CITATION:	*Police v TX* [2024] NTYJC 3
PARTIES:	*Police* v *TX* (a youth)
TITLE OF COURT:	YOUTH JUSTICE COURT
JURISDICTION:	CRIMINAL
FILE NO(s):	22327596, 22314645 & 22315789
DELIVERED ON:	23 February 2024
DELIVERED AT:	Darwin
HEARING DATE(s):	24 & 25 October and 14 & 15 November 2023
DECISION OF:	Judge Macdonald

CATCHWORDS:

CRIMINAL LAW – IDENTIFICATION - CRIMINAL RESPONSIBILITY – Recognition – Search and seizure – Knowledge - Rebuttable presumption – Proof beyond reasonable doubt - Inference – "*at the time of doing the act*" – "*knows that his conduct is wrong*" – 'material time' – *Criminal Code 1983* (NT) – ss 38A and 43AQ – Search of person – Police Administration Act – Youth Justice Act – Support person – Responsible adult – General Orders – Instructions – In the execution of duty.

Criminal Code Act 1983 (NT) ss 38A, 43AQ
Evidence (National Uniform Legislation) Act 2011 (NT) ss 114, 116, 135, 136, 137, 138, 165
Police Administration Act 1978 (NT) ss 27, 119, 123, 126A, 144
Youth Justice Act 2005 (NT) ss 10, 19, 20

Azzopardi v the Queen (2001) 205 CLR 50
BC v R [2019] NSWCCA 111
BDO v The Queen [2023] HCA 16
Chamberlain v R (No 2) (1984) 153 CLR 521
Coleman v Power (2004) 220 CLR 1
Director of Public Prosecutions v PM [2023] VSC 560
DPP v AM [2006] NSWSC 348
EL v R [2021] NSWDC 585
George v Rockett (1990) 170 CLR 104
Irani v R [2008] NSWCCA 217
KG v Firth [2019] NTCA 5
Knight v R (1992) 172 CLR 495
Mangurra v Rigby [2021] NTSC 6
Nguyen v The Queen [2007] NSW CCA 363
Parker v Comptroller-General of Customs (2009) 83 ALJR 494
Police v TU [2024] NYJC 2

Police v TV [2024] NTYJC 1
Queensland Bacon Pty Ltd v Rees (1966) 115 CLR 266
Rigby v ND [2022] NTSC 51
RJ v Dunne [2021] NTSC 32
Robinson v Woolworths Ltd (2005) 64 NSWLR 612
RP v The Queen [2016] HCA 53
R v Cassar [1999] NSWSC 321
R v Brotherton (1992) 29 NSWLR 95
R v Brownlowe (1986) 7 NSWLR 461
R v Em [2003] NSWCCA 374
R v Hall [2001] NSWSC 827
R v Hunt [2014] NTSC 19
R v Jesson [2009] NTSC 13
R v Lawrence [2016] NTSC 65
R v Leung and Wong [1999] NSWCCA 287
R v Nasrallah [2015] NSWCCA 188
R v Nguyen [2006] NSWSC 834
R v Palmer [1981] 1 NSWLR 209
R v Smith [1986] 7 NSWLR 444
Sherd v The Queen (1990) 170 CLR 573
Smith v The Queen (2001) 206 CLR 650
Stamp v The Queen [2012] NTCCA 15
Tasmania v Chatters [2013] TASSC 61
Tasmania v Seabourne [2010] TASSC 35
The Queen v BM [2015] NTSC
The Queen v Bonson [2019] NTSC 22
The Queen v Gehan [2019] NTSC 91
Timaepatua v Hutchinson [2023] NTSC 48
Tomlins v Brennan [2006] NTCA 5
Weissensteiner v The Queen (1993) 178 CLR 217

REPRESENTATION:

Counsel:

Police:	Ms K Smith
Defendant:	Ms J Cooper

Solicitors:

Police:	ODPP
Defendant:	NAAJA

Decision category classification:	B
Decision ID number:	[2024] NTYJC 3
Number of paragraphs:	88

IN THE YOUTH JUSTICE COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 22327596, 22314645
& 22314789

BETWEEN:

Police

AND:

TX (a youth)

Defendant

REASONS FOR DECISION

(Delivered 23 February 2024)

JUDGE MACDONALD

Background

1. In January and May 2023 the Defendant youth (TX) allegedly offended against Territory laws on three occasions giving rise to 12 charges (the Charges).[1] Eight of nine charges on file 22315789 were withdrawn on 14 November 2023, with an 'escape lawful custody' charge remaining extant on that file. The hearings were conducted over 24 and 25 October and 14 and 15 November 2023, with the evidence on file 22314645 proceeding first.[2] A range of legal issues were raised by TX's counsel in all three matters, both during hearing and in submissions, which are addressed below. However, TX was 13 years old at the time of alleged offending, giving rise to a threshold issue of criminal responsibility in relation to the Charges, it is appropriate to finally determine all of the Charges at the one time.[3]

2. Although the parties had not agreed to conduct the hearing on the basis that the issue of criminal responsibility (CR) should be determined first by preliminary or separate hearing, or

[1] Other than the 'escape lawful custody', the Charges may generically be described as 'unlawful entry', 'damage property', 'stealing', 'theft', 'unlawfully possess property' and 'assault police'. On the basis of the maximum sentences prescribed, all of the Charges may be characterised as objectively serious.

[2] The YJC also had the benefit of written submissions following the 4 November hearing, on most issues.

[3] It is noted that the phrase *doli incapax* describes a common law presumption which is not expressed in the Code. However, ss 38 and 43AP, and then 38A and 43AQ, of the Code respectively prescribe irrebuttable and rebuttable presumptions against criminal responsibility in relation to children under 12, and those of 12 or 13 years of age. Due to the state of the evidence and submissions as that 13 November 2023, on 16 February 2024 the parties were requested to advise the YJC whether either of them sought to be further heard in relation to the issue of CR or, alternatively, whether each of them had fully submitted on all issues.

that the hearings should proceed on the basis of 'agreed facts' for that purpose, counsel had been diligent and persistent in seeking to narrow the issues to those truly in dispute.[4] That included the parties agreeing facts for the hearing on 22317596 and the tender by consent of a redacted Statement of Officer Fitzpatrick on file 22315789, which served the purpose of agreed facts. The evidentiary situation on file 22314645 was more complex, with much of the evidence subject to objection, resulting in rulings on 14 November 2023, and below. That included in relation to identification, and search and seizure, with CR remaining as issue in dispute across all files.[5]

Criminal Responsibility (CR)

3. The legal principles and considerations relevant to determining the issue of CR in the Northern Territory have recently been referred to at length in the YJC, and need not be fully reiterated.[6] In submissions on 15 November 2023 counsel did refer to additional authorities, albeit those generally reiterated aspects of the leading authorities, or were examples of application by Superior Courts of the established principles.[7] The Court of Appeal's emphasis in *KG v Firth* [2019] NTCA 5 at [27] should, however, be highlighted;

> "*The categories of evidence which might be relevant to* [determination of CR] *include: any admissions made by the appellant; the nature of the alleged conduct (subject to the qualification that the presumption cannot be rebutted merely as an inference from the doing of the act); the circumstances surrounding the conduct, including any attempts at concealment or escape; and the appellant's background, including his education, upbringing, mental capacity and any previous criminal convictions. In RP v The Queen [2016] HCA 53 at [12], the plurality stated:*
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> *'What suffices to rebut the presumption that a child defendant is doli incapax will vary according to the nature of the allegation and the child. A child will more readily understand the seriousness of an act if it concerns values of which he or she has direct personal experience. For example, a child is likely better able to understand control of his or her own possessions and the theft of others' property compared to offences such as damaging public property, fare evading, receiving stolen goods, fraud or forgery. Answers given in the course of a police interview may serve to prove the child possessed the requisite knowledge. In other cases, evidence of the child's progress at school and of the child's home life will be required."*

4. The prosecution must prove the Defendant's knowledge to the standard of beyond reasonable doubt.[8] Context in determining a Defendant's knowledge was explained by the High Court in

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[4] The alternative approach of a separate or preliminary hearing on the issue of CR on the basis of 'agreed facts' proposed wholly and solely for the purpose of that determination was not availed of by the parties. The authorities applied in *Police v TV* [2024] NTYJC 1 at [27] to [30] may render that option more feasible in future matters.

[5] Remaining issues, in addition to CR, were identification, conduct or failure to prove elements, and police actions in entry, search and seizure plus arrest on file 22314645, and failure to prove elements on file 22315789.

[6] *Police v TV* [2024] NTYJC 1 at [24] to [26] and [31] to [39] and *Police v TU* [2024] NTYJC 2 at [4] to [12].

[7] *BC v R* [2019] NSWCCA 111, *RJ v Dunne* [2021] NTSC 32 and *EL v R* [2021] NSWDC 585.

[8] Regardless of the statement of Incerti J in *DPP v PM* [2023] VSC 560 at [67], another available characterisation is that of a defence, albeit that the evidentiary threshold borne by a defendant has already been furnished by the presumption, such that the starting point is for the Crown to disprove or rebut beyond reasonable doubt. By analogy, lack of "consent" is an element of the charge of assault, but regardless of any defendant raising consent at hearing, a lack of consent must always be proven beyond reasonable doubt by the Crown in order

RP v The Queen; "*Knowledge of the moral wrongness of an act or omission is to be distinguished from the child's awareness that his or her conduct is merely naughty or mischievous. This distinction may be captured by stating the requirement in terms of proof that the child knew the conduct was "seriously wrong" or "gravely wrong*", and "*The prosecution must point to evidence from which an inference can be drawn beyond reasonable doubt that the child's development is such that he or she knew that it was morally wrong to engage in the conduct. This directs attention to the child's education and the environment in which the child was raised*".[9] Similarly, a defendant youths "*intellectual and moral*" development requires close consideration in determining whether the element of knowledge is proven to the requisite standard.[10]

5. The sufficiency of the evidence will vary depending on the nature and seriousness of the allegation and matters subjective to the child. In particular, their age; maturity; cognitive and social development; education; personal experience and previous interactions with the justice system;[11] their family and formative environment, and social and cultural background. Overall, the court's attention must be directed to the intellectual and moral development of the particular child, in the contexts of the offending alleged and that cogent evidence of the requisite knowledge is required.[12]

The Evidence and Discussion

6. The Charges against TX for which the issue of CR is to be determined arose over the period 4 January to 22 May 2023, when he was 13 years of age. The evidence indicates that TX was arrested shortly following each of the incidents in May 2023, and then bailed. That was in the context of TX having been on bail or remand for various periods from September 2022.[13]

7. Oral and documentary evidence was adduced over 24 and 25 October and 14 and 15 November 2023. At hearing on 14 November 2023 I ruled various evidence sought to be tendered by the prosecution to be admitted and not admitted into evidence. Documents admitted were Education records due to their general importance[14], and a bundle of Bail Agreements and Remand Warrants.[15] Other evidence included, on file 22314645, a USB containing six CCTV and body worn footage (BWF) data files, *NTPF Instruction - Custody and Transport*, 34 photos, *General Order - Search Warrants*, and several statements of police officers and civilians (some of which are subject to objection).[16] Evidence on file 22327596 comprised

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to establish criminal responsibility. The scheme of Parts II and IIAA of the Code are also supportive of such an approach.

[9] *RP v The Queen* [2016] HCA 53 at [9]. The accepted principles regulating inferential reasoning generally apply; *Chamberlain v R (No. 2)* (1984) 153 CLR 521, *Shepherd v The Queen* (1990) 170 CLR 573 and *Knight v R* (1992) 175 CLR 495.

[10] *RP v The Queen* [2016] HCA 53 and *KG v Firth* [2019] NTCA 5 at [27].

[11] *Director of Public Prosecutions v PM* [2023] VSC 560 at 32

[12] The nature and extent of necessary lay and expert evidence will vary depending upon subjective and objective considerations. Some proceedings involving the issue are hard-fought and conducted and determined to the standards of counsel of perfection; see *Director of Public Prosecutions v PM* [2023] VSC 560 for example.

[13] Bail documents from 7 September 2022, and Remand Warrants from 14 October 2022, onwards comprised Ext P12 across all files.

[14] *RP v The Queen* [2016] HCA 53 at [9], [12] and [18], *KG v Firth* [2019] NTCA 5 at [26], [27] and [29], *Rigby v ND* [2022] NTSC 51 at [17] and *BDO v The Queen* [2023] HCA 16 at [16] and [42] and *Director of Public Prosecutions v PM* [2023] VSC 560 at [93] to [97]. Those records became Exhibit P10 for each proceeding.

[15] The authorities acknowledge the relevance of a youth's contact with and experience in the Criminal Justice System in assessing their knowledge and understanding.

[16] Exhibits P3, P4, P5, P6, and P7 to 9, respectively.

Agreed Facts, the Education records, that part of MFI11 which was admitted into evidence, and the bundle of Bail Agreements and Remand Warrants.[17] The evidence on file 22315789 is set out below.

8. A statement of SGT Motter-Barnard dated 18 July 2022 was sought to be tendered, but objected to on the basis that it comprised inadmissible opinion evidence, and that some content gave rise to unfair prejudice within the meaning of any of ss 135, 136 or 137 of the ENULA.[18] Paragraphs [7] to [50] of that Statement were excluded on 14 November 2023 on the latter basis, with the remainder to be ruled on in due course.

9. On consideration, paragraphs [1] to [6] contain relevant evidence within the meaning of s 55 of the ENULA, with aspects of [5] and [6] constituting opinion, concerning, presentation, changes in behaviour and aversions which appeared operative on TX. For the same reasons as apply to the relevant paragraphs of the second Statement of SGT Motter-Barnard referred to below, I admit paragraphs [1] to [6] of MFI11 and mark it as Exhibit P11 across the three proceedings.

10. A second Statement of SGT Motter-Barnard dated 10 May 2023 and a Statement of SGT Easton of the same date were also sought to be tendered by adaption of the process provided by s 33 of the ENULA.[19] All three statements included content relevant to the issues of identification and criminal responsibility, some of which can be characterised as opinion evidence. That evidence was variously objected to on the bases of relevance, inadmissible opinion and due to intentional influence. There was also the oral evidence given by the two officers at hearing on 24 and 25 October 2023.

11. It should be noted that, where either identification in the nature of "recognition" or criminal responsibility is in issue, the question of admission or otherwise of 'background' information contained in statements by members of police is problematic. Information necessary to establish recognition, or evidence concerning a youths contact with or experience in the Criminal Justice System, regardless of its likely probative value, holds a likelihood of being generally incriminating and prejudicial. That is, information which has been accumulated by a police witness through their previous contact with a defendant due to their service as a member. That concern is highlighted through acknowledging that diligent and vigilant members of police are naturally suspicious in the conduct of their duties, although this aspect can be addressed through directions and accordance of weight. The touchstone for ss 135 to 137 of the ENULA is 'unfairness', particularly through misuse. That risk is most prominent where a jury is responsible for deciding matters of fact.

12. One objection to 'recognition' evidence of both witnesses Motter-Barnard and Easton is on the basis of "*intentional influence*" within the meaning of s 114 of the ENULA. Without properly considering the extent to which s 114 may apply to the CCTV and what has arisen from it, I note that the first witness' evidence was that "*…it was **immediately** apparent that one of the four offenders depicted in the CCTV footage was* [TX]".[20] The second witness' evidence was "*I was*

[17] Exhibits P1, P10, P11 and P12.

[18] The Statement became MFI11 pending resolution of all objections.

[19] Exhibits P1 and P7. The Statements of two other officers, SC Rose and SC Couzens, were also sought to be tendered. They did not attend the hearing of 4645, such that no acknowledgement of s 33 of the ENULA was possible, and the contents of their Statements added nothing of relevance to the evidence ultimately before the YJC. Those statements are not admitted into evidence, and the marking of Ext P2 is rescinded.

[20] Exhibit P1 at [5]

*sitting at my desk approximately eight meters away when I heard a voice from the audio. I **stated straightaway** that's* [TX] *and walked over.*"[21] (**emphasis** added). It is common ground that other members of police present in the room who heard the audio but were not watching the footage said the same at around the same time. On balance, I consider the conclusion each of the witnesses came to was immediate, spontaneous and without influence of any other person. I take that view, regardless of the possibility that either or both witnesses simply jumped to conclusion, due to their familiarity with TX and the (superficial or otherwise) similarity between the audio and their knowledge (and in the case of SGT Motter-Barnard, what he saw). The objection under s 114 is not sustained.

13. The YJC was referred to a large number authorities in submissions concerning the admissibility or otherwise of the identification evidence of members Motter-Barnard and Easton.[22] That was on the issues of relevance, 'recognition', opinion, and unfair prejudice. An overlap between the foundational evidence seeking to establish the basis for the officers' 'recognition' of TX and in relation to TX's contact with and experience in the Criminal Justice System exists.

14. Having regard to the familiarity which witnesses Motter-Barnard and Easton have with the stature, physique, movement and voice of TX (including observing him on CCTV at, for example, the Casuarina Bus Station), and the quality and quantity of the CCTV, and having regard to their evidence concerning the extent of their contact with TX, I consider the evidence is generally relevant and admissible, and includes some opinion. Firstly, in my view the evidence does satisfy the exception provided by the High Court in *Smith v The Queen*;

> *"In other cases, the evidence of identification will be relevant because it goes to an issue about the presence or absence of some identifying feature other than one apparent from observing the accused on trial and the photograph which is said to depict the accused. Thus, if it is suggested that the appearance of the accused, at trial, differs in some significant way from the accused's appearance at the time of the offence, evidence from someone who knew how the accused looked at the time of the offence, that the picture depicted the accused as he or she appeared at that time, would not be irrelevant[23]. Or if it is suggested that there is some distinctive feature revealed by the photographs (as, for example, a manner of walking) which would not be apparent to the jury in court, evidence both of that fact and the witness's conclusion of identity would not be irrelevant."[24]*

15. The nature of evidence led against TX may be characterised as including 'distinctive features which would not be apparent to the factfinder'. Namely, the voice heard and walk or gait seen on the CCTV.[25] Due to the right to silence and that TX did not give evidence in the proceedings, and the static nature of defendants in the court room, the members' evidence is relevant and admissible. That is obviously more so the case in respect of witness Easton than witness

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[21] Exhibit P7.

[22] *R v Smith* [1986] 7 NSWLR 444, *R v Brownlowe* (1986) 7 NSWLR 461, *R v Brotherton* (1992) 29 NSWLR 95, *R v Cassar* [1999] NSWSC 321, *R v Leung and Wong* [1999] NSWCCA 287, *Smith v The Queen* (2001) 206 CLR 650, *R v Hall* [2001] NSWSC 827, *R v Nguyen* [2006] NSWSC 834 at [22] to [42], *Nguyen v The Queen* [2007] NSW CCA 363 at [9] to [39], *Tasmania v Chatters* [2013] TASSC 61, *Irani v R* [2008] NSWCCA 217, *Stamp v The Queen* [2012] NTCCA 15 at [19], and *R v Nasrallah* [2015] NSWCCA 188.

[23] *R v Palmer* [1981] 1 NSWLR 209.

[24] (2001) 206 CLR 650 at [15].

[25] Exhibit P3 – Vape_CCTV1, 2 and 3. It is also noted that some CCTV in evidence (in which identification is not an issue) also includes TX's voice, however he is particularly elevated, distressed and angry in that footage, such that comparison would be less certain.

Motter-Barnard, because the latter witness' evidence was confined to matters of stature and voice. Witness Easton's evidence included that TX has "*got a distinctive walk*" and "*a certain gait and, when he runs, you can tell*" and "*you see him on CCTV, and the way he walks - you can tell it's him*".

16. I also consider aspects of that evidence is opinion in nature, and that the approach adopted in *Nguyen v The Queen* [2007] NSWCCA 363 at [29] to [34] in relation to ss 78 and 79 of the ENULA applies here.[26]

17. There remains the issue of prejudice, on which I note 'unfairness' is the touchstone. On the basis that a member of police is capable of providing both identification evidence in the form of 'recognition', and evidence going to a youth's contact with and experience in the Criminal Justice System,[27] the inherent prejudice which attends those forms of evidence may generally be addressed by directions and according of weight, so as to avoid the unfairness contemplated by s 135 to 137 of the ENULA.[28] Despite the legitimate concern regarding some aspects of the evidence of witnesses Motter-Barnard and Easton, in my view the presumption of innocence together with careful consideration of any prejudicial evidence put before the YJC provide definite protection. That includes through a forensic lens appropriate to the consideration of professional investigators' opinions, whose natural focus includes to suspect. The concern in relation to contact with law enforcement authorities may also be ameliorated to some extent by the existence of the presumption against criminal responsibility.

18. The 'recognition' by each witness is undoubtedly genuine. However, having regard to the quality of both the video and audio, and regardless of the very clear similarities between TX's physique and voice depicted in other CCTV tendered in the proceedings[29] (so more so for the witnesses, due to their experience), and the detail of peculiarity of gait from one witness, the evidence of officers Motter-Barnard and Easton is incapable, on its own, of constituting proof beyond reasonable doubt. Other evidence would be required.

19. On a related aspect, I note the reference by SGT Motter-Barnard to some CCTV footage recorded shortly prior to 9 May 2023, which was not produced or tendered in the proceeding. Without considering the witness' conclusions drawn in relation to that viewing, the CCTV would clearly have been the best evidence. Although not seeking to penalise the prosecution, I decline to have regard to any evidence provided or given in reference to that CCTV, including [7] of Exhibit P1. The situation may have been otherwise had some explanation comprised part of the evidence.

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[26] The earlier dissenting or perhaps lone judgment of his Honour Justice Kirby in *Smith v The Queen* (2001) 206 CLR 650 is noted. However, that approach was not followed in *R v Stamp* [2012] NTSC 18, or applied by the NT Court of Criminal Appeal in *Stamp v The Queen* [2012] NTCCA 15.

[27] The reference to "*previous criminal convictions*" in *KG v Firth* [2019] NTCA 5 at [27] is noted, however the prosecution did not seek to tender any Antecedents or Information for Courts reports. Section 136 of the YJA is simply a modification of the usual procedure adopted following a finding of guilt.

[28] So directions that the evidence ultimately admitted can only be relevant wholly and solely for context in relation to the respective issues of identification and asserted 'knowledge of serious wrongness', and cannot establish any tendency, coincidence or bad character, are given. In addition, in relation to purported identification, directions under s 116 and 165 of the ENULA are given as to caution and unreliability, including due to the inherent suspicion of diligent officers.

[29] Exhibit P3 - DMB_REARDON_Arrest_10_05_23

20. Associated with the concerns above is any decision maker's experience with and knowledge of a defendant. The prosecution submission that the YJC can have regard to and take into account "*its own knowledge and experience of* [a] *young person*" is not accepted or acceded to.[30] To do so could lead to either umbrage or favour by a decision maker, and should be avoided.[31]

21. TX also objected to evidence concerning the entry to, searches of, and items seized at two addresses in the suburb of Malak. TX's mother was present at the first address (House 1) when witness Motter-Barnard entered and searched on 9 May 2023, and TX was present at the second address (House 2) when attended by the witnesses on 10 May 2023. It is clear from the BWF that the primary purpose of police attendance at House 1 and House 2 was to arrest TX.[32] It is also my conclusion that entry to both premises was with the permission of the lawful occupiers of those premises. The inevitable inequalities between members of police and the public are noted, as is that the permission granted at House 1 bordered on 'passive consent'. The permission granted in relation to House 2 was much clearer and unequivocal, despite that the words spoken by the lawful occupier could not be heard and did not comprise part of the evidence. SGT Motter-Barnard's advice to other members in attendance as to his understanding of what he had been told and the ambit of the consent was spontaneous, uncontrived and is accepted.[33] The further issue of compliance or otherwise with *General Order - Search Warrants* is addressed below.[34]

22. Section 123 of the *Police Administration Act 1978* (PAA) confers broad authority on members of NT Police to arrest any person without warrant, provided they "*believe on reasonable grounds that the person has committed … an offence*". The arrest ultimately effected on 10 May 2023 was not challenged for want of reasonable grounds. Regardless, I consider members of NT Police had reasonable grounds for that purpose on 9 and 10 May 2023. Section 126A of the PAA then empowers a member of NT Police to enter any place without warrant for the purpose of arrest if they believe on reasonable grounds "*that the person is at the place*". That is, without the permission or consent of the lawful occupier of the relevant place. In my view the members who entered House 1 had reasonable grounds to 'suspect' but probably not to "*believe*".[35] Although the members thought TX could well be hiding at House 1, unless they were subjectively and objectively satisfied that TX's was at least more likely to be there than not, they did not hold a 'reasonable belief'.[36] If I am wrong in that, the members had lawful authority through s 126A to enter House 1, regardless of what they considered the source of that authority to be at the time or in evidence at hearing.[37]

23. Despite my view on the legal status of the members' state of mind, and regardless of the extent to which the permission to enter was "*informed consent*", the members who attended House 1

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[30] Prosecution Submissions of 10 November 2023 at [44]. I am familiar with TX's appearance, voice and conflicts within the Criminal Justice System, and place that knowledge aside.

[31] The YJC was not referred to any authority in support, and it is noted that the YJC is, by s 49 of the YJ Act, is closed to the public, so any suggested "notice" through s 144 of the ENULA is not possible.

[32] Exhibit P3.

[33] "You can break the door, or unscrew the window to get in".

[34] Exhibit P6.

[35] *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266, *George v Rockett* (1990) 170 CLR 104 and *The Queen v Gehan* [2019] NTSC 91 at [34] to [50] and *R v Wilson-Anderson* [2020] NTSC 39 at [28].

[36] *Timaepatua v Hutchinson* [2023] NTSC 48 at [35]

[37] *R v Jesson* [2009] NTSC 13 at [45], and the principle established by *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 426 concerning 'mistaken authority'.

on 9 May 2023 did believe on reasonable grounds that something "*connected with an offence*" was inside the premises. Both the oral evidence and body worn footage make clear that their predominant purpose was to arrest TX, but also that they advised the occupier and TX's mother that there was evidence of the relevant stolen property outside at the front of the premises.

24. Section 119 of the PAA provides for entry and search of premises without warrant. That authority is, however, conditioned on the existence of "*circumstances of such seriousness and urgency as to require and justify immediate search or entry without the authority of … a warrant*" issued under ss 117 or 118 of the PAA. The decision of *Timaepatua v Hutchinson* considered the issue of searches without warrant, albeit in the context of the 'reasonable practicability' or otherwise of obtaining a warrant in the circumstances there.[38] It is noted that the offending being investigated here comprised serious offences, and that the contraband was of definite value and marketable, and relatively small and portable, and there were a number of people at House 1. A general imperative of preservation of evidence (by seizure or securing the premises) existed, ranged against the difficulties which could well attend leaving the premises in order to obtain a warrant. The members found themselves 'at the scene' and any application for a warrant would give rise to definite delays and other difficulties. In any event, despite the members' knowledge, I consider s 119 was not activated until the carton of what was said to be Vapes was located under TX's mother's bed.

25. Having regard to those matters, and the principle referred to at footnote [37], and that it is open to conclude on the balance of probability that both the members' entry to House 1 and their seizure of items found there was with the permission of the occupier or persons in control of the premises, I consider the entry, search and seizures were lawful.

26. In relation to House 2, SGT Motter-Barnard had a reasonable belief for the purpose of s 126A of the PAA. However, TX exited that House and was then arrested outside, such that s 126A became irrelevant.[39] It is also clear from the BWF that SGT Motter-Barnard reasonably believed that stolen goods were inside the premises. Similar circumstances to those which prevailed at House 1 as set out at [24] above existed, but to a more acute extent due to the age of those there. Similarly, I find that the entry, search and seizures at House 2 were lawful.

27. TX through his counsel also contended that failure to comply with *General Order - Search Warrants* should render the entries, searches and seizures unlawful. The Courts have generally extended some flexibility in the application of General Orders, albeit that clear, intentional or egregious breaches can readily amount to impropriety for the purpose of s 138 of the ENULA.[40] I also note in relation to enforcement of minimum standards expected of police forces, that "*the conduct must not merely blur or contravene those standards in some minor respect*".[41] Although the member's perfunctory attitude and approach at House 1 'sailed close to the breeze', I consider that the failures to strictly comply with [27] and [30] of the General Order did not require that the evidence be excluded under s 138 of the ENULA.[42]

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[38] [2023] NTSC 48 at [32]

[39] There was no evidence from NT Police witnesses that they believed any of the others apparently involved in the offence they were investigating was inside the house.

[40] *R v Em* [2003] NSWCCA 374, DPP v AM [2006] NSWSC 348, *R v Hunt* [2014] NTSC 19 and *The Queen v Bonson* [2019] NTSC 22.

[41] *Robinson v Woolworths Ltd* (2005) 64 NSWLR 612 at 618 and *Tasmania v Seabourne* [2010] TASSC 35 at [27].

[42] *R v Lawrence* [2016] NTSC 65 at [93] to [114].

28. The evidence admitted at hearing also included school records produced by the Department of Education[43] (Education records). Acceptance of the Education records into evidence was significant, due to the importance of a child's education in seeking to determine whether they 'knew that their actions were seriously wrong as a matter of morality'.[44]

29. The Education records contain information highlighting that TX's education has been sporadic and deficient and that, even when engaged, his performance is well below average. Those records also contain some information supporting a conclusion TX has had a difficult and traumatic upbringing, marred by the all too common blights which infect the lives of the majority of children appearing before the YJC.

30. Having regard to the school reports, and despite his low academic achievement which may be attributed to some undiagnosed neurodevelopmental impediment, it is also my conclusion that TX has a close to average intelligence. Many of the difficulties and challenges he has experienced in the school environment appear to be due to the ADHD he suffers from.[45] Consequent problems in concentration, staying on task, and behaving in an appropriate and regulated manner are all features of TX's presentation at school. I also note that, despite conflict with some peers, TX was well liked, personable and socially capable in the school community. While at school, TX was particularly adept and engaged in sporting activity, and activities involving ICT.

31. Of definite relevance is the information comprising an Incident Summary, being 36 pages at tab 3 of Exhibit P10, and the Behaviour Details Report at tab 4. TX has been suspended from school on various occasions, with some incidents being fairly described as serious. To that extent, school authorities had sought to sheet home to TX the consequences of anti-social behaviour.

32. It is also noted that the Education Records only span the period 2019 to 2021, with no records beyond that date. No evidence was adduced in explanation of that vacuum, and TX did not press for further disclosure at hearing, so the Charges and issues arising must be determined on the basis of the available evidence. Regardless, I do take notice that children's cognition, insight and understanding develop as they mature. I particularly take notice of the proposition that insight and understanding develop through, amongst other things, experiential learning.

33. Given the starting point that each and every child under 14 is presumed to not be criminally responsible for their actions, much of the content of the Education records comprise evidence running counter to a finding that TX properly knew the wrongness of his actions.[46] However, other relevant evidence includes the facts and circumstances comprising each incident underpinning the Charges, and TX's experience in and contact with the Criminal Justice System.

Proceeding 22315789

34. This matter comprised one count of 'escape lawful custody' from 22 May 2023.[47] In addition to the Education Records and SSGT Motter-Barnard's statement,[48] other evidence tendered

[43] Exhibit P10 across all files, essentially constituting business records.
[44] See authorities at footnote [14].
[45] See the RDH and School Psychologist reports in Exhibit P10.
[46] But noting the Court of Appeals guidance in *KG v Firth* [2019] NTCA 5 at [29].
[47] The remaining eight counts were withdrawn on 14 November 2023.
[48] Exhibits P1 and P11 respectively.

comprised a Statutory Declaration of NT Police Officer Fitzpatrick which essentially constituted Agreed Facts, and BWF of the incident.[49] TX was arrested by Officer Fitzpatrick at a retail outlet of Casuarina Square shopping Centre in relation to "*breaches of bail over the weekend*".[50]

35. It was submitted in defence of the Charge that because TX remained within Officer Fitzpatrick's view at all times and did not effect his purpose of escape, the charge of 'escape lawful custody' could not be made out. That is, an essential element was absent, so could not be proven. Associated with that contention was whether TX's actions could constitute an "*attempt*", attracting the operation of ss 4 and 277 of the Code. Due to my conclusion in relation to the threshold element of criminal responsibility below, those issues need not be considered and determined.

36. It is noted that the incident of 22 May 2023 was the latest in time of the matters for which TX was before the court. He had been arrested in relation to the incident of 9 May 2023 and, most relevantly, had been arrested on various occasions prior to that, including having spent time on remand at Don Dale Youth Detention Centre as a result.[51] My general conclusions in relation to what may be made of the Education records are set out above. The significance of TX's contact with and experience in the Criminal Justice System must also be considered.[52] It is also noted that, regardless of how heinous or wicked offending may objectively appear, that of itself will be insufficient to ground a finding of CR against a youth.

37. On 22 May 2023 shortly following arrest TX returned an item of recently stolen property to Officer Fitzpatrick, and then asked what he was under arrest for. His actions in slipping the grip of the officer followed soon after. I consider TX's actions were spontaneous, not the subject of any planning, and could well have been a basic 'fight or flight' response carried out in an absence of any rational reasoning. That is not to say that, if so, it could not be concluded to the necessary standard that TX 'knew his actions were seriously wrong'.

38. However, SGT Motter-Barnard and others evidence concerning the relationship and rapport which had developed over time between members of NT Police and TX is also relevant.[53] It is not my conclusion that TX simply saw the situation of his arrest as part of 'a game', and no doubt he was in trepidation at the spectre of being lodged at the Watch-house and possible remand at DDYDC. Reasonable inferences inconsistent with the requisite knowledge which TX must be proven to have held are nonetheless available. For example, his actions may have been the product of his 'cat and mouse' attitude to his dealings with members of police, or blind panic, or a combination of both. Associated with these, TX's "*direct personal experience*" in his interactions with members was likely a rudimentary one of evasion and avoidance in order to sustain his liberty wherever possible, rather than a rational and logical consideration of 'right from wrong' followed by conscious choice.[54]

39. In the circumstances, including the lower level of moral culpability attending the offence, I am not satisfied beyond reasonable doubt that TX knew his actions in extricating himself from the

[49] Exhibits P1 and P2.
[50] Exhibit P1 - Statement of Officer Fitzpatrick at [6].
[51] Exhibit P12
[52] *KG v Firth* [2019] NTCA 5 at [27] and *Director of Public Prosecutions v PM* [2023] VSC 560 at 32.
[53] Exhibits P1 and P11 and oral evidence.
[54] So the reverse of the High Court's analysis in *RP v The Queen* [2016] HCA 53 at [12].

Officer's grasp then running was 'seriously wrong as a matter of morality'. On that basis TX cannot be found criminally responsible for the alleged offence. The Charge on 22315789 dismissed.

Proceeding 22327596

40. This matter comprised three counts, being damage property, unlawful entry and stealing at a premises in Bayview on 4 January 2023. In addition to Agreed Facts, the evidence comprised the Education records, SGT Motter-Barnard's 2022 statement, and a bundle of remand warrants and bail undertakings.[55] The Agreed Facts included that TX's palm print was found on a shoe rack inside the premises adjacent to the point of entry.[56] The prosecution did not adduce any other fingerprint or DNA evidence, for example from the bottles of alcohol which the offenders sought to steal but left at the scene, or from an iPad stolen which was subsequently recovered at the Marrara Sports Grounds. No photographs of the property damage alleged or CCTV was available.[57]

41. In my view, given the location of the palm print found, there is no reasonable doubt that TX was one of the persons who damaged the property, unlawfully entered and sought to steal the alcohol and stole the iPad and $750. Also, that for the purpose of the 'fault elements' of the offences, those responsible were acting in common. If that simple analysis were insufficient, given that TX did not give evidence and is the only person who could explain the location of the palm print, I would consider whether the *Weissensteiner* principle might be applied, including with an appropriate self-direction.[58]

42. As with all of the Charges, the prosecution must prove CR in relation to TX. The incident of 4 January is the first in time across the three files heard. It is clear from Exhibit P12 that TX had been both arrested and remanded on several occasions in relation to allegations which predated January 2023, including for property offending. Certainly contact with and experience in the criminal justice system can provide good evidence that a youth has come to know that particular conduct is 'seriously wrong', despite that the complexities inherent in that proposition have been recognised by Superior Courts.[59]

43. However, despite there is no doubt that TX was one of the persons who entered the relevant premises on 4 January 2023 and was involved in the offences the subject of the Charges, the evidence does not disclose the nature and extent of TX's involvement, including whether he or someone else damaged the property in order to gain entry. I also consider that, due to the imputation of culpability involved, there may be some difficulty in application of the doctrine of 'common purpose' in the assessment of CR.[60]

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[55] Exhibits P1, P10, P11 and P12 respectively.
[56] Exhibit P1 at [5], [13] and [14].
[57] From which I infer, due to the DPP duties of disclosure and conduct, that samples were not taken and processed.
[58] *Weissensteiner v The Queen* (1993) 178 CLR 217 at 229, and *Azzopardi v the Queen* (2001) 205 CLR 50 at 75, noting that s9 of the *Evidence Act 1939* (NT) was repealed in 2013, and that s20 of the ENULA may be available, other than to a prosecutor.
[59] For example, *Director of Public Prosecutions v PM* [2023] VSC 560 at 32.
[60] It is noted that CR may be considered a threshold issue, separate and discrete from elements generically described as 'conduct'.

44. There is some appeal in the proposition that on 4 January 2023 TX must have known the serious wrongness of damaging property in order to then enter and steal at night time, due to his previous interactions with the Criminal Justice System. However, I am not satisfied beyond reasonable doubt that TX 'knew his actions were seriously wrong' in relation to the Charges. Had further evidence indicating the manner and extent of TX's involvement been available, such as CCTV, the situation may well have been different. The Charge on file 22327596 is dismissed.

File 22314645

45. This proceeding comprised seven counts in the nature of property offending and one of 'assault an officer in the execution of their duty', arising on 9 and 10 May 2023. Various further issues, in addition to those dealt with on a *voir dire* basis above, arise for determination in this proceeding. Principally as to CR, and identification of TX as the youth seen in the CCTV, and in relation to the personal search of TX on 10 May 2023 by SGT Easton, said by the prosecution to be in the execution of duty. The prosecution case relies heavily on the YJC applying inferential reasoning, including in relation to issues generally described as 'conduct'.[61]

46. Assuming TX is the youth depicted in the CCTV, the issue of CR is common across all counts alleged on file 22314645, and the considerations and analysis set out at [42] to [44] above are noted. Although TX's background, education, upbringing, and intellectual and moral development, as at 9 May 2023 would not have been superior to the state of those matters on 22 May 2023, other differences do exist. In particular, the seriousness of TX's actions said to constitute the offences, the role he played in the incident, and the obvious measure he employed to avoid detection. Not only was the incident of 9 May 2023 particularly significant and serious, involving a high level of 'violence' (being the use of the vehicle to gain entry to the premises), but TX clearly adopted a leadership role.[62] He was the first to enter the premises, and offered encouragement to others to offend as they did.[63] Despite acting jointly or in common, TX was clearly not being led. That he sought to conceal his face from identification by use of a T-shirt or the like compounds those features. Although far from conclusive, TX's hurried and hectic movement ferrying goods out of the store does corroborate my conclusion on the state of TX's knowledge.

47. It can also be readily concluded that TX's knowledge of and experience in the Criminal Justice System was consistent throughout May 2023. At that time, and despite that he would not yet have been confronted with the allegations from the incident of 4 January 2023[64], TX had accumulated a considerable number of adverse contacts with law enforcement authorities. That included arrests, custodies at the watch-house, and at least two significant periods on remand that DDYDC.[65]

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[61] *Chamberlain v R (No. 2)* (1984) 153 CLR 521, *Shepherd v The Queen* (1990) 170 CLR 573 and *Knight v R* (1992) 175 CLR 495.

[62] Without seeking to damn TX with faint praise, the timing of his entry does indicate that he was not the driver of the vehicle.

[63] Exhibit P3 - "*C'mon you mob*" heard at the beginning of the CCTV.

[64] The nature and obtaining of the evidence in that proceeding resulted in the charge being brought in August 2023.

[65] Exhibit P 12.

48. Having regard to the available evidence and the principles which regulate a finding of CR, I consider the prosecution has proven beyond reasonable doubt that TX knew his actions on 9 May 2023 in breaking into and stealing from the Super Vape Store were seriously and morally wrong.

49. The issue of identification also attends, to a greater or lesser extent, each and every count comprising the Charges on File 22314645. As noted above, the evidence of members Motter- Barnard and Easton is relevant and admissible, but does not rise to the level of proof beyond reasonable doubt. The warning or directions required by ss 116 and 165 of the ENULA concerning the caution required and inherent unreliability of identification evidence are particularly apt. It is noted that those considerations also apply to tribunals of fact, albeit that my conclusion is simply that (despite his face being partially concealed by fabric) the youth depicted on the CCTV bears a definite similarity to TX, in terms of physique and the shrill falsetto voice heard on both the three CCTV data files of 9 May 2023, and on the BWF.[66] That is, the CCTV footage is, in my estimation, very consistent with the youth being TX, but no higher.

50. There is also circumstantial evidence relevant to the issue of identification. A definite similarity exists between the shorts worn by the youth in the CCTV and those worn by TX on 10 May 2023 when he exits House 2 to surrender to arrest. That is in terms of their length, and that both shorts are clearly of weighty fabric. The shorts at House 2 are obviously worn denim or heavy cotton. Some similarity also exists in relation to the runners, in that they are black, with the vamps including reflective panels.[67] The relevant youth on the CCTV is also wearing a black NY Yankees baseball cap, including a reflective circular sticker in the middle of the peak. An identical cap was seized at House 2.[68]

51. In addition, two large wholesale size cartons addressed to the "*Super Vape Store*" were found outside House 1, where TX's mother had slept on 9 May 2023. I accept, on the basis of the BWF, that further small cartons of vapes were located and seized inside those premises. A large number of the vapes in various states, ranging from bulk packaged to unpacked individual items were located and seized at House 2, following TX's arrest at those premises. Other youths were also present at House 2 at that time, however none of them were the relevant youth seen on the CCTV recorded the day before.

52. There is direct evidence of the provenance of the vape cartons at House 1, with the evidence at House 2 being circumstantial. However, a probable albeit circumstantial connection exists between each piece of the evidence referred to.

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[66] Exhibit P3; with headphones and good volume, "*Come on you mob*" and a couple of other utterances are heard on the CCTV. The footage of the personal search of TX on 10 May 2023 prior to being lodged in the cage of a divisional van also depicts TX's voice, albeit that he was heightened and distressed at that time.

[67] Portions of the CCTV and photo [32] of Exhibit P5.

[68] Although I do not doubt the genuineness of the investigating member's belief at [18] of Exhibit P1, it is not open to simply conclude that the shorts and running shoes worn by the youth in the CCTV are those worn by TX on 10 May 2023.

53. In the circumstances of what can be seen and heard on the CCTV[69] (and BWF of the personal search), together with the circumstances and nature of the various items located and seized at House 1 and 2 referred to above, and similarities in attire, I am satisfied beyond reasonable doubt that the relevant youth depicted on the CCTV is TX.

54. It is also necessary to deal with issues concerning 'conduct' in relation to the Charges. Count 1, 'dishonestly drive without consent', was properly conceded by the prosecution to be unsupported by any evidence. That account is dismissed.

55. Count 2 alleged 'burglary' aggravated by 'commissioned in company' and 'possession of an offensive weapon'. I note TX is the small person depicted in the CCTV, and that three other youths are clearly involved. All who entered were clearly acting in concert, and each of their actions immediately following what I infer was the collision of a vehicle with the front doors of the premises, speak for themselves. The operation and effect of s 43BG and 43BGA of the Code apply to the obvious and concerted actions of TX and at least two male accomplices, despite that the female youth might be described as an observer. The substantive charge and aggravating circumstance (i) is made out. Aggravating circumstance (ii) is dismissed on the basis of analysis in *Tomlins v Brennan* [2006] NTCA 5.[70] TX and others' actions were predicated on the premises being unoccupied at the time the vehicle was driven into the doors. Regardless that a motor vehicle could constitute an "*article*", it was not 'adapted to cause injury or fear of injury' to any person in its use. TX is guilty of count 2, but with aggravating circumstance (ii) being dismissed.

56. In relation to the alleged 'theft' comprising count 3, TX can be clearly seen on the CCTV taking significant amounts of property for himself or others, which property belonged to the Super Vape Store, and I do infer that at least the vast majority of the vapes seized at House 2 were from that retail outlet.[71] Various of the photographs comprising Exhibit P5 also support this conclusion, and that the value of the property stolen was not insignificant. It is not my conclusion that the particular of *"$30,000*" is proven, or must be proven in order to establish guilt. Rather, any guilt found can only be to the extent of evidence to the necessary standard. I consider *May v O'Sullivan* (1955) 92 CLR 654 applies to elements of any offence, but not to particulars such as asserted then unproven value. TX is guilty of count 3 in respect of property of unspecified value.

57. In relation to count 4, 'damage property', the premises were clearly and obviously damaged for the purpose of entry by a white motor vehicle, the appearance of which is consistent with other evidence.[72] Akin to the analysis above in relation to count 3, and noting that TX was acting

[69] I have also not ignored the 'recognition' evidence of witnesses Motter-Barnard and Easton. However, due to the perspectives referred to, and that a person's gait could only be indicative not definitive, I have accorded their evidence little weight.

[70] Although that authority concerned whether an animal could constitute an "*offensive weapon*", the intended operation and effect of the section in light of relevant concepts was discussed.

[71] No doubt one or more youths at House 2 had a vape prior to 9 May 2023. However, the preponderance and, in some cases, packaging of the vapes found at House 2 generally belies pre-existing personal use.

[72] During the first 10 seconds of CCTV data-file No.1 of Exhibit P3 the vehicle can be heard to accelerate the collide with the doors, and is then seen (through the glass entrance doors to the Super Vape Shop) being parked outside. See also service station footage and relevant photos in Exhibit P5.

jointly or in common with at least two others, TX caused (with others) the damage to the premises. TX is guilty of count 4.

58. In relation to count 5, 'dishonestly appropriate Toyota CE24YH', although I infer TX arrived at the relevant premises in a motor vehicle and departed the premises in that vehicle, there is no evidence of what role he may have taken in that regard or, with one exception, what that vehicle was. I have little doubt TX was aware that the vehicle used against the premises was stolen, and have found he was complicit in that use. However, except for that use, there is no evidence of precisely what involvement TX had in the driving or disposal of the vehicle used or (other than brief CCTV footage, and photos in Exhibit P5), what that vehicle may have been. Even accepting that the vehicle depicted in Exhibit 5 was the vehicle used, I have some reasonable doubt concerning whether the extent of the damage was sufficient to make out the appropriation essential to the charge. I find TX not guilty of count 5.

59. In relation count 6, 'possess stolen property', I do infer that the vast majority of the vapes found at House 2 at the time of TX's arrest had been stolen from the Super Vape Shop. Due to other findings above, TX obviously knew they were stolen. I find TX guilty of count 6.

60. In relation count 8, 'damage property, being Toyota CE24YH', the connection between the said damaged vehicle, and TX and the incident for which he is charged can only be inferred.[73] That is through the evidence of SGT Motter-Barnard.[74] Taken as a whole, I consider no other reasonable inference is open on the evidence. I find TX guilty of count 8.

61. Determination of count 7, 'unlawfully assault a police officer', is not straightforward. The events comprising the episode which culminated in TX clearly spitting at SGT Easton from the cage on the police vehicle, with some of the saliva striking his face, are depicted on the relevant BWF in Exhibit P3. It may be seen that SGT Easton and others are seeking to conduct a personal search of TX, in order to identify any items he may have had on his person. That included the possibility of a knife and, on TX's own admission, did include a vape.

62. Unsurprisingly, the evidence of witnesses Motter-Barnard and Easton was that such searches are carried out routinely prior to placing any prisoner into a caged vehicle. It is also clear from the BWF that force in various forms was being employed by the relevant members. That included exterior touching in the nature of 'pat search' by members of TX's waist, pelvic area, and rear. The searching culminated with SGT Easton seeking to pull TX's shorts down below the waist, which included releasing the drawstring securing those shorts. SGT Easton's evidence included; "[TX] *was wearing two pairs of shorts and while we were holding him I pulled his top pair of shorts down to his thigh area to see if there was any other item secreted in his shorts*".[75]

63. From the outset, TX was heightened, distressed and uncooperative, including because he objected through an apparently homophobic perspective to being searched by another male.

[73] I note the earlier findings that TX was acting jointly or in common with the other male offender, and that TX arrived at and departed the Super Vape Shop in the vehicle used to enable entry to the premises.
[74] Particularly Exhibit P1 at [8] to [10] and photos 1, 2 and 33 to 36 of Exhibit P5 (plus a glimpse in Exhibit 3).
[75] Exhibit P7 at [14].

However, TX did offer (in his own way) on several occasions to retrieve and surrender the offending item from his shorts.[76]

64. Members of police are legally justified in the application of force to effect an arrest provided the force used is not "*unnecessary*".[77] The obverse of the premise is that 'unnecessary force' is not justified, and may be unlawful. I consider that the justification provided by s 27 persists for the duration of a prisoner's custody, rather than only at the time that hands are laid on, including due to s 27(b). The phrase "*unnecessary force*" is defined by s 1 of the Code to mean; "*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 analysis of her Honour Justice Kelly in *Mangurra v Rigby* [2021] NTSC 6 at [34] to [36] is noted and respectfully adopted. In addition, members of police are duty-bound to comply with any other legislated prescriptions which may regulate the proper and lawful execution of their duties. That includes any relevant provisions of the PAA and YJ Act. Use of force by a police officer which exceeds limits governed by legislation or the common law is unlawful.[78] Lastly, despite their status being less than an 'instrument of legislative character'[79] and not constituting "*an Australian law*",[80] members of police are duty-bound to have some regard to General Orders and Instructions issued by the Commissioner under s 14A of the PAA.

65. Due to the proposition that unlawful conduct takes an officer outside the proper execution of their duty, and particularly because 'in the execution of duty' is an element of count 7, the prosecution bears an onus of proving beyond reasonable doubt that, at the relevant time, SGT Easton was acting in the proper execution of his duty. I consider that may include proving that the force applied to TX was not unnecessary.

66. It is clear from the oral evidence of SGT Easton (and SGT Motter-Barnard) that he considered none of the method, location or force used in the personal search of TX was inappropriate or unnecessary. Similarly, that identifying and securing the attendance of an adult who could be responsible for or supportive of TX at that time was not feasible or appropriate in the circumstances. In particular, no adult was present at House 2, TX could have had evidence secreted on his person which could have been lost through any delay, and TX may have been armed, with delay unacceptably increasing risk to TX and attending members. In SGT Easton's view conduct of the personal search was urgent, and the manner of its conduct was necessary and appropriate.

67. The combined sum of the witnesses' evidence, that the personal search was conducted to retrieve the vape which TX said he had, and any other potential evidence which may have been on his person, and for any weapon which TX may have secreted, is accepted.

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[76] That could not be a complete answer to the members' legitimate concerns. The subsequent advent of 'wanding' may become relevant in the future.
[77] Section 27 of the Code.
[78] *Coleman v Power* (2004) 220 CLR 1 at [117].
[79] See distinctions established through the *Interpretation Act 1978*; ss 4, 20 and 61, and interrelated definitions in s 17.
[80] *The Queen v BM* [2015] NTSC at [66], *R v Lawrence* [2016] NTSC 65 at [112] and [113] and *The Queen v Bonson* [2019] NTSC 22.

68. It is also accepted that ss 119 and 144 of the PAA provide at least two species of personal search. However, on my reading s 119 is intended to operate prior to any arrest having been effected under the authority provided by ss 121 or 123 of the PAA. Section 144 of the PAA provides a broad power to search a person in lawful custody, which TX was.[81] On its face, s 144 applies to adults and youth alike. The YJC was not provided with a copy of the General Order guidelines which have undoubtedly been issued under s 16 of the YJA, and they do not appear to be published such that the YJC could refer to them as a "*statutory instrument*".[82]

69. Section 144(3) governs the circumstances in which a member of police can lawfully effect the removal of a prisoner's clothing. Its terms are directed to securing clothing as evidence of the commission of an offence, rather than the removal of clothing in order to ascertain if the prisoner has other evidence or a weapon secreted on their person. I also note that the process contemplated by s 144(3), at least initially, is that the prisoner be requested to remove their clothing of their own volition. Lastly, s 144(5) is directed to the point in time at which a prisoner is received at a custodial facility, which does not include the cage of a police vehicle. If I am wrong in that, for reasons set out below, the YJ Act nonetheless applies.

70. Crucially, s 144(1) authorises a member to "*use the force that is reasonably necessary to conduct the search*". On one characterisation, that would include any force not regarded as 'unnecessary for and disproportionate to the occasion'.

71. Provisions of the YJ Act must also be considered. The prosecution contends that s 19 of the YJ Act does not apply on the basis that the search was not conducted "*as part of an investigation of an offence*". I note the concept of investigation, and take notice that investigations do not conclude upon the arrest of a suspect. The material phrase does not have any narrow meaning, such as 'conducted in order to obtain evidence of an offence'. In any event, it was the members' evidence that one basis for the conduct of the search was to possibly obtain further evidence. As it was, the vape which TX advised he had may possibly have been from the Super Vape Shop.

72. Section 19 of the YJ Act may be considered a 'specific provision', and postdates s 144 of the PAA. Section 12 also makes clear that the provisions of Part 2 of the YJ Act apply to the extent of any inconsistency with the provision of another Act. I consider that, in relation to youths, the exercise of the power under s 144 of the PAA is conditioned on compliance with s 19 and other sections of Part 2 of the YJ Act. It is common ground that no "*support person*" was present for the search. The members' evidence and prosecution submission is that they "*reasonably*" believed that the search had to be "*carried out as a matter of urgency*" and that the delay which would have ensued if steps had been taken to enable a support person to be present would have created an *"unacceptable risk"* of either *"harm*" to TX or "*another person*", or of "*the loss or destruction of evidence*". That is, the situation invoked s 19(2).

73. I note that the arrest had been effected, with TX being placed in handcuffs. He was compliant, and was seated on the front veranda of House 2 for approximately 10 minutes before being conveyed to the rear of the police vehicle. At that point, following TX saying he had a vape, a member began to interfere with the waistband of TX's shorts and he became upset. That aspect

[81] The arrest of TX was carried out under s 123 of the PAA. I do note that the express references to ss 16 and 22 of the YJ Act in the Note to s 123 do not have the effect of obviating the operation and effect of the remainder of the YJ Act. Nor does the absence of any similar Note to s 144.
[82] Refer to the *Interpretation Act 1978* at footnote [79]. Provisions of the ENULA may also be relevant.

of the search included the member briefly pulling the waist-band of the 'under-shorts' away from his stomach or pelvis, such that TX's privacy was objectively infringed.

74. The officers had made no effort to contact any person who might fulfil the role of a "*support person*" (which could include a person also capable of being a "*responsible adult*" under the YJ Act), on their account due to s 19(2) applying. The search was not so urgent that no delay between arrest and its conduct could be permitted. It's 'urgency' was the imperative of placing TX into the caged vehicle and conveying him to the watch-house.[83] Critical underlying considerations will always include that a prisoner is not harbouring any further evidence which might be destroyed on the way, and that the conveyance is carried out in circumstances which are safe to the prisoner and to members of police. However, TX had been secured with handcuffs and was under guard. The members also had access to private rooms at House 2, and some of their presence there would persist for some time, in terms of crime scene investigation and seizure of stolen property and other evidence.[84] There was also capacity for the essential process to be partially attended to through cooperation and consent (which was, in a sense, offered by TX), despite that the members would need to also satisfy themselves.

75. They had earlier spoken to the lawful occupier of House 2, who was at work, but may have been able to make arrangements to return, or suggest an appropriate person. At least one member had become aware that TX's mother (and at least one other family member) was residing in the same suburb at House 1, and may have been available.[85] Red Cross is also an organisation which provides a "*responsible adult*" or "*support person*" to youths in custody.[86] The Education records also indicate that the CEO TFHC knew TX, such that one of her capable officers may well have been close by and willing to attend. All of those matters are speculation and surmise, because nothing was done by members to procure a "*support person*".

76. A material difference exists between "*a matter of urgency*" and an 'inconvenient delay'. It is accepted that members of NT Police may not, as a matter of practice, arrange for any support person to be present prior to searching youths preparatory to securing them in the cage of a police van.[87] Whether that is also the case in seeking to comply with instruction 117 of *Instructions - Custody and Transport*, requiring that; "*Children should be transported in the cabin of the police vehicle as a priority, with transportation in a police cage to be as a last resort*", is not clear.[88] It is, however, clear that an arresting member's obligations in the execution of their duties includes to take "*all reasonable steps*" to contact a "*responsible adult*" (which designation

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[83] It is noted that the time frames for processing from arrest to presentation of the prisoner before a court under the YJ Act are contracted as compared with the prescriptions which apply to adults.

[84] See many of the photographs comprising Exhibit 5.

[85] The suburbs of Darwin are small, more than one police vehicle was present at House 2, and it may have been a relatively rapid exercise to ascertain if TX's mother (or another there) was available, by visiting House 1. Members may also have had the mother's phone number? The evidence was that nothing was done, because members considered s 19 of the YJ Act did not apply.

[86] Acknowledging that service should only be availed of after two hours from arrest has elapsed, and all "*reasonable attempts*" have been unsuccessfully made to procure a "*support person*" – Section 35(5) of the YJ Act.

[87] Aspects of witness Motter-Barnard's and Easton's evidence indicated this to be the case. However, that aspect of their evidence was not further explored in chief or cross-examination.

[88] Exhibit P4 at [23] to [24]. However, I note that a partial alternative to searching is 'cooperation and consent', which might be adequate in some situations. For example, youths often hand over their bum-bags when asked by police, such that any content is thereby secured. I note that 'wanding' was not in operational use at the relevant time.

is included in "*support person*") and that notification must occur "*as soon as practicable*".[89] The role and importance of such persons in the process of arresting, detaining and dealing with youths is a strong thread running through the YJ Act.[90]

77. The circumstances as they presented at House 2 on 10 May 2023 following arrest of TX were not a "*matter of urgency*". Nor did any reasonable delay "*create an unacceptable risk of harm*" to either TX or any other person, or of "*loss or destruction of evidence*". Searching TX in the manner and fashion carried out could well have produced the former.

78. As matters transpired, the search was conducted without a support person being present, such that s 19(3) and (4) of the YJ Act then applied. The legislated requirements were therefore that the search was, firstly, to be conducted "*in a manner that preserves the dignity of the youth as best as is practicable*". Second, that "*The officer must not require a youth to remove any clothing"* unless they hold *"reasonable grounds for believing that the removal and examination of the clothing may afford evidence of the commission of an offence*".[91] The two conditions are logically and inextricably linked. For example, an officer would clearly be in breach if they required a male youth to disrobe from the waist down in a public place (regardless of whether in front of other people, and due to the affront to dignity which would ensue) if the clothes themselves would not afford evidence. Here there was no such request by members, however one aspect of the initial search referred to at [73] above was affronting, and the member then "*pulled* [TX's] *top pair of shorts down to his thigh area to see if there was any other item secreted in his shorts*".[92] That was on a public road, in front of a number of people, one of whom appeared to be female.

79. Section 19(4) is conditioned on the officer having "*reasonable grounds*" to believe that the *"removal and examination of the clothing may afford evidence of the commission of an offence*". The principles which govern the concept of 'reasonable grounds to believe' are referred to at [22] above. The objects of the member's actions were both evidence which may be hidden under the clothing, and also the possibility of a concealed weapon. Similar to s 144(3) of the PAA, I consider the exception provided by s 19(4)(a) is confined to clothing which in and of itself may contain forensic evidence, such as blood or DNA.[93] The officer had no belief in that vein and, in my view, the exception of 19(4) was inapplicable.

80. Had the officer(s) taken TX to a room in House 2 and requested that he cooperate under his own steam in order to satisfy the operational imperatives the officer(s) was seeking to satisfy, the indignity, affront and harm produced by the search as it was may have been avoided.[94]

81. Although not the subject of any evidence one way or the other, s 15(2) also requires, as a prerequisite to any search, that the officer inform the youth that they are entitled to access

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[89] See ss 18(1A)(c), 23 and 35 of the YJ Act, and instruction 207 of Exhibit P4, *Instructions - Custody and Transport*. Section 23 refers to "*arrested*" or "*charged*", however the latter term is ambulatory in the PAA, and the context in s 23 is not 'when formally charged many hours later at the watch-house'; ss 116(9) and 137 of the PAA refer.

[90] See footnote [87] above and, for example the concept of "*reasonable endeavours*" referred to and exampled at s 18(2A), and s 23(3).

[91] Section 19(3) and (4) of the YJ Act.

[92] Exhibit P7 at [14]. In the circumstances of TX wearing 2 pairs of shorts, no compliance with s 19(4)(b) was required.

[93] That is the ordinary and natural meaning of the conjunctive use of "*and*".

[94] TX had given several indications, in his own way, of be willing to assist the officers to satisfy their requirements (regardless of his motivations).

"*legal advice and representation*". It is acknowledged that this is only 'where practicable', noting attending members had access to the Custody Notification Scheme.[95] I also note the express provisions of s 20 of the YJ Act mandating that any search of a youth or their clothing "*must be carried out in a place and a manner that allows the youth privacy from persons of the other gender*" and that s 20(2) echoes s 19(3), requiring "*measures to preserve the youth's privacy and dignity*." The officer's conduct of the search of TX did not comply with that section.

82. Lastly, s 10 of the YJ Act bears repeating, namely;

> ***10 Use of force generally***
>
> *(1) If this Act permits a person to use force on a youth, the person may only use force if:*
>
> *(a)* ***all other reasonably practicable measures to resolve the situation have been attempted*** *and those measures have failed to resolve the situation; and*
>
> *(b) the person using the force:*
>
> *(i) gives a clear warning of the intended use of force; and*
>
> *(ii)* ***allows a reasonable amount of time for the youth to observe the warning****; and*
>
> *(iii)* ***uses no more force than the person considers to be necessary and reasonable*** *in the circumstances as perceived by the person; and*
>
> *(iv) holds a current qualification in physical intervention techniques on youths.*
>
> *(2) Subsection (1)(a) and (b)(i) and (ii) do not apply if the force is used in an emergency situation.*
>
> *(3) For subsection (1)(b)(iii), a person considering what force is necessary and reasonable in the circumstances may have regard to the age, gender, physical and mental health, or background of the youth in relation to whom the force is to be used.* (**emphasis** added).

83. There is no evidence whether the officer(s) held the prescribed qualification, however that may be assumed. In my view it is clear that the situation of TX at the rear of the caged vehicle, preparatory to conveyance, was not an "*emergency situation*" within the meaning of s 10(2).[96] Also, that "*reasonably practicable measures*" to resolve the situation were not attempted, and the haste and expedition of the search did not admit a 'warning' followed by affording TX a reasonable amount of time to comply in a calm and regulated way. Most relevantly, acknowledging the officer's evidence apparently included that he considered the force used was "*necessary and reasonable*", I find to the contrary. In my view application of the test provided by s 10(1)(iii) must be in the context of the authorised officer holding a sound working knowledge of relevant provisions of the YJ Act, including through the qualification prescribed. I infer that the officer cannot then have considered the force to have been both "*necessary and*

[95] That Scheme may or may not be a matter for "notice" under s 144 of the ENULA. It is also noted that failure to comply with s 15(2) is not unlawful, so cannot amount to a "*contravention of Australian law*" within s 138 of the ENULA. However, it could contribute to a finding of impropriety, depending.

[96] A good number of situations confronting members of police, involving risks of violence or harm to youths, the public or themselves, constitute 'emergency situations'. However, the situation of TX handcuffed and held firmly at the rear of a caged vehicle does not obtain that characterisation.

reasonable" in the circumstances (including having regard to options which were not pursued). The most extreme aspects of the force used were both 'unnecessary and unreasonable'.

84. At least two officers were involved in conducting the search of TX's person and clothing, and neither of them properly or substantially complied with requirements of the YJ Act.[97] Instructions 105 and 108 of *Instructions - Custody and Transport* were also not complied with.[98] The officer predominantly responsible for the search was very shortly thereafter spat on by TX, becoming a complainant (Complainant).

85. I note the prosecution contention that, regardless of whether the Complainant was acting outside the execution of his duty at the time of the search, by the time TX spat at him shortly thereafter, he had returned to proper duty. TX's assaultive action in relation to the Complainant was a matter of seconds following being hoisted into the cage by him, at which time TX's outer shorts were still halfway down his thighs. Although the Complainant had released his grip on TX, and was in the process of moving to close the cage door, TX's action was very proximate to the search and treatment which I have found did not comply with the YJ Act, and the Complainant remained the officer who continued to deal with TX. In the circumstances, I hold a reasonable doubt that the Complainant was acting in the execution of his duty as the time the spittle struck his face.

86. Although not the subject of submissions, it may be that once an officer steps outside the course of execution of duty, they cannot resume or re-enter proper execution without first disengaging.[99] That possibility need not be decided. Lastly, if the submission that the Complainant has resumed the proper execution of duty were accepted, I would have nonetheless excluded the evidence of the assault by application of s 138 of the ENULA on the basis of the evidence being obtained "*in consequence of an impropriety*".[100]

87. TX is not guilty of count 7.

88. In summary, I find TX;

    (i) Not guilty of counts 1, 2 and 3 on 22327596;

    (ii) Not guilty of count 4 from file 22315789;

    (iii) Not guilty of counts 1, 5 and 7 on file 22314645;

    (iv) Guilty of counts 2, 3, 4, 6 and 8 on file 22314645

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[97] The dictates of provisions of the YJ Act may not sit comfortably with expeditious operational perspectives and procedures. However, its terms govern the manner in which youths must be dealt with in investigation, arrest and custody. I do not find that the officer(s) acted in deliberate disregard of the law. However, evidence adduced at hearing indicate an improved familiarity with particular provisions of the YJ Act may assist their execution of duties.

[98] Section 14A indicates that an Instruction may enjoy the same status as a General Order, but neither are "an Australian law" within s 138 of the ENULA.

[99] Full Federal Court in *Re K* (1993) 46 FCR 336 at 340 to 341.

[100] *Robinson v Woolworths Ltd* (2005) 64 NSWLR 612, *Parker v Comptroller-General of Customs* (2009) 83 ALJR 494 and *R v Lawrence* [2016] NTSC 65.