CITATION:	*The Queen v Layt* [2018] NTSC 36
PARTIES:	THE QUEEN
	v
	LAYT, Matthew
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY exercising Territory jurisdiction
FILE NO:	21735312
DELIVERED ON:	29 May 2018
DELIVERED AT:	Darwin
HEARING DATE:	24 and 25 May 2018
JUDGMENT OF:	Grant CJ

CATCHWORDS:

CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – CONFESSIONS AND ADMISSIONS

Whether evidence of admissions made by accused at his residence inadmissible – requirement for caution pursuant to s 140 of the *Police Administration Act* (NT) – no requirement for administration of caution in the circumstances – evidence disclosed caution administered in any event – admissions not inadmissible because no record of caution kept – requirement for electronic record of admissions pursuant to s 142 of the *Police Administration Act* – no record kept – admission of evidence not contrary to the interests of justice within the meaning of s 142 of the *Police Administration Act* – admissions made in circumstances that were unlikely

to adversely affect their truth within the meaning of s 85(2) of the *Evidence (National Uniform Legislation) Act* (NT) – accused failed to discharge onus of establishing unfairness within the meaning of s 90 of the *Evidence (National Uniform Legislation) Act* – the probative value of admissions not outweighed by unfair prejudicial effect within the meaning of ss 135 and 137 of the *Evidence (National Uniform Legislation) Act* – admissions not obtained improperly or in contravention of an Australian law within the meaning of s 138 of the *Evidence (National Uniform Legislation) Act*.

Evidence (National Uniform Legislation) Act (NT) s 56, s 81, s 85, s 90, s 135, s 137, s 138, s 142
Police Administration Act (NT) s 137, s 140, s 141, s 142, s 143

Bullock [2005] NSWSC 825, *Bunning v Cross* (1978) 141 CLR 54, *Em v R* (2007) 232 CLR 67, *Festa v The Queen* (2001) 208 CLR 593, *Kelly v The Queen* (2004) 218 CLR 216, *McDermott v R* (1948) 76 CLR 501, *Parker v Comptroller-General of Customs* (2009) 83 ALJR 494, *Nicholls v The Queen* (2005) 219 CLR 196, *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266, *R v Esposito* (1998) 45 NSWLR 442, *R v Heaney* (1992) 2 VR 522, *R v Frangulis* [2006] NSWCCA 363, *R v GP* [2015] NTSC 53, *R v Ireland* (1970) 126 CLR 321, *R v Lee* (1950) 82 CLR 133, *R v Shmouil* (2006) 66 NSWLR, *R v Taouk* (2005) 154 A Crim R 69, *Ridgeway v R* (1995) 184 CLR 19; *Robinson v Woolworths Ltd* (2005) 158 A Crim R 546, *Walsh v Loughnan* [1991] 2 VR 351, referred to.

REPRESENTATION:

Counsel:

Prosecution:	T Grealy
Accused:	L Nguyen

Solicitors:

Prosecution:	Office of the Director of Public Prosecutions
Accused:	

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

The Queen v Layt [2018] NTSC 36
No. 21735312

BETWEEN:

THE QUEEN
Plaintiff

AND:

MATTHEW LAYT
Defendant

CORAM: GRANT CJ

REASONS FOR JUDGMENT

(Delivered 29 May 2018)

[1] The accused is charged with one count of unlawfully causing serious harm contrary to s 181 of the *Criminal Code* (NT).

[2] The brief outline of the Crown allegations is that the complainant attended at the accused's residence attempting to find the owner of a stray dog which had run into the complainant's yard. The complainant spoke to a young girl in the yard of the house and asked her to get her parents. The girl's mother came out of the house followed by the accused. The accused called the complainant a paedophile, and then pushed him and punched him in the face multiple times. The complainant suffered serious harm as a result.

[3] Police attended at the accused's residence that evening and spoke with the accused. It is alleged that the accused admitted that he pushed and punched the complainant; that he punched the complainant in the face several times; and that he chased the complainant from the address. The Crown has given notice that it intends to adduce evidence of those admissions at trial through the three police officers before whom they were made. Those admissions will be contextualised by also leading evidence from the police witnesses as to the reasons given by the accused for punching the complainant.

The accused's contentions concerning admissibility

[4] The accused contended that the evidence of those matters is inadmissible by operation of ss 85, 90, 135, 137 and/or 138 of the *Evidence (National Uniform Legislation) Act* (NT) ("ENULA"). The parties sought a ruling on those matters in advance of the trial.

[5] In summary, those contentions as described in written submissions were:

(a) the evidence of the admissions is hearsay and therefore inadmissible;

(b) no caution was administered to the accused before the admissions were made in accordance with the requirements of s 140 of the *Police Administration Act* (NT);

(c) the police evidence is "tainted with impropriety" because the video record made on the body-worn cameras at the time the admissions were made has been destroyed, lost or is otherwise no longer available without reasonable explanation; and

(d) the evidence should therefore be excluded pursuant to ss 88 [probably an erroneous reference to s 85], 90, 135, 137 and/or 138 of the ENULA.

[6] The determination of those matters is concerned with whether the evidence of the police officers is admissible. It is not directly concerned with the question whether that evidence is true or otherwise reliable. That is a matter for the jury to determine in the event that the evidence is ruled to be admissible.

The hearsay objection

[7] There is no doubt that the statements said to have been made by the accused are an "admission" as defined in the Dictionary at the end of the ENULA. They are representations previously made by a defendant in criminal proceedings which are adverse to the defendant's interest in the outcome of the proceeding. There is also no doubt that the admissions are relevant within the meaning of s 56 of the ENULA. If the evidence of the admissions is accepted, it could rationally affect a fact in issue in the proceedings.

[8] There is also no doubt that the evidence of attending police in relation to the admissions would be hearsay in nature. Section 81 of the ENULA provides that the rule against hearsay does not apply to evidence of an admission. There is no basis for the exclusion of evidence of the admissions on hearsay grounds alone.

Contentions concerning the *Police Administration Act*

[9] Two issues arise under the *Police Administration Act*, *viz*:

(a) whether there was a failure on the part of attending police to comply with the requirement under s 140 of the *Police Administration Act* before the admissions were made and, if so, the consequences of that failure; and

(b) whether the admissions should be admitted into evidence in the exercise of the discretion under s 143 of the *Police Administration Act* notwithstanding that there is no electronic recording of those admissions available to be tendered in evidence as required by s 142 of the *Police Administration Act*.

Sections 140 and 141 of the *Police Administration Act*

[10] Section 137 of the *Police Administration Act* provides relevantly:

> **Time for bringing person before court generally**
>
> (1) Without limiting the operation of section 123, but subject to subsections (2) and (3) of this section, a person taken into lawful custody under this or any other Act shall (subject to that Act where taken into custody under another Act) be brought before a court of competent jurisdiction as soon as is practicable after being taken into

custody, unless he or she is sooner granted bail under the *Bail Act* or is released from custody.

(2) Despite any other law in force in the Territory (including the common law), but subject to subsection (3) a member of the Police Force may, for a reasonable period, continue to hold a person the member has taken into lawful custody in custody to enable:

(a) the person to be questioned; or
(b) investigations to be carried out;

to obtain evidence of or in relation to an offence that the member believes on reasonable grounds involves the person, whether or not:

(c) it is the offence in respect of which the person was taken into custody; or
(d) the offence was committed in the Territory;

and the person must not be granted bail under Part 3 or section 33 of the *Bail Act* while so detained, whether or not the person has been charged with an offence.

[11] That section conditions the operation of s 140 of the *Police Administration Act*, which provides:

Person to be warned and given opportunity to inform friend or relative of person's whereabouts

Before any questioning or investigation under section 137(2) commences, the investigating member must inform the person in custody that the person:

(a) does not have to say anything but that anything the person does say or do may be given in evidence; and

(b) may communicate with or attempt to communicate with a friend or relative to inform the friend or relative of the person's whereabouts,

and, unless the investigating member believes on reasonable grounds that:

(c) the communication would result in the escape of an accomplice or the fabrication or destruction of evidence; or

(d) the questioning or investigation is so urgent, having regard to the safety of other people, that it should not be delayed,

the investigating member must defer any questioning or investigation that involves the direct participation of the person for a time that is reasonable in the circumstances and afford the person reasonable facilities to enable the person to make or attempt to make the communication.

[12] The term “custody” is not defined in the legislation. As is apparent from the text of s 137(1) of the *Police Administration* Act, both the questioning or investigation spoken of in s 137(2) of the *Police Administration Act*, and the requirement in s 140 of the *Police Administration Act*, are conditioned on the person being taken into lawful custody “under this or any other Act”. There is no suggestion that the accused in this case was taken into lawful custody under another Act. The means by which a person may be taken into lawful custody under the *Police Administration Act* are:

(a) where a person is detained for the purpose of executing a lawful search (s 119A(5));

(b) where a person is directed under warrant to remain at a place for the purposes of a search (s 120B(3));

(c) where a person is, without warrant, arrested and taken into custody by a member of the Police Force on reasonable belief that the person has committed, is committing or is about to commit an offence (s 123);

(d) where a person is, without warrant, arrested and taken into custody by a member of the Police Force on reasonable belief that a warrant of apprehension or committal has been issued (s 124(1));

(e) where a person is, without warrant, arrested and taken into custody by a member of the Police Force on reasonable belief that

the person has committed an offence in a State or another Territory (s 125(1)); and

(f) where a person is taken into "protective custody" (s 128).

[13] They are the circumstances in which a person may be taken into custody under the *Police Administration Act*, and to which the requirement in s 140 of the *Police Administration Act* has application (leaving aside cases of "protective custody" during which the person cannot be questioned in relation to an offence). Section 140 of the *Police Administration Act* has application only to questioning and investigation in those circumstances.

[14] It is also apparent from the text of s 138 of the *Police Administration Act* that a person will not necessarily be in "custody" for the whole period that person has been in the company of police. For the purpose of determining what is a reasonable period under s 137(2) of that Act, a court must take into account, amongst other things, "the time the person in custody has been in the company of police prior to and after the commencement of custody".

[15] The situation might be different if the requirement was conditioned on any circumstances of "custody" recognised by the common law. The situation might also be different if there was a statutory provision expressly extending "custody" to all cases in which a person is in the company of a police officer and being questioned to determine his or

her involvement in the commission of an offence, in circumstances where there is sufficient information in the possession of the investigating police officer to justify the arrest of the person (cf s 464(1) of the *Crimes Act 1958* (Vic)).

[16] The Police General Order in relation to custody provides that a person may be in custody without actually being arrested; that the test is whether the person was not free to leave, or had formed the belief that he or she was not free to leave; and that a person being detained or spoken to by police is in custody. These statements are illustrative rather than determinative of the proper construction and application of the statutory provisions. While those administrative requirements may be relevant to the assessment of fairness under the ENULA, they do not govern the operation of s 140 of the *Police Administration Act*.

[17] Counsel for the accused concedes that the accused had not been taken into lawful custody under any of the processes described under the *Police Administration Act*. The contention is that at the time the admissions were allegedly made the accused was in custody under some extended definition recognised by the common law (although no authority to that effect was proffered), or that the accused was in custody has recognised by the Police General Order. Even if it is accepted that s 140 of the *Police Administration Act* has application in those circumstances, those contentions are not borne out by the evidence.

[18] The evidence given in that respect by the police officers during the course of the *voir dire* hearing may be summarised as follows.

(a) Constables McLean and Byrnes attended at the complainant's residence on the night of 1 July 2017 in response to a report of an assault. They spoke to the complainant and his wife, who gave an account in which the complainant had been assaulted outside a nearby house while trying to locate the owners of a dog apparently frightened by the fireworks. The complainant was apparently intoxicated and suffering from relatively severe facial injuries.

(b) Constables Goldsmith and Bruton had heard the call on the radio and attended at the complainant's residence to provide assistance. They arrived after Constables McLean and Byrnes. On their arrival they heard the complainant give a rough description of his alleged assailant and the location of the premises at which the incident was said to have occurred. They also heard, either directly or on briefing by Constable McLean, the complainant's account that he had asked a child in the yard to get her parents and the person who assaulted him had accused him of being a "paedophile".

(c) Constables Goldsmith and Bruton left the complainant's residence with a view to locating the premises at which the incident was said to have occurred and the other party involved in the incident. While driving they saw a male person coming out of the front gate

of a residence. He met the general description given by the complainant, and the residence was in the location identified by the complainant.

(d) When Constable Goldsmith first saw the accused he had formed no view or opinion concerning the incident described by the complainant. At that point, he had not determined whether he was investigating an assault or an inappropriate approach to a child. At the time he saw the accused, his only conclusion was that the accused met the description of the other person involved in the incident.

(e) Constable Goldsmith alighted from the police vehicle and said words to the effect, “What happened?” In direct response to that enquiry, the accused said that a male person had come to his address, the accused had seen him speaking to his young daughter in the yard, the accused had asked him to leave, the male person had refused to do so, and the accused then punched the male person.

(f) After the accused had given that account, Constable Goldsmith asked some more questions, including whether the gate was open or closed. Those further questions were not directed to the physical interaction between the complainant and the accused. Rather, they were directed to the approach which was said to have been made to the young girl. During this discussion the accused

appeared to Constable Goldsmith to be highly agitated and speaking in a loud voice. He was forthcoming with the information he was providing, and appeared to want to provide an account of what had transpired.

(g) Constable Goldsmith does not recall whether he gave a caution to the accused before the admission was made. He thinks that is unlikely because, in his mind, he was not at that point investigating an assault. Constable Goldsmith did not form the view that the accused was a suspect in the commission of an offence until he made the admission that he had punched the complainant.

(h) Constable Bruton's account was that she was driving in company with Constable Goldsmith in the general vicinity described by the complainant when she saw a number of people at the front of a residence. She stopped because she thought they may know something about the incident. She then saw the accused come out of the yard. At that point she had formed no opinion about whether he was involved in the incident or not. Constable Bruton remained in the vehicle to do a radio check on the premises and its occupants after Constable Goldsmith had alighted.

(i) While Constable Bruton was still in the vehicle, she heard the accused tell Constable Goldsmith that an unknown male had come to the gate, that the accused had his daughter with him at the time,

that the accused had told the unknown male to go away, that the unknown male had refused to do so, and that the accused had then punched him. After she heard that account, she commenced looking for the complainant's glasses which he said had been lost at the scene of the incident. At no stage did Constable Bruton speak to the accused.

(j) Constables McLean and Byrnes arrived at the location approximately very shortly after the arrival of Constables Goldsmith and Bruton. The best estimate that could be made by Constables Goldsmith and Bruton is that was perhaps one or two minutes later.

(k) At the time Constable Byrnes left the complainant's residence he did not know the identity or address of the alleged assailant. His intention was to identify the other person involved in the incident in case the matter required follow-up for the purpose of an investigation. On arrival at the location Constable Byrnes saw that Constables Goldsmith and Bruton were already there. He got out of the vehicle and approached the location at which Constable Goldsmith was with the accused. He heard the accused say that he had punched the other male twice. In giving the description the accused was using what Constable Byrnes described as an aggressive tone and a loud voice. It was at that point that

Constable Byrnes formed the view that the accused was the other person involved in the incident.

(l) Constable Byrnes cannot recall whether that statement was made by the accused in response to a question by Constable Goldsmith. Constable Byrnes does not recall whether he cautioned the accused. He thinks it unlikely given that no statement had been taken from the complainant at that time given his injuries and state of intoxication. In those circumstances, there was in his mind no cause for the arrest of the accused.

(m) On arrival at the scene, Constable McLean alighted from the police vehicle and spoke with the accused's ex-partner who was also outside the premises. Constable McLean's intention was to find someone who had witnessed the event and knew what happened. Constable McLean did not speak to the accused during the attendance. However, on arrival at the premises she made an assessment that the accused was the person who had been described by the complainant.

(n) The evidence of the attending police officers is that they did not enter the accused's premises, the conversation with the accused and his ex-partner took place on the footpath outside those premises, the accused was not arrested, the accused was not told expressly that he was not free to go, and the attending police officers did not otherwise seek to prevent him from leaving.

[19] It may be concluded on the basis of that evidence that at the time the admissions were made the accused had not been taken into custody, either under the *Police Administration Act* or in accordance with some extended notion of "custody". Attending police did not at any time inform the accused that he was not free to leave. There is nothing in the evidence which would suggest that attending police exercised any physical or psychological dominion over the accused such that he was not free to leave. The accused was not called during the course of the *voir dire* to give evidence that he had formed the belief that he was not free to leave. The footage from Constable McLean's Body Worn Video which was received into evidence for the purpose of the *voir dire* gives no indication that the accused had formed a belief that he was not free to leave. Rather, he can be heard speaking volubly in the background without apparent feelings of restraint.

[20] That leaves the suggestion in the Police General Order that a person being detained or spoken to by police is in custody. Even assuming the General Order governs the operation of s 140 of the *Police Administration Act*, it cannot be suggesting that a police officer who speaks to a person in the course of his or her duty thereby takes that person into custody. In the circumstances of this case, the admissions made by the accused were spontaneous. The admission to Constable Goldsmith was made immediately on him asking the accused what happened. That same admission was heard by Constable Bruton. The

accused was not at that time being "spoken to" by police in the relevant sense.

[21] The admission heard by Constable Byrnes may have been the initial admission made to Constable Goldsmith, or it may have been a repeat of the account originally given by the accused. The manner in which the evidence fell out during the course of the *voir dire* makes it impossible to determine that matter. If it was the original admission, the same analysis has application. If it was a subsequent admission, it was not made as a result of Constable Byrnes speaking to the accused. Even if that was the case, however, the admission added nothing to what was said by the accused at the outset.

[22] For these reasons, it was not incumbent on attending police to satisfy the requirement s 140 of the *Police Administration Act* prior to the making of the admissions. Section 141 of the *Police Administration Act* adds nothing to the determination of admissibility. It provides that the investigating member required to give the information under s 140 "shall, if practicable, electronically record the giving of the information and the person's responses, if any". A failure to administer the caution when required may bear on the admissibility of any subsequent record of interview. A failure to record that administration ordinarily will not.

Sections 142 and 143 of the *Police Administration Act*

[23] I turn then to the operation of s 142 of the *Police Administration Act*. It provides, so far as is relevant for these purposes:

> **Electronic recording of confessions and admissions**
>
> (1) Subject to section 143, evidence of a confession or admission made to a member of the Police Force by a person suspected of having committed a relevant offence is not admissible as part of the prosecution case in proceedings for a relevant offence unless:
>
> (a) where the confession or admission was made before the commencement of questioning, the substance of the confession or admission was confirmed by the person and the confirmation was electronically recorded; or
>
> (b) where the confession or admission was made during questioning, the questioning and anything said by the person was electronically recorded,
>
> and the electronic recording is available to be tendered in evidence.

[24] This provision was modelled on a Victorian provision which was enacted to implement the recommendations of the Consultative Committee on Police Powers of Investigation. The second reading speech of the Victorian Minister (Legislative Council Parliamentary Debates, Hansard, 3 May 1988, p 1010) when the relevant Bill was introduced in that jurisdiction provided:

> It was the firm view of the Shorter Trials Committee and the Coldrey committee that universal tape-recording of interviews with suspects by law enforcement officials would have substantial benefits, financial and otherwise, for the administration of justice. It should be borne in mind that in many criminal trials a great deal of time is taken in determining the admissibility of an alleged admission by the accused; often it is the only real issue in the trial. Tape-recording will eliminate many of these disputes. As a result, trials will be shortened and more guilty defendants can be expected to plead guilty, leading to a great saving of public money.

[25] It may also be accepted that those substantial benefits for the administration of justice also included matters of police transparency and accountability. One object of the section is to overcome any perceived problem with the police "verbal", including the possibility of fabrication of evidence by police.

[26] Unlike the ENULA, the *Police Administration Act* does not define the term "admission". Counsel for the Crown concedes that the evidence in question concerns an "admission" for these purposes. It is also conceded by the Crown that although the admission was electronically recorded, that electronic recording is not available to be tendered in evidence. The reasons for that unavailability are discussed further below in the context of s 143 of the *Police Administration Act*.

[27] The statutory requirement has application to admissions made both before and after the commencement of the questioning spoken of in s 137(2) of the *Police Administration Act*. The operation of the *Police Administration Act* in that respect may be contrasted with s 8(1) of the *Criminal Law (Detention and Interrogation) Act 1995* (Tas), which was considered by the High Court in *Kelly v The Queen* (2004) 218 CLR 216. That provision relates only to admissions made by a defendant "in the course of official questioning".

[28] The application of the provision in these circumstances turns on the question whether the admissions were "made to a member of the Police

Force by a person suspected of having committed a relevant offence". Both aggravated assault and causing serious harm are relevant offences for that purpose. The time the suspicion must have subsisted is the time the admissions were made. For these purposes, a person may be "suspected" without investigating police being in possession of sufficient information to justify the arrest of the person. There need only be a suspicion on information that the person was involved in the commission of a relevant offence. Given the statutory purpose of the provision, an objective test should be applied in determining whether at the relevant time the accused was a "person suspected". The application of that test would bring in circumstances in which the accused ought reasonably to have been seen as a suspect.

[29] On the other hand, the section does not apply to an admission by an accused person made before there were reasonable grounds to suspect that he or she had committed the offence. In *Nicholls v The Queen* (2005) 219 CLR 196, the High Court considered the operation of s 570D of the *Criminal Code* (WA). That section provided that evidence of an admission relating to a serious offence made by a suspect to police is not admissible unless it was recorded on videotape, or the prosecution proves that there was a reasonable excuse for there not being such a recording, or there are "exceptional circumstances which, in the interests of justice, justify the admission of the

evidence". As Kirby J observed in that case at [217] (footnotes omitted):

> … the Western Australian Parliament did not enact an absolute bar on the reception at trial of unrecorded admissions to police. Circumstances will arise where the provisions of the Code are inapplicable (eg admissions blurted out before the accused person is a suspect) or, although applicable, where the admission is warranted (eg because the prosecution proves that there is a "reasonable excuse" for not recording or the court is satisfied of "exceptional circumstances" that justify the admission of the evidence "in the interests of justice").

[30] Section 281 of the *Criminal Procedure Act* 1986 (NSW) imposes a similar requirement to record an admission made by a defendant who was suspected of committing an offence, or could reasonably have been suspected by an investigating official of having committed an offence.

[31] In *R v Frangulis* [2006] NSWCCA 363, the New South Wales Court of Criminal Appeal considered circumstances in which the accused made a statement to a police officer giving an account of his movements on the day of a fire which was under investigation. The accused was the owner of the premises which had been destroyed by the fire. The police officer in question had not actively or subjectively considered the accused to be a suspect at that time. However, before taking that statement the police officer was aware that the fire was deliberately lit and that there were no signs of forced entry. That information was "capable of supporting the formation of the opinion" that the accused could have been involved in setting the fire.

[32] By way of contrast, in *R v Taouk* (2005) 154 A Crim R 69 the appellant had attended a police station to report a disturbance at his home. In the course of making the report he admitted to shooting an intruder. One of the questions on appeal was whether the accused "could reasonably be suspected of committing an offence" at the time the admissions were made. The Court held that there was no basis for reasonably suspecting involvement in the offending at that time. Smart J observed at [73]:

> However, in my opinion, even accepting that a purposive interpretation should be given to s 281, it is necessary that some regard be had to the actual language of s 281 and some effect be given to the word 'reasonably' in the expression 'could reasonably have been suspected'. A person could not reasonably have been suspected by a police officer of having committed an offence, unless something has been said or done which would provide some grounds for a police officer reasonably suspecting that the person has committed the offence.
>
> In my opinion, the attendance by the appellant at a police station, even in the early hours of the morning, and the saying by the appellant to a police officer of words to the effect that the appellant wished to report some untoward occurrence which had happened at his house did not provide any grounds on which the police officer could reasonably have suspected that the person had committed an offence.

[33] Hall J observed at [160]:

> The basis of the suspicion referred to in s 281(1)(a) is the state of mind of an investigating official. That state of mind is more than mere surmise. Applying a similar approach as has been applied with respect to search warrant legislation, it is one arrived at on the basis of material that is capable of supporting the formation of an opinion, even if only a slight opinion, that the person in question (the accused) could have committed the offence.

[34] That is consistent with the approach taken by the Victorian courts to s 464H of the *Crimes Act 1958* (Vic) dealing with evidence of admissions made by a person "suspected" of having committed an offence. The Victorian courts have adopted the view that while a suspicion requires a lesser factual basis than the creation of a belief, it must be built on some factual foundation: see, for example, *Walsh v Loughnan* [1991] 2 VR 351 at 356-7. A person is not properly characterised as a suspect based on speculation or "mere idle wondering": *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266 at 303. Suspicion in this sense is concerned with the consideration of known facts from which an apprehension that a person might possibly have committed an offence is created: *R v Heaney* (1992) 2 VR 522 at 547-8.

[35] The evidence of attending police concerning their knowledge at the time they first spoke to the accused has already been described. Constable Goldsmith said that at the time the admission was made he had no relevant suspicion because he had yet to determine whether the offence, if any, was an assault or an inappropriate dealing with a child. At the time the admission was made, Constable Bruton had formed no opinion or suspicion as to the accused's involvement in the incident. Immediately prior to the time Constable Byrnes heard the admission, he had formed no opinion or conclusion that the accused was involved in the incident.

[36] While I accept those were the subjective states of mind, in the application of the objective test there were grounds upon which attending police could reasonably have suspected that the accused had assaulted the complainant. All had been present at the complainant's residence while he gave the account. All had seen the complainant's injuries. Most significantly, at the time Constable Goldsmith first saw the accused he concluded that the accused met the complainant's description of the other person involved in the incident. From that point, and regardless of the fact that Constable Goldsmith had yet to form a view that the accused had committed an assault, he was in possession of sufficient information on which to conclude that the accused was a suspect.

[37] It may be concluded, then, that the admission was made to a member of the Police Force by the accused at a time he was suspected of having committed a relevant offence. The operation of s 142 of the *Police Administration Act* is to render the admissions *prima facie* inadmissible, subject to the express qualification concerning the operation of s 143 of the *Police Administration Act*. That section provides:

> **Certain evidence may be admitted**
>
> A court may admit evidence to which this Division applies even if the requirements of this Division have not been complied with, or there is insufficient evidence of compliance with those requirements, if, having regard to the nature of and the reasons for the non-compliance or insufficiency of evidence and any other relevant matters, the court is

satisfied that, in the circumstances of the case, admission of the evidence would not be contrary to the interests of justice.

[38] By way of paraphrase, the person seeking to adduce the evidence bears the onus of satisfying the court on the balance of probabilities that the admission of the evidence would not be contrary to the interests of justice having regard to the nature of the non-compliance and the reasons for it. The person seeking to adduce the evidence in those circumstances does not need to satisfy the court that the circumstances are "exceptional" (cf s 464H(2) of the *Crimes Act 1958* (Vic)).

[39] The nature of the non-compliance and the reasons for it was the subject of evidence from the attending police during the course of the *voir dire* hearing. That evidence may be summarised as follows.

(a) In early 2017, Northern Territory police introduced Body Worn Video for general duties police officers. All attending police officers on this occasion were equipped with Body Worn Video, and those cameras were activated during the course of the interaction with the accused.

(b) The procedure for the capture and storage of Body Worn Video is that at the end of shift police officers remove the video camera, dock it and upload the footage. If the footage is to be used for evidentiary or other purposes, it is necessary to go into the program and manually save the file. If that is not done, the footage is automatically deleted after 110 days. (That protocol

has since been changed so that the footage is now deleted after 365 days.)

(c) Constable McLean was the officer in charge of the investigation. As already described, no formal complaint or statement was taken from the victim on the night of the incident by reason of his intoxication and injuries. It was for that reason that Constable McLean subsequently proceeded by way of charge on summons. She had uploaded and saved the footage from her Body Worn Video because she was the officer in charge of the investigation. That footage only depicted her dealings with the complainant and his wife, and the subsequent dealings with the accused's partner. It did not record the admissions made by the accused.

(d) Constable McLean originally thought the matter would proceed by way of a charge for assault. As a result of medical evidence subsequently received, the charge of serious harm was laid on 10 November 2017. After the offence had been "upgraded", Constable McLean discovered that the other attending officers had not saved the footage from their Body Worn Video and it had been deleted after the default period of 110 days. Constable McLean took responsibility as officer in charge of the investigation for not earlier requiring the other attending officers to save the footage. She says that Body Worn Video was a relatively new process at

that time and dealings concerning footage were not as instinctual as they have now become.

(e) Constable Byrnes gave evidence that he did not save the footage from the evening because he did not think it was required. At that time, he thought it was an assault matter rather than a matter which would proceed by way of indictment. In addition, he was on extended leave between July and November 2017.

(f) Constable Goldsmith gave evidence that he did not save the footage because he was not notified that his statement and any evidence in his possession was required for a prosecution file until the upgrade of the charge in November 2017. By that time the footage had been automatically deleted. Prior to that time he was unaware that any charges had been brought in relation to the incident. The attendance on the evening in question had been his only involvement in the matter.

(g) Constable Bruton gave evidence that she did not save the footage because at the time she finished her shift the following morning her understanding was there had been no formal complaint and the matter was an open investigation. She was not required to provide a statement until November 2017, and received no information concerning the investigation between the night in question and that time. Constable Bruton's general procedure at that time was

to save the footage in cases involving arrest or use of force. Neither situation had presented on the night in question.

[40] The statutory criterion "not contrary to the interests of justice" engages the common law discretions governing exclusion on the grounds of fairness and public policy (see the preservation by s 9(1) of the ENULA of the principles of common law in relation to evidence in a proceeding).

[41] The discretion to exclude evidence of a confessional statement on the ground that its reception would be unfair to the accused has been considered by the High Court in a number of judgments: see, for example, *McDermott v The King* (1948) 76 CLR 501 at 513-515; *R v Lee* (1950) 82 CLR 133 at 148-155. The reception of an admission is not unfair because it has inculpatory effect. At common law, the content of the requirement of fairness is directed primarily to voluntariness. In joint reasons, the High Court in *R v Lee* (at 144) summarised the operation of the rule as formulated by Dixon J in *McDermott v The King* in the following terms:

> The reasons of the majority of the Full Court for allowing the appeal to it are set out in the careful and closely reasoned judgment of Smith J. His Honour began by putting s. 141 on one side on the ground that in the present case there was no evidence of a threat or promise, and then set out two imperative rules of the common law regarding confessional statements in the language of Dixon J. in *McDermott v. The King* (1948) 76 CLR 501, at p 511. These rules, stated in abbreviated form, are - (1) that such a statement may not be admitted in evidence unless it is shown to have been voluntarily made in the sense that it has been made in the exercise of free

> choice and not because the will of the accused has been overborne or his statement made as the result of duress, intimidation, persistent importunity or sustained or undue insistence or pressure, and (2) that such a statement is not voluntary if it is preceded by an inducement, such as a threat or promise, held out by a person in authority, unless the inducement is shown to have been removed. These two "rules" are, of course, well established, but it is important, we think, in this case to observe that they seem to be not really two independent and co-ordinate rules. There seems to be really one rule, the rule that a statement must be voluntary in order to be admissible. Any one of a variety of elements, including a threat or promise by a person in authority, will suffice to deprive it of a voluntary character. It is implicit in the statement of the rule, and it is now well settled, that the Crown has the burden of satisfying the trial judge in every case as to the voluntary character of a statement before it becomes admissible.

[42] The discretion to exclude evidence on the ground that its reception would be contrary to public policy was described by Barwick CJ in *R v Ireland* (1970) 126 CLR 321 at 334-335 in the following terms:

> Evidence of relevant facts or things ascertained or procured by means of unlawful or unfair acts is not, for that reason alone, inadmissible. This is so, in my opinion, whether the unlawfulness derives from the common law or from statute. But it may be that acts in breach of a statute would more readily warrant the rejection of the evidence as a matter of discretion: or the statute may on its proper construction itself impliedly forbid the use of facts or things obtained or procured in breach of its terms. On the other hand evidence of facts or things so ascertained or procured is not necessarily to be admitted, ignoring the unlawful or unfair quality of the acts by which the facts sought to be evidenced were ascertained or procured. Whenever such unlawfulness or unfairness appears, the judge has a discretion to reject the evidence. He must consider its exercise. In the exercise of it, the competing public requirements must be considered and weighed against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand there is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion.

[43] That statement was accepted as “the settled law in this country” in *Bunning v Cross* (1978) 141 CLR 54 at 69. In that later case, Stephen

and Aitken JJ (at 74-75) provided the following explanation of the operation of the discretion:

> What *Ireland* involves is no simple question of ensuring fairness to an accused but instead the weighing against each other of two competing requirements of public policy, thereby seeking to resolve the apparent conflict between the desirable goal of bringing to conviction the wrongdoer and the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law. This being the aim of the discretionary process called for by *Ireland* it follows that it by no means takes as its central point the question of unfairness to the accused. It is, on the contrary, concerned with broader questions of high public policy, unfairness to the accused being only one factor which, if present, will play its part in the whole process of consideration.

[44] Two matters in particular may be noticed concerning the operation of s 143 of the *Police Administration Act*. First, the public interest purpose is to obviate or reduce disputes concerning the admissibility of confessions and admissions. Secondly, it is not unlawful for a police officer not to make an electronic recording of an admission or confession. The provision does not cast a positive obligation on attending police. The provisions operate only to make a confession or admission *prima facie* inadmissible in the absence of an electronic recording for the public interest purpose described.

[45] The "reasonable excuse" exception under the Western Australian legislation was considered by the High Court in *Nicholls v The Queen* (2005) 219 CLR 196. Although the Western Australian provision is structured differently to s 143 of the *Police Administration Act*, it gives

rise to similar considerations. As to those considerations, McHugh J observed at [106] (footnotes omitted):

> The focus of any inquiry directed to the application of the 'reasonable excuse' exception must take account of the conduct of the police, as well as the fairness or otherwise to the accused of permitting the admissions to be admitted. In construing similar provisions in *MDR*, Wicks J held that the conduct of the police officers was relevant to the question whether it would be 'in the interests of justice' to admit evidence of admissions by the accused. His Honour thought relevant matters included whether non-compliance with the provisions was deliberate or the product of a reckless disregard of the provisions or was inadvertent or otherwise excusable. Such matters are also relevant in determining whether there was a 'reasonable excuse' for not recording the admission.

[46] The Crown says, in essence, that the admission of the evidence in this case would not be contrary to the interests of justice. The evidence from the three attending police officers concerning the content of those admissions is largely consistent. The evidence is not comprised by the uncorroborated recollection of a single police officer. The admissions were made in a context in which the accused was seeking to explain his conduct by reference to the complainant's interaction with his daughter. No issue arises concerning either the reliability of the admissions or the reliability of the evidence by attending police. The reliability of the police evidence is bolstered by the fact that Constable Byrnes made notes that evening on the PROMIS system recording what he heard the accused say that night.

[47] Ranged against that, the accused does not suggest that the statement was not voluntarily made in the exercise of free choice; or that his will

was overborne; or his statement made as the result of duress, intimidation, persistent importunity or sustained or undue insistence or pressure. The accused also does not suggest that his admissions were preceded by an inducement, such as a threat or promise, held out by the attending police. Nor does the evidence suggest any such influence or inducement.

[48] Counsel for the accused maintains that the police evidence should be considered unreliable on two bases. The first is that there are inconsistencies between the various accounts of the admissions given by police. The second is that the accused instructs her that at the time police attended they were not interested in hearing his side of the story. As to the first matter, the accounts given by Constables Goldsmith and Bruton are consistent. The account of the admission given by Constable Byrnes varies in some details, but not so as to suggest unreliability, concoction or fabrication. As to the second matter, the accused did not give evidence on the *voir dire*, and his counsel asserts privilege over his instructions. It is difficult to see how counsel's advertence in general terms to undisclosed instructions gives rise to any basis on which to assert unreliability on the part of the police witnesses. That is particularly so given that her cross-examination of the attending police officers did not elicit the slightest suggestion of partiality on their part.

[49] Counsel also suggests that the conduct of police in not saving the footage was so grossly negligent and incompetent that oral evidence of the admissions made by the accused should be excluded on public policy grounds. However, this is not a case which involved non-compliance with some positive obligation. There is no question of unlawful conduct here, and there is nothing sinister or otherwise improper about the nature of the non-compliance and the reasons for it in the circumstances. Nor was the failure to save the footage the product of a reckless disregard of the statutory provision. It was inadvertent and excusable in the circumstances.

[50] On the other hand, the reception of the evidence would not be unfair to the accused given the circumstances in which the admissions are alleged to have been made. Generally speaking, where an accused spontaneously makes an admission to police in circumstances where the admission is not elicited in response to official police questioning, a court will not exclude an unrecorded admission: see, for example, *Bullock* [2005] NSWSC 825. Although the admissions were recorded in this case, similar considerations arise.

[51] For these reasons, I am satisfied that the admission of the evidence would not be "contrary to the interests of justice" within the meaning of s 143 of the *Police Administration Act.*

The operation of s 85(2) of the ENULA

[52] Counsel for the accused had initially contended in written submissions that evidence of the admissions is not admissible because the circumstances in which they were made were not such as to make it unlikely that the truth of the admission was adversely affected within the meaning of s 85(2) of the ENULA.

[53] Section 85 of the ENULA provides:

> **85 Criminal proceedings – reliability of admissions by defendants**
>
> (1) This section applies only in a criminal proceeding and only to evidence of an admission made by a defendant:
>
> (a) to, or in the presence of, an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence; or
>
> (b) as a result of an act of another person who was, and who the defendant knew or reasonably believed to be, capable of influencing the decision whether a prosecution of the defendant should be brought or should be continued.
>
> *Note for subsection (1)*
>
> *Subsection (1) is inserted as a response to the decision of the High Court of Australia in Kelly v The Queen (2004) 218 CLR 216.*
>
> (2) Evidence of the admission is not admissible unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected.
>
> (3) Without limiting the matters that the court may take into account for the purposes of subsection (2), it is to take into account:
>
> (a) any relevant condition or characteristic of the person who made the admission, including age, personality and education and any mental, intellectual or physical disability to which the person is or appears to be subject; and
>
> (b) if the admission was made in response to questioning:
>
> (i) the nature of the questions and the manner in which they were put; and

(ii) the nature of any threat, promise or other inducement made to the person questioned.

[54] Section 85 of the ENULA is concerned with whether the circumstances adversely affected the "truth of the admission". The enquiry does not raise any consideration of whether the admissions made were, in fact, true. The relevant enquiry is whether circumstances such as the accused's personal characteristics and the level of compliance with procedural safeguards may have affected the truth of the confession: see *R v GP* [2015] NTSC 53 at [30]. In other words, the enquiry is whether the circumstances were such that it was unlikely that the accused made a false confession: see *R v Esposito* (1998) 45 NSWLR 442 at 459-460.

[55] Counsel for the accused had contended in written submissions that "it is likely from the nature of the questions put to the accused made clear he was a primary suspect in the matter"; and "it is likely that the manner in which the questions were put to the accused were accusatory in nature". Those contentions were not borne out on the evidence. As already described, the evidence on the *voir dire* suggests the admissions were made by the accused in an attempt to explain the circumstances in which he pushed and punched the complainant. Following the receipt of the police evidence during the conduct of the *voir dire* hearing, counsel for the accused abandoned the objection to admissibility on this ground.

The operation of s 90 of the ENULA

[56] The accused's next contention is that the record of interview should be excluded because it would be unfair to the accused to use the evidence having regard to the circumstances in which the admission was made within the meaning of s 90 of the ENULA. The accused bears the onus of establishing unfairness on the balance of probabilities: see ENULA, s 142(1).

[57] Section 90 of the ENULA provides:

> **90 Discretion to exclude admissions**
>
> In a criminal proceeding, the court may refuse to admit evidence of an admission, or refuse to admit the evidence to prove a particular fact, if:
>
> (a) the evidence is adduced by the prosecution; and
>
> (b) having regard to the circumstances in which the admission was made, it would be unfair to a defendant to use the evidence.
>
> *Note for section 90*
>
> *Part 3.11 contains other exclusionary discretions that are applicable to admissions.*

[58] In *Em v R* (2007) 232 CLR 67, the High Court considered the admissibility of an admission secretly taped by police. In the course of that consideration Gummow and Hayne JJ (at [107]) dealt in the following terms with the focus of the enquiry concerning unfairness:

> As pointed out at the commencement of these reasons, the central issue is whether the evidence of admissions should not have been admitted because, having regard to the circumstances in which they were made, it would be unfair to the defendant to use the evidence. That question requires consideration of whether there was identified some aspect of the circumstances in which the admissions were made that revealed why the use of the evidence,

> at the trial of the person who made the admissions, 'would be unfair'. That is, the focus of s 90 falls upon the fairness of using the evidence at trial, not directly upon characterising the circumstances in which the admissions were made, including the means by which the admissions were elicited, as 'fair' or 'unfair'".

[59] As is apparent from that discussion, the focus is not upon whether the circumstances in which the admission was made were fair or unfair. Rather, it is on whether having regard to those circumstances it would be unfair to a defendant to use the evidence at trial. There is a subtle but meaningful distinction. Gummow and Hayne JJ went on to deal (at [109]) with the interaction between the various exclusionary provisions in the ENULA in the following terms:

> When it is "unfair" to use evidence of an out-of-court admission at the trial of an accused person cannot be described exhaustively. "Unfairness", whether for the purposes of the common law discretion or for the purposes of s 90 [of the Uniform Evidence Acts], may arise in different ways. But many cases in which the use of evidence of an out-of-court admission would be judged, in the exercise of the common law discretion, to be unfair to an accused are dealt with expressly by particular provisions of the Act[s] other than s 90. Thus although the discretion given by s 90 is generally similar to the common law discretion considered in [*R v Lee* (1950) 82 CLR 133], it is a discretion that will fall to be considered only after applying the other, more specific, provisions of the Act[s] referred to at the start of these reasons. The questions with which those other sections deal (most notably questions of the reliability of what was said to police or other persons in authority, and what consequences follow from illegal or improper conduct by investigating authorities) are not to be dealt with under s 90. The consequence is that the discretion given by s 90 will be engaged only as a final or 'safety net' provision.

[60] The unfairness in this case is said by counsel for the accused to arise from the fact that the accused had not been cautioned before he made

the admissions, and that the police evidence of the admissions does not capture the entirety of the accused's account. So far as the question of the caution is concerned, for the reasons already described it was not incumbent on police to administer the caution before the accused made his spontaneous admission. Police did nothing to contribute to any mistaken assumption on the part of the accused that what he said could not be used against him. The accused's freedom to say nothing was in no way impugned. He knew he was speaking to police officers who were attending in relation to some form of altercation.

[61] Even if that was not the case, in the particular facts of this case questions concerning the reliability of what was said and the lawfulness and propriety of the police conduct are matters properly addressed under provision such as ss 85 and 138 of the ENULA. As Gummow and Hayne JJ observed in *Em v R* (at [112]):

> As noted earlier, s 90 of the Act expressly directs attention only to the fairness of using the evidence at the trial of the accused. Section 85 deals with evidence of an admission made by a defendant in the course of official questioning, and provides that the evidence is not admissible unless the circumstances in which the admission was made 'were such as to make it unlikely that the truth of the admission was adversely affected'. It follows that consideration of the reliability of what was said in a statement made to police can have no part to play in the operation of s 90.

[62] And further at [121]:

> It also follows from the conclusions just expressed about the operation of s 138 that to begin examination of the operation of s 90 from a premise which attaches determinative significance to

> the fact that the appellant had the mistaken belief (caused or contributed to by the police) that what he said was not being recorded and would not be admissible in evidence would be erroneous. It would be erroneous because that would not take the operation of provisions like ss 85 and 138 into account. The relevant questions presented by the Act (in particular, by ss 85 and 138) are about the reliability of the admissions made to police, and the lawfulness and propriety of the methods used to obtain the admissions. Showing that the person making the admission acted under some misapprehension is not to the point.

[63] So far as the accused's second complaint in this context is concerned, the police evidence clearly contextualises the purpose for which the accused made the admissions and the gist of his story. That is, as has already been described, the complainant came to his gate; in the accused's assessment, the complainant interacted inappropriately with the accused's daughter; the complainant refused to leave when asked; and the accused then punched him. These are matters which can no doubt be further explored in cross-examination of the complainant, the police officers and the accused's ex-partner at trial. These are also matters of which the accused can give evidence at trial for exculpatory purposes should he elect to do so. As best as can be discerned, the proposition which appears to be put by counsel for the accused is that but for evidence of the admissions, the defence would not be required to meet the Crown case. That submission is without foundation.

[64] In the present circumstances, the assessment of unfairness otherwise calls up the same considerations as presented in the exercise of the common law discretions under s 143 of the *Police Administration Act*

(discussed above). For the reasons given in that context, evidence of the admissions is not rendered inadmissible by operation of s 90 of the ENULA.

The operation of ss 135 and 137 of the ENULA

[65] The accused's next contention is that the admissions should be excluded in the exercise of the general discretions under ss 135 and 137 of the ENULA.

[66] The first provision confers a general discretion to refuse to admit evidence if its probative value is "substantially outweighed by the danger that the evidence might: (a) be unfairly prejudicial to a party; or (b) be misleading or confusing; or (c) cause or result in undue waste of time. The term "probative value" is defined to mean "the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue". For the reasons given by the Crown, the evidence of the admissions is highly probative. If accepted by the jury, it would establish that the accused engaged in the conduct alleged to constitute the assault.

[67] So far as the balancing exercise is concerned, there is no basis on which to conclude that the receipt of the evidence might be misleading or confusing, or cause or result in undue waste of time. Evidence is not unfairly prejudicial merely because it makes it more likely that the defendant will be convicted. It is unfairly prejudicial if it would

deprive the accused of a fair trial. The accused will be deprived of a fair trial if there is a real risk that the evidence will be misused by the jury in some unfair way. Counsel for the accused does not identify any relevant or tenable risk of misuse in these circumstances. The only matters identified by counsel for the accused are those discussed above in the context of s 90 of the ENULA.

[68] Section 137 of the ENULA is restricted in its operation to criminal proceedings, and requires the court to refuse to admit evidence adduced by the Crown "if its probative value is outweighed by the danger of unfair prejudice to the defendant". For the reason described in the context of s 135 of the ENULA, the admissions are highly probative.

[69] Again, in order for there to be a danger of unfair prejudice to the accused "[t]here must be a real risk that the evidence will be misused by the jury in some way that the risk will exist notwithstanding the proper directions which it should be assumed the Court will give": *R v Shamouil* (2006) 66 NSWLR at [72] per Spigelman CJ. The test enunciated by McHugh J in *Festa v The Queen* (2001) 208 CLR 593 at [51] is in the following terms:

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

[70] The evidence does not appear on its face to be weak. In the absence of circumstances demonstrating concoction, implausibility or uncertainty, contestable matters of credibility and reliability will ultimately be for the jury to determine. The submission by counsel for the accused that the asserted inconsistencies between the accounts given by police deprive the evidence of any probative value should be rejected. There is also no basis on which to suggest that the jury would give the evidence more weight than it deserves, or that it would divert the jury from its proper task.

[71] For of these reasons, there is no basis for the exercise of the discretion to exclude the evidence of the admissions made by the accused in pursuance of ss 135 and 137 of the ENULA.

The operation of s 138 of the ENULA

[72] The accused's final contention is that evidence of the admissions should not be admitted because it was obtained improperly within the meaning of s 138(1) of the ENULA. Section 138 of the ENULA provides relevantly:

> **Exclusion of improperly or illegally obtained evidence**
>
> (1) Evidence that was obtained:
>
> (a) improperly or in contravention of an Australian law; or
>
> (b) in consequence of an impropriety or of a contravention of an Australian law;
>
> is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence

that has been obtained in the way in which the evidence was obtained.

(2) Without limiting subsection (1), evidence of an admission that was made during or in consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been obtained improperly if the person conducting the questioning:

(a) did, or omitted to do, an act in the course of the questioning even though he or she knew or ought reasonably to have known that the act or omission was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning; or

(b) made a false statement in the course of the questioning even though he or she knew or ought reasonably to have known that the statement was false and that making the false statement was likely to cause the person who was being questioned to make an admission.

(3) ….

[73] The burden is on the party seeking exclusion of the evidence to establish that it was improperly obtained: see *Parker v Comptroller-General of Customs* (2009) 83 ALJR 494 at [28] per French CJ. The ENULA contains no general or specific definition of "impropriety". The method or conduct will only be “improper” in the relevant sense if it is "not in accordance with truth, fact, reason or rule; abnormal, irregular; incorrect, inaccurate, erroneous, wrong": see *Parker v Comptroller-General of Customs* (2009) 83 ALJR 494 at [29] per French CJ.

[74] The meaning of the term "improperly" was described by Basten JA in *Robinson v Woolworths Ltd* (2005) 158 A Crim R 546 at [23] in the following terms:

> It follows that the identification of impropriety requires attention to the following propositions. First, it is necessary to identify what, in a particular context, may be viewed as "the minimum standards which a society such as ours should expect and require of those entrusted with powers of law enforcement". Secondly, the conduct in question must not merely blur or contravene those standards in some minor respect; it must be "quite inconsistent with" or "clearly inconsistent with" those standards.

[75] As suggested in that extract, the test is not materially different to the common law position that in order to warrant the exclusion of evidence on this basis the conduct in question must be "inconsistent with the minimum standards which a society such as ours should expect and require of those entrusted with powers of law enforcement": *Ridgeway v R* (1995) 184 CLR 19 at 36 per Mason CJ, Deane and Dawson JJ. Moreover, that conduct must be “clearly inconsistent” with those standards. Although it may be accepted for these purposes that the method or conduct in question need not have been intentionally improper, it must still be capable of characterisation as clearly and significantly inconsistent with minimum standards.

[76] The relevant impropriety in this case was first said by counsel for the accused to arise from the circumstances already described and considered above in the context of ss 140 to 143 of the *Police Administration Act*. For the reasons already expressed, none of those matters, either alone or in combination, could be said to have adversely affected the reliability of the admissions; or to constitute conduct which was inconsistent with the minimum standards expected of law

enforcement officers; or to be in contravention of an Australian law or in consequence of a contravention of an Australian law.

[77] Counsel for the accused then asserted that the failure to retain the footage from the Body Worn Video was "intentional, reckless, negligent or incompetent", and so fell short of the relevant minimum standards. There is a distinction to be drawn between impropriety on the one hand and oversight or incompetence on the other. There may be circumstances demonstrating incompetence of such degree as to constitute impropriety, but this is not such a case. I have described above the evidence in relation to the circumstances in which the body-worn footage was not retained. Those circumstances do not disclose conduct falling below the minimum standards expected of law enforcement officers.

[78] Even leaving that matter aside, there is a fundamental difficulty with the proposition that the failure to save the uploaded footage from the Body Worn Video was the relevant impropriety. Section 138 of the ENULA operates only to exclude evidence that was obtained improperly or in contravention of an Australian law. The evidence in this case is evidence of the admissions. That evidence was not obtained improperly. There was no breach of s 140 of the *Police Administration Act*. Section 142 of the *Police Administration Act* does not cast a positive obligation on police which was breached by receipt of the accused's spontaneous admissions. The failure to save the

uploaded footage was not to obtain evidence improperly or in contravention of an Australian law. In fact, it has nothing to do with the manner in which the evidence was obtained.

[79] For these reasons, the accused has not established that evidence of admissions made by him during the interviews was "obtained improperly" or in contravention of an Australian law within the meaning of s 138 of the ENULA, and should therefore be excluded on that basis. Even if there was relevant impropriety (which there was not), the exclusion is not absolute. It would require the court to balance the desirability and undesirability of admitting the evidence. That calls into play the considerations under s 138(3) of the ENULA. The probative value and importance of the evidence, the nature of the offence, and the nature of the asserted contravention would be such that the evidence would properly be admitted notwithstanding a finding of relevant impropriety.

Ruling

[80] The evidence from attending police officers concerning the admissions made by the accused at his residence on the evening of 1 July 2017 is admissible in the trial.
