 Transcript, EROI at 7.9-8.5.

25 Transcript, EROI at 8.

26 Transcript, EROI at 40.

included asking questions if he did not hear or understand what was being said.

[42] On the other hand, those processes did not require much comprehension to be able to comply with police instructions. Police acted fairly towards him throughout the arrest process. There would have been little doubt from his point of view that he was in a coercive situation during the arrest. The EROI commenced at 5:16pm. Shortly after the EROI commenced, he told police about the languages he spoke:[27]

LEIVERS:	Thank you. Ok so – um – obviously we're communicating in English – um do you speak any other languages?
POUDEL:	Yeah I do – I do, I speak Nepalese and Hindi, little bit Urdu. Yeah.
LEIVERS:	OK and – um – just to – um – confirm can you understand everything that I'm saying OK?
POUDEL:	Not hundred percent but it's still like – like, but yeah I – I, I'm – I'm (inaudible) it's good we can communicate in English, so - - -
LEIVERS:	OK.
POUDEL:	It's not like a hundred percent every words like some, I, I'll – I'll tell you if you have to repeat the question.
LEIVERS:	Sure, absolutely.

27 Transcript, EROI at 2-3.

POUDEL: Yeah.

LEIVERS: Like I say, as – um – if – if I say something today that you don't understand - - -

POUDEL: Yeah.

LEIVERS: - - - you can tell me that you don't understand and I'll do my best to rephrase that so you do understand.

POUDEL: Yeah no problem.

LEIVERS: Are ya happy to conduct this interview today in English?

POUDEL: Yep. Not a problem.

LEIVERS: OK. Um - - -

POUDEL: Just go with a few easy, easier words. Not the - - -

LEIVERS: Yeah.

POUDEL: - - -Literary sorta words.

LEIVERS: OK. No worries. Um – do you want an interpreter present for this interview, or?

POUDEL: Nah, not really.

LEIVERS: OK. Um – so, the reason, what I would like to talk to you about today is – um – your involvement in – um – several – offences that are alleged to have committed – um – in the early hours of yesterday morning – ah – the early hours of last night, sorry the late - - -

POUDEL: Late.

LEIVERS: - - - late evening yesterday and early hours of today, in the morning.

POUDEL: Yep.

[43] As mentioned, Detective Leiver's evidence was that he thought General Order Q2, which he also knew as the *Anunga Guideline*, applied to the accused. Detective Leivers agreed the accused was not as fluent as the ordinary English speaker.[28]

[44] Detective Leivers agreed the purpose of General Order Q1 and Q2 is to ensure that a person being questioned answers voluntarily, 'absolutely'.[29]

[45] In the circumstances of this case, despite some rambling and unsatisfactory answers by the accused, he does have some reasonable facility with English. The language issue by itself would not cause me to rule the EROI inadmissible. There were many instances when the accused asked for clarification of questions before he answered which gave an impression he could cope with questioning. Alternatively, the fact that he needed to ask for clarification highlights the potential for miscommunication. Proceeding with a lengthy interview when an accused with his attributes has expressed that he is tired, is of significant concern when those factors are combined with

28 Transcript, 19 June 2024 at 70, 83.

29 Transcript, 19 June 2024 at 89, 95.

the cognitive load required to answer questions in a second or third language, even if the command of that language appears to be reasonable.

[46] Shortly after the commencement of the interview, the accused makes it clear that he is tired, but then told police 'I'm good I'm happy to continue to be honest'.[30]

LIEVERS:	Sure. No worries. Um – so – ah – are you injured?
POUDEL:	Yeah leave it, not much 'because I just came from the (inaudible) operation and year last – last night someone pushed me and I feel down, someone ripped my shirt.
LEIVERS:	OK.
POUDEL:	Little I fell from the stairs and year I was, little bit, it's-it's throbbin' here.
LIEVERS:	So that's your, you're showing me your right forearm?
POUDEL:	Yeah.
LIEVERS:	And it's got a, you're saying it's a little bit sore.
POUDEL:	Yes, yeah like a little bit - little bit hot this side.
LIEVERS:	OK. Are you feeling ill at the moment?
POUDEL:	Yeah.
LIEVERS:	Tired?

30 Transcript, EROI at 8-9.

POUDEL: Hundred percent.

LIEVERS: OK. Are you happy to continue, even though you're feeling tired?

POUDEL: Yeah I'm good I'm happy to continue to be honest.

[47] While it is the case that after his arrest the accused was in custody from sometime between 1:00am and 2:00am until the interview at 5:16pm, it is not clear that he rested throughout that time. Detective Leivers was not told, nor would he necessarily be told, whether the accused was able to sleep.[31] The Custody Log does not shed light on that.[32] At the time of the arrest it was likely the accused was highly intoxicated. In the interview he told police he thought he had 15-20 standard drinks of Chivas scotch from 5:30pm.[33] He also told police he had a high tolerance to alcohol because of his history of heroin use and can drink a litre without "any problem". His drinking gave him a really "good kick", "8 out of 10", a "good high".[34] During the course of the interview, he indicated he was tired and a little hungover[35] but did not indicate he was intoxicated.

[48] Detective Leivers acknowledged there was a break after two hours of interviewing but that before then, he had not noticed any signs of fatigue or

31 Transcript, EROI at 90.

32 Exhibit P4.

33 Transcript, EROI at 19, 20, 21.

34 Transcript, EROI at 20.

35 Transcript at 9.

tiredness particularly.[36] He said the interview went on "for quite a while" but he did not have much concern with regard to fatigue. "… He presented like he was alert and wasn't falling to sleep or anything like that".[37]

[49] Detective Leivers agreed one of the provisions of General Order Q1 is to ascertain whether a person is tired. He agreed he knew fatigue can manifest beyond physical symptoms, it can impact on making mental judgements. He agreed that was why it was important that a person not be interviewed when they are tired as it can affect the reliability of the answers.[38] He agreed with the proposition it was incumbent on him to ensure that the person had the capacity to participate in the interview and in particular when it becomes protracted.[39]

[50] In terms of whether police made it clear the accused could have someone notified that he is in custody, there are two issues. First is whether police acted on any indication given during the administration of the s 140 *Police Administration Act* cautions and second whether police acted on his request during the course of the interview to contact a person.

[51] When a person is in custody, s 140 of the *Police Administration Act* requires police to inform the person that they may communicate or attempt to communicate with a friend or relative to inform them of their whereabouts

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36 Transcript, 19 June 2024 at 72.

37 Ibid at 72.

38 Ibid at 90.

39 Ibid at 90.

unless the communication would result in an interference with evidence or the circumstances are urgent. Questioning must be deferred to allow the person to be questioned to make reasonable attempts to contact the relative or friend.

[52] At around 3:30pm Detective Leivers spoke to the accused when he was in the cells. He said the recording of the s 140 did not start in the cell. He said a s 140 would have been completed by Constable Reardon, the arresting member but it was likely the accused was intoxicated. For fairness, Detective Leivers said another s 140 was offered when the accused had time to sober up a little bit. He did not appear intoxicated at the time.

[53] The s 140 with Constable Reardon taken at 2:12am indicates the accused did not understand the charges and did not want a friend contacted.[40]

REARDON:	Okay, so the time is 0212 hours on 7th August, 2023. Speaking is Constable REARDON of Casuarina Police Station? Okay. So, mate, can you please state your full name, date of birth?
POUDEL:	Uh, Rahul POUDEL and 16th of April, 1987.
REARDON:	Alright, so you're currently the Palmerston Watch House. Tonight you've been arrested for aggravated assault and gross indecency involving a child under 16. Okay.
POUDEL:	What was that?

40 Transcript BWF, Constable Reardon, 7 August 2023 at 2:12am.

REARDON:	Gross indecency involving a child under 16. You don't have to say anything, but anything you do say is been recorded and that can be used evidence in court, right?
POUDEL:	No, I I don't understand. What was that? The, the things, what did I do?
REARDON:	Okay. You also have the right to contact a friend or a relative.
POUDEL:	Yep.
REARDON:	Would you like us to contact someone for you?
POUDEL:	No, not really.
REARDON:	Okay.
POUDEL:	So what did I do?
REARDON:	So they're, they're the charges?
POUDEL:	Yep.
REARDON:	Okay. Someone will speak to you later on today.
POUDEL:	Alright bro. (Inaudible)
REARDON:	No worries. Time is 0, 0213 hours on the same date and recording.

[54] In his s 140 conversation Detective Leivers informed the accused he could contact a friend. He informed him of a number of charges[41] and that police

41 At that time the accused was told he was facing sexual intercourse without consent, among other offences. That was not correct and was not the charge he was arrested for.

"are planning on doing, is we're gonna go into the interview room shortly and um, conduct an electronic record of interview". In terms of a "support person" as the contact person was then called, the accused states "I've only got my family, my wife, she's the one doing things. I got no one." Detective Leivers then told the accused "… There is a register for support people that we can refer to if you would like us to, um, try and seek out a support person from a different area or alternatively you can do the interview on your own. It's up to you". The accused then answered "Yep, no problem" and Detective Leivers asked "You're happy to do it on your own?" The accused answered in the affirmative.

[55] Detective Leivers accepted in his evidence that at the point the accused answered "Yep, no problem" could be at best regarded as an equivocal answer, but also seemed to be a positive response that the accused did want someone contacted. He agreed he could have clarified by asking the accused whether he wanted someone from the agency to be contacted. He did not agree that in the context, the question "You're happy to do it on your own" was suggestive of an answer. He agreed in hindsight he could have clarified the response by better questions and he agreed did not explain what a support person was very well.[42] He thought that because the accused was able to nominate his wife, who would have been inappropriate, he understood the role of a support person.

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42 Transcript, 19 June 2024 at 83.

[56] During the formal EROI, the accused asked if he could consider having a support person after being reminded of his response earlier in the s 140.[43] He replied "yeah I said I don't like that time" but goes on to ask "can I consider now, or not?" He then nominated a friend, by name and informed police that his telephone number is in his Apple Iphone:[44]

> LEIVERS: OK sure. Do you know Bhairab's number, off the top of your head?
>
> POUDEL: Yeah (in audible) – um – it should be in my Apple, what's there, the other Apple.
>
> LEIVERS: OK.
>
> POUDEL: I – I got the number in my ….
>
> LEIVERS: All Right well we can – we can have a chat about that Apple once were finished with this, ok?
>
> POUDEL: Yeah, not a prob, yeah.

[57] The interview proceeded notwithstanding the accused's request. A "support person" may actually offer support by their mere presence, similar to how a "prisoner's friend" was regarded in the *Anunga Guidelines*. There is some differentiation from the person to be contacted for s 140 purposes, to ensure that a friend or relative knows the whereabouts of the suspect. Regardless of the difference, there should have been an attempt made to allow the accused to contact his friend. Alternatively, to allow him to contact him to be a

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43 Transcript, EROI at 5-6.

44 Transcript, EROI at 6-7.

support person as investigating police had suggested. The accused's vulnerabilities were understood by police. In any event, regardless of those vulnerabilities, s 140 mandates questioning be deferred to allow the suspect the opportunity to contact the person.[45]

[58] Here the accused had identified the person and how to contact them. The questioning should have been deferred for a reasonable time. After the oral evidence had been given on the voir dire, counsel for the Crown advised the Court of a case note from Officer Carter notifying Yogi was found.[46] While it was appropriate for police to make that notification, it was at 2117 hours, and after the interview had finished. It reads 'Carter reports notifying Bhairab Yogi of Rahul Poudel being in custody as per s 140 request of Poudel'.

[59] Mention has been made about the length of the EROI in circumstances where the accused was not a first language English speaker and was tired. If some of those factors were not fully appreciated by investigating officers at the outset then, at 7:24pm when the accused had been interviewed for over two hours, and stated 'I feel I am going to pass out',[47] should have signalled a change of approach. After a break until 7:51pm, police recommenced questioning. From there, the accused is engaged in a number of bizarre responses including introducing the concept of having the devil inside.

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45 *The Queen v Bonson* [2019] NTSC 22 at [34].

46 Exhibit P8.

47 Transcript, EROI at 85.

Police also appeared to become frustrated with the accused's answers and attempted to point out inconsistencies and change in his story. For brevity I will not set out all of the relevant passages, however from the time of the resumption after the break it is difficult to treat the answers as reliable. It is appreciated the investigating police were at a 'compare and contrast' stage of the interview, as they explained in evidence, however given the accused's need for a break and the length of time, the questioning may be seen as to some degree oppressive.

[60] Counsel for the accused also raised the failure of police to ensure the accused understood the second limb of the caution as the accused was not asked to explain what he understood by that part of the caution as set out in Police General Order Q2, 3.13. By this mechanism police can assure themselves and if necessary a court that a suspect whose first language is not English understands the meaning of the caution and agrees to participate in the knowledge of how the interview will be used.

[61] Although not particularly comprehensive, the accused did tell police he understood 'maybe the Magistrate, or maybe the lawyer' would hear the evidence.[48] It is accepted that it is not clear that the consequences of speaking to police have been spelt out to the accused, with Detective Leivers saying a Judge "can make an overarching decision on what happens after

48 Transcript, EROI at 5.

that". However, I would not exclude the EROI on that basis. There has been some attempt at compliance with Police General Order Q2.

[62] It may also be noticed the accused was told in the s 140 conversation that police would conduct a recorded conversation. At that point he was not told he would have a choice about whether to participate. I would not exclude the EROI on that basis. Once participating, he seemed to understand that he did not need to answer questions, or at least articulated that part of the caution.

[63] It is the combination of the following factors which lead to the conclusion the EROI should be excluded. The conduct of the record of interview while the accused was tired, bearing in mind he had the additional cognitive burden of not conversing in his first or even second language. Additionally, the length of the interview, particularly when considered with the first two factors culminating in the accused stating "I feel like I am going to pass out, mate". If I am an error in excluding the EROI, I would in any event exclude those parts of EROI after the break when the EROI recommenced at 19:51 as in all of the circumstances those parts of the questioning, in the form of cross examination or at least deeply probing questions illustrate a degree of oppression and contribute to unreliability.[49]

[64] For those reasons I cannot be satisfied that any admissions made by the accused were made in circumstances in which it is unlikely that the truth of

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49 For example, Transcript, EROI at 90-91 re the phone ownership; 92 about contradicting himself; at 96 regarding a change in his description of events; at 98 and 99, repetition of subject matter; at 106 encouraging the accused to speak more about his 'devil' and then telling him 'we can work through this together' followed by a degree of chastisement at 109 "I am not trying to give you a hard time or anything Rahul…".

those admissions were adversely affected. All factors discussed make it likely that the truth of any admissions was adversely affected.

[65] This is a case where the accused's clear request shortly after the commencement of the record of interview for his friend to be contacted should have been actioned. His previous indication that he did not want anyone contacted was ambiguous given he may have been indicating he wanted police to contact an agency to provide a support person. I agree with Hiley J's sentiment in *The Queen v Bonson*:[50]

> I consider that a primary purpose of s 140(b) is to ensure that a friend or relative of a person in custody is aware that the person is in custody, and where the person is being held. I consider that another important purpose of s 140(b), read with the requirement in the last part of s 140 that questioning be deferred for a reasonable time to enable such communication to take place, is to give the suspect an opportunity to receive initial advice from such a friend or relative before being requested to answer questions or participate in an investigation.

[66] Section 143 of the *Police Administration Act* permits the Court to admit an EROI even if the requirements have not been complied with. Section 143 requires consideration of the reasons for non-compliance. Detective Leivers agreed that after being given the friend's name he said "All right. Well, we can – we can have a chat about that Apple [referring to his phone] when we've finished with this. Okay." Answer "Yeah". Detective Leivers agreed that statement effectively closed off the discussion about contacting Yogi.[51] He agreed he was told the restaurant owned by Yogi was in Stuart Park and

50 [2019] NTSC 22 at [34].

51 Transcript, 19 June 2024 at 86.

timing wise, contact could be reasonably attempted. However, Detective Leivers also explained he was motivated to continue the interview and neglected to defer it as he should have.[52]

[67] The reasons are not sufficient to excuse non-compliance with s 140, especially in the circumstances of dealing with a person for whom English is not a first language. The safeguards are important in such circumstances. Admission of the evidence would be contrary to the interests of justice. The potential or partial admissions to the most serious of the charges are not particularly clear. There are admissions relevant to the less serious of the charges. The EROI is not the only evidence available to the Crown. There is other lay evidence available. Exclusion of the EROI should not substantially weaken the Crown case, although it may have some negative impacts.

[68] In the circumstances I will not consider exclusion under s 138 *UEA*.

Rulings

1. The DNA evidence will be admitted.

2. The EROI is excluded.

3. These reasons will be forwarded to counsel by email.

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52 Ibid at 88.