CITATION:	*The Queen v Metcalfe* [2018] NTSC 45
PARTIES:	THE QUEEN
	v
	METCALFE, Garrin
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	21712433, 21719649 & 21722807
DELIVERED:	14 June 2018
REASONS PUBLISHED:	5 July 2018
HEARING DATES:	13 & 14 June 2018
JUDGMENT OF:	Blokland J

CATCHWORDS:

CRIMINAL LAW – Evidence – admissibility of recordings made by complainant of conversations with accused – whether recordings inadmissible – recordings sought to be led as admissions highly probative but involved no procedural safeguards, incomplete responses and accused unaware of being recorded – recordings sought to be led as admissions inadmissible and excluded – *Evidence (National Uniform Legislation) Act* (NT), s 90.

CRIMINAL LAW – Evidence – admissibility of recordings made by complainant of conversations with accused – whether recordings illegal or improper as complainant police officer – all recordings relevant – some recordings are direct evidence or form basis of charges – some recordings are relevant relationship context evidence – recordings not illegal or improper under *Surveillance Devices Act* (NT) and *Telecommunications (Interception and Access) Act 1979* (Cth) not enlivened – all recordings not

sought to be led as admissions admitted – *Evidence (National Uniform Legislation) Act* (NT), s 138.

CRIMINAL LAW – Practice and procedure – complainant requested certificate against self-incrimination – misapprehension about status of investigation into complainant and of certificate – possibility of re-opening issue – *Evidence (National Uniform Legislation) Act* (NT), s 128.

Evidence (National Uniform Legislation) Act (NT) ss 55, 90, 128, 135, 137, 138
Surveillance Devices Act (NT) s 15
Telecommunications (Interception and Access) Act 1979 (Cth)

R v East (2003) 154 A Crim R 1
R v Storey, VSC, unreported, 1994, BC 9406093
RG v The Queen [2010] NSWCCA 173
Russell v Russell [2012] FamCA 99

REPRESENTATION:

Counsel:

Prosecutor:	P D'Arcy
Defendant:	T Berkley

Solicitors:

Prosecutor:	Office of the Director of Public Prosecutions
Defendant:	Hubber Legal

Judgment category classification:	B
Judgment ID Number:	BLO 1803
Number of pages:	14

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

The Queen v Metcalfe [2018] NTSC 45
No. 21712433, 21719649 & 21722807

BETWEEN:

THE QUEEN

AND:

GARRIN METCALFE

CORAM: BLOKLAND J

REASONS FOR RULINGS

(Delivered 5 July 2018)

Introduction

[1] These are reasons for evidentiary rulings made before the trial of the accused on an indictment with 15 counts.[1]

[2] The charges span over a period of approximately one decade. A number of historical charges were alleged to have occurred in or about 2007, through to relatively recent matters in 2017. The indictment contains nine counts of assault with circumstances of aggravation, one count of unlawful entry with intention to commit an indictable offence, one count of make a threat to kill

1 When later arraigned before the jury the accused entered pleas of guilty to counts 11 and 12, namely two counts of using a carriage service in such a way that reasonable persons would regard as menacing, harassing or offensive, under s 474.17(1) of the *Criminal Code 1995* (Cth). However, at the time of the ruling it was anticipated there would be a trial on all counts.

with intent to cause fear and three counts of using a carriage service in such a way that reasonable persons would regard as menacing, harassing or offensive. The offending was alleged to have occurred over the course of a spousal relationship, including the marriage and eventual separation between the accused and the complainant MM.

[3] The accused denied all allegations made against him by the complainant. From around February 2016 through to May 2017, the complainant made recordings of interactions between herself and the accused. A large number of the recordings were sought to be led in evidence by the Crown. The accused objected to the recordings being led.

Outline of the objections

[4] Both the complainant and the accused are police officers. It is submitted on behalf of the accused that given the complainant is a police officer, at all relevant times, she would have known the recordings she made of telephone communications or in person conversations were illegal or improper. This was submitted to be the case, particularly when the recording was done without the accused's knowledge. It was not completely clear with respect to some of the recordings whether they were made with or without the accused's knowledge. There are many examples of recordings in which the accused indicates expressly or impliedly that he knew the complainant was recording him. However, with some of the earliest recordings, it is likely he was unaware that the interactions between them were being recorded.

[5] Objection is taken to the recordings on the basis the recordings breach the *Surveillance Devices Act* (NT) and that the contents of recordings of telephone conversations amount to an unlawful interception in the terms of the *Telecommunications (Interception and Access) Act 1979* (Cth). It is submitted the illegality or impropriety of the recordings should lead to their exclusion. In all instances it is submitted the recordings should be excluded after consideration and application of ss 55, 135, 137 and 138 of the *Evidence (National Uniform Legislation) Act* (NT) *("UEA").* Additionally exclusion is sought on the basis of the exercise of the discretion under s 90 of the *UEA* in respect of the recordings that were sought to be led as admissions.

The nature of the recordings and discussion of the objections

Recordings constituting admissions

[6] Recordings 8, 13, 23, 34 and 47 are sought to be led as admissions, directly relevant to counts 7 and 8. Count 7 is a charge of aggravated assault, alleged to have been committed in 2015 at Howard Springs Holiday Park. Recording 8 includes a reference to past allegations of violence, including at a caravan park. The conversation refers to the accused's hands around MM's neck and a partially cut-off response from the accused. There is also a reference made by the complainant in that recording suggesting she wants to talk to the accused about what happened in Lajamanu. Calls 23, 34 and 47 are also at least in part referable to discussions about what happened in

Lajamanu and therefore to the allegations comprising count 8, a charge of aggravated assault in Lajamanu in 2015.

[7] As to whether the recordings are relevant in terms of s 55 UEA, in my view, the recordings identified clearly amount at least to partial admissions in respect of conduct referred to, or closely associated with, charges on the indictment. Recording 13 contains an admission to grabbing a Christmas tree and throwing it to the ground that is also indirectly relevant to at least one of the counts, providing reference to the date of one of the allegations made.

[8] I proceed on the basis recording 8, made on 10 December 2016, was an in-person conversation recorded on MM's iPhone, recording 13 was an in-person conversation recorded on 11 December 2016, recording 23 was a recording from a telephone conversation, recorded on the iPod and made on 24 December 2016, recording 34 was a recording from a telephone conversation, recorded on the iPod, made on 13 January 2017, and recording 47 was made on 18 February 2017 but it is unclear as to which device was used.[2]

[9] The accused submits the recordings of the relevant conversations contravene the *Surveillance Devices Act* (NT), and further and alternatively that s 15 of the *Surveillance Devices Act* (NT) prevents any further use of the recorded material. I disagree. The recordings do not contravene the *Surveillance*

---

2 "Annexure A" of Outline of Submissions in Relation to iPhone and iPod Recordings made by MM 15 June 2018.

Devices Act (NT). Relevantly, the *Surveillance Devices Act* (NT) provides that a "listening device" means a device capable of being used to listen to, monitor or record a conversation or words spoken to or by a person in a conversation.[3] The devices used for recording by the complainant were an iPod or an iPhone. A limited number of messages were recorded on a voicemail service. In any event, the devices used are clearly surveillance devices within the meaning of the Act. Section 11(1)(a) prohibits the use or installation of such a device to listen to or record a private conversation, however that provision prohibits the use of the listening device only in respect of conversations to which the person is not a party. Clearly the complainant at all material times was a party to the conversations. In the context of the Act "party" to a private conversation is a person by or to whom words are spoken in the course of the conversation.[4] Further, s 11(2)(b)(i) provides that the offence provision in s 11(1) does not apply if at least one party to the conversation expressly or impliedly consents to the monitoring or recording. The complainant was clearly a party to conversations and was obviously consenting to the recordings.

[10] Section 15 of the *Surveillance Devices Act* (NT) prohibits the communication or publication of a recording of a private conversation. I note and agree with the approach taken by Mildren J in *R v East*[5] concerning

---

3 *Surveillance Devices Act* (NT), s 4.

4 *Surveillance Devices Act* (NT), s 4.

5 [2003] NTSC 42; 154 A Crim R 1 at [15]-[29], citing Cummins J in *R v Storey*, VSC, unreported, 1994, BC 9406093.

the meaning of a private conversation. The circumstances of the conversations here were private at the time they were engaged in. That the recordings were kept and later forwarded to investigating police officers does not deprive them of their private character.[6] The provision of the recordings to police investigating the allegations clearly falls within the exception under s 15(2)(b), namely that the communication is reasonably necessary in the public interest.[7] A strong public interest is engaged in these circumstances where serious allegations of spousal violence were made. Further, the recordings were reasonably necessary for protecting the complainant's lawful interests.[8] Clearly the complainant has an interest in self-protection, including protection from allegedly harassing or offensive phone calls from the accused or from intimidation and abuse, be that physical or emotional. Any further communication or publication of the recordings made to police investigating the allegations are clearly exempt from the offence provision by the operation of s 15(2)(e). The accused's submission on the *voir dire* that the purpose of the recordings was for the complainant to secretly record the accused to extract evidence of false admissions or for the purpose of manufacturing false or misleading evidence

---

6 See *R v Storey*, VSC, unreported, 1994, BC 9406093 as extracted in *R v East* [2003] NTSC 42 at [27]-[28].

7 Section 15(2)(b)(i).

8 Section 15(2)(b)(ii).

for a court case has not been made out.[9] Neither has non-compliance with the *Surveillance Devices Act* (NT).

[11] In my opinion there has been no breach of the *Telecommunications (Interception and Access) Act 1979* (Cth). Section 7 of that Act, in general terms, provides that a telecommunication shall not be intercepted, however, it is the interception of "a communication passing over a telecommunications system" that is the subject to the prohibition. It was not disputed that in this matter the complainant installed an application on her iPhone that records telephone conversations. Consequently, the relevant communication had already passed by the time it was recorded. That this construction is intended can readily be ascertained from consideration of the plain words of s 7, particularly when the section is read as a whole. The exceptions listed in s 7(2) of the Act are relevant to persons or circumstances likely to be engaged in an interception during the course of a telecommunication, for example, things done during the course of installation of equipment or maintenance of the telecommunications system. Those exceptions are clearly directed to persons who might otherwise be exposed to the prohibition under the Act due to incidental interceptions of the passing of a communication over the system. It may be noticed Mildren J

9 A substantial amount of material before the Court includes the complainant's statements of 20 December 2016, 10 March 2017, 23 March 2017, 24 May 2017 and 31 May 2017.

accepted this to be the correct construction, albeit after concessions were made by both parties in *R v East*.[10]

[12] The *Telecommunications (Interception and Access) Act* is directed to a different set of circumstances than those present in this matter. The Act is concerned with "carriers", "carriage services providers" and unlawful interferences with the "passing over" of a telecommunication, or more generally with the security of the relevant telecommunication system or network, not what may occur after a telecommunication has passed. Section 5F of the Act deals with when it may be said a communication is "passing over" a telecommunications system. The communication is taken to "start passing over" when it is sent or transmitted by the person sending the communication and "is taken to continue to pass over the system until it becomes accessible to the intended recipient of the communication". Once the communication is accessed, it is no longer regulated by the Act.

[13] Although the Family Court in *Russell v Russell*[11] concluded certain recordings by use of the installation of a recording device to be improperly obtained, it is not clear from the decision how the device operated. The Court's conclusion in *Russell* was made after a concession by the party who obtained the recording. Despite the concession, the Family Court in *Russell* found the desirability of admitting the evidence outweighed its exclusion on the basis and manner in which it was obtained. In my view the approach

---

10 (2003) 154 A Crim R 1 at [8].

11 [2012] FamCA 99.

taken by Mildren J in *R v East*, notwithstanding it too was concluded after a concession, is with respect correct. In my view the Act does not envisage covering recordings made after the telecommunication has been received. The distinction between the communication "passing over" and when it becomes accessible to the receiving party does not appear to have been drawn to the Family Court's attention in *Russell*.

[14] As indicated at the conclusion of the *voir dire*, although I do not think the recordings constituting admissions should be excluded for any reason of being unlawfully obtained or for any impropriety under s 138 of the *UEA*, with the recordings constituting admissions there is a case for discretionary exclusion under s 90. The relevance of the complainant being a police officer is not so significant in these circumstances when the recordings were of personal interactions, some involving allegations of violence against her personally. So far as can be ascertained, she was acting in a personal capacity. She was not acting in an official capacity, nor so far as the material available disclosed, was she on duty in respect of her dealings and conversations with the accused. Nevertheless, in as much as the recordings set out above are admissions, the admissions were made without any procedural safeguards, some involved historic allegations to which there were incomplete responses and it is likely the accused did not at that time know he was being recorded. There is a risk the admissions would operate to unfairly disadvantage the accused at trial.

[15] Although not necessarily prejudicial in the relevant sense, in my view this is a proper case to exclude the admissions in the exercise of the discretion under s 90 of the *UEA*. In doing so I acknowledge they are of high probative value, particularly in circumstances where all allegations are denied, however the overall circumstances in which the recordings were made, as some of the calls are highly emotional, would lead to unfairness.

Recordings directly relevant to the charges

[16] In a series of recordings, in particular recordings 18, 20, 27, 28, 29, 31 and 38, references are made to a Domestic Violence Order taken out by the complainant in December 2016. Recording 18, made on 19 December 2016, was an in-person conversation, recording 20, made on 22 December 2016, was recorded from a telephone call on an iPod, and recordings 27, 28, 29 and 31 were all recorded from telephone calls on the iPod between 28 December 2016 and 5 January 2017.[12]

[17] A number of the recordings record abusive/aggressive swearing and name-calling by the accused as well as reminders by him of attempts at suicide, concerns about seeing the children, interspersed with issues about their relationship and suggestions to the complainant that she "won't have a fucken job", "you fucken took pingas in college. You're going down. You deleted a case note entry boom you're gone again. You're fucked, fucken good luck to you dickhead". Those recordings are relevant directly to count

12 "Annexure A" of Outline of Submissions in relation to phone and iPod recordings made by MM, 15 June 2018.

10, given their content and timing. Count 10 is charged under s 103A(1)(d) of the *Criminal Code*, namely causing detriment to a person with the intention of inducing them not to act in a way that might influence the outcome of proceedings under the *Domestic and Family Violence Act*. The recordings are highly probative of the charge. They are the direct evidence of the charge in circumstances where the complainant is to be challenged on her account. For the reasons given in relation to the recordings constituting admissions, I do not find the recordings were illegally or improperly obtained. In terms of the exercise of the discretions to exclude under ss 135-137, in the face of highly probative evidence that may in large part go directly to proof of the elements of the charge, the danger of prejudice in the relevant sense is slight and does not substantially outweigh the very significant probative value.

[18] Recording 45 made on 16 February 2017 records the accused, *inter alia*, calling the complainant a "lying, cheating, fucking slut" and saying that the accused had told his lawyer "to go to fucking town on you". This recording was made of a telephone conversation recorded on an iPod. It is clearly relevant to count 11, namely using a carriage service in such a way that reasonable persons would regard that use as being menacing, harassing or offensive, contrary to s 474.17(1) of the *Criminal Code 1995* (Cth). The words used and their context form the substance of the charge. Recording 56 relates to a voicemail message recorded and received by the complainant on 5 March 2017 that *inter alia* includes statements such as "third time lucky.

You are the lowest piece of shit. Fuck you. Don't fuckin bother trying to contact me". The timing and content of that recording is directly relevant to count 12, namely using a carriage service in such a way that reasonable persons would regard as menacing, harassing or offensive contrary to s 474.17(1) of the *Criminal Code 1995* (Cth).

[19] Once again, the words recorded and their context form the substance of the charge and should not be excluded. Similarly, recording 68 made on 23 March 2017 forms the basis of count 15, which is a further count against s 474.17(1) of the *Criminal Code 1995* (Cth) and I see no reason why it should be excluded.

[20] A series of recordings made on 9 March 2017, namely recordings 57-67, are alleged to be the lead up to an incident and a recording of the incident itself that forms the basis of counts 13 and 14, namely unlawful entry of a building with intent to commit an indictable offence and aggravated assault. It is clear from the recordings the accused knew he was being recorded. The incident was recorded on the complainant's iPod. In those circumstances the recordings are direct evidence of the alleged offending, are not tainted by illegality or impropriety and in my view should not be excluded in the exercise of any of the discretions under Part 3.11 of the *UEA*. They are not prejudicial in the relevant sense. They are highly probative given the complainant's account of the unlawful entry and aggravated assault is denied and challenged.

The balance of the calls – context evidence

[21] In my view the balance of the recordings that are primarily around the time of the issuing of the DVO and what follows are properly considered to give context to the specific allegations in the indictment. The calls will enable the jury to better understand the complainant's evidence and assist to answer hypothetical questions that may arise.[13] In my view this is a case demanding of context and it would be wrong not to admit the balance of the recordings. Over the relevant period there are clear indications the accused knows he is being recorded.[14]

[22] The material disclosed by the recordings, although unpleasant, is not of such a kind to arouse disgust or cause the jury to be distracted from the task of impartially considering the evidence. I decline to exercise the discretions under Part 3.11 of the *UEA* to exclude the evidence to be placed before the jury to give context.

[23] For these reasons the recordings constituting admissions were excluded. The balance were admitted.

Section 128 *UEA* certificate issue

[24] Prior to the complainant giving evidence, counsel for Crown advised the Court there may be areas of evidence in relation to which the complainant would request a certificate under s 128 of the *UEA* as she may incriminate

---

13 *RG v The Queen* [2010] NSWCCA 173 at [38].

14 For example the content of recordings 14, 34 and 38.

herself.[15] The Court was told she would give the evidence if a certificate were issued. Counsel for the accused indicated there would be an objection to the issue of a certificate as relevant investigations had concluded. Counsel for the Crown were to make further inquiries as to the status of any investigation relevant to the complainant.[16] Nothing further was said about this issue until the end of the trial. Material produced at that time by counsel for the accused indicated there *was* a separate investigation continuing into one aspect of the complainant's conduct. As no objection was taken during the course of the complainant's evidence, s 128 of the *UEA* appeared not to have been complied with and on the face of it there was no jurisdiction to issue a certificate. It is noted however there may yet be an application made to re-open this issue as it is possible there was a misapprehension by the Crown and/or the witness as to the status of the issue of a certificate under s 128 of the *UEA*.

---

15 Transcript, 20 June 2018, p 82.

16 Transcript, 20 June 2018, p 82.