CITATION:	*The Queen v Willcocks* [2018] NTSC 21
PARTIES:	THE QUEEN
	v
	WILLCOCKS, Kevin
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	21728562
DELIVERED ON:	29 March 2018
DELIVERED AT:	DARWIN
HEARING DATE:	17 January 2018
JUDGMENT OF:	BARR J

REPRESENTATION:

Counsel:

Crown:	N Louden
Accused:	M Thomas

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Accused:	

Judgment category classification:	B
Judgment ID Number:	Bar1803
Number of pages:	12

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

The Queen v Willcocks [2018] NTSC 21
No. 21728562

BETWEEN:

THE QUEEN
Plaintiff

AND:

KEVIN WILLCOCKS
Defendant

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 29 March 2018)

Introduction

[1] The accused is charged with having had sexual intercourse without consent with NAW, a female, on 10 June 2017. The particular act alleged was the insertion of the neck of a beer bottle into the complainant's vagina.[1]

[2] On 17 January 2018 the accused entered a plea of not guilty and a voir dire hearing then took place in relation to the admissibility of three pieces of evidence relied on by the prosecution as admissions.

[3] The contested evidence is as follows:

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1 The definition of "sexual intercourse" in s 1 Criminal Code includes "the insertion to any extent by a person of … an object into the vagina … of another person".

1. Statement made by the accused in a telephone conversation with Detective Sergeant Jonathon Beer ("Beer"), on 13 June 2017.

2. Statement made by the accused to Detective Senior Constable Toby Wilson ("Wilson"), also on 13 June 2017.

3. Recorded conversation between the accused and Wilson.

Crown Case

[4] I set out a summary of the prosecution allegations in pars [5] to [8] below.

[5] The accused and approximately 15 other males attended a buck's party in the afternoon of Saturday, 10 June 2017. The complainant worked as a topless waitress that day from 2.00 pm to 7.00 pm, travelling on a small bus with the group of males to various hotels in the Darwin rural area before returning to a private property in Giraween. The complainant and the group of males consumed beer throughout the afternoon.

[6] The group arrived at the Girraween property just before 7.30 pm and gathered in a large shed. The complainant then performed a "show". It is alleged that, prior to the show commencing, she explained to the group of men that there were three rules: (1) no-one was allowed to touch her unless invited, (2) no-one was to step on her performance mat and (3) no-one was permitted to take photos or videos of the show.

[7] As part of the show, the complainant danced with the intended groom, poured wax on him, poured mousse on him, set him on fire and whipped him. For the finale, the complainant shot a number of small dildos from her

vagina in the direction of various members of her audience. While doing this, she was lying on her back on the ground, naked, with her legs spread. Members of the audience retrieved the dildos and returned them to the complainant.

[8] As part of this show, the complainant projected a dildo in the direction of the accused. He caught it and then approached her with the dildo in one hand and a beer bottle in his other hand. He leaned over the top of the complainant, put one hand on her stomach and with the other hand inserted the tip of the beer bottle into her vagina for a few seconds. She tried to kick him but he moved away, taking the bottle with him. She then got to her knees and felt the sensation of cold beer running out of her. She was upset and began to cry. Police were contacted. The complainant did not know the name of the accused. There was no formal identification evidence.

[9] On 13 June 2017 at approximately 12.45 pm, Wilson and Senior Constable Anya Hoffman went to the home of the accused to speak with him. He had been identified as one of many guests at the buck's party. He was not at home and police spoke with his wife. In the presence of police officers, the accused's wife called him and then informed police that the accused was in Winnellie and would not be home for a while. Detective Wilson left his business card with the accused's wife and requested that the accused call him.

[10] At 1.30 pm that same day, the accused called the number given to him and was diverted to the Sex Crimes Unit at the Berrimah Police Station, where he spoke with Beer. The relevant part of the conversation was as follows:

> Beer: Were you at the buck's party the other night?
>
> Accused: Yes, he only needs to speak to me, it was me.

[11] At approximately 1.35 pm, Beer called Wilson and told him of his contact with the accused. Beer told Wilson to call the accused. Wilson said in evidence that Beer also told him that Mr Willcocks had said, "I'm the one you want to speak to".[2]

[12] Wilson called the accused and arranged a meeting in Winnellie. Wilson and Hoffman then met with the accused outside the Veterans' Affairs Building on Winnellie Road, Winnellie. Wilson said that, prior to speaking to the accused, the accused was not a suspect.

[13] However, after Wilson asked the accused what happened, the accused replied as follows:

> It got out of hand. N was doing a dildo show. Shooting out dildos. My beer ended up in her vagina. I took it out. I said sorry to her".[3]

[14] Having received that information, specifically the statement "my beer ended up in her vagina. I took it out", Wilson formed the opinion that the accused

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2 Transcript 17 January 2017 p 13.6.
3 Statement Wilson Exh P2 par 28.

was a suspect.[4] He did not conclude that he was necessarily the offender but he did believe that the accused was "someone who had knowledge in relation to the matter". As a result, Wilson activated his digital recorder and recorded the conversation as it continued. He cautioned the accused and also informed him that he could have someone else present. The accused replied, "I'm happy to continue the conversation now."

[15] In the course of the recorded conversation, the accused made a number of admissions, which I extract below:

1. "… somehow I've stood up and there was a stubby inside her vagina. … the tip of the stubby."

2. "I grabbed the stubby back and um went out … I come back and apologised."

3. [When asked who put the stubby in the complainant's vagina] "I don't recall that."

4. [When asked who removed the stubby] "Oh, I don't 100 percent recall that, but I think I did"

5. [When asked if anybody else was standing nearby when he removed the stubby] "Um, not in the vicinity, no"

6. [When asked if he had seen anyone else put the stubby in] "No"

7. "I come back and she was upset and I apologized".

8. [When asked where the stubby had been before he realized that it was in N's vagina] "Oh, it must have been in my hand or on the ground".

[4] Transcript 17 January 2017 p 14.9.

The statement to Beer

[16] An "admission" is defined in the *Evidence (National Uniform Legislation) Act 2011* (NT) as a previous representation, made by a person who is or becomes a party to a proceeding, "adverse to the person's interest in the outcome of the proceeding".[5] A "representation" includes an implied oral representation.[6]

[17] The test of what amounts to an admission for determining whether evidence of an admission is admissible is that stated in s 88 *Evidence (National Uniform Legislation) Act 2011*, namely whether it is "reasonably open to find" that what was said was an admission. It is ultimately for the jury to decide whether a statement (or 'representation') is an admission, but only where the Court has first decided that such a finding is reasonably open.

[18] In *R v Horton*,[7] Wood CJ at CL (Sully and Ireland JJ agreeing) held that the dictionary definition of admission was wide enough to include any form of representation, whether by conduct or by oral or written statement, so long as it is "adverse to the (makers) interest in the outcome of the proceedings". In that case, the definition was sufficiently wide to encompass even exculpatory statements which ultimately turned out to be harmful for the defence case.

[19] The accused's statement to Beer was, at least, an acknowledgment by the accused of a relevant fact which, if established at trial, would be adverse to

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5 *Evidence (National Uniform Legislation) Act 2011*, Dictionary, Pt 1, Definitions: "admission".
6 *Evidence (National Uniform Legislation) Act 2011*, Dictionary, Pt 1, Definitions: "representation".
7 *R v Horton* (1998) 45 NSWLR 426 at 427G.

the interests of the accused. A finding is reasonably open that the statement made by the accused in the course of his telephone conversation with Beer was an admission, particularly when that statement is considered with other evidence. I reject the submission of defence counsel that the accused's statement to Beer should be assessed, for admissibility, in isolation from the other evidence.

[20] Further, I am satisfied that the accused's statement to Beer was voluntary and spontaneous, made in the course of a telephone conversation initiated by the accused to a police officer who was not involved in the investigation. There was no requirement for Sergeant Beer to caution the accused because he was not a suspect at that stage. Sergeant Beer was no doubt aware that a large group of men were being interviewed in relation to the events at the buck's party, but beyond that he had no particular knowledge of the accused.

[21] Because the accused was not "a person *suspected* of having committed a relevant offence",[8] s 142 *Police Administration Act* did not apply. Therefore, the fact that the accused's statement to Beer was not recorded has no bearing on its admissibility.

[22] The accused's statement to Beer is admissible.

Admissions made to Wilson before recording commenced

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[8] *R v Grimley* (1994) 121 FLR 236 at 258.9, cited with approval by the Court of Criminal Appeal in *Lai v The Queen* (2003) 13 NTLR 139 at [21] - [22].

[23] There is no doubt that the accused's statement extracted in [13] contained admissions, for the same reasons given in [16], [17] and [18]. Moreover, the admissions were voluntary and spontaneous.

[24] None of the provisions of the *Police Administration Act* apply to exclude the admission or admissions made to Wilson before recording commenced. The accused was not then "a person *suspected* of having committed a relevant offence", and hence s 142 *Police Administration Act* did not apply. It was only after the accused made that statement that Wilson reached the stage of suspecting that the accused had committed a relevant offence.[9]

[25] Moreover, there was nothing in the circumstances to indicate that s 85 *Evidence (National Uniform Legislation) Act* had any role to play. The circumstances in which the admissions were made were not such as to make it unlikely that the truth of the admissions was adversely affected.[10]

Recorded conversation with Wilson

[26] The accused's statements extracted in [15], read in context and in combination with one another, contained clear admissions. I refer to and repeat the reasons given in [16], [17] and [18].

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9 Transcript 17 January 2017 p 14.9.

10 *Bin Sulaiman v R* [2013] NSWCCA 283 at [81].

[27] By this stage the accused was a suspect and hence s 142 *Police Administration Act* applied. I am satisfied that it was complied with. The accused's statements containing admissions were electronically recorded as required by s 142(1)(b) of the Act. Moreover, although the accused was not in custody, Wilson gave him a warning (or caution), in compliance with s 140(a) of the Act. Wilson also informed the accused that he could have someone else present while they talked, which was not in strict compliance with s 140(b) of the Act.[11] In any event, the accused replied, "I'm happy to continue the conversation now". It was the accused's decision to proceed with the interview. Indeed, he was co-operative and seemed quite keen to continue the conversation with police.

[28] Counsel for the accused submits that the accused was in a de facto custody situation from the time of the commencement of the recording; alternatively, from the time Wilson and the accused moved from standing in the street to sitting in the police vehicle. By way of explanation, Wilson proposed that he and the accused re-locate to the police vehicle part-way through the conversation because, he said to the accused, it was "a bit hot" and noisy standing in the street.[12] Wilson asked the accused, "Do you mind if we just take a seat in the car over there and we can talk there?" Although the accused replied "Yeah", it is clear from the context that he was agreeing to continue the conversation in the police vehicle.

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11 The actual requirement is that the investigating member must inform the person in custody that the person (b) "may communicate with or attempt to communicate with a friend or relative to inform the friend or relative of the person's whereabouts."

12 See transcript of the recorded conversation p 3.7.

[29] I reject the primary and alternative defence submissions set out in the previous paragraph. I am satisfied, from the context disclosed by the evidence, that the accused was not in custody. He was voluntarily assisting police officers in a 'non-custodial' situation. No inference should be drawn from the fact that the accused was invited to continue the conversation in the police vehicle and agreed to do so. That change did not convert the situation into a custodial or de facto custodial situation.

[30] Counsel for the accused further contends that, from the moment the accused made the statement extracted in [13] above, police officers should have arrested him and placed him in custody so that he had the benefit of the protections provided by s 140 *Police Administration Act*. Counsel cited no authority for that proposition, and I reject the submission. Even if the accused were in custody at the time of the recorded conversation, and s 140 *Police Administration Act* applied, the requirement contained in s 140(a) was complied with, in that Wilson administered an appropriate caution. Although, as mentioned in [27] above, s 140(b) was not complied with, Wilson offered the accused more than the right to simply communicate with a friend or relative (to inform that person of his whereabouts), in that he gave the accused the opportunity to have somebody present for the continuation of the interview. It could not be argued in those circumstances

that Wilson's non-compliance would render admission of the evidence contrary to the interests of justice.[13]

[31] I am satisfied that the accused's statements in his recorded statement with Wilson, extracted in [15] above, are admissible.

Discretion to exclude admissions – the unfairness discretion

[32] Counsel for the accused finally submits that the court should refuse to admit evidence of the accused's admissions, pursuant to s 90 *Evidence (National Uniform Legislation) Act 2011* (NT) because, having regard to the circumstances in which the admissions were made, it would be unfair to the accused to use the evidence. The accused bears the onus of establishing such unfairness.

[33] The accused has failed to satisfy me that admission of the contested evidence would create any forensic disadvantage for him at trial or that it would otherwise render his trial unfair. I would not refuse to admit the evidence pursuant to s 90 of the Act. The provision in s 90 is concerned with the right of an accused person to a fair trial and whether there is a risk of improper conviction.[14] It is a final or safety net provision after the more specific exclusionary provisions of the Act have been considered and applied.[15]

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13 See s 143 *Police Administration Act*.
14 *R v Swaffield* (1998) 192 CLR 159.w
15 *NEM v The Queen* (2007) 232 CLR 67 at [109] per Gummow and Hayne JJ. Note also the observations of Gleeson CJ at [56].

Conclusion

[34] In conclusion I rule that all of the contested evidence referred to in [3] is admissible at trial.

[35] These Reasons are published to the parties in confidence pending the trial, which is now listed in May 2018. I will review the restricted publication status at the completion of the trial.
