

CITATION: Wayne O'NEILL v Desmond ROBERTS [2023] NTLC 19

PARTIES: Wayne O'NEILL

v

Desmond ROBERTS

TITLE OF COURT: LOCAL COURT

JURISDICTION: CRIMINAL

FILE NO(s): 22233188

DELIVERED ON: 6 October 2023

DELIVERED AT: Darwin

HEARING DATE(s): 22 November 2023

DECISION OF: Acting Local Court Judge Murphy

**CATCHWORDS:**

CRIMINAL LAW - EVIDENCE – HEARSAY EVIDENCE – *Evidence (National Uniform Legislation) Act 2011 (NT) – s65(2)(b)&(c) – s137 – exceptions to hearsay rule – admissibility – maker unavailable – whether probative value of evidence outweighs the danger of unfair prejudice to Defendant – risk of prejudice – whether representation is unlikely to be a fabrication – whether it is highly probable that representation is reliable.*

*Evidence (National Uniform Legislation) Act 2011 (NT)*

*The Queen v Sullivan [2022] NTSC 73*

*The Queen v Doolan [2019] NTSC 53*

**REPRESENTATION:**

*Counsel:*

Prosecution: Mr D Warner-Collins

Defendant: Mr B Overend

*Solicitors:*

Prosecution: Director of Public Prosecutions

Defendant: North Australian Aboriginal Justice Agency

Decision category classification: B

Decision ID number: [2023] NTLC 19

Number of paragraphs: 15

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

No. 22233188

BETWEEN:

Wayne O'Neill

Complainant

AND:

Desmond Roberts

Defendant

REASONS FOR DECISION

(Delivered 6 October 2023)

ACTING JUDGE MURPHY

1. The Defendant is charged with breach of domestic violence order and aggravated assault. In brief summary the prosecution's case is that the defendant assaulted the complainant by *inter alia* slashing her right upper arm with a knife which required medical attention including 12 stitches. The offence is alleged to have occurred on 10 September 2022.<sup>1</sup> At that time there was a domestic violence order in force as between the Defendant and Complainant which prohibited the Defendant from *inter alia* approaching the complaint.<sup>2</sup>
2. On 22 September 2023 the Defendant entered a plea of not guilty to both charges at the Darwin Local Court. Thereafter, the hearing proceeded by way of a *voir dire* before me. The *voir dire* concerned the prosecution's application to admit evidence obtained by police from Mr Mundy Cleary. Mr Cleary died on 3 October 2022.<sup>3</sup> The defence opposed that application.
3. The evidence sought to be admitted consists of:
  - a. Police Body Worn Video (BWV) footage of a conversation as between Mr Cleary and Constable Katrina Campbell which occurred Mr Cleary's home, house 12 Kalano, on 10 September 2022 at or about 12.20pm.<sup>4</sup>
  - b. Statutory declaration of Mr Cleary dated 10 September 2022.

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<sup>1</sup> Charge 2 on Complaint (breach domestic violence order) and charge 3 on Information (aggravated assault).

<sup>2</sup> Exhibit P11 – Domestic Violence Order, dated 26.07.2022, condition 1.

<sup>3</sup> Exhibit P5 – Death certificate dated 17.05.2023.

<sup>4</sup> Exhibit P2 – Police BWV footage, 10.09.2022.

4. The Prosecution's application to admit the aforementioned evidence is made under section 65 of the *Evidence (National Uniform Legislation) Act* (the ENULA), which, relevant to the circumstances applicable in this case, states:

*65 Exception – criminal proceedings if maker not available*

- (1) *This section applies in a criminal proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.*
- (2) *The hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation:*
  - (a) ...
  - (b) *was made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication; or*
  - (c) *was made in circumstances that make it highly probable that the representation is reliable; or*
  - (d) ...

5. Pursuant to Part 2 section 4 (1)(a) of the Dictionary in the ENULA, a person is not available to give evidence if that person is dead. It is without argument therefore that Mr CLEARY was not available to give evidence in this proceeding. Consequently, section 65 (1) of the ENULA is satisfied.
6. It is also without argument that those representations were made within hours of the alleged offences having been committed and therefore “shortly after” the facts asserted in those representations. Consequently, the admissibility of Mr CLEARY's aforementioned representations will depend upon whether those representations are unlikely to be a fabrication<sup>5</sup> or alternatively were made in circumstances that make it highly probable that his representations are reliable.<sup>6</sup> To make that determination it is necessary to consider all of the evidence provided during the course of the *voir dire*.

## The Evidence

7. During the *voir dire*, the prosecution called evidence from Constable Katrina Campbell. It was Constable Campbell who recorded Mr Cleary's conversation on her BWV and took his handwritten statutory declaration. During her testimony Constable Campbell confirmed:
- a. Katherine District Hospital staff had made a mandatory domestic violence report to police.
  - b. As a result of that report she and Constable Nurse had been tasked to attend upon the Complainant at the Katherine District Hospital (KDH).

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<sup>5</sup> *Evidence (National Uniform Legislation) Act* (ENULA), section 65(2)(b).

<sup>6</sup> *Ibid*, at section 65(2)(c).

- c. Upon her attendance at the KDH and prior to speaking to the Complainant she activated her BWV and recorded her conversation with the Complainant.<sup>7</sup> In summary the Complainant confirms that she had been drinking with the Defendant at house 12 Kalano in Katherine, that she was too drunk to remember what had happened but was informed by her grandmother, Yvonne Brennan, that her partner (the Defendant) had pushed her and that she fell onto a fence cutting her arm. That account is largely consistent with the Complainant's account as recorded in the St John's Ambulance log<sup>8</sup> save for mention of the Complainant having been told this by her grandmother.
- d. As a result of that conversation she and Constable Nurse attended at house 12 Kalano.
- e. Upon her arrival there she activated her BWV<sup>9</sup> and spoke to Mr Cleary. Also present at the residence at that time was a female identified only as Yvonne, presumably Yvonne Brennan the complainant's grandmother. The following is a transcript of the conversation from that BWV footage:

At 0:15

*Campbell: Hello. Are you Yvonne in the kitchen? Can I come in?*

...

At 0:47

*Door to residence is opened from inside and police (Constables Campbell & Nurse) are allowed entry into the premises.*

At 1:01

*Campbell: ... So we are here about Danicka (the Complainant). Danicka sorry.*

*Nurse: About last night.*

*Yvonne: Oh, yeah. I don't know what happened. I don't know. Um she came here but then I thought they were sitting here at the court (gesturing towards the front door outside of the premises) you know with everyone but then I went off to sleep. So I don't know.*

*Nurse: Who else was here?*

*Yvonne: Well my husband (looking towards Mr Cleary who was sitting in the same room at this time).*

*Nurse: (to Mr Cleary) Did you see anything?*

*Cleary: Yeah they were fighting in the kitchen.*

*Campbell: Who's fighting?*

*Cleary Danicka and his partner.*

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<sup>7</sup> P6 – BWV footage, Katherine District Hospital 10.09.2023 (first attendance).

<sup>8</sup> Exhibit P10 – St John Ambulance Log.

<sup>9</sup> Exhibit P2 – BWV – House 21 Kalano (first attendance).

Yvonne: (to Mr Cleary) Well I don't know anything. Did you? You been hear them?

Nurse, Cleary and Yvonne talking over one another – undecipherable.

At 1:40

Cleary: I could see them from the room.

Campbell: Who was fighting? Danicka and?

Cleary: Her partner. What her name. What, what's his name? What that young fella name?

Campbell: What's your name sir?

Cleary: Mundy Cleary.

Campbell: What is it, sorry?

Cleary: Mundy Cleary.

Campbell: Munty?

Yvonne: Mundy.

Campbell: Oh, Mundy?

Yvonne: M-U-N-D-Y.

Campbell: How do you spell your last name?

Cleary: C-L-E-A-R-Y.

Campbell: C-L?

Cleary: E-A-R-Y.

Campbell: Thank you. What's your date of birth Mundy?

Cleary: (Nil response provided by Mr CLEARY to that question).

Campbell: So was Danika here with her partner?

Cleary: Yeah.

Campbell: And what happened?

Cleary: **They were fighting in the kitchen.**

Campbell: **Yeah?**

Cleary: **I don't see what really happened. I think he got a knife or fork or something.**

Campbell: **Yeah.**

Cleary: **Over here (pointing to his left upper arm with his right hand).**

Campbell: **Yeah he stabbed her. You see that one happen?**

Cleary: **(Shakes his head) No.**

Campbell: **So you didn't see it happen, you just had a guess that that's what happened?**

Cleary: **Yeah.**

Campbell: **OK.**

Cleary: **Cause she had a thing on the side (pointing to left upper arm with right hand).**

Campbell: **So when they were fighting were they hitting one another or just words?**

Cleary: **Very very aggressive he was towards her.**

Campbell: **Yeah. Was it just words?**

Cleary: **Not words. Slung her around.**

Campbell: **Slung her around.**

Cleary: **Yeah.**

Campbell: **Yeah. Would you be able to give me a statement about what happened?**

Cleary: **Yeah.**

Campbell: **You can give me a statement? Like what you seen?**

Cleary: **Yeah.**

Campbell: **Yeah. OK. She says she fell over a fence.**

Cleary: **No didn't fall.**

Campbell: **Didn't fall over a fence?**

Cleary: **(shakes his head) No.**

Campbell: **So if I go over and get my paperwork, can you give me that statement? Is that OK?**

Cleary: **Yeah.**

Yvonne: **I didn't question it this morning when I got up. I just saw her arm with that Chucks spread around it (motioning with left hand on her right upper arm).**

Nurse: **(speaking to Yvonne) So who called the paramedics? Was that you or ambulance? Who called them?**

Yvonne: **I think she did.**

Nurse: **She does.**

Yvonne: **I didn't have anything.**

Nurse: **No well you were asleep. You didn't know anything.**

Campbell: **Uhm, Mundy seen her being slung around.**

Yvonne: **Well he might have seen that.**

Campbell: **He's going to give us a statement. So I'm just going to get my paperwork. ....**

- f. Following that conversation she had stopped the BWV, walked to the police vehicle, got her paperwork, and returned to the residence. She then reactivated her BWV<sup>10</sup> and came back into the residence from the police car, at which point Constable Nurse was speaking to Yvonne and Mr Cleary about blood drops on the floor in the residence. She then sits at the dining room table preparing to take Mr Cleary's statutory declaration whilst Constable Nurse leaves the residence to look for blood outside.
  - g. She then turns off her BWV and took a handwritten statutory declaration from Mr Cleary. She confirms that after completing the statutory declaration, Mr Cleary had read it and that she had also read it to him before he signed it. She further confirmed that the taking of that hand written statutory declaration and its endorsement by Mr Cleary was not recorded on her BWV.
  - h. She photographed the blood drops on the floor and a knife that Mr Cleary had identified as the knife that the Defendant may have used to cut the Complainant with.<sup>11</sup>
  - i. Having taken Mr Cleary's statutory declaration, she and Constable Nurse then re-attended upon the Complainant in the KDH whereupon she completed a Victim Impact Statement (VIS)<sup>12</sup> which she had the Complainant sign. Unlike her election to have turned off her BWV when she took the statutory declaration from Mr Cleary, Constable Campbell recorded the taking of the VIS on her police issue BWV. The BWV footage depicting the taking of VIS<sup>13</sup> shows Constable Campbell suggesting to the Complainant what the contents of the statement should be and acquiring little input from the Complainant as to those contents. It further shows that Constable Campbell had the Complainant sign the VIS without having read it to her or giving the Complainant the opportunity to have read it.
  - j. Constable Campbell's BWV footage of her second attendance upon the Complainant at the KDH also records the Complainant, even after having been informed by police that the Defendant has stabbed her, stating that she was too drunk to remember what had happened, that she had been told by her grandmother, Yvonne that she had tripped over a gate and cut her arm that way, and that she was drinking with her grandmother Yvonne Brennan and her sister in law Marida Maleaban.
  - k. Constable Campbell confirmed that she was unaware if any inquiries were made by police to locate or obtain a statement from Marida Maleaban.
8. Constable Nurse was called to give evidence during the *voir dire*. His evidence was initially limited to the attempts to summon the Complainant in this proceeding. However he was then recalled following Constable Campbell's testimony at which time he confirmed that:
- a. The photograph of the knife depicted at page 9 of the photographic index was identified by Mr Cleary as the knife that may have been used by the Defendant;

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<sup>10</sup> Exhibit P3 – BWV footage – video 2 – house 12 Kalano (second attendance).

<sup>11</sup> Exhibit P7 – Photographic index.

<sup>12</sup> Exhibit P9 – Victim Impact Statement, dated 10.09.2022.

<sup>13</sup> Exhibit P8 – BWV footage 10.09.2022 Katherine District Hospital (second attendance).

- b. He had walked around the perimeter fence of house 12 Kalano and could not find any evidence of blood on that fence. It is apparent from Constable Campbell's BWV footage<sup>14</sup> that Constable Nurse had left the premises to conduct the fence inspection whilst Constable Campbell was taking the handwritten statutory declaration from Mr Cleary;
  - c. No forensic examination was conducted on the blood drops or the knife located at house 12 Kalano as depicted on pages 3, 8 and 9 of the photograph index;
  - d. The Complainant had identified her grandmother Yvonne Brennan and sister in law Marida Maleaban as being present when she asserts that she had fallen onto the fence and cut her arm;
  - e. He conducted no follow-up inquiries with Ms Maleaban;
  - f. He attended upon Ms Brennan on 16 May 2022 to obtain a witness statement regarding this matter but she declined to provide a statement as she was too drunk to recall what had happened.
9. The Complainant did not give evidence in this proceeding as she was not summonsed to do so. Police attempts to serve the Complainant with a summons to give evidence at this proceeding consisted of a single telephone conversation between Constable Nurse and the Complainant on 16 September 2023 (approximately one week prior to the hearing). During that conversation Constable Nurse confirmed that the Complainant lived at King Valley station, which is located approximately 60 km south of Katherine on the Stuart Highway, explained to the Complainant that police had a summons for her to attend at the Darwin Local Court on 22 September 2023, did not tell her what the summons was about, and requested that she attend the Katherine Police station so that police could serve her with the summons. The Complainant did not attend the Katherine Police station nor did the Police attend King Valley Station to serve the summons upon her.
10. Police attempted to telephone the Complainant on 17 September 2023 and then again on the morning of the hearing (22 September 2023). Both times voice messages were left and no response was received. No attempts were made to facilitate the Complainant's travel from King Valley Station to Darwin nor was conduct money paid to the Complainant for her to do so. It was apparent therefore that the Prosecution did not *take all reasonable steps to secure* the Complainant's attendance at court, thereby rendering the Complainant as something other than an unavailable person for the purpose of giving evidence in this proceeding.<sup>15</sup> Consequently, I refused the Prosecution's application to tender the Complainant's account of what had transpired at the time of the alleged offending as captured in the Police BWV footage<sup>16</sup> and St John Ambulance log.<sup>17</sup>
11. Notwithstanding that the Complainant identified her grandmother Yvonne Brennan and sister in law, Marida Maleaban, as persons that were or may have been present when she asserts that she had fallen onto the fence and cut her arm, the police had not obtained statements from or summonsed those persons to provide evidence in this proceeding. Consequently the Prosecution's case is based entirely upon the evidence of Mr Cleary.

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<sup>14</sup> Exhibit P3 – BWV footage – house 12 Kalano (second attendance).

<sup>15</sup> ENULA, Part 2, section 4(1)(f).

<sup>16</sup> Exhibit P6 and P8 – BWV footage KDH 10.09.2023 (first and second attendance respectively).

<sup>17</sup> Exhibit P10 – St John Ambulance Log.



## Application of sections 65 and 137 of the ENULA

12. The account provided by Mr Cleary in the BWV conversation and the account provided in his statutory declaration are materially inconsistent in the following respects:

- a. In the recorded BWV conversation, Mr Cleary asserts seeing the Defendant and Complainant fighting in the kitchen from his room, that the Defendant was very aggressive towards the Complainant and that the Defendant had “*slung*” the Complainant around.<sup>18</sup> Whereas, in his statutory declaration, Mr Cleary asserts that he saw the Defendant grab the Complainant by the hair, and throw her around.<sup>19</sup> That the Complainant then ran into his (Mr Cleary’s) room, that the Defendant then entered his room, dragged the Complainant into the dining room<sup>20</sup> and punched her to the face a couple of times;<sup>21</sup>
- b. In the recorded BWV conversation Mr Cleary asserts that he did not see the Defendant stab the Plaintiff and that he had guessed that the Defendant had stabbed her because he had seen the Complainant’s wound.<sup>22</sup> Whereas, in his statutory declaration, Mr Cleary asserts that he had seen the Defendant grab a brown handled butcher’s knife from the kitchen bench,<sup>23</sup> walk over to the Complainant with that knife in his right hand,<sup>24</sup> and then slice the Complainant’s right arm causing it to “*bleed a lot*”;
- c. In his statutory declaration Mr Cleary asserts that after the Complainant had been stabbed, she had run back into his (Mr Cleary’s) room. At which point he had told the Defendant to “*stop it*” and to “*give me the knife*”, that the Defendant then gave him the knife,<sup>25</sup> and then waited outside of the bedroom yelling at the Complainant “*Come out here Danicka. I’m going to smash you*” and then remained out there for a long time before leaving the premises. That during the long wait, the Complainant remained in Mr Cleary’s bedroom and the Defendant, notwithstanding his threats to the Complainant, did not re-enter Mr Cleary’s bedroom or continue his assault upon the Complainant.<sup>26</sup> In his recorded BWV conversation, Mr Cleary does not mention the Complainant having come into his bedroom at all, nor having spoken to the Defendant nor the Defendant giving him the knife he had used to cut the Complainant’s arm.

13. Those material inconsistencies are so great as to constitute fabrication by Mr Cleary in at least one of the version of events that he has provided to police and unreliability with regards both versions of events. Furthermore, the physical evidence at the residence, namely the 6 drops of what may be the Complainant’s blood on the dining room floor of House 12 Kalano<sup>27</sup> is much

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<sup>18</sup> See transcript of BWV in bold (above).

<sup>19</sup> Exhibit P4 – statutory declaration, Mr Mundy Cleary, dated 10 September 2022 at [4].

<sup>20</sup> Exhibit P4 – statutory declaration, Mr Mundy Cleary, dated 10 September 2022 at [6].

<sup>21</sup> Exhibit P4 – statutory declaration, Mr Mundy Cleary, dated 10 September 2022 at [7] & [8].

<sup>22</sup> See transcript of BWV in bold (above).

<sup>23</sup> Exhibit P4 – statutory declaration, Mr Mundy Cleary, dated 10 September 2022 at [9].

<sup>24</sup> Exhibit P4 – statutory declaration, Mr Mundy Cleary, dated 10 September 2022 at [10].

<sup>25</sup> Exhibit P4 – statutory declaration, Mr Mundy Cleary, dated 10 September 2022 at [11] & [12].

<sup>26</sup> Exhibit P4 – statutory declaration, Mr Mundy Cleary, dated 10 September 2022 at [13] & [14].

<sup>27</sup> Exhibit P7 – Photographic index. Page 3 of the photographic index depicts 4 blood drops located next to the dining room table. Page 8 of the photographic index depicts 2 blood drops located next to the dining room table.

less than what one would expect had the Complainant have been in the kitchen/dining room of that residence when she was stabbed in the upper arm. That being the case I am not satisfied that the Prosecution has met the preconditions under sections 65(2)(b) or (c) of the ENULA and I decline to admit Mr Cleary's BWV conversation or statutory declaration into evidence.

14. Should I be mistaken as to the Prosecution meeting the test under section 65(2)(b) or (c) of the ENULA, I still decline to admit Mr Cleary's BWV conversation or statutory declaration into evidence pursuant to section 137 of the ENULA. I do so because:
- a. The Prosecution's case is based entirely upon Mr Cleary's BWV conversation and his statutory declaration, both of which are so materially inconsistent with each other as to be contradictory, thereby diminishing the probative value of that evidence.<sup>28</sup>
  - b. Admission of that evidence would deprive the Defendant of the opportunity to test that evidence through cross-examination of Mr Cleary and the Court the opportunity to observe the demeanour of Mr Cleary under cross-examination, in circumstances where there is a prior inconsistent statement that could have been explored.<sup>29</sup>
  - c. The inability to cross examine Mr Cleary as to the contents of the statutory declaration given its inconsistencies with the BWV recorded conversation, particularly in circumstances where the taking of the statutory declaration was not recorded on police BWV, deprives the Defendant of the opportunity of properly testing or rebutting Constable Campbell's assertion as to Mr Cleary having made, understood and signed that statutory declaration as being a true account of what he asserts had occurred, all the more so given the BWV recording of the Complainant's VIS and the manner in which that statement was taken by Constable Campbell.
  - d. Admission of that evidence where there are no other witnesses to be called by the Prosecution effectively reverses the onus of proof as the Defendant would have to take the stand to rebut that evidence.<sup>30</sup>
15. It is my opinion that the prejudice to the Defendant as particularised above outweighs the probative value of Mr Cleary's BWV conversation and statutory declaration, and on that basis I exclude that evidence pursuant to section 137 of the ENULA.

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<sup>28</sup> *The Queen v Sullivan* [2022] NTSC 73 at [31].

<sup>29</sup> *The Queen v Doolan* [2019] NTSC 53 at [8] and [9].

<sup>30</sup> *Ibid* at [9].