CITATION:	*Cebu v Rigby* [2024] NTSC 72
PARTIES:	CEBU, Darius v RIGBY, Kerry Leanne
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from LOCAL COURT exercising Territory jurisdiction
FILE NO:	LCA 28 of 2021 (21937426)
DELIVERED:	4 September 2024
HEARING DATE:	29 November 2021
JUDGMENT OF:	Blokland J

CATCHWORDS:

Appeal – evidence – whether errors in the exercise of the discretion to exclude evidence obtained improperly or in contravention of an Australian law – whether error not to make a finding on breach of propriety or unlawful conduct – finding should have been made on the nature of any contravention of an Australian law – whether no mention of the public interest to deal with unlawful conduct of law enforcement in reasons was an error – no error found – whether error to consider exercise of the discretion to exclude evidence involved condoning conduct of appellant – whether reasons inadequate – whether search unlawful – whether Notice of Contention made out to the effect there was error in the finding that the evidence was obtained in consequence of an impropriety or illegality. Appeal allowed in part. Notice of contention upheld in part.

Criminal Code 1983 (NT) s 2 s 31, s 187, s 189A, s 240
Evidence (National Uniform Legislation) Act 2011 (NT) s 138
Local Court (Criminal Procedure) Act 2011 (NT) s 163

Police Administration Act 1978 (NT) s 119

Briginshaw v Briginshaw (1938) 60 CLR 336, *Bunning v Cross* (1978) 141 CLR 54, *Coleman v Power* (2004) 220 CLR 1, *Coleman v Zanker* (1991) 58 SASR 7, *Director of Public Prosecutions (NSW) v AM* (2006) 161 A Crim R 219, *Director of Public Prosecutions (NSW) v Owens* [2017] NSWSC 1550, *Director of Public Prosecutions v Tamcelik* (2012) 224 A Crim R 350, *DL v The Queen* (2018) 92 ALJR 636, *DPP v Carr* (2002) A Crim R 151, *DPP v Coe* [2003] NSWSC 363, *DPP v Farr* (2001) 118 A Crim R 399, *DPP v Kaba* (2014) 44 VR 526, *DPP v Marijanevic* (2011) 33 VR 440, *Employment Advocate v Williamson* (2001) 111 FCR 20, *House v King* (1936) 55 CLR 499, *JB & Ors v Northern Territory of Australia* (2019) 343 FLR 41, *Kadir v The Queen* (2020) 267 CLR 109, *Monte v Director of Public Prosecutions (NSW)* [2015] NSWSC 318, *Mangurra v Rigby* [2021] NTSC 6, *Neal v The Queen* (1982) 149 CLR 305, *Parker v Comptroller-General of Customs* (2009) HCA 7, *Pollard v The Queen* (1992) 176 CLR 117, *Prior v Mole* [2015] NTSC 65, *Re K* (1993) 46 FCR 336, *Ridgeway v The Queen* (1995) 184 CLR 19, *Robinett v Police* (2000) 78 SASR, *RRG Nominees Pty Ltd v Visible Temporary Fencing Australia Pty Ltd (No 3)* [2018] FCA 404, *R v Edelsten* (1990) 21 NSWLR 542, *R v Ireland* (1970) 126 CLR 321, *R v Malloy* [1999] ACTSC 118, *R v Nicholas* (2000) 1 VR 356, *R v Nguyen* (2015) 248 A Crim R 398, *R v Phung* (2013) 117 SASR 432, *R v Swaffield* (188) 192 CLR 159, *R v Tang* [1998] 3 VR 508, *R v Theophanous* (2003) 141 A Crim R 216, *R v Turner* [1962] VR 30, *Slater v The Queen* [2019] VSCA 213, *Walker & Anor v Hamm & Ors and Walker & Anor v Carter and Anor* [2008] VSC 596, *Wilson v Brown* [2015] NTSC 89, *Wollongong v Metwally [No 2]* (1985) 52 ALJR 481, referred to.

Australian Law Reform Commission, *Evidence*, Report No 26 (1985) Vol 1 Odger's, Uniform Evidence in Australia, (2020), 16th Edition and 14th Edition, LawBook Co.

REPRESENTATION:

Counsel:

Appellant:	P. Coleridge
Respondent:	D. Castor

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
Respondent:	Office of the Director of Public Prosecutions

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

Cebu v Rigby [2024] NTSC 72
LCA 28 of 2021 (21937426)

BETWEEN:

DARIUS CEBU
Appellant

AND:

KERRY LEANNE RIGBY
Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 4 September 2024)

Background

[1] Darius Cebu ('the appellant') appealed against findings of guilt made by the Local Court on 15 June 2021 on three counts (Count 3, 4 and 5). Each count charged assaulting a police officer while acting in the execution of their duty, contrary to s 189A of the *Criminal Code 1983* (NT).

[2] The findings of guilt followed a summary hearing in which the appellant unsuccessfully sought to exclude evidence of his offending on the basis that the evidence was obtained in consequence of improper and/or unlawful conduct by police.

[3] The appeal is brought as of right pursuant to s 163(1)(b) of the *Local Court (Criminal Procedure) Act 2011*.

[4] Across six grounds of appeal, the appellant suggested three categories of error could be drawn from the Local Court Judge's reasons and conclusions:

(1) First, the Local Court committed various specific errors in its application of s 138 of the *Evidence (National Uniform Legislation) Act 2011* (NT) ('the Act'). The Local Court failed to consider and weigh significant factors that bore upon the evaluative task prescribed by s 138(3); acted on a wrong principle, reasoned illogically or considered irrelevant matters; and failed to give adequate reasons for its decision;

(2) Second, the Local Court erred in failing to conclude that the search of the appellant was unlawful because the circumstances were, objectively, not of "such seriousness and urgency" to "justify and require" a warrantless search; and

(3) Third, the Local Court's conclusion that the desirability of admitting the evidence outweighed the undesirability of admitting evidence obtained in the way the evidence was obtained was wrong, as a result of a specific error or that it is plainly wrong.

[5] The respondent filed a Notice of Contention which seeks a finding that the Judge erred in concluding that the evidence in relation to counts 3, 4 and 5 was obtained in consequence of an impropriety or illegality.

Proceedings in the Local Court

[6] In terms of background facts, the appellant is an Indigenous male who is paraplegic and uses a wheelchair. At around 5:30am on the morning of 9 October 2019, police officers pursued him as he departed Goyder Square in his wheelchair. This took place after police received and acted on a report

about the theft of alcohol. The appellant was not involved in that offending. The appellant acknowledged he was intoxicated at the time of the interaction with police, including his offending against police. He was aggressive and insulting towards police officers at various stages of interacting with them. The police officers were wearing full police accoutrements. Relevant CCTV and body worn footage was played and tendered in both the Local Court and at the hearing of the appeal.

[7] Police searched the appellant relying on powers under s 119 of the *Police Administration Act 1978* (NT) ('*PAA*'). That provision permits a search 'in circumstances of such seriousness and urgency as to require and justify immediate search or entry without the authority of an order of a court or a warrant'.

[8] The grounds for the search were that one of the officers, Constable Nutt, had seen a bottle of alcohol in the appellant's wheelchair and believed it to be stolen.[1] Constable Nutt also heard what he thought sounded like clinking bottles just before the search. As mentioned, that interaction between the police and the appellant followed the theft of bottles of alcohol from the Good Times Bar and Grill. Subsequently two offenders were arrested at Goyder Square for that theft.[2] It was not alleged that the appellant was involved in any unlawful entry or theft at the Good Times Bar and Grill. The

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1 Exhibit P8: Statement of Constable Andrew Nutt dated 9 October 2019 at 10; 3 Transcript of Proceedings, *Kerry Leanne Rigby v Darius Cebu* (Local Court of the Northern Territory, 15 June 2021), at 14 ('Transcript of Proceedings')

2 Transcript of Proceedings, 24 May 2021, Evidence of Robert Andrew Nutt.

concern or suspicion or belief was that the appellant was in possession of a stolen bottle or bottles of alcohol that may have been passed to him in Goyder Square.

[9] The Judge found that after the three officers surrounded and physically searched the appellant, Constable Nutt, "grabb[ed] the defendant by his throat, pushing him backwards and almost simultaneously with his left hand, spinning or pivoting [him] in his wheelchair so that the front of the chair faced away from [him]".[3] Shortly after this application of force to the appellant's throat, Constable Nutt again applied significant force to the appellant, pushing him from behind "forwards" and "downwards" in his chair, and again searching him for alcohol. There is no evidence that the appellant was injured as a result of this conduct. The respondent drew attention to the fact that at one point before the application of force, the appellant attempted to remove the taser from Constable Nutt's vest.[4] From the footage it is not clear that he was in fact attempting to grab the taser. He makes random erratic movements in and around the area of the waists of police but it must be remembered he is in a wheelchair and waist height is the likely reach. It is also possible he was reaching for his hat. The Judge

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3 Transcript of Reasons, *Kerry Leanne Rigby v Darius Cebu* (Local Court of the Northern Territory, 15 June 2021), at 4 ('Transcript of Reasons').

4 Respondent's written submissions at [6]; 1 Exhibit P8 - Statement of Constable Robert Andrew Nutt dated 9 October 2019 at [6]; Exhibit P11 - Statement of Senior Constable Helen Davies dated 9 October 2019 at [9].

made no positive finding on that subject. The Judge also found that the appellant was aggressive and belligerent.[5]

[10] Within a short period of time following this interaction, the appellant swung a fist at one of the officers, Senior Constable Davies (the conduct charged as Count 3). The swing missed Senior Constable Davies. The Judge found that it was "clear … that … Constable Nutt's actions did result in the attempted assault by the defendant on Constable Davies."[6]

[11] The appellant was then arrested, carried from his wheel-chair and loaded into the cage of a divisional van. While being placed on the floor of the cage by Constable Nutt, the appellant spat at him (Count 4). While being unloaded from the van at the Palmerston Watch House and carried to a cell, he spat at another officer (Count 5). The Judge concluded that those assaults by spitting were "in consequence" of Constable Nutt's "improper use of force".[7]

[12] The conduct by the appellant and Constable Nutt was captured on CCTV and BWV which was played to both Courts. In the Local Court the three police officers who interacted with the appellant gave oral evidence. Evidence of other witnesses, including the victim of Count 5, was received by consent.[8] There was little dispute about the primary facts. The main issues at the

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5 Transcript of Reasons at 3.

6 Transcript of Reasons at 6.

7 Ibid.

8 Statement of Chris Harden, Exhibit P14.

hearing concerned the legal character of the facts and the consequences of the characterisation of those facts in terms of the admissibility of evidence of the appellant's offending. After hearing and assessing his oral evidence, the Judge rejected Constable Nutt's evidence to the effect that his application of force to the appellant's throat was a 'mistake'.[9] Instead, the Judge found that the application of force to the throat "was a deliberate and effective action which … was not taught to him in training".[10]

[13] In relation to the application of force to the appellant's throat, the Judge found that "an ordinary person similarly circumstanced would well regard the force as unnecessary in or disproportionate to the occasion."[11] Of the application of force to the appellant's back, the Judge found that it relevantly fell "within the same category as the force of the hand to the throat".[12] The Judge did not go so far as to make findings that the actions of Constable Nutt constituted an assault. The appellant accepts such a finding was not made but argues it should have been made.[13]

[14] The Judge accepted that s 138 of the Act was engaged. However, he concluded that the desirability of admitting the evidence outweighed the undesirability of admitting it.[14] On 24 May 2021, the Local Court heard evidence and submissions and the decision was reserved. On 7 June 2021,

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9 Transcript of Reasons at 4.

10 Ibid.

11 Transcript of Reasons at 4.

12 Ibid.

13 Written submissions of the Respondent at [5].

14 Transcript of Reasons at 6-7.

further submissions were heard. On 15 June 2021, the Judge gave the decision and delivered considered reasons. The Judge admitted the evidence of the appellant's offending and convicted him on Counts 3, 4 and 5. The appellant was ultimately acquitted of the charge of possession of property reasonably suspected of being stolen (Count 1), and of behaving in a disorderly manner in a public place (Count 2).

[15] The appellant contends the Judge made the following errors in terms of the application of s 138 of the Act:

(1) When undertaking the balancing exercise under s 138(1) of the *Act*, the Local Court failed to consider a relevant consideration: namely, that Constable Nutt's misconduct was not just improper but was unlawful, and that the nature of that unlawfulness was that the conduct constituted an assault by a police officer on a member of the public.

(2) When undertaking the balancing exercise under s 138(1) of the *Act*, the Local Court failed to consider a relevant consideration: namely, the public interest in deterring unlawful conduct by police officers, who are entrusted with enforcing the law.

(3) When undertaking the balancing exercise under s 138(1) of the *Act*, the Local Court erred, by acting on a wrong principle, reasoning illogically, or taking into account an irrelevant consideration, when it concluded that to admit the evidence "would be to condone something in the nature of revenge and retribution".

[16] As above, s 138 provides for the discretionary admission of evidence shown to be obtained improperly or in contravention of an Australian law or in consequence of such impropriety or contravention:

138 Exclusion of improperly or illegally obtained evidence

(1) Evidence that was obtained:

(a) improperly or in contravention of an Australian law; or

(b) in consequence of an impropriety or of a contravention of an Australian law;

Is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

(2) [Not reproduced – relevant to admissions only]

(3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account:

(a) the probative value of the evidence; and

(b) the importance of the evidence in the proceeding; and

(c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and

(d) the gravity of the impropriety or contravention; and

(e) whether the impropriety or contravention was deliberate or reckless; and

(f) whether the impropriety or contravention was contrary to or inconsistent with a right recognised by the International Covenant on Civil and Political Rights; and

(g) whether any other proceedings (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and

(h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

[17] The respondent emphasized the following points in submissions. A total of three different police officers were assaulted. Two of the three police officers had no involvement in the impugned conduct of Constable Nutt. The Judge found those officers were acting in the execution of their duty. One of the victims was not at the scene but rather was at the Palmerston police station when the appellant offended against him. The Court was urged to consider whether there was any real causal connection operating between the conduct of Constable Nutt and the assaults perpetrated by the appellant. The respondent emphasised the causal connection was required to be made in respect of each assault if the evidence relating to those assaults was to be considered in the exercise of the discretion.

[18] The appellant submitted the Judge erred by concluding that the misconduct was either 'improper or unlawful' and did not go further, pointing out there is a significant difference between low level impropriety and serious illegality. Where evidence has been illegally obtained, the 'nature of the illegality' is a factor which will influence how seriously the misconduct 'should be characterised'.[15] For example, as noted in *Pollard v The Queen*,[16] unlawful conduct, as opposed to merely improper conduct, weighs in favour

15 *DPP v Marijanevic* (2011) 33 VR 440 at [67].

16 (1992) 176 CLR 117.

of exclusion for the reasons stated by Deane J (after quoting from *Bunning v Cross*):[17]

> As that passage makes plain, the principal considerations of "high public policy" which favour exclusion of evidence procured by unlawful conduct on the part of investigating police transcend any question of unfairness to the particular accused. In their forefront is the threat which calculated disregard of the law by those empowered to enforce it represents to the legal structure of our society and the integrity of the administration of criminal justice. It is the duty of the courts to be vigilant to ensure that unlawful conduct on the part of the police is not encouraged by an appearance of judicial acquiescence. In some circumstances, the discharge of that duty requires the discretionary exclusion, in the public interest, of evidence obtained by such unlawful conduct. In part, this is necessary to prevent statements of traditional disapproval appearing hollow and insincere in a context where curial advantage is seen to be obtained from the unlawful conduct. In part it is necessary to ensure that the courts are not themselves demeaned by the uncontrolled use of the fruits of illegality in the judicial process.

[19] Once the discretion is enlivened, s 138 gives rise to a balancing exercise. It is therefore logical to determine where the method of obtaining the evidence sits on the scale between improper and unlawful in order to be able to properly weigh up the desirability or undesirability of admitting the evidence.

[20] To ensure a proper understanding of the reasoning, what follows is a summary of the sequence of events as determined by the learned Local Court Judge and the findings in short form most relevant to the appeal:[18]

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17 Ibid at 202-203.

18 Principally the findings made at Transcript of Reasons, 2-7. (Note, I have changed the Judge's reference from 'Senior Constable' to 'Constable' as 'Constable First Class' was the rank Constable Nutt gave in his evidence), Transcript of Proceedings, 24 May 2021 at 10.

Counts 1 and 2, are offences under ss 61 and 47 of the *Summary Offences Act*. Possession of property reasonably suspected of being stolen and disorderly behaviour. In the criminal calendar, such offences are at the low end of the scale.

Counts 3, 4 and 5 are each charges of unlawfully assault a police officer, s 189A of the *Criminal Code*. Those offences can properly be described as serious charges. Not the most serious in the criminal calendar. Having viewed the footage, Darius Cebu was intoxicated but not to the extent that would activate s 128 of the *Police Administration Act*. Police did not attempt to take Darius Cebu into protective custody. A reasonable doubt exists as to counts 1 and 2, the alleged contraventions of the *Summary Offences Act*.

In relation to count 1, all officers were acting in the execution of their duty, pursuing the defendant when he departed the location in his wheelchair with bottles clunking. Police had a reasonable suspicion he was in possession of stolen property. The reasonable suspicion arose as a result of the licensed premises having earlier been broken into. The suspicion arose because the bottles had pouring mechanisms on their tops. The charge particularised one bottle of red wine. There was no evidence that any of the stolen alcohol was red wine.

Despite the vile nature of the insults used by Darius Cebu at various points, there is reasonable doubt it would constitute an offence under s 47(a), although it would have constituted an offence if he had been charged under s 47(e). It was certainly causing substantial annoyance to another, each of police officers, Constable Nutt and Senior Constable Davies.

Each of the officers were acting in the execution of their duty in pursuing him at the location where his wheelchair was brought to a halt. Constable Nutt commenced to search the person and chair of Mr Cebu for stolen property.

Once all officers were present, and in response to aggression and belligerence by the defendant, Constable Nutt laid hands on him. [Referring to the footage in exhibit D9] Constable Nutt's action can be fairly and properly described as grabbing the defendant by his throat, pushing him backwards and almost simultaneously with his left hand, spinning or pivoting the defendant in his wheelchair so that the front of the chair faced away from Constable Nutt.

It was not a push or mistake as described by Constable Nutt. It was deliberate and effective action. It was conceded by Constable Nutt, this was not taught to him in training. Defensive tactic training which police would receive would not focus on persons who are wheelchair bound, suffering the descriptions [Note, possible error in the transcript, may be 'conditions' rather than 'descriptions']. There is also a reasonable doubt that a reasonable person similarly circumstanced, in the circumstances of being present at Goyder Square, the similarly circumstanced probably contemplates a person acquainted with police training. There is a reasonable doubt that a reasonable [the transcript states 'inaudible' but most likely the phrase was 'reasonable person'] would not conclude that the force was not unnecessary [the Judge made reference to a decision of Kelly J's without naming the decision].[19]

To put it in the terms of s 1 of the Code, an ordinary person similarly circumstanced would regard the force as unnecessary in or disproportionate to the occasion. That is despite the aggression and belligerence of the defendant, and his apparent attempt to collide the front of his wheelchair with Constable Nutt's legs.

Constable Nutt could have evaded the defendant and his chair and could have immobilised the defendant by tilting the chair from behind, perhaps with assistance of two colleagues. He pushed the defendant forwards, downwards in his chair. That force falls within the same category as the force of the hand to the throat.

Reasonable doubt does exist as to whether the force in each of those circumstances is not a necessary. It was not unnecessary. Each of the applications of force have not been proven to have been lawful, so the reasonable doubt exists concerning whether Constable Nutt was acting in the execution of his duty.

Following the applications of force, the defendant's behaviour escalated significantly, that was both in terms of seeking to confront and collide with Constable Nutt by use of his chair and the use of foul insults directed to two or three officers.

The CCTV depicts a further relevant aspect. The defendant rushed towards Constable Davies in his wheelchair, and while travelling at some speed to her left-hand side, or in front of her, attempted to punch

19 The decision was most likely *Mangurra v Rigby* [2021] NTSC 6 which was referred by counsel during submissions before the Judge.

her. She had to take evasive action to avoid the impact. She told the defendant "You will get charged with assault police if you're not careful". The defendant was arrested shortly after and charged with s 47(a) of the *Summary Offences Act*.

The defendant sought to assault Senior Constable Davies shortly after the force which Constable Nutt applied to him Senior Constable Davies was, at all times, acting in the execution of her duty.

Without considering counts 4 and 5 which took place after his arrest, in all the circumstances, including lack of cooperation, the probable intoxication, the belligerence of the defendant immediately following the attempt to assault Senior Constable Davies, sufficient basis existed for his arrest. That is because his agitated and intoxicated behaviour would have rendered a summons or notice to appear not feasible. The officers were fully occupied trying to deal with the situation as it developed, and it got out of hand.

The defendant's action when he sought to strike Senior Detective Davies can be said to have been a consequence of Constable Nutt's improper unlawful restraint. [His Honour referred to Southwood J's discussion of s 138 of the *Uniform Evidence Act* in *Prior v Mole* (2015) NTSC 65 at [54]-[70] and authorities cited therein]. It is clear Constable Nutt's actions resulted in the attempted assault by the defendant on Constable Davies, however, that is problematic as Senior Constable Davies was at all times acting in the due execution of her duty.

By the time the defendant spat at Constable Nutt, while police were seeking to place him in the vehicle, Constable Nutt had returned or re-entered into the execution of his duty. This conclusion is despite Constable Nutt's actions of grabbing the defendant by the throat and spinning him in the wheelchair. The spitting on Constable Nutt occurred many minutes after the improper use of force. I accept the defence submission in relation to counts 3 and 4 and arguably 5 (5 is further removed) were in consequence of at least an impropriety.

[His Honour then referred to s 138(1) and to the criteria in s 138(3)]. In weighing the issue of desirability versus undesirability: the probative value of the evidence is significant, and crucial to counts 3 and 4. Minds may differ on the gravity of the impropriety. A fair assessment of Constable Nutt's conduct ought not lead to a conclusion of choking.

> He deliberately grabbed the neck region of the defendant and applied force by pushing. I certainly (inaudible) is made out.
>
> The court should acknowledge that its functions should not be to weigh actions of police officers taken in the heat of the moment on some golden scales in a refined court room environment. Constable Nutt was not trying to hurt or harm the defendant in a gratuitous way. He was seeking to take control of the situation. His evidence acknowledged some difficulty with the precise manner in which he did so.
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> The earlier action of Constable Nutt was deliberate, but the impropriety itself was not. It could be described as reckless. Mr Cebu has a range of human rights at international law, including to be treated in a lawful way. Those things are relevant under para (f). The fact that there is some other legal proceeding on foot is not significant. There would be insurmountable difficulty in obtaining the evidence without impropriety in as much as Ms Cebu's actions and behaviour were essentially a consequence of the way he was treated.
>
> In terms of desirability versus undesirability, the lapse of time between the arrest and the actions of Mr Cebu in spitting at Constable Nutt draws me to conclude that the desirability of admitting the evidence outweighs the undesirability. To find otherwise, in my view, would be to condone something in the nature of revenge and retribution.
>
> Darius Cebu was justifiably upset by the way he was treated. He should not have had the force applied to him in the way it was applied. He should have been more compliant in his interactions with police. In the absence of that, he should have been brought into line in a more humane and less forceful way.
>
> With count 3, the offence against Senior Constable Davies, the desirability of admitting the evidence outweighs the undesirability, simply because she was always acting in the execution of her duty. It is not clear, other than simply anger, why Mr Cebu would have been lashing out at her, seeking to assault her. On the night he was particularly agitated after Constable Nutt applied the force that he did.

[21] The Judge obviously put great thought into the reasons. From a review of the facts which includes the statements tendered, transcribed evidence from the Local Court and CCTV and body worn footage, there cannot be said to

be an error in the description of the facts. It is also agreed here that in the cold light of day in a courtroom far removed from the stressors which confront both police officers and people they are required to deal with, courts should be cautious about attempting to weigh the actions of police as if there is a perfect response to dealing with difficult people in trying circumstances. However, the impugned action of Constable Nutt, in particular when he grabbed the appellant by the throat is confronting to watch. It is a shock to see such an action from a police officer, particularly against the appellant who was wheelchair bound. At the same time, the stressors and difficulties confronting police are not to be underestimated. However, all police officers would understand force cannot be applied save for particular times where it is justified. Some analysis is required to determine whether the Judge correctly characterised the conduct as either an impropriety or an illegality rather than making an explicit finding. The characterisation of the conduct bears on the exercise of the discretion.

[22] The decision the Judge was required to make was discretionary and is to be reviewed in accordance with *House v King*[20] principles. To justify overturning the exercise of the discretion, error must be shown such that it had a material bearing on the decision.

Ground 1: When undertaking the balancing exercise under s 138(1) of the *Evidence (National Uniform Legislation) Act* 2011, the Local Court

20 (1936) 55 CLR 499.

failed to consider a relevant consideration: namely, that Constable Nutt's misconduct was not just improper but was unlawful, and that the nature of the unlawfulness was that the conduct constituted an assault by a police officer on a member of the public

[23] As is well acknowledged, s 138 reflects, with some modifications the common law discretion confirmed in *Bunning v Cross*[21] which was concerned with 'high public policy':[22]

> [T]he weighting against each other of two competing requirements of public policy, thereby seeking to resolve the apparent conflict between the desirable goal of bringing to conviction the wrongdoer and the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law.

[24] The common law provided a discretion to exclude otherwise admissible evidence. Section 138 represents some shifts from the common law. By use of the term 'not to be admitted', evidence unlawfully or improperly obtained is presumptively inadmissible, but is subject to discretionary inclusion.[23]

[25] The party seeking to exclude the evidence, here the appellant, bears the onus to establish that the conditions for exclusion are satisfied, namely that the evidence was obtained improperly or in contravention of an Australian law. The burden then falls upon the party seeking admission of the evidence, here the respondent, to persuade the court that it should be admitted. In *Parker v*

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21 (1978) 141 CLR 54 at [27].

22 *Bunning v Cross* (1978) 141 CLR 54 at [27]; *R v Swaffield* (188) 192 CLR 159 at [132].

23 *R v Malloy* [1999] ACTSC 118 at [10].

Comptroller-General of Customs[24] French CJ described the shifting burdens as a 'two stage process'. The party seeking admission of the evidence has the burden of proof of facts relevant to matters weighing in favour of admission. It also has the burden of persuading the court that the desirability of admitting the evidence outweighs the undesirability of admitting the evidence obtained in the way in which it was obtained.[25]

[26] Consistent with s 142 of the Act, the appellant must prove on the balance of probabilities the existence of the facts which are said to form the basis of the impropriety or contravention of a law.[26] Given the facts found by the Judge, on appeal the question is whether there was error in how the discretion was exercised and whether the error was material such that the discretion should be exercised afresh on appeal.

[27] I do not agree with the appellant's submission that there is any specific obligation which requires a court to settle on *either* a contravention of the law *or* an impropriety or both. The text of s 138 does not require it, nor do the authorities cited call for such a finding to be made. However, I accept there are cases where such a finding is required if in a given context an allegation of a contravention of a law is made and that contravention is to inform the exercise of the discretion in a meaningful way. In some cases a

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24 (2009) HCA 7 at [28] French CJ.

25 *Parker v Comptroller-General of Customs* (2009) HCA 7 at [28], French CJ; *Employment Advocate v Williamson* (2001) 111 FCR 20 at [78], Branson J; *Director of Public Prosecutions v Tamcelik* (2012) 224 A Crim R 350 at [107]-[109] per Garling J.

26 *Director of Public Prosecutions (NSW) v AM* (2006) 161 A Crim R 219 at [33], Hall J.

finding of an unlawful act as opposed to an impropriety will be a relevant consideration.

[28] The appellant relies on *DPP v Marijanevic*[27] as authority for the proposition contended. My reading of *Marijanevic* is that it emphasises the significance of one of the factors required to be taken into account, namely the 'gravity of the impropriety or contravention' under s 138(3)(d). A contravention of the law may be serious or may be technical. It may be considered to be a minor infringement of the law. Misconduct in terms of a breach of procedure or an impropriety may similarly be serious or not considered to be of great moment. For conduct which is both a contravention of the law and improper conduct there is a continuum within which the misconduct will need to be assessed. In *Marijanevic* it was explained:[28]

> At the least serious end of the spectrum of improper conduct would be that which did not involve any knowledge or realisation that the conduct was illegal and where no advantage or benefit was gained as a consequence of that impropriety. In the middle of the range would be conduct which was known to be improper but which was not undertaken for the purpose of gaining an advantage or benefit that would not have been obtained had the conduct of the legal. At the most serious end of the range would be conduct which was known to be illegal and which was pursued for the purpose of obtaining a benefit or advantage that could not be obtained by lawful conduct. Cases such as *Ridgeway* exemplify this category of impropriety. There are of course other factors which will bear upon how seriously the impropriety should be characterised such as the nature of the illegality and the extent to which it is widespread.

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27 (2011) 33 VR 440.

28 (2011) 33 VR 440 at [67].

[29] In *Marijanevic* the trial Judge had described the evidence as 'improperly or illegally obtained'. Exclusion of the evidence by the trial Judge was not disturbed on appeal, however the need for distinction between the two was not germane to the outcome. The nature of the impropriety or illegality is relevant to the gravity of the conduct.

[30] In some cases the impugned conduct will be both an impropriety and a contravention of a law. The circumstances of the case may require a finding of one or the other. As indicated, not all illegalities are in a serious category and an impropriety may or may not be of significance. Once it is known whether the impropriety or illegality is established, the *gravity* of either is to be assessed under s 138(3)(d). In this case the actual misconduct was same whether viewed as a contravention of a law or an impropriety. However, on behalf of the appellant the case was plainly made that he was assaulted, consequently whether the misconduct was unlawful was, in this particular case, a relevant consideration. The consequence of a finding that an assault took place was materially different from an impropriety and the desirability or undesirability of admitting the evidence is not the same as it would be for an impropriety.

[31] The cases clearly treat unlawful conduct by police as requiring robust consideration of exclusion of the evidence obtained because of the detrimental effects of unlawful conduct on the administration of criminal

justice.[29] According to the older case of *Ireland*, an examination of the comparative seriousness of the offence and the illegality of law enforcement is required.[30] The High Court has also emphasized such conduct is not to be encouraged by an appearance of judicial acquiescence.[31] Section 138 has been said to reflect the legislature's view that the obtaining of evidence by unlawful means should be discouraged, and the integrity of the judicial system not be diminished by apparent condonation of unlawful conduct.[32] Further, where police officers are entrusted with powers that permit the abrogation of rights, it has been held on numerous occasions that there must be 'close attention to the conditions on which the lawful exercise depends'.[33]

[32] In terms of how s 138 was intended to operate, in assessing the 'desirability' or 'undesirability of admitting the evidence' the Australian Law Reform Commission (ALRC) recognised that 'there is a public interest in minimising the extent to which law enforcement agencies act outside the scope of their lawful authority'.[34] Further, the ALRC noted the relevant concerns include police discipline, the deterrence of future illegality, the protection of individual rights and executive and judicial legitimacy.[35] The

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29 *Pollard v The Queen* (1992) 176 CLR 117 at 202-203.

30 *R v Ireland* (1970) 126 CLR 321; *Bunning v Cross* (1978) 141 CLR 54 at 75.

31 *Pollard v The Queen* (1992) 176 CLR 117 at 202-203.

32 *RRG Nominees Pty Ltd v Visible Temporary Fencing Australia Pty Ltd (No 3)* [2018] FCA 404 at [40]; *Employment Advocate v Williamson* [2001] FCR 20 at [71].

33 Odger's, Uniform Evidence in Australia, (2020), 16th Edition at 1365, citing *R v Phung* (2013) 117 SASR 432 at [41]; *R v Nguyen* (2015) 248 A Crim R 398 at [40].

34 Australian Law Reform Commission, *Evidence*, Report No 26 (1985) Vol 1 [959], ('ALRC'); *Employment Advocate v Williamson* (2001) 111 FCR 20 at [79]; *DPP v Farr* (2001) 118 A Crim R 399.

35 Ibid ALRC at [959].

presumption of inadmissibility of evidence unlawfully or improperly obtained was retained in s 138 after the ALRC review of 2006[36] which also retained the onus being placed on the prosecution to persuade a court to admit the evidence as it 'emphasises that crime control considerations should be balanced equally with the public interest in deterring police illegality, protecting individual rights and maintaining judicial legitimacy'. Deliberate disregard of the law weighs strongly in favour of exclusion.[37]

[33] Despite my misgivings about the need in general to distinguish between impropriety and a contravention of a law, in this particular case it was important that if a contravention of law had taken place, such a finding should made. If the conduct was unlawful, a more robust view would likely be taken, tending towards exclusion of the consequential evidence. If the evidence is found to be obtained in contravention of a law as opposed to a breach of propriety, even a serious example of the latter, the cases already mentioned treat illegality as tending more towards exclusion than an impropriety. The often repeated considerations include the need to deter law enforcement from unlawful actions and to refrain from an appearance of judicial acquiescence over unlawful acts and the preservation of integrity of the criminal justice system.

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36 ALRC, *Uniform Evidence Law* No 102, (2006) at [571].

37 *R v Edelsten* (1990) 21 NSWLR 542, 557; *Coleman v Zanker* (1991) 58 SASR 7, 15; *R v Tang* [1998] 3 VR 508, 518; *R v Nicholas* (2000) 1 VR 356; *R v Theophanous* (2003) 141 A Crim R 216 [117].

[34] It is unclear why the Judge did not make a finding of assault or indeed rule out such a conclusion if an assault was not in fact proven. It may have been as a result of a concern regarding unfair or premature judgement of a police officer, but the reasons are not clear on this point.

[35] To make a finding that there has been a contravention of a law, here potentially an assault, required only a finding on the balance of probabilities, albeit enhanced in the *Briginshaw* sense.[38] A finding beyond reasonable doubt is not required. As any finding is on the balance of probabilities, Constable Nutt retains the protection of the presumption of innocence in the face of such a finding. There are numerous circumstances in which courts are required to make findings on the civil standard when such findings may amount to a ruling that an offence has been committed.

[36] The Judge effectively made a finding of assault in all but name. The findings set out above include the conduct which comprised grabbing the appellant by the throat, pushing him backwards, then pushing him "forwards" and "downwards".

[37] To prove the commission of the offence of assault, first required proof of an 'application of force'.[39] The Judge made such a finding which was well supported by the evidence. That was the evidence of Constable Nutt grabbing the appellant by the throat and pushing him from behind. The

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38 *Briginshaw v Briginshaw* (1938) 60 CLR 336.

39 *Criminal Code* s 187(1)(a) read with s 1 'application of force' includes 'striking, touching etc'.

second element is that the 'application of force' was without consent.[40] Although no specific finding was made to that effect, clearly the particular application of force was without consent, apparent in any event from the footage. Third, that the application of force was intentional or foreseen as a possible consequence of the physical actions of Constable Nutt.[41] If the acts were not intended then consideration is to be given about whether the application of force was foreseen as a possible consequence of his conduct and that an ordinary person similarly circumstanced would have foreseen the same and not proceeded with the action in the sense of s 31(2) of the *Criminal Code*. The Judge made the finding that the impugned conduct was deliberate. The respondent submits the Judge found the "action" to be deliberate, but not the application of force.[42] That is a highly strained interpretation of the remarks. The Judge conveyed the conclusion that the impugned conduct was deliberate. The footage played confirmed that was so. The required mental element was proven.

[38] The fourth element is that the application of force is not 'authorised or justified'.[43] The Judge considered justification, relying on *Mangurra v Rigby*.[44] *Mungarra* required consideration of the application of a level of force and whether police were acting in the due execution of their duty.

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40 *Criminal Code*, s 187(1)(a).

41 *Criminal Code*, s 31(1) and (2).

42 Respondent's summary of submissions, para 12.

43 *Criminal Code*, s 2.

44 [2021] NTSC 6 (Kelly J).

Kelly J set out the following relevant principles with which I respectfully agree:[45]

> **Relevant principles**
>
> Section 27 of the Code provides (relevantly):
>
> In the circumstances following, the application of force is justified provided it is not unnecessary force and it is not intended and is not such as is likely to cause death or serious harm:
>
> (a) to lawfully execute any sentence, process or warrant or make any arrest;
>
> (b) to prevent a person who is being or who has been lawfully arrested from escaping or from being rescued;
>
> The definition of "unnecessary force" in s 1 of the Code provides:
>
> "unnecessary force" means force that the user of such force knows is unnecessary for and disproportionate to the occasion or that an ordinary person, similarly circumstanced to the person using such force, would regard as unnecessary for and disproportionate to the occasion.
>
> The relevant legal principles are uncontroversial and can be summarized as follows.
>
> (a) It is an essential element of the offence of resisting a police officer in the execution of his duty contrary to s 158 of the *Police Administration Act 1978* (NT) that the officer be acting "in the execution of his duty" at the time the accused does the act or acts said to constitute the offence. Likewise, it is an essential element of the offence of assaulting a police officer in the execution of the officer's duty contrary to s 189A of the Code that the officer be acting "in the execution of the

45 Ibid at [32]-[34]; [36]-[38].

officer's duty" when the accused does the act said to constitute the offence.

(b) A police officer acts in the execution of the officer's duty from the time the officer embarks upon a lawful task connected with the functions of a police officer, and continues to act in the execution of that duty for as long as he is engaged in that task.[46]

(c) It is not part of a police officer's duty to engage in unlawful conduct.[47] The use of force by a police officer is subject to limits and, beyond those limits, is unlawful.

(d) If a police officer uses greater force than is justified the officer cannot be said to be acting "in the execution of his duty".[48]

There are two aspects to the definition of "unnecessary force" in s 1 of the Code:

(a) Force is "unnecessary force" if the user of such force knows it is unnecessary for and disproportionate to the occasion.

(b) Force is also "unnecessary force" if an ordinary person, similarly circumstanced to the person using such force, would regard it as unnecessary for and disproportionate to the occasion.

It is not contended by the appellant that the police officers in question knew that the force they used on the appellant was unnecessary or disproportionate to the occasion. The contention is that it was reasonably possible that an ordinary person, similarly circumstanced, would regard the use of the taser on the appellant as unnecessary for and disproportionate to the occasion; and hence the trial judge ought to have entertained a reasonable doubt about whether the force used was "not unnecessary" and therefore lawful within the meaning of s 27 of the Code. That being so her Honour ought to have entertained a reasonable doubt about whether the

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46 *Re K* (1993) 46 FCR 336 at 340-341 per Gallop, Spender and Burchett JJ cited with approval in *Coleman v Power* (2004) 220 CLR 1 at p57 [117] per McHugh J

47 *Coleman v Power* per McHugh J at [117]

48 *Wilson v Brown* [2015] NTSC 89 at [57] per Southwood J

> Crown had established an essential element of each offence – that the officers were acting in the execution of their duty when the appellant did the acts said to constitute Counts 1, 2 and 3.
>
> The question is not whether the response was reasonable in the circumstances as the officer perceived them; it is whether the ordinary person in those circumstances, but perceiving them for herself (or himself), would have regarded the force as unnecessary for and disproportionate to the occasion. The proportionality of the force must be assessed against "the evil to be prevented" by the use of the force;[49] and the assessment of what an ordinary person would regard as unnecessary for and disproportionate to the occasion must be made in a "realistic manner" that takes into account "the reality that the officer has to make decisions quickly, often in emergencies and under pressure."[50]

[39] Relevant here is the Judge's finding that an ordinary person similarly circumstanced would regard the force as unnecessary or disproportionate to the occasion. That finding would seem to rule out justification on the balance of probabilities. A related point is that the Judge doubted that Constable Nutt was acting in the execution of his duty when the force was applied. He found that after he had laid hands on the appellant, he resumed acting in the execution of his duty.

[40] That is not to say that if Constable Nutt was to face a criminal charge, it would be inevitable that he would be convicted. First is the higher burden of proof in criminal proceedings. Second it must be remembered that for certain purposes an offence is regarded as committed under the *Criminal*

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49 See eg, *R v Turner* [1962] VR 30 at 36

50 *Walker & Anor v Hamm & Ors and Walker & Anor v Carter and Anor* [2008] VSC 596 at [55] per Smith J.

Code even if 'excused'.[51] It was a relevant consideration in this particular case that the impugned conduct went beyond an impropriety and on balance constituted an offence, notwithstanding the conduct may have possessed mitigating features referred to above. At the same time, the appellant was plainly a vulnerable person.

[41] A finding of a contravention of a law in these circumstances materially impacts on the exercise of the discretion towards not admitting the evidence. It is not however determinative. In terms of s 138(1)(d) it is a contravention of substantial gravity, although as also found by the Judge, it was not a case of choking but was that he "deliberately grabbed the neck region of the defendant and applied force by pushing". It was mitigated by the fact "Constable Nutt was not trying to hurt or harm the defendant in a gratuitous way. He was seeking to take control of the situation." Constable Nutt was found not to be acting in the due execution of his duty at the time of deliberately applying the force. Given that conclusion by the Judge, the ultimate finding must be that the appellant was unlawfully assaulted in the manner described.

[42] Ground one is made out.

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51 *Criminal Code* s 2: 'For the purposes of this part, an offence is committed when a person who possesses any mental element that may be prescribed with respect to that offence does, makes or causes be act, omission or event, all the series or combination of the same, constituting the offence in circumstances where the act omission or event, or the series or combination of the same, constituting the offence in circumstances where the act, omission or event, or each of them, if there is more than one, is not authorised all justified'. For example, for certain purpose an offence is still committed, excused by virtue of immature age, mental impairment etc.

Ground two: When undertaking the balancing exercise under s 138(1) of the Act, the Local Court failed to consider a relevant consideration: namely, the public interest in deterring unlawful conduct by police officers, who are entrusted with enforcing the law.

[43] Although 'the public interest in deterring unlawful conduct by police officers' is not included in the matters to be taken into account under s 138(3), the section does not purport to be an exclusive list. The phrase 'without limiting the matters that the court may take into account' is relevant. The public interest in deterring such unlawful conduct arises from *Bunning v Cross*[52] and was confirmed in *Kadir v The Queen*[53] as relevant to s 138.

[44] In *Kadir* the High Court considered two appeals relating to the conviction of two appellants for animal cruelty offences stemming from the use of live animals as bait in training greyhounds. At trial the prosecution sought to tender video recordings depicting activity involving greyhounds. The recordings were made by a person on instructions from Animals Australia, an organisation which investigated allegations of cruelty to animals. The video-recorded evidence was found to have been obtained in contravention of the *Surveillance Devices Act 2007* (NSW). Material obtained pursuant to the execution of a search warrant and evidence derived from the warrant, which included admissions was excluded. In the discussion of the

52 (1978) 141 CLR 54 at [27].

53 (2020) 267 CLR 109; 279 A Crim R 25.

application of s 138 the Court held the public interests which were required to be weighed were broader than those weighed in the exercise of the *Bunning v Cross* discretion but included the public interest in not giving curial approval to evidence unlawfully obtained:[54]

> The desirability of admitting evidence recognises the public interest in all relevant evidence being before the fact-finding tribunal. The undesirability of admitting evidence recognises the public interest in not giving curial approval, or encouragement, to illegally or improperly obtained evidence generally. In a criminal proceeding in which the prosecution seeks to adduce evidence that has improperly or illegally obtained by the police (or another law enforcement agency), the more focused public interests identified in *Bunning v Cross* remain apt.

[45] *Kadir* was not a case of police or other law enforcement misconduct. While the public interest in deterring law enforcement from using unlawful means is a fundamental or overarching principle, it must be remembered that simply because a factor is not mentioned by a Judge does not mean it was not considered. Here there was no mention of the need to deter such conduct. Given the submissions made to the Judge including the authorities generally submitted on the subject, this factor was likely to have been a matter at least in the background of his Honour's considerations. It was a factor that was relevant here, however I am not prepared to find that an omission to mention it in the reasons means it was not considered or that the Judge lost sight of an important principle.

[46] Ground two is not made out.

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54 Ibid at [13] and [14].

Ground three: When undertaking the balancing exercise under s 138(1) of the Act, the Local Court erred, by acting on a wrong principle, reasoning illogically, or taking into account an irrelevant consideration, when it concluded that to admit the evidence "would be to condone something in the nature of revenge and retribution".

[47] It is unclear why the Judge thought exclusion of evidence would amount to condoning revenge and retribution or would appear to amount to condoning the same. The appellant's offending and its nature was one of the factors required to be taken into account under S 138(3)(c). It was part of the balancing exercise and whatever the final conclusion, could not perceived as condoning revenge and retribution. A number of authorities make plain that notwithstanding that offending by an accused is not to be condoned, the public interest in deterring police conduct that causes the offending may justify the exercise of the discretion to exclude.[55] This part of the reasoning reveals error in the approach taken.

[48] Ground 3 is made out.

Ground 4: In the alternative to Grounds 1 and 2, the Local Court erred in failing to give adequate reasons.

First particular: The Local Court's reasons leave the reader to speculate as to whether and, if so, how, the Local Court considered and weighed the fact and nature of the unlawful of the police misconduct.

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55 *Robinett v Police* (2000) 78 SASR 85; *DPP v Carr* (2002) A Crim R 151; *DPP v Kaba* (2014) 44 VR 526.

Second particular: The Local Court's reasons leave the reader to speculate as to whether and, if so, how the Local Court considered and weighed the primary rationale for s 138, which is to deter unlawful conduct by those who are entrusted with enforcing the law.

[49] If the conclusion above that ground one is made out is wrong, in my view the first particular of this ground is made out. The misconduct may or may not have been considered to constitute an assault by the Judge. It appears to have been considered as such in all but name. How the misconduct was then characterised and evaluated in the context of s 138 becomes less clear. The point was queried by counsel for the appellant at the conclusion of the Judge's remarks which included the findings. The Judge said he would leave it up to counsel because 'unlawful' has a "range of meanings". It became apparent the Judge regarded the conduct as either improper *or* unlawful without a determination of which one being made:[56]

> Mr Clelland: … [I]f I might clarify your Honour's – I've endeavoured to take notes, and maybe I misunderstood, but in respect of the voir dire proceedings, your Honour found the application of force of officer Nutt to be unlawful *and* improper.
>
> His Honour: Improper *or* unlawful
>
> Mr Clelland: Either?
>
> His Honour: Yes
>
> Mr Clelland: Thank you, your Honour.

56 Transcript of Proceedings at 13.

> His Honour: But I did find that he was not – there's the reasonable doubt in the execution of his duty at the time. So how that measured in with the rest precisely, I will leave to you. Because unlawful has got a range of meanings.

[50] There is no finding on whether the conduct was unlawful, and if so, in what way. It is not clear whether the Judge did finally conclude the appellant had been assaulted. The Judge left open whether there had been an unlawful act, stating at one point, the offences were in consequence of "at least" an impropriety. The reasons invite speculation as to "which of a number of possible paths of reasoning the judge may have taken to that conclusion".[57]

[51] This ground is made out in the terms of the first particular.

[52] As to particular 2, as above, this is an overarching consideration which although not mentioned specifically in the Judge's reasons, I am not prepared to accept it was not taken into account given the fundamental nature of the consideration. While it may have been preferable to include reasons incorporating the rationale for the law of discretionary exclusion, failure to mention the rationale does not invite speculation.

[53] The second particular of this ground is not made out.

Ground 5: The Local Court erred in failing to conclude that the search of the appellant was unlawful, because the circumstances were, objectively, not of 'such seriousness and urgency' to 'justify and

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57 *DL v The Queen* (2018) 92 ALJR 636 at [131].

require' a warrantless search under s 119 of the *Police Administration Act* 1978 (NT).

[54] The Local Court found that the officers had a reasonable suspicion that the appellant was in possession of alcohol that had been stolen.[58]

[55] The appellant argued that the Local Court should have found that the search was unlawful because the circumstances did not come within the terms of s 119 of the *Police Administration Act*. It was initially submitted that objectively the circumstances were not of "such seriousness and urgency" to "justify and require" search without a warrant. Section 119(1)(a) provides:

> **119 Urgent searches without a warrant**
>
> (1) A member of the Police Force may, in circumstances of such seriousness and urgency as to require and justify immediate search or entry without the authority of an order of a court or of a warrant issued under this Part, without warrant:
>
> (a) search the person of, the clothing that is being worn by and property in the immediate control of, a person reasonably suspected by him to be carrying anything connected with an offence.

[56] It is clear that Constable Nutt suspected the appellant to be in possession of alcohol that had been stolen by other offenders and that because he was leaving Goyder Square some urgency was required to search him.[59] The appellant argued there could not reasonably be regarded to be

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58 Transcript of Reasons at 3.

59 Exhibit P8: Statement of Constable Andrew Nutt, 9 October 2019 at [9], [10].

"circumstances of such seriousness and urgency as to require and justify immediate search".

[57] While this Court is not precluded from making an objective assessment of the "seriousness" and "urgency", not only was the point not taken below, but the appellant's counsel expressly disavowed reliance on the point and stated "I'm not submitting that that was an unlawful search".[60] Nothing in the facts or circumstances would permit this Court to make a finding that the circumstances were of an exceptional nature, allowing consideration of this ground.[61]

[58] While the facts leading up to the search may be uncontentious, the reasoning of the officers concerned has not been properly ventilated. There may well have been beliefs or suspicions connected to the original thefts which did not involve the appellant which nevertheless led to a sense of urgency. It is impossible to interrogate the relevant thought processes of police at that time and it would be an error to make specific findings on appeal. Ultimately, this ground was not pressed in oral argument on appeal.

[59] Ground 5 is not made out.

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60 Transcript of Proceedings at 48.

61 *JB & Ors v Northern Territory of Australia* (2019) 343 FLR 41 at [217]; *Wollongong v Metwally [No 2]* (1985) 52 ALJR 481 at 483.

The Notice of Contention: the learned sentencing Judge erred in concluding that the evidence in relation to counts 3, 4 and 5 was obtained in consequence of an impropriety or illegality

[60] The respondent acknowledged that where offending takes place 'in consequence' of an impropriety or contravention of a law, it may be open for a Judge to exclude the offending conduct. In those circumstances the inevitable consequence is that the prosecution case would fail.[62]

[61] The form of police misconduct here and whether it can be said to have 'caused' the offending should be distinguished from the entrapment cases where the conduct is encouraged or tolerated by those in higher authority in the police force, or in the case of illegal conduct, by those responsible for the institution of criminal proceedings.[63] Encouragement or tolerance to the commission of an offence tends towards exclusion of the evidence. This case may be distinguished from the authorities dealing with that subject, although some of the guiding principles remain relevant.

[62] Both parties drew attention to the approach of Bleby J in *Robinett v Police*[64] which was determined under *Bunning v Cross* principles and was subsequently adopted by Smart AJ in *DPP v Carr*[65] in the context of s 138.

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62 Respondent's summary of submissions at [16].

63 *Ridgeway v The Queen* (1995) 184 CLR 19 at 39.

64 (2000) 78 SASR 85.

65 (2002) 127 A Crim R 151.

[63] As to whether there is a causal link, Smart AJ in *Carr* found the impropriety there (improper arrest) and the offences charged to be 'closely related and interconnected'. In *Carr* the facts were that rocks had been thrown at a police vehicle. The police approached the accused to inquire into the identity of the person who had thrown the rocks. The accused thought he was the suspect and became agitated and used offensive language towards police and generally in public. He was asked to stop swearing but continued to do so and walked away. A police officer arrested him for offensive language and took him by the arm. He pushed the police officer away and attempted to flee. The police officer caught him and tackled him. He was charged with offensive language, resist arrest and assault police. As to threats later made by him in custody, he was charged with intimidate police.

[64] At first instance it was held the arrest for offensive language was lawful, but was improper. The evidence of the subsequent offences was excluded under s 138. On appeal by the Crown, Smart AJ held the evidence of the offences was obtained as a consequence of an improper arrest and the evidence was properly excluded. The reasons for exclusion were as follows:[66]

> There is a distinction between the commission of further offences by a defendant as a result of improper police conduct which precipitated them and the evidence of them which becomes available to be adduced on the one hand, and evidence improperly obtained as to past offences and unconnected with further offences. Can s 138(1) operate to render inadmissible evidence obtained of the commission of further offences following an improper act or omission by the police such as an ill-advised arrest as to an earlier offence and/or the withholding of medical

66 *Carr* at [63]-70].

> treatment. A number of situations may arise. The person arrested may in a state of anger at his ill-advised arrest commit a serious crime, for example, attempted murder or maliciously inflict grievous bodily harm with intent to do so. In such a case, the evidence of those subsequent acts would be admitted. On the other hand he may commit a relatively minor crime such as a mild assault or resist arrest. Further, he may, if moderately intoxicated, utter threats never intended to be carried out…
>
> …
>
> …[i]f the offences were moderately serious to serious and disproportionate to an ill-advised arrest it would not be possible to contend that the evidence of such offences was obtained in consequence of an impropriety. A question of degree is involved. This is not completely satisfactory as it does give rise to debate at the margins.
>
> …
>
> All the offences were closely related and interconnected and at the lower end of the criminal scale. The offences and the evidence stemmed from the ill-advised and unnecessary arrest. A narrow construction should not be given to s 138(1)(a) and (b) nor one that is unduly broad. This is not the kind of case to apply the "but for" test except in the restricted way outlined above.

[65] The approach taken in *Carr* would rule out the possibility of a causal connection being established if police misconduct is followed by offending which is serious or disproportionate to the improper or unlawful conduct by police. This was emphasised in *Coe*[67] where evidence of a charged serious assault in response to an alleged improper arrest by a brief touching of the accused on the arm was held not to be obtained in consequence of an impropriety. Adams J wrote:[68]

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67 [2003] NSWSC 363.

68 *Coe* at [23].

> [T]he alleged response of the defendant to the constable's conduct was so disproportionate and so serious an offence that, even if it was 'obtained' by that conduct, it was not caused by it.

[66] Further, in *Carr* it was accepted that the evidence of the offences, the offences themselves, would not have been obtained 'but for' the improper arrest. The finding was that the impropriety and the offences committed were 'closely related and interconnected'. In *Coe*, the issue of causation was treated in a somewhat stricter way by Adams J:

> It seems to me that something more than a mere causal link or (to use the learned magistrate's language in the instant) "trigger" is necessary before s 138 comes into play…
>
> …
>
> It will be seen from the above discussion that Smart AJ considered that "obtained" was the practical equivalent of "caused" or "stemmed from" … I am, with the greatest respect, unable to agree with this interpretation. The word "obtained" is ordinary parlance and should not be unduly or artificially restricted: *Haddad & Treglia* (2000) A Crim R 312 per Spigelman CJ at [73] but it cannot apply more widely than circumstances which fairly fall within its ambit. Where "real evidence" is indeed obtained as a result of impugned conduct, then the case would, of course, come within the purview of the section, even if the conduct was not undertaken for the purpose of acquiring the evidence. Where, however, the evidence in question is that of offences which have been caused by the impugned conduct, it does not seem to me that the evidence will have been "obtained" unless something more is shown than the mere causal link: the circumstances must be such as to fit fairly within the meaning of "obtained" almost invariably because the conduct was intended or expected (to a greater or lesser extent) to achieve the commission of offences.

[67] *Robinnett v Police*[69] involved charges arising from an arrest and the application of capsicum spray by police for public order offences. The appellant claimed threats made to a police officer when he was in custody which formed the basis of the charges were made because of improper and/or illegal conduct on the part of police which served to enliven the public discretion. The improper conduct revolved around the failure of police to obtain medical assistance for the appellant when he was irritated by the application of the spray. The abuse and threats made to police were interspersed with requests to see a doctor and complaints of not being able to breathe and of eye irritation.

[68] Justice Bleby considered whether the conduct was of the kind which could give rise to the exercise of the public policy discretion and if so whether the conduct caused or contributed to the commission of the offence. Bleby J found the failure to ignore the requests for medical attention of people in custody fell into the category of impropriety or unfairness that gives rise to the exercise of the public police discretion. In the circumstances of that case, it was held to be bound to give rise to the type of offending that occurred. The appellant's increasingly offensive language appeared to be a direct consequence of the irritation from the spray, the failure to respond to the request for medical attention given the asthma, enforced confinement and intoxication. The failure of police to attend to the issues caused or contributed to the commission of the offences charged. Indeed it was said to

69 (2000) 78 SASR 85.

be as a "direct consequence"[70] or "was almost certain" to have followed.[71] It was held the evidence should have been rejected.

[69] In as much as there may be a difference between the various approaches taken, especially as between *Carr* and *Coe*, Hall J in *Director of Public Prosecutions v AM*[72] preferred the approach in *Carr*. In *AM* a Local Court magistrate excluded evidence of an assault against police in circumstances where a juvenile was arrested for offensive language. She was later charged with assaulting police which took place after resisting arrest, and fleeing. She was subsequently arrested and was placed in police custody. She committed the assault against police when in police custody. The magistrate found the arrest improper. Although Hall J upheld a Crown appeal and found the arrest was not improper, his Honour made the following comments about Adam J's reasoning in *Coe*:[73]

> … The proposition is advanced that…the word "obtained" in s 138(1) requires, in addition to causal nexus, that the impugned conduct must either be "intended" or "expected" to achieve the commission of offences. However, cases involving an ill-advised or unnecessary arrest which result in unintended consequential offences by definition lack a purposive element. In other words, offences stemming from such an arrest occur without any intention on the part of the arresting officer to provoke such offences. It is, for that reasons, that I cannot agree with Adams J that in such cases the word "obtained" cannot be satisfied unless the causal nexus is also accompanied by "something more" in the nature of "intended" order in such cases for evidence to be "obtained", it may, in some such cases, be necessary that the conduct (the arrest) be of a kind that could be "expected" to give rise to the

70 Ibid at [54].

71 Ibid at [54].

72 (2006) 161 A Crim R 219.

73 Ibid at [82]-[83].

> commission of further offences. The reference to an "expectation" by Adams J in *Coe* may, in some cases, be a material aspect and *Robinett* and *Carr* could, as his Honour observed, be seen as examples of that proposition.
>
> Reference to what might be expected to follow from certain conduct essentially, in my opinion, relates to the likelihood of an event occurring. In other words, whether one thing might be expected to give rise to another is really an aspect that is related to causation – how likely is an arrest, for example, to give rise to particular conduct? This essentially involves questions of predictability and anticipation.

[70] This reasoning was accepted in *Director of Public Prosecutions v Kaba*[74] where Bell J held it was open to a magistrate to find that, viewed objectively, evidence of the offences was obtained in consequence of police misconduct. The offending which comprised assault police and certain street offences was not 'so grossly disproportionate' to the alleged police misconduct (carrying out a random licence to check for which police arguably did not have authority) that the causal link was not made. In his analysis of the New South Wales decisions his Honour said:[75]

> I would not disagree with the outcome in *Coe* that the evidence was admitted. It was evidence of very serious assaults upon police that were out of all proportion to the alleged misconduct. However, because the concepts of obtaining and causation in s 138(1)(b) are objective and do not incorporate any element of intention or purpose, I would not accept the reasoning of Adams J on that subject. In that connection, I would generally accept the analysis of Hall J in *Director of Public Prosecution (NSW) v AM* according to which the cases of *Robinett* and *Carr* are examples of obtaining of evidence of offending that occurred in consequence of (unintended) impropriety or contravening conduct within s 138(1)(b).

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74 (2014) 44 VR 526; 247 A Crim R 300 at [345].

75 Ibid at [345].

[71] In *Monte v Director of Public Prosecutions (NSW)*[76] Bellew J reviewed the reasoning in both *Coe* and *AM*. His Honour accepted what Hall J had said in *AM* to the effect that references to what might be expected to follow from certain conduct related to the likelihood of an event occurring. Thus, in context, a magistrate who used the phrase as an event being 'reasonably foreseeable' should be viewed as a reference to the likelihood of an event occurring.[77]

[72] It would appear in some cases there is an acknowledged difference between evidence which is 'obtained' under s 138(1)(a) and evidence 'obtained in consequence' under s 138(b). In Odger's, treatment of this subject,[78] the learned author points out:

> It needs to be emphasised that just because the balancing text applies to evidence whether it falls within the terms of s 138(1)(a) or s 138(1)(b), the result of that balancing may differ depending on which category the evidence falls into. Thus, examples, in *Restricted Judgement* [2017] NSWCCA 288, the NSW Court of Criminal Appeal distinguished between certain evidence which fell within s 138(1)(a) and other evidence that fell within s 138(1)(b), where the party obtaining the evidence 'in consequence of…a contravention of an Australian law" had not condoned any breach of Australian law. The way in which the latter evidence was obtained was "materially different' and the undesirability of admitting the evidence was not the same (at [125] and the latter evidence was held admissible while much of the former evidence was properly excluded.

[73] The distinction made between s 138(1)(a) and (b) in *Restricted Judgement* is not apt here. This case does not include an antecedent contravention of

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76 [2015] NSWSC 318.

77 Ibid at [96]-[99].

78 Stephen Odgers, Uniform Evidence Law, 14th Edition, LawBook Co, 138.150.

Australian law to be balanced against a later innocent, materially different body of evidence.

[74] There is a crystallizing of judicial opinion around the cases of *Robinett*, *Carr* and *AM* although the facts of *Coe* may account for a seemingly stricter approach.

[75] The respondent also referred to the *Director of Public Prosecutions (NSW) v Owens*,[79] however in that matter, on the facts, Hulme J did not accept there was any impropriety or illegality given the offending (resist arrest, assault police) took place after an arrest which was authorised by warrant. The alleged impropriety was said to be a failure to caution when executing the warrant. His Honour noted the differing views, in the context of different factual situations as expressed in *Coe* and *AM* as to the asserted impropriety on illegality of arrest and the connection between such arrest and subsequent offending.[80] In my view *Owens* does not add substantially to the considerations required here given the rejection of the premise of impropriety.

[76] The respondent also referred to *Slater v The Queen*[81]where the Court of Appeal (Victoria) emphasized 'distal causal relationship' between the evidence and the impugned act and said:[82]

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79 [2017] NSWSC 1550.

80 Ibid at 64.

81 [2019] VSCA 213.

82 Ibid at 44.

> The degree of connection between evidence obtained 'in consequence of' an impropriety or contravention and that impropriety or contravention is plainly a matter capable of bearing on the balancing exercise. If the impropriety or contravention bears only a distant causal relationship to the evidence, the public interest in deterring impropriety or contravention of the law by obtaining evidence in the manner concerned might be thought more likely to be outweighed by the public interest in admitting probative evidence. Conversely, exclusion of evidence closely connected to the impropriety or contravention might more obviously serve the public interest in deterring the obtaining of evidence in that manner.

[77] The case before the Local Court was put on the basis the evidence was obtained 'in consequence' (s 138(1)(b) of an impropriety. To answer the Notice of Contention requires the criteria set out by the cases as discussed above to be applied to each count, bearing in mind a question of degree is involved which 'does give rise to debate at the margins'. The matter of causation is not capable of precise measurement. Human behaviour and the philosophy of actions and behaviour is complex and difficult if not impossible to reduce to a single cause. Multiple causes may be operative, as is acknowledged in other areas of the law which require 'substantial' causation to be established before a cause of action can be proven or indeed there may be a requirement that 'to cause' is to 'substantially contribute'[83] when necessary to prove an offence. The focus here must be on whether the evidence obtained was 'in consequence of' in the sense of 'closely related (or) connected' to the misconduct (*Carr*). It involves consideration of whether the offending was serious or disproportionate to the improper or unlawful conduct or whether the misconduct could be expected to achieve

83 Eg s 240, *Criminal Code* (NT).

the commission of the offences, or whether the offending was likely to occur. It is also relevant but not determinative to ask whether 'but for' the unlawful conduct, would the offences have been committed?

[78] As to count 3, the attempt to punch in the form of a swing towards Constable Davies. As above, the Judge found that common with the other counts, the offending was in consequence of the police misconduct, already described. The conduct constituting count 3 took place very shortly after (some 40 seconds) the misconduct by Constable Nutt constituted by grabbing the appellant by the throat and moving him as described already. The appellant was intoxicated, agitated and insulting towards police. The offending, while in a serious category of offending given it was an assault against police, was not a serious example of such offending given there was no contact made with Senior Constable Davies. Senior Constable Davies was at all times acting in the execution of her duty, nevertheless, the swing towards her was closely connected with the actions Constable Nutt. The appellant's reaction, as someone who is paraplegic, intoxicated, agitated, in a wheelchair and had just been assaulted was reasonably foreseeable in the circumstances. It is likely the appellant would not have swung a punch towards Senior Constable Davies but for the actions of Constable Nutt. I would not uphold the respondent's contention in respect of count 3.

[79] Count 4 involves the assault by spitting at Constable Nutt minutes after the appellant was assaulted. Once again, it must be remembered the appellant was intoxicated and agitated, no doubt some of the agitation was due to

being grabbed around the throat when wheelchair bound. Assault by way of spitting is serious, especially towards police officers who need to then deal with the precautionary health consequences which may require pathology tests given biohazards and being required to take time away from usual activities. It is humiliating and degrading to a victim. Offenders who assault by way of spitting at police officers often receive sentences of imprisonment. It must also be kept in mind the authorities acknowledge that spitting is a typical response of children and others without power reacting to particular stressors.[84]

[80] In the circumstances here, despite the few minutes between the assault by Constable Nutt and the apprehension of the appellant, the assault by way of spitting was predictable or reasonably foreseeable. The appellant was intoxicated, agitated and had been treated very roughly by Constable Nutt when he was in a wheelchair and arrested. While the assault by spitting took place a few minutes later and was after his arrest, it was not so remote as to lose the connection with the assault by Constable Nutt. If not for the assault by Constable Nutt, it is unlikely the appellant would have assaulted him by spitting.

[81] I would not uphold the respondent's contention in respect of count 4.

[82] In relation to count 5, I agree with the respondent that the assault which took place at Palmerston Watchhouse, an assault by spitting, is in a different

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84 *Neal v The Queen* (1982) 149 CLR 305, 319; see also *Prior v Mole* [2015] NTSC 65 at [70] (Southwood J).

category to the offending in counts 3 and 4. The offending in count 5 does not have the same close connection with the actions of Constable Nutt. There is some association with Constable Nutt's actions, and those actions may have been one of a number of factors operative at the time of the offending. The offending in count 5 took place 10 to 15 minutes later. Although the lapse in time is not determinative, it is a factor. Another factor was that an arrest had been completed which plainly interrupts the connection with the original incident. The victim was not involved and not present at the time of the misconduct incident. The appellant at the time of the offending in count 5 had been removed from the scene which had been the origin of his angst and frustration. He was removed from the area where he was assaulted. He would have still been agitated, and felt powerless given he was in custody, however the connection with the earlier police misconduct is greatly reduced to the point that the conduct in count 5 could not be said to be reasonably foreseeable. The Judge noted count 5 was "further removed."

[83] I will uphold the notice of contention as it relates to count 5.

Further consideration of the exercise of the discretion

[84] The errors identified require the discretion to be exercised afresh.

[85] Relevant to all counts, I confirm the finding that on the balance of probabilities, for the period Constable Nutt grabbed the throat of the

appellant and pushed him from behind as described in the Judge's findings set out above, he was not acting in the execution of his duty.

[86] Absent any justification, and none was raised, on the balance of probabilities, Constable Nutt's actions constituted an assault. His actions were deliberate. The assault possessed features which were serious. The appellant was an Indigenous man who was paraplegic, in a wheelchair, intoxicated and, as it turned out was not involved in the offending Constable Nutt was investigating. Of some mitigation, the appellant was abusive and non-compliant with police. Although it is not accepted here that the evidence establishes the appellant attempted to grab the taser, in the stress of the moment, Constable Nutt may have thought that was the case. Constable Nutt attempted to control the situation by unlawful means, namely by the assault. He was dealing with a difficult person. The assault did not cause injury but is serious for other reasons, particularly the unjustified use of force by law enforcement officers in the course of dealing with a suspect. Such conduct must be deterred in keeping with the authorities mentioned above. The Court should not give curial approval or encouragement of such conduct. If this analysis is wrong, then the use of force against the appellant was in any event a breach of propriety, but on any measure a serious breach of propriety for the reasons already given.

[87] The consequence of the contravention of the law, is that the appellant committed the offences charged as count 3 and count 4. As indicated above in the discussion of the Notice of Contention, in my view count 5, although

associated with the contravention, is not so closely connected that it should be regarded as a 'consequence' of the misconduct. If I have erroneously characterised the conduct as a contravention of an Australian law, the conclusion as to the consequence of the impropriety remains the same.

[88] The evidence of offending for count 3 and count 4 is presumptively inadmissible, unless the desirability of admitting the evidence outweighs the undesirability of admitting it given the way in which it was obtained (s 138(1)(b). Turning to the factors in s 138(3), which are not exclusive matters to be considered:

(a) The probative value of the evidence is plainly high; the prosecution would fail without the evidence.

(b) The evidence is clearly important as with (a), the prosecution would fail without it.

(c) The offence is in a serious category of offending, being offences against police. Count 3 was at the lower end as no connection was made with the police officer who was acting in the execution of her duty. Count 4 is more significant as it involved spitting which is humiliating to the victim and requires biohazard protocols to be considered. However, it is not at the higher end of offending of this generic kind. The offending took place shortly after the appellant was assaulted when he was in an agitated and intoxicated state and was non-compliant with

police who wanted to search him; he was a vulnerable suspect, wheelchair bound, who had not engaged in offending.

(d) The gravity of the contravention was substantial. It was an assault on a vulnerable suspect who was non-compliant, intoxicated and difficult to deal with. It was an action not approved by police training. The acts comprising the assault were deliberate, with reckless disregard for whether the acts contravened the law or police procedures. No injury was caused but the misconduct caused the appellant to respond with an attempt to assault and assault (by spitting). The officer acknowledged, to some degree the wrongfulness of his conduct. There was no physical injury suffered.

(e) The misconduct appears inconsistent with Article 9 of the International Covenant on Civil and Political Rights (ICCPR), the right to security of the person.

(f) There was mention in the Local Court of a complaint being made to the Ombudsman and mention was made of it on appeal. It is accepted that such a complaint would be investigated by the Ombudsman, regardless of the outcome of court proceedings including this appeal.

(g) Not relevant.

[89] Consistent with the authorities cited above, the need to ensure law enforcement officers do not contravene the law in circumstances such as

these is an important consideration as is the duty of courts not to be seen to approve of such actions or to acquiesce. That is not to condone the actions of the appellant. The public interest strongly favours for obvious reasons the prosecution of wrongdoers. Neither does the conclusion here underestimate the stressful circumstances police officers find themselves in when dealing with difficult but vulnerable persons. Police officers must know difficult situations cannot be resolved by the use of unjustified force. Having given consideration to all of the factors, I am not persuaded it was desirable to admit the evidence. It was undesirable to do so.

[90] Given those conclusions, I will not deal with ground 6.

[91] The orders are:

1. The appeal is allowed in part.

2. The convictions on counts 3 and 4 are quashed.

3. The conviction on count 5 is confirmed.

4. The Notice of Contention is accepted in part, with respect to count 5 but is dismissed with respect to counts 3 and 4.

[92] The reasons will be forwarded to counsel and solicitors with a courtesy letter relevant to the delay.
