CITATION:	*The King v Fred* [2024] NTSC 78
PARTIES:	THE KING
	v
	FRED, Tamsley
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	22336567
DELIVERED ON:	17 September 2024
HEARING DATE:	2 September 2024
JUDGMENT OF:	Brownhill J

CATCHWORDS:

EVIDENCE – Criminal proceedings – Admissibility of admissions made by the accused – Whether admissions should be excluded pursuant to ss 138, 90 and 137 of the *Evidence (National Uniform Legislation) Act* – Admissions are admissible at trial.

Whether admissions were improperly obtained or obtained in consequence of an impropriety – Whether the alleged non-compliance with Police General Orders equated to an impropriety – Admissions were made spontaneously and voluntarily – Admissions are not evidence obtained improperly nor in consequence of an impropriety.

Whether admissions had probative value – Admissions went to the accused's state of mind and related to a fact in issue – Admissions had probative value – Unnecessary to conduct 'balancing exercise' required by s 138(1).

Discretion to exclude admissions pursuant to s 90 – Whether there was unfairness to the accused – The admissions were spontaneous and voluntary

– Unfairness addressed by not providing body worn footage to the Jury – Admissions are admissible.

Em v The Queen (2007) 232 CLR 67, *The King v Woods* [2023] NTSC 21, *The Queen v Bonson* [2019] NTSC 22, *The Queen v Layt* [2018] NTSC 36 referred to.

Evidence (National Uniform Legislation) Act 2011 (NT) ss 81, 85, 90, 137, 138.

Police General Order Q1: Questioning and investigations

Police General Order Q2: Questioning people who have difficulties with the English Language – The "Anunga" guidelines.

REPRESENTATION:

Counsel:

Crown:	S Ledek
Accused:	S Ozolins

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Accused:	Northern Territory Legal Aid Commission

Judgment category classification:	C
Judgment ID Number:	Bro2408
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The King v *Fred* [2024] NTSC 78
No. 22336567

BETWEEN:

THE KING
Crown

AND:

TAMSLEY FRED
Accused

CORAM: BROWNHILL J

REASONS FOR JUDGMENT

(Delivered 17 September 2024)

[1] The accused was charged with having sexual intercourse with the complainant without her consent, contrary to s 192(3) of the *Criminal Code*. The offence was alleged to have occurred on 9 November 2023.[1]

[2] The Crown sought to rely on certain admissions made by the accused after being taken into Police custody. The Defence argued the admissions were inadmissible or should be excluded under various provisions of the *Evidence (National Uniform Legislation) Act 2011* (NT) ('ENULA').

1 This was prior to the amendments to the *Criminal Code* made by the *Criminal Justice Legislation Amendment (Sexual Offences) Act 2023* (NT), which commenced operation on 25 March 2024. By s 475(1) of the *Criminal Code*, the amendments made by the Amendment Act do not apply to offences committed on or before that date, and the offence provisions as in force before that date continue to apply in relation to offences committed before that date.

[3] On 2 September 2024, I ruled that the admissions were admissible and not to be excluded. I indicated that I would publish my reasons in due course. These are my reasons.

Crown case

[4] The Crown case is that the complainant and the accused met on a dating application in or about October 2023. The accused was a 'fly in fly out' worker who lived in Queensland, but came to Darwin roughly every two weeks for a two week work shift. The accused and the complainant had been communicating via the dating application, and later via text messages, for a few weeks. They went on a first date and continued to communicate via text messages thereafter. During the text exchanges, the complainant made clear to the accused that she wished to be married before living together or having children, and said she would like to get to know the accused better. By contrast, the accused often suggested romance, physical intimacy and proposed that the complainant should stay overnight with him when they next met in person. They agreed to go on a second date on 9 November 2023. The day before the second date, the complainant sent a text message to the accused saying that sex or living together before marriage was a non-negotiable option for her and maybe she and the accused were just looking for different things.

[5] At around 6.30pm on 9 November 2023, the complainant and accused met in the city for their second date. They walked around the Esplanade and went to a restaurant for dinner. After dinner they walked to the accused's hotel room on the Esplanade. Neither had consumed any alcohol. Inside the room, they sat down and drank some water. The accused stood up and leant towards the complainant, kissing her on the lips. She kissed him back. He then pulled her up to stand facing him and put his arms around her back, pinning her body to his. He pulled her shirt up and she pulled it down. She asked him to walk her back to her car, which was parked across the road from the hotel. He said words to the effect of: 'Come on, it's just a hug'. He kissed her quite forcibly. She repeated several times: 'No, I don't want this, let's go, walk me to the car'. The accused put the complainant's hand inside his shorts and underwear onto his penis and told her to fiddle with him. He thrust his hips against the complainant and her hand. She felt frozen with shock. He pulled down her shorts and underwear and she pulled them back up. He pulled them down again and she pulled them up. He pulled them down again and removed them from her. He sat her down on the bed by putting his hand on her shoulder. He put his hands under her thighs and lifted her further up towards the centre of the bed. She was lying on her back. He took off his clothes and inserted his penis into her vagina. The intercourse continued for around 20 minutes, with him kissing her on the mouth while her mouth was shut. During this

time, she said to him ‘no’ and ‘I want to go home’ and sat up. He said words to the effect of: ‘Just let me finish’, pushed her back down on the bed and continued having sex with her until he ejaculated. He went to the bathroom. The complainant got dressed, grabbed her things and left the hotel room. She walked to her car and drove home past the Nightcliff Police Station, which was not open. She went from her home to the Emergency Department at the hospital, reporting that she had been raped.

[6] After she left the hotel room and as she drove, the accused called her several times and she did not answer. He sent her several text messages asking where she was and saying he was looking for her. She replied saying: ‘You knew I was angry and didn’t want to have sex with you at all. Why did you force yourself on me?’ and ‘I said no multiple times and yet you continued. Why?’

[7] The accused responded asking why the complainant was angry, that it all started with a good kiss, and he wanted to have a relationship with her. He also said: ‘Am sorry but we were already there and I just had to finish. Am sorry if I didn’t make u enjoy. We can be better next time.’

Lead up to the arrest

[8] The following day, the complainant was examined at the Sexual Assault Referral Centre and gave a recorded interview to Police. She gave a physical description of the accused, including of some tattoos

he had on his arms. She told Police what limited information she had about the accused, including that he was originally from Papua New Guinea and was a fly in fly out worker who worked in a mine in the Northern Territory as an engineer, that he lived in Queensland and was flying back to Queensland at 6.30pm that day.

[9] Police made various efforts to identify the accused as the complainant did not know his full name. They had a photograph of him which the complainant had on her phone. Police went to the airport to apprehend the accused before he caught the flight.

Arrest and admissions

[10] At 3.25pm, the accused was located by Police detectives sitting outside the airport terminal. The accused was arrested by two officers. The arrest, and the exchanges between Police and the accused, were captured on body worn footage.

[11] The arrest and exchange occurred as follows:

Police:	*How are you buddy?*
Accused:	*Hi. I'm good.*
Police:	*Just show us your hands, mate, [handcuffs placed on the accused]. My name's [name]. This is [name], from the Northern Territory Police, mate. I'm just going to inform you, you're under arrest, okay? For sexual intercourse without consent.*
Accused:	*Which one?*

Police: *Sexual intercourse without consent. All right? So you were at a hotel, I believe it was last night. Alright? You don't have to say anything. Anything you say or do is being recorded [gestures to body worn camera and accused looks at the camera] and may be used in evidence, okay? Do you understand what I'm saying?*

Accused: *Oh, I cannot...*

Police: *Hey, is there anybody you want notified that you're with the police today?*

Accused: *No.*

Police: *Nah? Okay. Alright. You all good?*

Accused: *I'm good.*

Police: *Okay. Alright. I know it's scary mate. But [accused moves to stand] stay sat down for us. Do you have any questions about what's going on?*

Accused: *I was, I was with my girlfriend. Yeah.*

[Accused is asked to provide identification. He does so. He is asked for his name and where he is flying to. He provides that information. Police tell the accused they will take him to the Watch house in their car, he asks about his luggage, and is told Police will take care of it. Police have a brief discussion about 'telling AFP' and retrieving the accused's luggage.]

Police: *How long have you been in Darwin?*

Accused: *Oh, I've, um, been here like two months now. Yeah.*

So I, I, we will speak at the station, but I sort of met this girl, ah, we were talking for a bit and then she agreed to go with me, um, to the hotel. Um, and we, we started like making out, making out. And actually we were having intercourse, um, but she sort of decided at the middle of intercourse that she, she wanted to like get to the car and I just told her I had to finish before we can, we can go. That's all I, I, I said to her.

[Other Police arrive and further discussions occur between Police about transporting the accused, and getting his luggage, and he is placed in a paddy wagon.]

[12] The accused was then taken to the Watch house and processed into custody. At the Watch house, the following exchange occurred:

Police: *So, um, I'm going to inform you that you are under arrest. You've been arrested today for, uh, sexual intercourse without consent. You don't have to say anything. Anything you say or do...*

Accused: [nodding] *Mm-hm.*

Police: *... is being recorded and may be used in evidence, okay?*

Accused: *Okay. Yep.*

Police: *Um, so as a right of somebody in custody, you have the uh the right to contact somebody to let them know you're with the police today. Is there anybody we can contact to let them know that you are here?*

[Accused asks for family back at home, specifically his mother in Papua New Guinea, to be contacted. Police advise him that will be facilitated. Police inform the accused that Police will be seizing his mobile phone to have it forensically analysed, and then he can have it back.]

Police: *Okay. Alright. Um, it's up to you whether you do or not, are you willing to provide your PIN? It may speed the process up, but it's entirely up to you.*

Accused: *Is it, um, with respect to the conversation I had with the, the one who's complaining? The complainant?*

Police: *Yes.*

Accused: *Yeah, that's all right.*

Police: *Yes. So...*

Accused: *We can, we can sort of, um, have a look at it. Cause it, I don't think it's, against their will. Cause we, on the message, we, we sort of agreed first and she, she actually agreed to like, for us to be together, um, like have a bit of intimacy and all that.*

Accused: *Um, and her complaint came after like we've, we've been through it and in the mid, mid, mid during the, um, activity, um, she decided to stop. So from, from, from my point of view, I don't see this being against their will. Um, she was upset about something and she sort of stopped.*

[There is a discussion about the PIN code. Accused is offered a recorded interview, which he accepts. There is further discussion about the accused's details and personal situation.]

[13] The underlined portions above were the admissions sought to be relied on by the Crown.

[14] It was not in dispute that those underlined portions were admissible pursuant to s 81 of the ENULA as admissions or statements made at the same time and reasonably necessary to understand the admissions. Nor was it in dispute that those underlined portions were admissible pursuant to s 85 of the ENULA because the circumstances in which the admissions were made were such as to make it unlikely that the truth of the admission was adversely affected.

[15] Rather, the Defence argued that the admissions should be excluded pursuant to ss 138, 90 and 137 of the ENULA.

Exclusion of improperly obtained evidence – s 138, ENULA

[16] The Defence argued that the admissions were obtained improperly or in consequence of an impropriety within s 138 of the ENULA. The basis of that argument was essentially because the caution was not administered in accordance with Police General Orders, and because in the circumstances it was clear the accused may not have understood his right to silence.

[17] Failure of Police to comply with Police General Orders may have the effect that any admissions made by an accused comprise evidence that was obtained improperly or in consequence of an impropriety within s 138(1) of the ENULA.[2]

Airport admission

[18] Firstly, the Defence argued that Police General Order Q1, item 2.1 had not been complied with because the accused was placed in handcuffs before he was arrested. Item 2.1 states:

> Prior to arrest, Police have no authority to exercise any restraint whatsoever upon a person being questioned or to detain the person in any way, whether upon police premises or elsewhere, and the person is free to come and go as they please.

[19] I do not accept that item 2.1 was not complied with. At the time of the arrest, the accused was not 'a person being questioned' within the meaning of item 2.1. The only question asked of him prior to his arrest

2 See *The Queen v Bonson* [2019] NTSC 22 at [41]-[50], [56] per Hiley J and the authorities there cited; *The King v Woods* [2023] NTSC 21 at [39] per Reeves J, citing *Bonson*.

was ‘how are you?’ and the purpose of the Police approaching him was to arrest him and take him into custody, not to question him. In any event, the words ‘you’re under arrest’ were stated by the Police officer to the accused less than six seconds after a handcuff was placed on his wrist, after the officer had introduced himself and the other officer as being from the Northern Territory Police, and during the course of the handcuffing process.

[20] Even if item 2.1 was not complied with (and I do not accept that), I do not accept that the non-compliance had, or could have had, any bearing at all upon the voluntariness or truthfulness of the admissions made by the accused at the airport. The accused’s admission at the airport was made more than three minutes after he was placed under arrest. I do not accept that a six second delay between the commencement of the handcuffing and the words ‘you’re under arrest’ could have had any impact upon the accused’s decision to tell Police about what had happened with the complainant the night before.

[21] Secondly, the Defence argued that the Police did not comply with Police General Order Q1, item 3.1 when administering the caution, particularly given the accused’s apparent lack of understanding of it.

[22] Item 3.1 states:

> A member, before questioning a person who is suspected of committing an offence, should inform the person of the nature of the allegations and caution the person in the following manner:

> "I am going to ask you certain questions about [state briefly nature of inquiry] which will be recorded. You are not obliged to say anything unless you wish to do so, but whatever you do say will be recorded and may be given in evidence. Do you understand that?"
>
> It is not necessary for the caution to be administered verbatim. This may be inappropriate for certain people. What is important is that the essence of the caution must be conveyed, that is:
>
> (a) the suspect knows the nature of the allegations;
>
> (b) the suspect understands that they don't have to say anything (they have the right to remain silent);
>
> (c) the suspect understands that what they say will be recorded;
>
> (d) the suspect understands that this recording may be used in court.

[23] As Reeves J observed in *The King v Woods* (at [36]),[3] the purpose of a caution is, in broad terms, to inform an accused person of three things: (i) the existence of their right to silence; (ii) the basic content of that right; and (iii) the consequences of waiving that right. An effective caution must therefore convey each of these elements.

[24] The caution administered by Police in this proceeding did essentially contain the words of the caution in item 3.1 above.

[25] Despite that, the Defence argued that in the circumstances, the Police should have gone further by confirming that the accused did understand each of the elements of the caution. Defence argued that the Police should have followed the requirements of Police General Order Q2, particularly by: (a) in accordance with item 2.2, gathering evidence to

3 *The King v Woods* [2023] NTSC 21 at [36].

demonstrate whether the accused is entitled to the benefit of the Anunga Guidelines; and (b) in accordance with item 3.1.3, asking the accused to explain what is meant by the caution, phrase by phrase.

[26] Police General Order Q2 states:

> **General Order Q2 – Questioning people who have difficulties with the English language – The 'Anunga' Guidelines**
>
> ...
>
> **2. Persons entitled to the benefit of the Anunga Guidelines**
>
> 2.1 The guidelines apply to any person being questioned as a suspect, if that person is not as fluent in English as the average white person of English descent. Two important points must be understood by all members:
>
> 2.1.1 not only aborigines fall into this category – it extends to migrants and possibly other groups as well ...
>
> 2.2 Investigators must determine, as part of the investigation, whether or not a particular suspect is entitled to the benefit of the guidelines. Evidence must be gathered to demonstrate whether or not a particular suspect is so entitled. Such evidence might include:
>
> 2.2.1 the investigator's observations of, and dealings and conversation with the suspect;
>
> 2.2.2 the suspect's answers to questions put to the suspect, ...
>
> **3. The Guidelines**
>
> ...
>
> 3.1.3 Great care should be taken in administering the caution when the stage has been reached that it is appropriate to do so. The suspect should be asked to explain what is meant by the caution, phrase by phrase.

> Questioning should not proceed until it is apparent that the suspect understands the right to remain silent.
>
> ...

[27] The Defence argued that the requirement to go further than cautioning the accused by use of the words set out in Police General Order Q1, item 3.1 arose because:

a. when informed of the charge, the accused said ‘which one?’;

b. when asked if he understood the caution, the accused said ‘oh, I cannot ...’;

c. when informed of his arrest and cautioned, the accused looked confused;

d. the accused is a Papua New Guinean national, so English was not, or may not have been, his first language.

[28] After the accused said ‘which one?’, the charge was repeated to him and further details were given, namely that it related to him being at a hotel the night before. It is more than apparent, from his admission given later, that the accused understood the nature of the charge, specifically that it related to his having had sex with the complainant the night before, and that it related to sex having occurred without her consent.

[29] It is also clear from the interactions between the accused and the two Police officers across the next three minutes before he made the admission at the airport (and later at the Watch house), that the accused was 'as fluent in English as the average white person of English descent' (as per the terms of Police General Order Q2). In those three minutes the accused answered questions and followed instructions regarding his identification, his transportation and raised with Police the retrieval of his luggage.

[30] Further, prior to going to the airport to seek the accused, the arresting officer had been informed (at around 2pm) of an investigation being undertaken by the Sex Crimes Unit, he reviewed the 'PROMIS job', liaised with members of the Sex Crimes Unit, reviewed 'Evidence.com' and the photo of the accused obtained from the complainant, watched CCTV footage obtained from a supermarket attended by the accused and the complainant the night before, and was informed by members of the Sex Crimes Unit that the complainant had stated that the accused was due to fly to Townsville that day because he was a fly in fly out mine worker.[4]

[31] By the time the arresting officer became involved in the investigation, the complainant had completed a recorded interview with Police during which she disclosed her allegations against the accused, had informed

4 Statutory Declaration of Constable First Class Christopher Smith, 10 November 2023.

Police that she had been having communications with the accused by text messages for a number of weeks prior to 9 November 2023, had shown the interviewing officer some of those text messages, and had told the arresting officer that the accused was a mining engineer who worked with explosives, originally from Papua New Guinea, staying in north Queensland, working at a mine in the Northern Territory, and that he socialised with friends with mining connections.

[32] I consider it highly likely that, prior to the accused's arrest, the arresting officer had been briefed with those details about the accused (or sufficient of them) for him to reasonably form the view that the accused was, despite his Papua New Guinean nationality, a person 'as fluent in English as the average white person of English descent'. This view would have been confirmed by his observations of, dealings with, and conversations with the accused after the arrest.

[33] Consequently, I find that the requirements of Police General Order Q2, item 2.2 were complied with and the accused was not a person falling within the terms of item 2.1.

[34] I do not accept that the accused's 'negative' response to the question asking if he understood the caution, and his look of 'confusion', were any sort of indication that he did not understand it. The response was unfinished and appears to me to convey more surprise or shock at being arrested for sexual intercourse without consent than a failure to

understand the essential elements of the caution, particularly his right to remain silent. The accused clearly understood that he was being recorded as he looked directly at the body worn camera when informed of that.

[35] In any event, I do not accept that the accused was 'a person being questioned as a suspect' within the meaning of Police General Order Q2. He was simply a person being arrested. The question which preceded the accused's admission was not a question designed to elicit information from him about a suspected offence, it was simply a question about his personal circumstances, most probably for the purpose of putting him at ease as his transportation was arranged. It appears from the absence of any reliance by the Defence on s 139 of the ENULA that the Defence accepted that the admissions were not made 'during questioning' at least within the meaning of that provision.

[36] I find that the admission made by the accused at the airport was spontaneous and entirely voluntary, and not in any way a consequence of an impropriety, nor do I find that it was elicited in response to official Police questioning. While the accused made the admission after being asked how long he had been in Darwin, that question was not asked for the purpose of eliciting information about the alleged offending and the admission was not responsive to that question. There was nothing about the accused's manner or the words he said to

suggest that he felt compelled to speak about the allegations. He was clearly seeking to inform Police that the complainant had consented to the sexual intercourse and his awareness or understanding of that. He wished to put to them his side of the story, and elected to do so, in my view, fully aware that anything he said or did was being recorded and could be used as evidence in court.

[37] Consequently, the admission made by the accused at the airport was not evidence that was obtained improperly or in consequence of an impropriety within s 138(1) of the ENULA.

Watch house admission

[38] The Defence repeated the arguments dealt with above in relation to the Watch house admission, which was made after the accused was re-cautioned in a similar way to the caution at the airport, and which was accompanied by the accused nodding and followed by the accused giving an affirmative response to the caution (‘okay’).

[39] The nodding and affirmative response confirm that the accused had understood the caution at the airport. The Defence submission that this may have been some form of gratuitous concurrence is rejected. The accused’s responses to instructions and requests again disclose that he was a person as fluent in English as the average white person of English descent. His use of the words ‘complaint’ and ‘complainant’ indicate a good understanding of English. His questions before his

affirmative response to Police requests for the PIN code to his phone show that he understood himself to be giving permission which he was not compelled to give. He was not simply concurring without actually agreeing to what was said to him.

[40] Again, I find that the admission made by the accused at the Watch house was spontaneous and entirely voluntary, and not in any way a consequence of an impropriety or elicited in response to official Police questioning. While the accused made the admission after being asked for the PIN code to his phone, and the officer confirmed that it was being sought in relation to his communications with the complainant, he had not been asked anything about those communications. The admission was not responsive to any request for information about those communications or their presence on his phone. Again, there was nothing about the accused's manner or the words he said to suggest that he felt compelled to speak about the allegations. He was clearly seeking to put forward his side of the story, and elected to do so, in my view, fully aware that anything he said or did was being recorded and could be used as evidence in court.

[41] For these, and the reasons set out above relating to the airport admission, the admission made by the accused at the Watch house was not evidence that was obtained improperly or in consequence of an impropriety within s 138(1) of the ENULA.

Desirability and undesirability of admitting the admissions

[42] The above conclusions make it unnecessary to consider the balancing exercise required by s 138(1) of the ENULA, and the matters set out in s 138(2) to be taken into account.

[43] I will deal with this matter only briefly.

[44] The Defence argued that the admissions had no probative value because they did not establish or make more likely any fact which the complainant had not already agreed to in cross-examination about the complainant wanting to go to her car in the middle of sexual intercourse, the accused saying he wanted to finish the intercourse first, and the sexual intercourse resuming without any protest or overt act from her to indicate that she did not consent thereafter. It was said that, by virtue of her agreement to them in cross-examination, these facts were not in dispute.

[45] I reject the submission that the admissions had no probative value.

[46] There were no agreed facts to the effect asserted by the Defence. There was no indication by way of the Defence opening address that these facts were not in issue (as opening addresses had not, at the time of the voir dire, been made). There was no confirmed intention by Defence to expressly inform the jury that these facts were not in issue. Instead, it

was essentially argued that the jury would find these facts on the basis of the complainant's agreement to them in cross-examination.

[47] The difficulty with that submission is that the complainant's evidence-in-chief (by way of her recorded statement) was that the sex with the accused was, from the outset, without her consent. Further, she did not, at any time, agree with the proposition that when the sex resumed after the accused said he wanted to finish the intercourse, it resumed with her consent. Furthermore, the accused's state of mind in relation to the complainant's consent to the whole of the sexual intercourse was in issue.

[48] The fact that the accused told Police that the complainant agreed to 'intimacy', that during the sexual intercourse, the complainant wanted to go to her car, was upset about something and stopped the intercourse, and that he told her he had to finish the intercourse, so in his mind the sex was not against her will, must rationally affect the assessment of the probability that: (a) these things happened; and (b) the accused was aware of a substantial risk that the complainant was not consenting and took that risk, or that he did not give any thought to whether or not she was consenting. As to (a), even if the admissions are consistent with the complainant's evidence in cross-examination, that would make those facts more likely. As to (b), both what the accused said and the way that he said it in the admissions would clearly have significant probative value in the jury's determination about his

state of mind regarding the complainant's consent to the sexual intercourse.

[49] For these reasons, I reject the Defence submission that the admissions had no, or very little, probative value (s 138(3)(a)).

[50] I also consider that the admissions were important evidence in the proceeding (s 138(3)(b)) because they were direct evidence from the accused about his state of mind, and the accused may or may not have elected to give evidence in the trial.

[51] Given that there was no suggestion that the impropriety asserted by the Defence was considerably grave (s 138(3)(d)) or deliberate (s 138(3)(e)), the probative value of the admissions would have weighed very heavily in favour of admitting them over the undesirability of admitting evidence obtained in the way that it was.

Discretion to exclude admissions – ss 90, 137, ENULA

[52] The Defence argued that the admissions should be excluded pursuant to s 90 of the ENULA which provides that in a criminal proceeding, the court may refuse to admit evidence of an admission if the evidence is adduced by the prosecution and, having regard to the circumstances in which the admission was made, it would be unfair to an accused to use the evidence.

[53] That question of unfairness 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 accused would be unfair, that is, s 90 focusses upon the fairness of using the evidence at trial.[5]

[54] This is a distinct question from the reliability of the admissions, which is the province of s 85 of the ENULA, and the lawfulness and propriety of the Police conduct, which is the province of s 138 of the ENULA.[6]

[55] I have already found that the admissions were spontaneous and not elicited in response to official Police questioning. I note that, in *The Queen v Layt* [2018] NTSC 36, Grant CJ observed (at [50]) that 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,[7] and similar considerations arise where the admission is recorded. I agree with that observation.

[56] The Defence argued that the use of the evidence at trial would be unfair to the accused within s 90 of the ENULA because the conduct of the Police brought about an unreliable admission because it presented an incomplete representation of the way the sexual intercourse between

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5 See *Em v The Queen* (2007) 232 CLR 67 at [107] per Gummow and Hayne JJ.

6 Ibid at [109], [112], [121]

7 Citing *Bullock* [2005] NSWSC 825.

the complainant and the accused took place. Specifically, it omitted anything about what happened after the accused said he wanted to finish the intercourse.

[57] Accepting, without deciding, that this kind of argument falls to be determined under s 90 rather than ss 85 or 138 of the ENULA, I do not accept that there was some incompleteness which made the admissions unreliable. The context of the admissions is clear and occurred after the accused was arrested for sexual intercourse with the complainant without her consent. The accused sought to inform Police about why the sex was consensual and why he believed it to be so. If the admissions are incomplete in that regard, which is doubtful, that is because the accused did not give a complete version of events, and is not a consequence of anything done by Police to cut his story short. The complainant was cross-examined about what occurred both before and after the accused said he wanted to finish the intercourse. The accused could give evidence about these matters at trial for exculpatory purposes if he elected to do so.

[58] Secondly, the Defence argued that had the Police administered the cautions differently and in the way contemplated by Police General Order Q2, item 3.1.3 (with the suspect being asked to explain what is meant by the caution, phrase by phrase), he may not have made any admissions at all, or may have made them differently. The only basis for that submission is that prior to receiving legal advice, the accused

was prepared to give a recorded interview with Police and, after receiving legal advice, he declined to do so.

[59] Reliance was placed on the observations of three members of the High Court in *The Queen v Swaffield* (1998) 192 CLR 159 (at [54]) where Toohey, Gaudron and Gummow JJ observed that, while unreliability may be a touchstone of unfairness, it has been said not to be the sole touchstone, and it may be that no confession might have been made at all had the police investigation been properly conducted. In so saying, their Honours cited two earlier observations of members of the High Court.

[60] The first was in *Van der Meer v The Queen* (1988) 62 ALJR 656 at 662 where Mason CJ found that the police conduct of the interrogation of the applicants in that case was such to make it unfair to use their admissions against them and, had the police observed the principles governing the interrogation of suspects, it might well have transpired that the statements would not have been made or not made in the form in which they were (which was initially to deny and then increasingly to admit to involvement in the offending). Mason CJ observed that after the investigation reached the accusatory stage when the Police should have given them a caution and dealt with them as suspects, Police in the course of a very lengthy interrogation proceeded to induce the applicants to answer questions by various expedients, such as attempting to break down the denials of each by reference to

contradictory statements made by the others, which tactics culminated in the confrontation of one of the applicant's by the complainants, and all the while the applicants' remained at the police station in circumstances which to them must have seemed compelling and their detention was unlawful.

[61] The second was in *Duke v The Queen* (1989) 180 CLR 508 at 513 where Brennan J observed as follows:

> The unfairness against which an exercise of the discretion is intended to protect an accused may arise not only because the conduct of the preceding investigation has produced a confession which is unreliable but because no confession might have been made if the investigation had been properly conducted. If, by reason of the manner of the investigation, it is unfair to admit evidence of the confession, whether because the reliability of the confession has been made suspect or for any other reason, that evidence should be excluded. Trickery, misrepresentation, omission to inquire into material facts lest they be exculpatory, cross-examination going beyond the clarification of information voluntarily given, or detaining a suspect or keeping him in isolation without lawful justification – to name but some improprieties – may justify rejection of evidence of a confession if the impropriety had some material effect on the confessionalist, albeit the confession is reliable and was apparently made in the exercise of a free choice to speak or be silent.

[62] By comparison with those cases, there is absolutely nothing to suggest that the conduct of the Police towards the accused gave rise to admissions which would not otherwise have been made or made in the form that they were.

[63] Thirdly, the Defence argued that the body worn footage depicting the accused making the admissions was highly prejudicial, showing him in handcuffs with numerous Police coming and going, and showing the conversations between Police about his transportation, informing the 'AFP' and so on, and in the Watch house with other prisoners and Police present.

[64] In acknowledgment of the capacity of the body worn footage to prejudice the jury's perception of the accused and render the use of the footage unfair to the accused, the Crown elected to provide evidence of the admissions to the jury in the form of a transcript, rather than in the form of video footage, with almost all of the extraneous exchanges between the accused and Police (including the arrest and cautions) removed.

[65] On that approach, the only real potential unfairness within s 90 of the ENULA, of the use of the admissions by the Crown, was removed.

[66] Likewise, this course also removed the only potential danger of unfair prejudice to the accused within s 137 of the ENULA. Consequently, the probative value of the admissions was not outweighed by that danger.

[67] Consequently, evidence of the admissions (in the written form the Crown proposed to elicit it) is not rendered inadmissible by operation of ss 90 and/or 137 of the ENULA.

Disposition

[68] For the above reasons, on 2 September 2024, I ruled that the admissions were admissible at the trial.
