CITATION:	*The King v Cowen [No. 2]* [2024] NTSC 58
PARTIES:	THE KING v COWEN, Graham Michael
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	22210117
DELIVERED:	4 July 2024
HEARING DATE:	6, 7, 13 and 21 June 2024
JUDGMENT OF:	Huntingford J

CATCHWORDS:

EVIDENCE – Admissibility and relevance – Evidence (National Uniform Legislation) Act 2011 (NT) s 38 (3) and s 38(1)(c) – prior inconsistent statement – whether entering plea a representation of conduct – evidence given on Basha enquiry – cross-examination as to credibility – application of principle to cross-examine on prior inconsistent statement to demonstrate the truth of the matter – consideration of unfair prejudice – consideration of probative value – application granted

EVIDENCE – Admissibility and relevance – Evidence (National Uniform Legislation) Act 2011 (NT) s 137 – consideration of whether possession of firearms indicia of drug supply – circumstantial evidence – consideration of unfair prejudice – consideration of probative value – whether the unfair prejudice can be dealt with by direction on propensity reasoning – application to exclude not granted

EVIDENCE – Admissibility and relevance – Evidence (National Uniform Legislation) Act 2011 (NT) s 137 – consideration of whether evidence of time in jail of accused is prejudicial – application not granted

Evidence (National Uniform Legislation) Act 2011 (NT) s 31, s 43, s 101A, s 102, s 103, s 106, s 192A, s 192

The King v Cowen [2024] NTSC 44*; Hillen v The King* [2023] NTCCA; *DPP (Vic) v Bourbaud* [2011] VSC 103*; HML v The Queen; SB v The Queen; OAE v The Queen* (2008) 235 CLR 334*; The Queen v Le* (2002) 54 NSWLR 474*; Sultana v The Queen* (1994) 74 A Crim R 27*; Blackwell v The Queen* (1996) 87 A Crim R 289*;Thompson and Wran v The Queen* (1968) 117 CLR 313*; The Queen v Falzon* (2018) 264 CLR 361; *R v Lisoff* [1999] NSWCCA 364

REPRESENTATION:

Counsel:

Crown:	T Grealy
Accused:	P Crean

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Accused:	Bryson Kelly Barristers & Solicitors

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The King v Cowen [No 2] [2024] NTSC 58
No.22210117

BETWEEN:

THE KING

AND:

GRAHAM MICHAEL COWEN

CORAM: HUNTINGFORD J

REASONS FOR JUDGMENT

(Delivered 4 July 2024)

Introduction

[1] This is an application under s 192A of the *Evidence (National Uniform Legislation) Act 2011* (NT) (UEA) for advance rulings in relation to a number of evidentiary matters. The applications are:

(a) an application by the Crown pursuant to s 38 of the UEA for leave to cross-examine Kara Burgoyne (KB) as to a prior inconsistent statement and on matters going only to her credit;

(b) an application by the Crown pursuant to s 38 of the UEA for leave to cross-examine TH as to a prior inconsistent statement;

(c) an application by Defence for a ruling that evidence proposed to be adduced by the Crown as to the firearms found in the storage unit during the police search on 31 March 2022 is not admissible on the basis of relevance or alternatively should be excluded pursuant to s 137 of the UEA; and

(d) an application by Defence for a ruling pursuant to s 137 of the UEA that evidence proposed to be adduced from NE in cross-examination[1] is inadmissible.

[2] Two further areas of dispute or potential dispute were raised in argument. They were:

(a) a potential application by Defence for a ruling pursuant to s 137 of the UEA that evidence as to the facts of the police chase on 21 August 2021 and the findings in the accused's car on 22 August 2021 is inadmissible; and

(b) an application by Defence for a ruling pursuant to s 136 of the UEA that, if cross-examination of KB as to her plea of guilty and facts of that plea is allowed, based on the Crown's application above, that the use of that evidence be restricted to issues of credit only, and not the truth of the facts apparently asserted.

1 Leave to cross-examine NE, a Crown witness, was given in *The King v Cowen* [2024] NTSC 44.

[3] In relation to each of these matters I decline to give an advance ruling as I do not consider it appropriate to do so.

[4] As to the evidence of the events of 21-22 August 2021, that evidence is sought to be adduced by the Crown as circumstantial evidence of drug dealing during the period covered by count 1 on the indictment. The precise objection by Defence has not been identified. Defence originally prepared submissions based upon the fact that the evidence was "context" or background evidence in relation to the charge. However, that is not how the Crown propose to use the evidence. In the circumstances, this is an issue which may resolve between parties or, if it does not, is a relatively short point which could be dealt with by the trial Judge within the course of the trial.

[5] The question of the limitation of the use of evidence of KB pursuant to s 136 of the UEA is best considered once the evidence which KB gives in the trial, considered in context with the other evidence, is known. In my view the trial Judge is better placed to make this decision and to rule upon it now would be premature.

Background

[6] The accused is charged with six offences contrary to the *Misuse of Drugs Act 1990* (NT). The charges are:

a. Between 1 March 2021 and 31 March 2022 at Katherine, the accused intentionally supplied cannabis plant material (count 1);

b. On 30 March 2022 at Katherine, the accused possessed $143,975 (count 2) and $1,610.25 (count 3) in cash which was obtained from the sale of dangerous drugs.

c. Between 1 March 2021 and 31 March 2022 at Katherine, the accused received $4,025 (count 4) and $10,000 (count 5) in cash, knowing that property was obtained from the supply of dangerous drugs; and

d. On 30 March 2022 at Katherine, the accused possessed a trafficable quantity of methylenedioxymethamphetamine (MDMA) (count 6).

[7] The accused was the target of a police investigation from August 2020 until 30 March 2022. The Crown case, in very brief summary, is that the accused came into possession of between 25 and 50 pounds of cannabis plant material (cannabis) which he stored in a shipping container at a self-storage warehouse facility and supplied to persons in the Katherine area for cash.

[8] A search warrant was executed at the shipping container on 30 March 2022. Police located and seized a number of items including vacuum bags, discarded packaging, a sealed cryovac bag with 443 grams of cannabis, empty clip seal and cryovac bags, three mobile phones, small digital scales, a glass ice smoking pipe, 1.39 grams of MDMA, two firearms, a locked tool box, a trace amount of cannabis in a yellow envelope on the floor, an empty box for a cryovac machine and $143,975 in cash. The accused's inside middle fingerprint was found on an empty vacuum bag inside the locked tool box in which some of the items were found.

[9] The mobile phones found were not registered. The firearms were unregistered and one was a prohibited weapon. A fingerprint of the accused's left index finger was found on the scope of the other firearm, a .22 calibre rifle.

[10] The accused was arrested when he attended Katherine Police Station on request the same day. Various items were located and seized from the accused on arrest, namely a mobile phone, keys to the shipping container and tool box, and $1,610.25 in cash.

[11] Police also located and seized a Honda motorcycle and its key, and $50 cash found in the rear tool box of the motorcycle. Search warrants were also executed at the accused's home address, where he lived with his partner KB, and the home address of his mother. KB told police that she had some cannabis in a window sill and approximately $5,000 to $6,000 in her handbag which she had saved for dental work.

[12] At the accused's home police seized unused cryovac bags, 7.23 grams of cannabis in two locations, two vials of an unknown substance, two mobile phones and $4,025 in cash located in KB's handbag. After the search, KB told police that she had used some of the cash, which she said explained why her estimate in her initial conversation with police was wrong. KB was convicted of possession of $4,025 of tainted property and sentenced on 6 November 2023.[2] It is not in dispute that the money which was the subject of

2 *The King v Kara Burgoyne*, Sentencing Remarks, Kelly J, 6 November 2023, 2.

the charge against KB is the same cash which is the subject of count 4 in this proceeding.

[13] Police observed that there were 10 motorcycles at the accused's residence as well as two boats with trailers. Police also observed that the furniture and appliances in the house appeared to be new, as did the tools in the shed.

[14] At the home of the accused's mother, TH, police located and seized items including a small digital scale, a total of 36.35 grams of cannabis from various locations around the house, .72 grams of cannabis seeds, two mobile phones, three grinders, 17 .22 Winchester rounds, $10,000 cash bundled with rubber bands in a dresser drawer in the bedroom, $2,210 cash in a pink purse in a drawer of the bedside table, and a smoking pipe. It is not in dispute that the money which is the subject of the charge against TH is the same cash which is the subject of count 5 in this proceeding.

Cross-examination of KB as to prior inconsistent statements and credit

[15] KB is to be called as a witness in the Crown case. She has not provided a statement to police but on 30 May and 6 June 2024 she gave evidence in a Basha enquiry. KB's evidence was that when police searched her house on 30 March 2022 they found $4,000 in her handbag.[3] She said that the money was paid to her by her older sister, LW, in repayment for money loaned by KB to her over a number of years.[4] KB identified the cash from the handbag in photographs taken by police. She also identified cannabis photographed in

3 *The King v Graham Michael Cowen*, Transcript of proceeding, Huntingford J, 30 May 2024, 39.

4 Ibid, 40.

a bowl which she said was hers, some other cannabis in a storeroom, which she said she did not own, and a money box with change she had been saving and some cannabis on the dining room window, which she said were hers.[5]

[16] On 31 October 2023, KB entered a plea of guilty to a charge of intentionally receiving or possessing $4,025 in cash knowing that the money was obtained from the supply of dangerous drugs.[6] KB admitted in evidence that she entered a plea of guilty to the charge, that she was present when the facts were read out and that she heard her lawyer say that she admitted that the facts were true. She said that she pled guilty "by advice from her lawyers".[7] A little later in her evidence KB said that she was "very unwell that morning" and that she did not agree that the facts read out at the time of her plea were true.[8]

[17] A document setting out a statement of the facts on KB's sentencing hearing was attached to the Crown's notice of intention to seek leave to cross-examine KB. The statement of facts included the following relevant statements [formal parts omitted]:

> 9. There was no one at the offender's address at the time of police entry. Police contacted KB by text message. KB indicated that she had some cannabis inside a window sill and about $5,000 to $6,000 cash in her handbag saved for dental work. KB attended the address

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5 Ibid, 41.

6 *The King v Kara Burgoyne*, Sentencing Remarks, Kelly J, 6 November 2023, 2.

7 *The King v Graham Michael Cowen*, Transcript of proceeding, Huntingford J, 30 May 2024, page 42. Upon being advised that she could claim legal professional privilege in relation to communications between herself and her lawyers Ms Burgoyne did not elaborate further. She had not had the benefit of legal advice at the time of giving evidence on the Basha enquiry.

8 *The King v Graham Michael Cowen*, Transcript of proceeding, Huntingford J, 30 May 2024, 43.

and was cautioned but made the same admissions. A drug detection dog was utilised at the offender's address. There police located and seized:

a. unused cryovac bags …

b. 0.84 grams of cannabis located in a steel bowl on the outdoor table…

c. 1.12 grams of cannabis located in a bowl in the rear store room ….

d. 2 vials of unknown substance …

e. a Samsung mobile phone located inside a small safe outside on patio …

f. a bundle of cash in $50 and $100 denominations totalling $4,025, bundled the same way as the cash in the shipping container, located in a hand bag in the kitchen…

g. 5.24 grams of cannabis in a zip lock bag located in a bronze money tin on the dining room window sill …

h. Samsung mobile phone sized from KB …

10. When KB realised there was less cash in the hand bag than she had estimated, she told police she had been using some of the cash….

14. KB knew that the $4,025 cash in her possession and been obtained through the sale of dangerous drugs by COWEN.

[18] In cross-examination on the Basha enquiry KB gave evidence about her employment history and her receipt of royalties from her position as a traditional owner from Groote Eylandt. KB said that she ceased her last job towards the end of 2021. She also gave evidence as to who owned two boats, a quad bike and three dirt bikes which police found at her property. Her evidence was that none of those items were owned by the accused. She also stated that she purchased the property at 27 Heron Crescent, Katherine in her own name in 2021 with a mortgage, and that she installed a jacuzzi on the property which was paid for in instalments using "Zippay". KB stated in re-examination that during the period that she was unemployed she was

doing cleaning jobs for cash, and that she received financial assistance from her father between 2020 and 2021.[9] KB was not asked any questions in cross-examination about her plea or the facts upon which it was based, or the money found by police.

[19] There is no doubt that KB's evidence on the Basha enquiry is unfavourable to the Crown case within the meaning of s 38(1)(a) of the UEA because she said that the cash found in her handbag did not come from the sale of drugs by the accused. Further, she gave unfavourable evidence about the ownership and purchase of various assets because that evidence was to the effect that those assets were purchased or acquired with monies other than cash received by the accused from the business drug supply.

[20] The Crown also seek leave to cross-examine KB on the basis that she has made prior inconsistent statements within the meaning of s 38(1)(c) as to the origin of the $4,025 in cash in relation to which she was convicted for possession of tainted property. The disputed inconsistent statement is a representation, by her conduct, on her plea that she knew the cash had been obtained through the sale of dangerous drugs by the accused.

[21] A prior inconsistent statement of a witness is defined as a previous representation that is inconsistent with evidence given by the witness.[10] Representation is defined as: an express or implied representation (whether

9 *The King v Graham Michael Cowen*, Transcript of proceeding, Huntingford J, 30 May 2024, 25-27.

10 UEA Dictionary, definition of "prior inconsistent statement".

oral or in writing); a representation to be inferred from conduct; a representation not intended by its maker to be communicated to or seen by another person; or a representation that for any reason is not communicated.[11] A previous representation is a representation made otherwise than in the course of giving evidence in the proceeding in which evidence of the representation is sought to be presented.[12]

[22] The cross-examination of KB as to her alleged prior inconsistent statement is cross-examination as to her credibility.[13] Section 38 is a procedural provision. Evidence adduced must be otherwise admissible. In that regard, s 103(1) provides an exception to the credibility rule[14] for evidence adduced in cross-examination (which includes cross-examination with leave in accordance with s 38) provided that the evidence could substantially affect the assessment of the credibility of the witness.

[23] The first question is whether KB has made a prior inconsistent statement as alleged. The Defence argued that she has not because the plea, and the admission of the facts on the plea, did not amount to a representation inconsistent with the evidence she gave at the Basha enquiry. The argument was that the facts on the plea were prepared by the Crown and were contrary to what KB had earlier said to police and what she later said to the writer of

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11 Ibid, definition of "representation".

12 Ibid, definition of "previous representation"

13 *The Queen v Le* (2002) 54 NSWLR 474, [66] – [67] quoted with approval in *Hillen v The King* [2023] NTCCA 9, [50]

14 UEA, s 102.

the pre-sentence report prepared for her sentencing hearing. Defence argued that in those circumstances it could not be said that KB had made the representations relied upon by the Crown.

[24] Defence argued that KB had not always accepted the facts as read out in court on her plea. She gave a version in her initial conversation with police, when she told them that the money was saved by her for dental work, and another version when she told the writer of the pre-sentence report in November 2023 that the money was received from her sister to repay her debt, the same account she gave at the Basha enquiry. The transcript of KB's sentencing hearing before Kelly J on 6 November 2023 was tendered on the voir dire. The account given by KB to the pre-sentence report writer was raised directly in court and KB's counsel told the court that she had taken instructions and that KB "confirms and accepts the truth and accuracy of the Crown Facts as pled to".[15] KB was present in the court during that proceeding.

[25] I have taken into account that KB's statement that the money was given to her by her sister is not a peripheral matter. It is an element of the offence to which she pled guilty, and relevant to the charges against the accused, in particular count 4.[16] KB's statement to police that the money was saved for dental work, and that the money was received from her sister as repayment

15 *The King v Kara Burgoyne*, Sentencing Remarks, Kelly J, 6 November 2023, 3

16 *Misuse of Drugs Act 1990* (NT), s 8(1) and Part 11, Division 1, Subdivision 1.

of a debt, are both inconsistent with that plea. However they are representations made on other occasions to different people.

[26] A plea of guilty, and acceptance of the facts upon which it is based, can be a representation by conduct. In *Hillen v The King*[17] the Court of Criminal Appeal considered an appeal against a finding of guilt. One of the grounds of appeal was that a miscarriage of justice had occurred because the facts of a co-offender's plea had been admitted into evidence. The co-offender had given evidence in the trial which was contrary to the facts upon which his plea was based and was cross-examined by the Crown. The Court in *Hillen* said that, in the absence of some evidence raising a doubt, the combination of an offender's plea of guilty together with a willingness to be sentenced on the basis of the summary of facts will ordinarily support an inference that the facts constitute a prior representation.[18]

[27] As the decision in *Hillen* makes clear, the relevant representation in such a case is not a representation contained in a document (i.e. the statement of facts), but rather a representation by conduct in entering the plea based upon the facts read out to the sentencing court.[19] The evidence of KB on the Basha enquiry was that she agreed that she entered a plea of guilty to the charge and that she did so on the basis of the facts read out in court. The fact that KB may have made other, consistent or inconsistent, representations (as to

17 *Hillen v The King* [2023] NTCCA 9.

18 *Hillen*, [53], referring with approval to judgment of Redlich JA and Robson AJA in *Power v The Queen* (2014) 43 VR 261, [68] and [70]

19 *Hillen*, [57].

the origin of the cash) on different occasions, to different people, does not mean that she did not make the representation alleged at the time of the plea and sentencing hearing.

[28] Defence also argued that the fact that KB had not made a police statement meant that it could not be said that there was a prior inconsistent statement. This submission ignores the fact that the representation was by conduct, as I have explained. KB's evidence was taken on the Basha enquiry because she had declined to give a statement. The relevant inconsistency is with that evidence which, it is assumed for the purpose of the voir dire, is the same evidence that KB will give at the trial. Therefore, the fact that KB had not made a police statement is irrelevant.

[29] Taking into account all of the above matters, I am satisfied that the making of the plea and acceptance of the facts by KB on 31 October and 6 November 2023 constitutes a representation by conduct on her part.

[30] In considering the application for leave I am required to consider the matters referred to in s 192(2) of the UEA. The evidence as to KB's credibility is important because it relates to the central issues in the case. Contrary to the submission by Defence, I do not consider that the granting of leave would be likely to add unduly to the length of the hearing. I do not accept that it would be necessary to call at least most of the various witnesses suggested by Defence counsel. It seems to me that there is little doubt about what was said by KB on any of the other occasions. The facts of what happened are

uncontroverted. Based upon her evidence on the Basha enquiry it is unlikely that KB will dispute what occurred on her plea, or what she said on other occasions. There is no unfairness to KB in questioning her about those matters. KB said in evidence that she entered her plea "on advice". It is a matter for her, and not for the accused, whether she waives legal professional privilege and chooses to explain that statement.[20] Whether she does or does not waive her rights in that regard, it is not a matter which gives rise to any obvious unfairness to the accused, given that there appears to be little doubt about what occurred.

[31] It follows that the Crown should have leave pursuant to s 38(1)(a) and (c) of the UEA to cross examine KB as to her plea and the facts upon which it was based on the basis that she has made prior inconsistent statements. That cross-examination is relevant to KB's credibility, particularly so with respect to the origin of the cash which is the subject of count 4. Those are matters which could substantially affect her credibility within the meaning of s 103(1), taking into account the matters in s 103(2).[21] In other words there is a direct correlation between the evidence to be admitted and the credit of the witness in relation to central facts in issue in the proceeding.

Exclusion of the evidence pursuant to s 137 UEA

[32] The Defence submitted that evidence of KB's plea of guilty and facts upon which it was based should be excluded pursuant to s 137 because it is

20 At the time of the Basha enquiry KB had not received advice as to that matter, however, it is understood that she will do so prior to the trial.

21 Noting that the matters in s 103(2) are not exhaustive of the matters properly to be considered by the Court.

unfairly prejudicial to the accused. The notion of prejudice in this general context "… means the danger of improper use of the evidence. It does not mean its legitimate tendency to inculpate."[22] Something more is required, such as the possibility that the evidence may be misused by a jury in some respect.

[33] In my view the probative value of the evidence is high, noting that it is relevant to the credit of KB who was found in possession of the cash which is the subject of count 4, and gives an explanation for the origin of that money. The source of the $10,000 cash is central to count 4, and is also circumstantial evidence relevant to the other counts.

[34] Cross-examination of KB as to her plea and facts upon which it is based is generally unlikely to give rise to evidence which is unfairly prejudicial to the accused. It was pointed out that there appears to be an error in the Crown Facts, namely the statement at paragraph [4] of the Crown Facts on KB's plea that "In November 2020 Cowen purchased the house at 27 Heron Crescent, Katherine for $275,000 then fully renovated it". This statement is background or context evidence, not essential on the plea. There is evidence that Cowen did not purchase the house, but it was purchased by KB in her sole name.[23] Therefore, any statement that the house was purchased by the accused as the legal owner appears to be factually incorrect. However, that is a matter which is easily clarified and is unlikely to mislead or confuse the

22 *HML v The Queen; SB v The Queen; OAE v The Queen* (2008) 235 CLR 334, [12] per Gleeson CJ.

23 Affidavit of Bronte Kelly, 5 June 2024, [8] – [9] and annexure B.

jury. To exclude evidence about that matter would likely be unfair to the accused as it may deprive him of a cross-examination point directed towards the reliability of the representations made by KB.

[35] In my view the probative value of the evidence likely to be adduced in cross-examination of KB as to her prior inconsistent statements is not outweighed by the danger of unfair prejudice to the accused. To the extent that there are matters which need to be pointed out to the jury as to the import and use of the evidence, they would be the subject of directions in the usual course and adequately addressed in that way. If KB gives evidence as to her prior statements, or they are proved otherwise than from the witness, the jury will be able to use that evidence to assess her credibility. If use of evidence of the prior inconsistent statements is not limited to credibility, then the jury may have two, or more, accounts to consider. There is nothing unfair, or particularly unusual, about that.

Restriction upon use of the evidence adduced in cross-examination: s 136

[36] Argument was directed towards whether the document comprising the statement of facts in KB's plea hearing should be admitted as evidence. Consideration of that question is premature. Pursuant to s 43 of the UEA the occasion for proof of the contents of a prior inconsistent statement otherwise than from the witness, arises only if the prior statement is not admitted. KB's evidence on the Basha enquiry did not dispute that she had entered a plea or agreed to the facts read. Rather, she sought to minimise or explain

her conduct on the basis that she did it "on advice" or because she felt unwell that day.

[37] Further, as explained in *Hillen*, a document comprising the statement of facts on a plea, tendered for the purpose of assessment of the co-offender's credibility as a witness in the accused's case, is credibility evidence within the meaning of s 101A(1) of the UEA and not admissible, pursuant to s 102, unless it falls within an exception. In the circumstances in *Hillen* the document was admissible in reliance upon the exception in s 106(2)(c).[24]

[38] Out of court representations, whether contained in the statement of Crown Facts document or otherwise, are hearsay and inadmissible. However, pursuant to s 60 of the UEA, the hearsay rule does not apply to evidence of a previous representation admitted for a purpose other than proof of a fact asserted. Therefore, if the evidence of what KB previously said is admitted, it could become evidence in the trial. Such use is subject to any order the court may make limiting its use in accordance with s 136 of the UEA.

[39] In this case, there may turn out to be circumstances which lead to the making of an order that the use of the evidence is restricted to assessing the credibility of KB. Much will depend upon what evidence KB gives as to the reasons or basis for her previous statements.

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24 *Hillen*, [38] – [47].

[40] The Court in *Hillen* referred to the case of *DPP (Vic) v Bourbaud*.[25] In that case Lasry J postponed making of an order as to the use of the evidence until the relevant witnesses had given evidence and been cross-examined in the trial on the basis that the witnesses might at the trial give explanations for their pleas which lessened the effect of those pleas.[26] There is, in my view, considerable merit in taking that approach in this case.

Cross-examination of TH as to prior inconsistent statements and credit

[41] TH is the mother of the accused. She has not provided a police statement but gave evidence at the Basha enquiry on 30 May and 6 June 2024. She said that when the police executed the search warrant at her house on 30 March 2022 they removed cash from a drawer in the dresser and from her purse. She said that she put the bundle of cash in the drawer when she saw it on the kitchen table earlier in the morning of 30 March 2022. She did not know how much cash was there. She said that she asked her partner, GS, about the cash and he first told her that he didn't know, but a week later said that it was his and he put it on the table. She said that she asked GS why the bundle of cash had rubber bands on it and he told her not to ask that many questions.[27] She also said that GS told her that he had put the money on the table for her grandson's funeral, but he would not tell her where it came from.[28]

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25 *DPP (Vic) v Bourbaud* [2011] VSC 103, referred to in *Hillen*, [53].

26 *Bourbaud*, [43].

27 *The King v Graham Michael Cowen*, Transcript of proceeding, Huntingford J, 30 May 2024, 22-23.

28 Ibid, 24.

[42] As for the $2,210 cash in her purse (the pink purse),[29] TH said that this was partly money which family and friends had given her after her grandson's death to help with his funeral.[30] TH also said that she had "over a thousand or two" left over from money which her daughter had given her before she passed away in 2018, and that she had also put that in the pink purse before the police search.[31]

[43] TH said that she told police when they conducted the search that the money was probably from her daughter, and other sources.[32]

[44] TH was charged with some offences as a result of the search. She said at the Basha enquiry that she did not know what they were, apart from possession of a quantity of cannabis found in her house, which she admitted was hers and said she smoked for pain relief.

[45] TH was cross-examined on the Basha enquiry but not in relation to evidence about how she came to have the money which was seized.

[46] After the Basha enquiry count 5 on the indictment was amended to allege that the tainted property received by the accused was $10,000, not $12,210 as previously stated, effectively removing reference to $2,210 cash found in the pink purse.

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29 TH identified the purse in photograph 24, *The King v Graham Michael Cowen*, Transcript of proceeding, Huntingford J, 30 May 2024, 30

30 *The King v Graham Michael Cowen*, Transcript of proceeding, Huntingford J, 30 May 2024, 24.

31 Ibid, 24-25.

32 Ibid, 25.

[47] The Crown intends to call evidence of a telephone call between the accused and TH on 29 July 2022 recorded by the prison telephone system. A transcript of that call was produced on the voir dire. That transcript in part reads:[33]

> COWEN: And that's what I said to Kara, I said Kara, I cannot believe you're charged.
>
> TH: Yeah. Mm.
>
> COWEN: Yeah.
>
> TH: Amanda and they reckon just to the Supreme Court anyway.
>
> COWEN: Yeah. But on what grounds?
>
> TH: Yeah.
>
> COWEN: That's what I'm saying. Like I cannot believe that's, it's still going. You know what I mean? This, this lad's put in an affidavit, you know, and sent it through saying that the money was his and he put it here. I don't see what the bucking big, why it's still going.
>
> TH: I don't know.
>
> COWEN: Mm-Hmm. Yeah. But with, with you, I mean, there's nothing there.
>
> TH: yep.
>
> COWEN: Absolutely nothing.
>
> TH: Only that money you left on the table that day.
>
> COWEN: Yeah. But even that's nothing.
>
> TH: Yeah.
>
> COWEN: Like I'm saying, it's nothing. It's, yeah.
>
> TH: Hmm.

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33 Transcript of prison PTS of 27 July 2022, 171.

[48] This account of how the money on the kitchen table (the $10,000 the subject of count 5) came to be placed there is inconsistent with the evidence TH gave on the Basha enquiry. At the Basha she said her husband put the money on the table, however in the telephone call she says it was the accused.

[49] The Crown also seeks to cross-examine TH as to the account she gave to the police when they conducted the search on 30 March 2022. The conversation between TH and officers Parsons and Goymer was captured on body worn video. A transcript was relied upon on the voir dire. That transcript reads so far as is relevant:[34]

> GOYMER: And and um, the cash?
>
> TH: I, my daughter when she passed away …
>
> GOYMER: Mm-Hmm <affirmative>
>
> TH: … in 2018 she left $20,000 in me, to me.
>
> GOYMER: Mm-Hmm. <affirmative>
>
> TH: And in purses that's what the money is.
>
> GOYMER: Yep
>
> TH: And I have just now got it all out to do other stuff.
>
> GOYMER: Okay.

[50] This account, given to police on the day of the search, is on its face inconsistent with the evidence TH gave at the Basha enquiry because she appears to say to the accused that she has $20,000 left to her from her

34 Transcript of conversation between TH and Officers Parsons and Goymer of 30 March 2022.

daughter, which is much different to the $1,000 or $2,000 “left over” which she gave evidence about at the Basha enquiry.

[51] Assuming TH gives the same evidence in the trial as at the Basha enquiry, I am satisfied that the prior representations made to police on 30 March 2022 and in the conversation with the accused on 22 July 2022 are inconsistent and the Crown should have leave to cross-examine her as to those matters. The different accounts which TH has given potentially raise a real question as to her credibility. Her evidence is likely to be of high probative value as the source of the cash which is the subject of count 5 is a central factual issue in dispute. There is no apparent unfair prejudice to the accused.

Evidence of firearms in storage container

[52] The accused objects to the Crown leading evidence of the discovery of two firearms in the shipping container at the storage facility in Katherine, including the fact that a fingerprint of the accused was found on one of the guns. Defence argue that the evidence can only show that the accused attended at the shipping container and, because that fact is not in issue in the proceeding, the evidence is irrelevant. If the evidence is found to be relevant, Defence argue that its probative value is outweighed by the danger of unfair prejudice to the accused and it must therefore be excluded under s 137 of the UEA.

[53] The Crown relies upon the evidence of the presence of firearms not only to show that the accused attended at the shipping container[35] but as circumstantial evidence which, in conjunction with the evidence of other items located, is capable of founding the inference that the accused was engaged in the business of dealing in drugs.[36]

[54] In *Sultana v The Queen*[37] the New South Wales Court of Criminal Appeal considered whether evidence that the appellant was in possession of firearms could support an inference that the appellant was a dealer in heroin. Gleeson CJ, with whom Handley JA agreed, said:

> Common sense indicates that supplying heroin on the street, as the appellant is alleged to have done, is a dangerous activity. A jury would be entitled to reason that possessing firearms, or imitation firearms, would be appropriate to the business of the street heroin dealer, and in considering whether the appellant was in that line of business, it was logically open to them to take into account the appellant's possession of such firearms. That line of reasoning would not depend upon evidence or inference that all, or even most, heroin dealers carry weapons. Nor would it depend upon the premise that possessing weapons tends to indicate that the possessor is a drug dealer as distinct from this person in some other line of dangerous work. None of the items in question, standing alone, would point to the nature of the appellant's occupation. It is their combined effect, in conjunction with the other evidence in the case that is important.[38]

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35 Which may not ultimately be in dispute although there is currently no agreed fact as to the issue.

36 The Crown also intends to lead evidence from Detective Sgt Bradshaw, a police officer with experience in drug supply investigations, regarding the relevance of guns to drug supply. There was no argument on the voir dire as to that proposed evidence. The firearms are not the subject of any charges before this Court.

37 *Sultana v The Queen* (1994) 74 A Crim R 27.

38 *Sultana*, per Gleeson CJ, 29-30.

[55] In *Blackwell v The Queen*[39] the Court of Criminal Appeal of South Australia considered an appeal on the ground that evidence of possession of mace and a gun was wrongly admitted in the appellant's trial on a charge of possessing heroin for sale. In dismissing the appeal, Duggan J with whom Prior and Bell JJ agreed, said:

> It is well accepted that if, in addition to being found in possession of drugs, a person is found also to have items commonly associated with drug dealing, then the finding of such items usually will be relevant as part of the circumstantial material to out of the evidence was that the appellant was found in possession of bullets establish the purpose for which the drug was in that person's possession.[40]

[56] In *Radi v The Queen*[41] the appellant was charged with supplying a commercial quantity of methamphetamine. The Crown case was circumstantial and evidence that the appellant was in possession of cartridges was admitted at his trial. There was no evidence of possession of a firearm. The appellant argued that the evidence of possession of the cartridges was irrelevant and should not have been admitted. The New South Wales Court of Criminal Appeal found that the evidence was not wrongly admitted. Hoeben J said:

> The basis upon which the evidence was admitted was that one of the indicium of drug supply (to be taken with the multiple mobile phones and large sum of money) was the use of firearms by persons engaged in such supply. The offence with which the appellant was charged was

39 *Blackwell v The Queen* (1996) 87 A Crim R 289.

40 *Blackwell*, per Duggan J, 290.

41 *Radi v The Queen* [2010] NSWCCA 265.

> drug supply. Accordingly, evidence of the finding of a box of bullets was relevant.[42]

[57] His Honour went on to distinguish that case from the decision of the High Court in *Thompson and Wran v The Queen,*[43] where evidence that the two accused were in possession of safe breaking equipment which was not of the type used in the commission of the offence was found not to be admissible. Pointing out that the High Court in *Thompson and Wran* said that it would have been sufficient if the tools "might" have been used in the commission of the charged offence, not that they necessarily had been so used, his Honour found that the case was an example of that very circumstance and therefore the evidence was relevant.[44]

[58] The reasoning in this line of cases was referred to with approval in the High Court decision of *The Queen v Falzon*.[45] The Court said:

> Where an accused is found in possession of a prohibited drug and is charged with its possession with intent to sell, proof that the accused was, at the time of possession, engaged in a business of selling drugs or drug trafficking is evidence logically probative of the fact that the accused's purpose in purchasing the drug on that occasion was the purpose of sale. Accordingly, as has been established by a succession of Australian intermediate appellate court decisions, evidence that an accused found in possession of a prohibited drug is also found in possession of the accoutrements of a drug trafficking business, such as scales, resealable plastic bags, firearms, a multiplicity of mobile telephones or significant quantities of cash, is admissible in proof of the charge. [footnote omitted][46]

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42 *Radi* per Hoeben J, [33].

43 *Thompson and Wran v The Queen* [1968] HCA 21; 117 CLR 313.

44 Ibid, [34].

45 *The Queen v Falzon* (2018) 264 CLR 361, [1].

46 Ibid.

[59] Defence argue that evidence of the presence of the guns should be excluded pursuant to s 137 of the UEA because the probative value of the evidence is low and is outweighed by the high danger of unfair prejudice to the accused. The danger of prejudice is said to be that the jury are likely to give the evidence more weight than it deserves by reasoning that if the accused has guns near where drugs were found he is likely to be a drug dealer.

[60] In this case, as with the various decisions referred to above, it is not the presence of the guns alone which the Crown relies upon, but their presence as part of a range of items which taken together are circumstantial evidence that a business of drug supply was being carried on. The Crown argues the items are part of the "tools of trade" of a drug trafficker. In addition to the firearms, items found in the storage container were vacuum bags, discarded packaging, unused cryovac bags, a sealed cryovac bag with 443 grams of cannabis, empty clip seal and cryovac bags, three mobile phones, small digital scales, a glass ice smoking pipe, 1.39 grams of MDMA, two firearms, a locked tool box, a trace amount of cannabis in a yellow envelope on the floor, an empty box for a cryovac machine and $143,975 in cash. In my view, the presence of those items together is evidence from which it is possible to infer that the business of drug supply was being carried on. Whether that inference is drawn is a matter for the jury. However, the probative value of the evidence taken in context is high.

[61] The test of danger of unfair prejudice is not satisfied by the mere possibility of prejudice. There must be a real risk of unfair prejudice by reason of the

admission of the evidence.[47] In this case, the potential prejudice raised by Defence is limited to the very use for which the evidence is legitimately sought to be led. The fact that evidence supports the Crown case does not make it prejudicial in the relevant sense. To the extent that there may be a risk that the jury engage in propensity reasoning because of the presence of the guns, that risk is of the sort which is readily and routinely dealt with by an appropriate direction. The probative value of the evidence that guns were found in the storage container is not outweighed by the danger of unfair prejudice to the accused.

Application to exclude evidence that NE and the accused were in jail together

[62] I previously made a ruling[48] that the Crown has leave to cross-examine a Crown witness, NE, as to his proposed evidence in the proceeding and as to his credibility. Defence object to the Crown adducing any evidence in the course of cross-examination about the fact that the accused and NE were in gaol together, on the basis that disclosure of the fact that the accused was in gaol at the time is prejudicial because it paints him as a person of bad character. Defence argue that the probative value of that evidence is outweighed by the danger of unfair prejudice to the accused.

[63] The evidence sought to be adduced in cross-examination is relevant to the credit of NE. The probative value of the evidence is potentially very high

47 *R v Lisoff* [1999] NSWCCA 364 at [60].

48 *The King v Cowen* [2024] NTSC 44.

because it goes to a central issue in dispute, namely whether the cash found in the shipping container was the proceeds of a drug supply operation conducted by the accused.

[64] The evidence expected to be adduced from NE is that he "found out" that the accused had been charged with having in his possession tainted cash and realised that he, not the accused, was responsible for placing that cash in the shipping container. The Crown seek to adduce evidence that NE became so aware when he was sharing a cell with the accused and when the accused had access to the brief of evidence against him. The Crown will seek to prove that NE's statement about placement of the cash was made after that time. The context in which NE made his statement as to placing of the cash, is therefore relevant context to the cross-examination of NE.

[65] It is not unusual for persons accused of serious offences to be remanded in custody for a period of time. Members of the community serving on the jury will be aware of that fact. They will also be aware that a person charged with an offence is innocent until proven guilty, and directions are always given to that effect. Additional directions might be given, if required, for example to avoid propensity or bad character reasoning based on the fact that the accused was remanded in custody at the time that he shared a cell with NE. There is no reason to assume that such directions would not be readily understood, or followed.

[66] In my view any danger of unfair prejudice to the accused by cross-examination of NE as to the circumstances leading up to the making of his statement, including that he was sharing a cell with the accused at the time, is slight. It does not outweigh probative value of the proposed evidence.

Orders

[67] I make the following orders:

1. The Crown has leave to cross-examine KB at the trial in relation to her unfavourable evidence and her prior inconsistent statements, including by conduct arising from her plea of guilty and the facts of the plea, as matters going only to her credit;

2. The Crown has leave to cross-examine TH at the trial in relation to her prior inconsistent statements to the police on 30 March 2022 and to the accused on 22 July 2022 as matters going to her credit;

3. The Defence application to exclude evidence of the firearms found in the storage container is refused; and

4. The Defence application to exclude evidence that NE and the accused were in gaol together before NE made the statement upon which leave to cross-examine has previously been given is refused.

[68] These reasons for decision are published to the parties in confidence, pending conclusion of the accused's trial. Depending upon the outcome of

the prosecution, the Court may authorise publication of this ruling without further reference to the parties.
