The Queen v Smiler (No 1) [2017] NTSC 28

PARTIES:	THE QUEEN
	v
	SMILER, Robert
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	21628678
DELIVERED:	11 April 2017
HEARING DATES:	3 APRIL 2017 AND 4 APRIL 2017
JUDGMENT OF:	KELLY J

CATCHWORDS:

EVIDENCE – Admissibility – Hearsay – Statement of deceased – *Evidence (National Uniform Legislation) Act 2011* (NT) ss 65(2)(b), 65(2)(c), 137

Evidence (National Uniform Legislation) Act 2011 (NT) ss 65, 108, 137

Conway v The Queen (2000) 98 FCR 204; *Harris v The Queen* (2005) 158 A Crim R 454; *IMM v The Queen* (2016) 257 CLR 300; [2016] HCA 14; *R v Ambrosoli* (2002) 55 NSWLR 603; *R v Mankotia* [1998] NSWSC 295; *R v Ryan* (2013) 33 NTLR 127; [2013] NTSC 54; *Sio v The Queen* (2016) 90 ALJR 963; [2016] HCA 32; *Williams v The Queen* (2000) 119 A Crim R 490, applied

R v Murphy [2000] NSWCCA 297, distinguished

Haddara v The Queen (2014) 43 VR 53, referred to

REPRESENTATION:

Counsel:

Crown:	D Dalrymple with J Bochmann
Accused:	J Murphy with P Coleridge

Solicitors:

Crown:	Director of Public Prosecutions
Accused:	North Australian Aboriginal Justice Agency

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

The Queen v Smiler (No 1) [2017] NTSC 28
No. 21628678

BETWEEN:

THE QUEEN

AND:

ROBERT SMILER

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 11 April 2017)

[1] The accused, Robert Smiler, has been charged with one count of aggravated assault against Peter Doucas and one count of unlawfully causing serious harm to Edward Aden. Mr Doucas has since died and the Crown seeks to have two statements made by him admitted into evidence under s 65 of the *Evidence (National Uniform Legislation) Act 2011* (NT) ("UEA").

The Crown case

[2] The Crown case is that on the night of 11 April 2016, Mr Smiler went with his wife in a taxi to Malabar Lodge in Smith Street, Darwin. Mr Smiler stayed in the taxi while his wife, Ms Wurramarrba, went up the external stairs at Malabar Lodge to get her cousin. As

Ms Wurramarrba got to the landing at the top of the stairs, she passed Mr Doucas who was sitting on a chair on the landing.

[3] It is alleged that Mr Smiler then ran up the stairs, confronted Mr Doucas, accused him of indecently touching Ms Wurramarrba, punched Mr Doucas, and then threw him down the stairs. It is further alleged that Mr Smiler ran down the stairs and further assaulted Mr Doucas, hitting him with a chair and kicking him in the head a number of times and that Mr Doucas called out, "I never touched your woman."

[4] It is alleged that Mr Aden heard shouting. He picked up a heavy stick he kept in his room and hit Mr Smiler on the legs (or the back and legs) with the stick in an attempt to make him stop assaulting Mr Doucas. Mr Aden then fell over and Mr Smiler assaulted Mr Aden with the same stick, causing him injuries which amounted to serious harm.

[5] Mr Doucas has since died and the Crown want to adduce evidence of two statements he made to police – one short statement made on the night of the incident (11 April 2016) and one longer statement made a week later on 18 April 2016.

(a) The representation made to Senior Constable Legget on 11 April 2016

[6] Evidence of the representations made by Mr Doucas on 11 April 2016 is sought to be led from Senior Constable First Class Brad Leggett. In a

statutory declaration sworn on 24 April 2016, Senior Constable Leggett said that on the night of 11 April 2016, Mr Doucas told him "he had been thrown down the stair case by the alleged offender". He said Mr Doucas also told him "he had been assaulted by the alleged offender by being kicked in the face with a work boot" and that he had provided a description of the alleged offender (which is set out in the statutory declaration). Senior Constable Leggett concluded (in this part of his statement): "Doucas stated he had no idea why he had been assaulted and declined to speak with SJA officers at the scene. I did not obtain a victim statement from Doucas at the time as he declined."

(b) The statement made to police on 18 April 2016

[7] On 18 April 2016 police went back to Malabar Lodge and this time Mr Doucas did agree to make a formal statement. In that statement Mr Doucas described a tall lady walking up the stairs past him, and said that he leaned back to let the tall lady get past. The tall lady was greeted by another lady who was sitting behind Mr Doucas having a smoke. Then an Aboriginal man ran out of a taxi and up the stairs. He grabbed Mr Doucas and threw him down the stairs. Mr Doucas said he rolled down the stairs covering his head with his hands. He said he landed on all fours hurting his finger and spraining his wrist. He staggered away and then felt the man kick him. He saw the rubber soled work boot coming. He said the man kicked him again in the back of the head and then in the mouth.

[8] The statement then went on to talk about the interaction between the alleged offender and Mr Aden, which is the subject of count 2 on the indictment. He said he saw "the old guy" (Mr Aden, also known as "Eddie") yelling at the man to get off Mr Doucas. He saw that "the old guy was carrying some sort of stick". He said, "I remember looking up at one stage and seeing the young Aboriginal male beating the old guy I called Eddie with the stick Eddie had. I was a bit dazed and confused at the time. I couldn't be sure but I think I saw Eddie get hit with the stick at least twice. I was very groggy from the beating I took. Time sort of went fuzzy and the next thing I knew police had arrived."

[9] Earlier in the statement, Mr Doucas described his condition on the night of 11 April 2016. He said, "I hadn't been drinking and I was sober." The evidence of Senior Constable Leggett will be that on the night of 11April 2016, he could smell liquor on Mr Doucas' breath.

The application

[10] The Crown is seeking to have both sets of representations by Mr Doucas admitted into evidence under UEA s 65(2)(b) and/or (c), but concedes that that part of the statement of 18 April 2016 in which Mr Doucas said he thought he saw "Eddie get hit with the stick at least twice" should not be admitted because of Mr Doucas' lack of certainty and the fact that he deposed to being groggy and confused.

[11] Defence counsel objects to the admission of either statement. I will consider the objections to each set of representations in turn.

(a) Consideration of the representations made to Senior Constable Leggett on 11 April 2016

Section 65(2)(b)

[12] Evidence of the representations made to Senior Constable Leggett on 11 April 2016 is admissible under s 65(2)(b) if the representations were made when or shortly after the asserted facts occurred and in circumstances that make it unlikely that the representations are fabrications.

[13] In *R v Ryan*[1] I reviewed the cases on s 65(2)(b) and concluded that the following principles could be distilled from those cases.

(1) The section is not just a restatement of the *res gestae* principles. It was intended to significantly expand upon the range of statements that were admissible at common law as part of the *res gestae*. (*Conway* at [123] and [133]; *Harris* at [33]).

(2) A narrative of past events may be admissible under s 65(2)(b). (*Conway* at [133]).

(3) The emphasis in s 65(2)(b) is not on reliability as such, but on admitting evidence that is unlikely to have been fabricated. For that reason the section requires that the statements be made "when" the asserted fact occurred (rephrased in *Williams* as "during the occurrence of the asserted fact") or "shortly after" the asserted fact occurred (rephrased in *Williams* as "under the proximate pressure of the asserted fact"). (*Williams* at [48])

[1] (2013) 33 NTLR 127; [2013] NTSC 54 at [27]

(4) For that reason, the court should not over-emphasise such matters as whether the events in question were fresh in the memory of the person making the statement in determining whether a statement was made shortly after the event. (*Williams* at [48]) However it is proper to take into account whether the events are likely to have been fresh in the mind of the person when the statement was made, as the policy behind the provision is to exclude evidence of a recollection which may have faded in accuracy over time. (*Conway* at [123] – [135]; *Harris* [33] to 40; *R v Mankotia* (unreported, Supreme Court, NSW, Sperling J, No 70049 of 1997, 27 July 1998) quoted in *Harris* at [34])

(5) "The predominant factor in the phrase 'shortly after' must be the actual time elapsed and whether that fits the ordinary usage of the term 'shortly after' in the circumstances of the case." (*R v Mankotia* quoted in *Harris* at [34])

(6) The assessment of whether a statement was made "shortly after" the event in question may be influenced by the subject matter of the statement and by how long the memory of such an event is likely to be clear in the mind. (*R v Mankotia*; *Harris* at [34])[2]

[14] The onus is on the Crown to establish that the hearsay evidence should be admitted.

[15] There is no doubt that the statements made to Senior Constable Leggett were made "at or shortly after" the asserted facts occurred. They were made on the same night that the alleged assaults occurred to police who were called to the scene. This falls comfortably within the ordinary usage of the phrase "shortly after". Further, given the traumatic nature of the event the subject of the representation – being thrown down

[2] *R v Ryan* (2013) 33 NTLR 123 at 131-132 [27]; *Conway v The Queen* (2000) 98 FCR 204; *Harris v The Queen* (2005) 158 A Crim R 454; *Williams v The Queen* (2000) 119 A Crim R 490; *R v Mankotia* [1998] NSWSC 295

stairs and kicked in the face – the memory of the events described are likely to have been clear in Mr Doucas'mind.

[16] In my view, those representations were also made in circumstances that make it unlikely that the representations were fabrications.

[17] In *Sio v The Queen*[3] the High Court was concerned with whether hearsay evidence was admissible under s 65(2)(d), where the focus is on reliability. The plurality said:

> One category of circumstances that has been recognised as warranting a relaxation of the exclusionary effect of the hearsay rule was identified in *Wigmore on Evidence* as those circumstances that "are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification be formed"; in other words, circumstances that of themselves tend to negative motive and opportunity of the declarant to lie.[4] *[citations omitted]*

[18] These remarks are equally applicable to the question to be determined under s 65(2)(b), namely whether the representation was made in circumstances that make it unlikely that the representation is a fabrication, and in my view the circumstances in which Mr Doucas made the representations to Senior Constable Leggett on 11 April 2016 fit this description.

[19] First there is the timing of the representations. In *Williams v The Queen* Whitlam, Madgwick and Weinberg JJ said:

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3 (2016) 90 ALJR 963; [2016] HCA 32

4 Ibid at [64] per French CJ, Bell, Gageler, Keane and Gordon JJ

> …it is principally a concern to exclude concocted evidence that informs the meaning of the phrase "shortly after". …
>
> … The rationale for the exception to the hearsay rule contained in s 65(2)(b) is not based only upon the necessity to ensure that the events in question may be easily recalled. Rather that provision is, as a whole, intended to allow evidence that is unlikely to be a fabrication. One condition of this is that the statements be made spontaneously during (when) or under the proximate pressure of (shortly after) the occurrence of the asserted fact.[5]

In my view, the representations made by Mr Doucas to Senior Constable Leggett partake of this quality.

[20] Second, the representations were made to a police officer, and it can be assumed that most people are aware that it is a serious matter to make a false complaint of criminal conduct to a police officer.

[21] Third, the alleged offender was a person unknown to Mr Doucas, making it unlikely that he would have had any motive to fabricate a false allegation against him. In my view this is reinforced by the fact that Mr Doucas declined to provide a "victim statement" on that occasion – an indication that he did not have a vendetta against Mr Smiler and was unlikely therefore to have been motivated to fabricate evidence against him.

[22] Defence counsel cast this unwillingness as an indication of the opposite – ie that one explanation for Mr Doucas' unwillingness to provide a victim statement might be that he <u>had</u> made a false complaint

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5 (2000) 119 A Crim R 490 at [47]-[48]

and did not want it to be taken further and tested in court. Defence counsel pointed out that in the statement provided by Mr Smiler's partner, Ms Wurramarrba, she stated that it was Mr Doucas who had pushed Mr Smiler down the stairs. He said an inference might be drawn that Mr Doucas was making a false complaint to cover up his own wrongdoing. It seems to me that a more rational inference to be drawn from Mr Doucas' refusal to provide a victim statement is that he did not have any vindictiveness towards Mr Smiler which would act as a motive to make a false statement accusing him of criminal conduct.[6] (It should be noted that the other eye witness – who did not know Mr Smiler and did not know Mr Doucas sufficiently well to know his last name – said it was Mr Smiler who pushed Mr Doucas down the stairs.) However, for the purpose of the exercise of determining whether to admit evidence of the representations made on 11 April 2016, I will treat Mr Doucas' unwillingness to provide a victim statement on the night of 11 April as a neutral factor.

[23] Even treating Mr Doucas' unwillingness to provide a victim statement on 11 April as a neutral factor, I am of the view that the representations made to Senior Constable Leggett are admissible under s 65(2)(b).

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[6] There was no indication that Mr Doucas would not give evidence in court. He gave a statement to police a week later.

[24] Defence counsel submitted that the term "fabrication" in s 65(2)(b) should be interpreted widely enough to include falsity due to unreliable observation or memory. I reject that contention. To "fabricate"[7] something means to make it. When used about a statement, it means to make it up purposely[8] – not to misremember or misperceive something. The rationale given in *Sio* and *Williams* (quoted above at [17] and [19]) for the requirement that the representation be made "when or shortly after the asserted fact occurred" is at least partly to ensure that the representations allowed in under this section are those which are uttered spontaneously before there is time to reflect, plan and make something up or at least in circumstances under which it is unlikely that the person making the statement would make it up.

[25] Defence counsel referred to UEA s 108 which contains the following statement:

> (3) The credibility rule does not apply to evidence of a prior consistent statement of a witness if:
>
> (a) evidence of a prior inconsistent statement of the witness has been admitted; or
>
> (b) it is or will be suggested (either expressly or by implication) that evidence given by the witness has been fabricated or re-constructed (whether deliberately or otherwise) or is the result of a suggestion;

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7 from "fabricare" (v.) to make

8 The definition in the *Australian Concise Oxford Dictionary* is: **fabricate** *v.tr.* **1.** construct or manufacture, esp. from prepared components. **2.** invent or concoct (a story, evidence, etc.) **3.** forge (a document) **fabrication** *n.*

> and the court gives leave to adduce the evidence of the prior consistent statement.

[26] Counsel submitted that the phrase in parenthesis "whether deliberately or otherwise" refers back to both verbs "fabricated" and "re-constructed" and that therefore in the UEA "fabricated" must be interpreted to include unintentional falsehoods wherever it appears. I do not agree. That is simply not what the word "fabricated" means. Section 108(3) makes perfect sense if the phrase in parenthesis refers simply to the verb "reconstructed": that rule applies if it is suggested that evidence given by a witness has been fabricated or if it is suggested that the evidence has been reconstructed (deliberately or otherwise).[9]

[27] For the reasons set out above, I consider that the circumstances under which the representations were made to Senior Constable Leggett on 11 April 2016 are such as to make it unlikely that he made them up.

Section 65(2)(c)

[28] I am also of the opinion (if it were necessary to decide) that the representations made by Mr Doucas to Senior Constable Leggett on 11 April 2016 would be admissible under s 65(1)(c). Evidence is admissible under s 65(2)(c) if the statement in question was made in

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9 In any case, that reasoning could as easily (or more easily) be turned on its head. Where the word "fabricated" is used on its own in s 65, the legislature does not use the phrase "deliberately or otherwise". That phrase is only introduced in s 108(3) where the words "or reconstructed" follow "fabricated", indicating an intention that the phrase "deliberately or otherwise" is intended to refer to "reconstructed" only.

circumstances that make it highly probable that the representations in the statement are reliable. The representations made by Mr Doucas on 11 April 2016 were made in circumstances in which they were unlikely to have been fabricated (for the reasons outlined above). They were made to a police officer very soon after the events happened and concerned what happened to him. All of these circumstances make it highly probable that the representations are reliable. Some evidence will be given by Senior Constable Leggett that Mr Doucas smelled of alcohol that night and Mr Doucas himself said in his later statement that he felt "a bit dazed and confused at the time". However, he is unlikely to have been mistaken about being thrown down the stairs and kicked in the head and unlikely, in the short interval that elapsed before he spoke to Senior Constable Leggett, to have forgotten what had happened.

Section 137

[29] Defence counsel submits that even if the evidence of the representations made by Mr Doucas to Senior Constable Leggett is admissible under s 65(2)(b) or 65(2)(c), it should be excluded under UEA s 137.

[30] Under s 137, in a criminal proceeding such as this, the Court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

[31] The obvious prejudice to the defendant of admitting the hearsay evidence of Senior Constable Leggett of representations made to him by Mr Doucas, is that defence counsel will not have an opportunity to cross-examine Mr Doucas. As I said in *R v Ryan*:

> I recognise that there is significant prejudice to the defence in being unable to cross examine. That cannot be determinative (although in some cases it may be sufficient) as that will always be the case when statements are let in under s 65. It is open to the defence to make submissions to the jury about the risks inherent in acting on evidence which has not been tested in cross examination and, of course, appropriate warnings will be given to the jury in summing up.[10]

[32] In this case, the prejudice occasioned by the inability to cross-examine Mr Doucas is somewhat (though obviously not entirely) mitigated. Although defence counsel will not have the opportunity to put to Mr Doucas the suggestion that he was the aggressor, not Mr Smiler, Ms Wurramarrba has provided a statement and will presumably give evidence to that effect. Further, evidence about one matter which the defence may submit reflects adversely on Mr Doucas' reliability (namely the fact that he had been drinking that night) will be given by Senior Constable Leggett.

[33] A decision whether to exclude evidence under s 137 requires the Court to carry out a balancing exercise. The prejudice to the defence from the inability to cross-examine Mr Doucas must be balanced against the probative value of the statements made by Mr Doucas. I consider the

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10 (2013) 33 NTLR 123 at [34]

probative value of those statements to be very high indeed. Mr Doucas told police what he says happened to him within a short time after the events occurred in circumstances which (I have found) make it unlikely that the representations were fabrications. The representations made by Mr Doucas on 11 April 2016 are solely concerned with what happened to him and were made when the incident was fresh in his mind. They are highly likely to be reliable.

[34] Also, I consider the importance of the evidence is high. Admittedly this is not a case, such as for example some sexual assault cases, in which there is no other evidence of what occurred. (The Crown intends calling two eye witnesses – Ms Wurramarrba who has said in her statement that Mr Doucas pushed Mr Smiler down the stairs and another witness who has said Mr Smiler pushed Mr Doucas down the stairs.) Nevertheless, in the circumstances, I consider the jury is likely to be greatly assisted by hearing an account of what the alleged victim says he saw and felt.

[35] In my view, the probative force of this evidence does outweigh its prejudicial effect and I decline to exclude it under s 137.

(b) Consideration of the statement made to police on 18 April 2016

[36] In determining whether a statement is admissible under s 65(2)(c), the focus is on the circumstances under which the statement was made and whether those circumstances render it highly probable that the

statement is reliable, not the actual reliability of the statement itself, judged (for example) by reference to its consistency with other reliable evidence.[11]

[37] In the statement made to police on 18 May 2016, Mr Doucas speaks of two matters – what happened to him and what he saw happening to Mr Aden. Different considerations apply to these two different topics.

Representations about the assault on Mr Doucas

[38] I consider that the part of the statement in which Mr Doucas tells what happened to him is admissible under s 65(2)(c). The circumstances in which the statement was made make it highly probable that the statement in relation to that topic is reliable. First, the statement was made only a week after the events in question. It concerns what he directly experienced, and the events he described (being thrown downstairs and kicked in the head) are the kinds of things that are likely to stick in the mind.[12] For these reasons, the events he relates are likely to have been fresh in his mind when he made the statement. Second, the representations are in a formal statement made to police, which Mr Doucas has signed acknowledging that "a person who

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[11] *R v Ambrosoli* (2002) 55 NSWLR 603 at 616 [34]; *Williams v The Queen* (2000) 119 A Crim R 490 at [54]; *R v Ryan* (2013) 33 NTLR 123 at [9]

[12] The relationship of the maker of the statement to the subject matter of the statement is a relevant circumstance for the purposes of the assessment under s 65(2)(c). *R v Ryan* (2013) 33 NTLR 123 at [11]

wilfully makes a false statement in any material particular is guilty of a crime and liable to imprisonment".

[39] Defence counsel relied on the fact that there is evidence that suggests Mr Doucas may have been intoxicated on the night of 11 April 2016 as "a circumstance tending towards unreliability" and made the same submission about the possibility that Mr Doucas' injuries may have included a head injury.[13] While I agree that intoxication (or a head injury) may be factors affecting the reliability of evidence, the focus for the purpose of s 65(2)(c) is on the circumstances of the making of the statement, and it seems to me that the fact that the person might have been intoxicated (or have had a head injury) at the time of the events being talked about is not a circumstance surrounding the making of the statement. Rather it is one of the factors affecting intrinsic reliability.

[40] As I consider that this part of the statement is admissible under s 65(2)(c), it is unnecessary for me to decide whether it satisfies the criteria in s 65(2)(b).

Representations about the assault on Mr Aden

[41] Different considerations apply to that part of the statement in which Mr Doucas tells what he saw happen in relation to Mr Aden. The fact

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[13] Defence counsel relied on *R v Murphy* [2000] NSWCCA 297 at [83] to [88] for this proposition. That case did not concern s 65. It was simply looking at factors which might affect the reliability of evidence and so attract a warning under UEA s 165.

that those representations too are in a formal statement to police is a circumstance which increases the probability of the representations being reliable, but the other circumstances supporting the probability of reliability are absent. That part of the statement does not concern matters directly experienced by Mr Doucas of a kind unlikely to be easily forgotten and it cannot necessarily be inferred that they were fresh in his mind when the statement was made.

[42] Nor do I think that this second part of the statement satisfies the criteria in s 65(2)(b). I would not have much difficulty in finding that the circumstances surrounding the making of the statement were such as to make it unlikely that the statement was fabricated. However, I do not think that the statement can be said to have been made "shortly after" the event. The statement was made a week later, and that part of the statement concerning the assault on Mr Aden did not concern matters so directly experienced by Mr Doucas that one can infer they would have been fresh in his mind.

Section 137

[43] Defence counsel submits that if the statement of 18 April 2016 is admissible under s 65, it should nevertheless be excluded under s 137 as its probative value is outweighed by the danger of unfair prejudice to the defendant.

[44] The only part of the statement of 18 April 2016 that I consider to be admissible under s 65 is the part in which Mr Doucas talks about the assault on himself. It is therefore not necessary to determine whether the balance of the statement should be excluded under s 137, and many of the defence submissions on s 137 were directed towards that part of the statement that has not been held to be admissible.

[45] The defence relies on several factors which, it is submitted, cast doubt on the reliability of Mr Doucas' recollections. These are, chiefly, that there is evidence to suggest that Mr Doucas had been drinking on the night of 11 April 2016; the fact that he may have received a head injury that night; the fact that he was probably suffering from stress as a result of the "violent altercation"; and the fact that he said in his statement of 18 April 2016 that he had not been drinking on 11 April 2016 and was sober that night.

[46] The first three factors are said to potentially affect Mr Doucas' recollection and ability to narrate events. The last factor is said to reflect poorly on Mr Doucas' credit. All are said to reduce the probative value of the evidence.

[47] However, when making an assessment of the probative value of evidence under s 137, the Court must assume that the jury will accept the evidence. "[I]t follows that no question as to credibility of the

evidence, or the witness giving it, can arise. For the same reason, no question as to the reliability of the evidence can arise."[14]

[48] It seems to me that, assuming it is accepted by the jury, the probative value of the statement made by Mr Doucas on 18 April 2016 concerning what he says Mr Smiler did to him is very high indeed. It is direct evidence of what he experienced.

[49] The unfair prejudice to the defendant comes from the inability to cross-examine Mr Doucas. That prejudice is amplified somewhat by the factors said to cast doubt on Mr Doucas' reliability – listed at [45] above. The defendant will be unable to explore these matters in cross-examination. However, as pointed out at [32] above this prejudice is mitigated somewhat by the other evidence that is available. The defendant will not be shut out from making submissions about what the defence will contend is the unreliability of Mr Doucas. If Mr Doucas suffered a head injury, there will be medical evidence of that which will be at least as good as any admission from Mr Doucas in cross-examination that he suffered a head injury. (Mr Doucas is not a medical expert.) There will be evidence from Senior Constable Leggett that Mr Doucas smelled of alcohol on the night of 11 April 2016, and

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[14] *IMM v The Queen* (2016) 257 CLR 300; [2016] HCA 14 per French CJ, Kiefel, Bell and Keane JJ at [52]. It follows that my *obiter* remarks in *R v Ryan* (2013) 33 NTLR 123 at [35] (decided before *IMM*) in which I said I would have taken into account the intoxication of the statement maker at the time of the event being described when considering the probative value of her evidence for the purpose of s 137 were wrong, though it would have been right (as I also said) to take that fact into account in assessing the prejudice to the defendant in being unable to cross-examine the unavailable maker of the statement.

the jury will have Mr Doucas' statement that he had not been drinking. Defence counsel will be able to submit to the jury that they should infer from this that Mr Doucas lied about his drinking, that he is therefore unreliable, and that they should not accept what he said in his statement.

[50] Balancing what I consider to be the very high probative value of the statement by Mr Doucas about what happened to him against the real, but to a certain extent mitigated, prejudice to the defendant in being unable to cross-examine Mr Doucas, I am of the opinion that the probative value of those parts of the statement I have ruled admissible under s 65(2)(c) does outweigh the danger of unfair prejudice to the defendant. Accordingly, I decline to exclude that evidence under s 137.

Residual common law discretion to exclude

[51] Defence counsel has also submitted that I should exclude both statements of Mr Doucas exercising the general residual common law discretion to exclude admissible evidence to ensure the defendant receives a fair trial.[15]

[52] The unfairness relied upon is that Mr Smiler was only charged with aggravated assault on Mr Doucas after he had been committed to stand trial on the charge of causing serious harm to Mr Aden and, further, that the existence of a police notebook entry made on 11 April 2016 to

[15] *Haddara v The Queen* (2014) 43 VR 53 at 59-60 [16]

the effect that Mr Doucas was intoxicated was not disclosed until recently. The charge was laid and the notebook entry disclosed after the death of Mr Doucas. Had the charge been laid and the notebook entry disclosed earlier, defence counsel would almost certainly have applied for leave to cross-examine Mr Doucas at the preliminary examination. (Defence counsel made it clear that no criticism of the Crown was intended and that it was not suggested that the non-disclosure was deliberate or the late laying of the aggravated assault charge was the result of a forensic decision by the Crown.)

[53] Assuming this residual discretion exists (and it is unnecessary for me to make any finding either way about that), I simply do not think that these circumstances make it unfair to admit the statements of Mr Doucas or that it is necessary to exclude that evidence in order to ensure a fair trial.