CITATION:	*Paul Jason Wood V JB* [2013] NTMC 035
PARTIES:	PAUL JASON WOOD
	V
	JB
TITLE OF COURT:	YOUTH JUSTICE COURT
JURISDICTION:	CRIMINAL
FILE NO(s):	21303894
DELIVERED ON:	8 November 2013
DELIVERED AT:	Darwin
HEARING DATE(s):	30 September 2014 & 1 October 2013
JUDGMENT OF:	Ms Sue Oliver SM

CATCHWORDS:

Criminal Law – Evidence - Confessions and Admissions – Discretion to Exclude – Conduct of Interview with Youth

REPRESENTATION:

Counsel:

Plaintiff:	Ms Barnaart
Defendant:	Ms MacCarren

Solicitors:

Plaintiff:	ODPP
Defendant:	NTLAC

Judgment category classification:	A
Judgment ID number:	035
Number of paragraphs:	53

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

No. 21303894

BETWEEN:

PAUL JASON WOOD
Police

AND:

JB
Defendant

REASONS FOR JUDGMENT

(Delivered 8 November 2013)

1. On 30 September 2013 at the hearing of this matter, I refused to admit into evidence an electronic record of interview conducted with the youth defendant on a charge of aggravated assault. I gave a brief summary of my reasons at the time and indicated that I would publish written reasons at a later date. These are the reasons.

Arrest of JB

2. On 24 January 2013 police had attended a group of persons drinking in the Urquhart Street area of Parap. Senior Constable Arnott said that they were dispatched to the job where they found about 7 people in various stages of intoxication. On taking details from the group they discovered that JB, a youth of 17 years[1], had an outstanding warrant issued for his failure to appear on another matter. Senior Constable Arnott said that he seemed "fairly sober". He also knew that JB was wanted for questioning on an alleged assault. He said that JB said he was 16 or thereabout. JB was taken

[1] JB gives his age as 17 years in the record of interview although the birth date on the charge sheet would make him 16 years old.

into custody and transported to the watch house. He was transported with adults who had been taken into "protective custody" in the same van. At the watch house he was charged with a breach of bail and the duty magistrate was contacted, bail refused and a remand warrant issued. In evidence Senior Constable Arnott said this was close to midnight.

The Conduct of the Interview

3. Senior Constable Arnott said they then needed to track down a "responsible adult" so they went back to Parap where they located a Mr Daniel Harrison and spoke to him. Senior Constable Arnott said he knew Mr Harrison because he had had "dealings" with him at Bulman. He said Mr Harrison said he was JB's uncle and they asked him to be his support person. Senior Constable Arnott then said that they would have brought Mr Harrison in before JB was charged and bail refused. I do not accept his evidence about this because it is contradictory to the evidence that I will come to below and as to what was said in the recorded interview.

4. He said the explanation that he gave to Mr Harrison about his role as a support person was to tell him why JB was in custody, that a "support person" was required, that his role was to just sit and support him and that a magistrate might have questions on a bail review. Given what I have just noted about when Mr Harrison was brought in I do not accept that the last explanation was given to Mr Harrison.

5. Senior Constable Arnott said that he allowed JB some time with Mr Harrison before the interview. He could not remember whether he asked JB if he wanted a lawyer. He was not able to give in cross examination a proper explanation of the terms "support person" and "responsible adult" within the meaning of the *Youth Justice Act* saying only that a "support person" was there to support a youth and a "responsible adult" is responsible for a youth.

6. Constable Whitfield was on duty with Constable Arnott. She said that she stood by while the defendant talked to the magistrate and that he was remanded to the 25th of January. After they had "finalised the breach of bail and warrant" they returned to the Parap shops where they picked up the "responsible adult" Mr Harrison, who was sober. She said that they had let JB have a sleep in a cell while they went to get Mr Harrison because he said that he was tired.

7. She said that JB "liaised" with Mr Harrison, that Snr Constable Arnott said that Mr Harrison could assist him if he didn't understand and that they (Mr Harrison and JB) had a conversation in Kriol. She could not recall whether JB was asked whether he wished to contact a lawyer.

8. In cross examination, Constable Whitfield was likewise asked what she understood the terms "support person" and "responsible adult" meant. She said that a support person was someone who came along to assist if the [youth] didn't understand the court system or terminology. A responsible adult was a person who sits in on an interview with a child. Constable Whitfield did not think that there was a need to explain on camera to a support person what their role involved.

9. It is clear from the descriptions each officer gave of "responsible adult" and "support person" that neither have a proper understanding of the meaning of those terms in the *Youth Justice Act*.

10. Mr Harrison gave evidence of his participation. He was in custody at the time he gave evidence. He confirmed that he was still at the Cheesecake Shop which is where JB had been arrested when collected by police. He had been there when JB was arrested. He was asked if he was given an explanation by police as to his role and he said that they wanted an adult guardian or something in there when talking to police. He said that they told me that JB just wanted me to stand with him. He had not taken the role of a

support person before. He understood it to be that he was to stay there as guardian because JB was a minor boy.

11. In cross examination he was asked what he understood the term "incriminate" to mean and he said it meant to make a fool of yourself. He confirmed that JB had been drinking that night and that he (JB) was hung over at the time of the interview.

12. It is clear from Mr Harrison's evidence that he was not provided with a proper explanation as to his role as support person in the interview with JB.

13. The interview (EROI) commenced at 2 am. JB is huddled in a blanket, sometimes pulling it over his head during the course of the interview. "Dishevelled" would be to understate his appearance. He is asked his relationship to Mr Harrison who says that JB is his cousin's sister's son. They clarify that they call each other Uncle and Nephew.

14. JB is asked whether he is happy for his Uncle to be present as a "support person" and as "your responsible adult". JB says that he is, however he looks embarrassed and then pulls the blanket across his face. No explanation is given on camera to JB about what these terms mean or the role that Mr Harrison is to take with respect to him.

15. JB is asked if he is tired. He says yes. He is asked if he had been sleeping. He says yes. He says it's all right [to go ahead with the interview] as he's awake. He is asked if he is sober. He is asked if he is a healthy man. He says No – I don't know, not really." Then asked how he feels, he says "good...but" and "too many grog cans" to which Senior Constable Arnott responds "grog sick?" and JB says "yeah".

16. Senior Constable Arnott asks Mr Harrison "Daniel are you satisfied that [JB] is healthy, awake and happy to participate in an interview?" Mr Harrison agrees. He does not separately ask JB to confirm that after ascertaining that JB is "grog sick".

Compliance with the *Youth Justice Act*

17. From the evidence it is clear that there are numerous failures to comply with specific provisions of the *Youth Justice* Act.

18. At the beginning of the interview, Senior Constable Arnott confirms with JB that "about 10.25" last night he was "arrested on warrants and that was sorted out and Magistrate Morris said you go to court tomorrow morning and **that after you talked to her we had a conversation and said we wanted to talk to you about trouble with your little mother**[2]" *(emphasis added)*.

Failure to notify a responsible adult

19. JB had been arrested on a warrant issued by the Court in relation to his non-appearance on an unrelated matter. He was subsequently charged at the watch house with a breach of bail for that non-attendance. Section 23 of the Act provides

> **23 Responsible adults to be informed**
>
> (1) As soon as practicable after a youth is:
>
> (a) arrested in relation to an offence; or
>
> (b) charged with an offence,
>
> the police officer who arrested or charged the youth must take all reasonable steps to ensure that a responsible adult in respect of the youth is notified of the arrest or charge.
>
> (2) The notification must include the time and place when the youth will be brought before the Court or, if summoned, when the youth must appear in court.
>
> (3) This section applies whether the responsible adult resides in the Territory or not.

20. There was no compliance with this provision following his arrest and charge for the offence of breach of bail. However, once charged with the breach of

[2] The alleged victim GB (his "little mother") is not JB's biological mother. As noted further in this judgement, his biological mother lived close by to where JB was arrested.

bail, and in accordance with section 24 of the Act, an application was then made to the on call magistrate for a warrant to remand JB without taking any steps to notify a responsible adult of the arrest and charge. Section 24 provides:

> **24 Detention of youth not admitted to bail**
>
> (1) If a youth has been charged with an offence and is not admitted to bail, a police officer must, as soon as practicable, apply to the Court or a magistrate for an order that the youth be detained at a detention centre or other place approved by the Minister for the purpose.
>
> (2) A police officer may apply for an order under subsection (1) in person or, if it is not practicable to apply in person, the officer may apply by telephone to a magistrate.
>
> (3) If the Court or magistrate makes the order, it must:
>
> (a) be in writing; and
>
> (b) specify the detention centre or other place at which the youth is to be detained.
>
> (4) The Court or magistrate must give or send a copy of the order to the police officer as soon as practicable.
>
> (5) The police officer may take the youth to the detention centre or other place under the order despite not having received the copy if he or she is informed of the order by the Court or magistrate by telephone.

21. Although a remand warrant was granted, JB was not taken to the detention centre but was put to sleep in a cell at the watch house while the officers went to collect Mr Harrison and then he was woken for the interview that commenced at 2am.This would appear to be in contravention of section 24 although the remand warrant was not in evidence.

22. As I have said, on the evidence there was no responsible adult present when the duty magistrate was contacted for a bail review with respect to the warrant and breach of bail charge. However, at the outset in the interview, JB gives details of his mother and older sister and the house they are living at (where he has been staying) not far (in fact only minutes) from where JB

was arrested. Mr Harrison also knows this information and provides further detail of the address. Mr Harrison was not JB's responsible adult. When at the outset of the interview JB's mother's identity and whereabouts were made known to the officers, they did not suspend the interview to see if she would come to the station.

23. It is obvious from this evidence that no earlier attempt was made by the police officers to ascertain who was JB's responsible adult or locate that person prior to contacting the duty magistrate to seek a remand warrant. I cannot determine whether this was deliberate so as to ensure that JB would not be granted bail or simply further illustration of the officers' lack of understanding of the youth justice system. At the very least they knew where relatives were (near the Cheesecake Shop) in order to make inquiry as to his parents or guardians. They could have done that at the time they arrested JB. Mr Harrison was there at that time and had the relevant information.

Failure to inform ability to have legal advice

24. Part 2, Division 2 of the *Youth Justice Act* provides for police powers and obligations with respect to youth. The Part applies despite the provisions of any other Act.[3] In other words the powers and obligation set out in this Part are those that govern police interaction with youths consistent with a justice system that recognises the distinction between adult offending and child and youth offending.

25. Section 15(2) provides that before a youth is interviewed or searched in connection with the investigation of an offence, a police officer must, unless impracticable, inform the youth of his or her ability to access legal advice and representation.

26. At most, the evidence of compliance with this provision is Senior Constable Arnott's evidence that it is standard practice. Constable Whitfield could not

[3] Section 12

recall if he was asked if he wanted to speak to a lawyer and Mr Harrison did not think he had been asked. In the interview a slip of paper is handed over to JB "to hand to legal aid" so that they will know [he] had an interview. It might be expected that if he had been advised of his ability to access legal advice that would have been put on the record at that point. I am not satisfied that there was compliance with section 15(2) of the *Youth Justice Act.* However, evidence obtained arising out of a failure to comply with section 15 is not inadmissible only because of that failure[4].

Failure to provide a proper support person

27. Section 18 applies to offences that are punishable by more than 12 months imprisonment. An officer must not interview the youth in respect of the offence, or cause the youth to do anything in connection with the investigation of the offence, unless a support person is present while the officer interviews the youth or the youth does the act. The offence with which JB was subsequently charged is such an offence.

28. Section 35 of the Act provides for definition of a "support person." A support person can be a responsible adult in respect of the youth, a person nominated by the youth, a legal practitioner acting for the youth or a person from the register of support persons where reasonable attempts to obtain one of the other categories of support persons have been made.

29. Although in the interview, Senior Constable Arnott refers to Mr Harrison as being JB's "responsible adult" clearly he is not. That term has a specific meaning in the Act and means "a person who exercises parental responsibility for the youth, whether the responsibility is exercised in accordance with contemporary social practice, Aboriginal customary law and Aboriginal tradition or in any other way". Mr Harrison might be his uncle aboriginal way but there was nothing to suggest to the officers that he exercised parental responsibility for JB.

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[4] Section 15(3)

30. Mr Harrison was a person nominated by JB. However the fact that a youth nominates a particular person to be their "support person" at interview does not mean that the person is suitable and should be unreservedly accepted by the interviewing officers as a "support person". Mr Harrison was present during the drinking session with the others that included so much alcohol ("too many grog cans") that JB felt unwell. JB is under 18 years and should not have had access to alcohol. He was drinking in a public place with others that were so intoxicated that they had to be taken into protective custody. Mr Harrison's involvement or presence in or at the drinking party should have amounted to an immediate recognition by the officers that Mr Harrison was not in any sense of the phrase either "a responsible adult" or a person appropriate to act as a support person in an interview for a serious offence.

31. There are other aspects of Mr Harrison's conduct during the EROI that indicate that he did not properly understand his role as support person. He appears to have some personal knowledge of the incident and adds detail or prompts JB at some points. For example when Senior Constable Arnott begins reading a statement to JB about the incident they want to talk to him about Mr Harrison says "That's Gwenda's statement". "Gwenda" is indeed the alleged victim. It seems that he may have been told about it by JB or others or may even have been present at some point.

32. At other points in the interview, when JB attempts to interrupt something that is being put to him in what appears to be an attempt to contradict it, he shushes him and gestures to him not to speak.

33. In my view, the requirement of the *Youth Justice Act* that a youth have a support person for an interview with police was not complied with by the presence of Mr Harrison. The role of support person was not explained to him, he did not understand what he was and was not entitled to do during the

interview, in particular to ensure that JB understood and could exercise the privilege against self-incrimination.

34. In *Police v DM and SKL* [2008] NTMC 067 I considered what was intended by the Act in requiring a support person for the interview. I said

> "[10] In Ligertwood, *Australian Evidence* (2004, 4th Edition) at page 661, following discussion of statutory provisions and Police guidelines requiring the presence of a third person at an interview by Police, the learned author suggests that the presence of a third person at an interrogation serves two purposes. First it guards against Police impropriety by ensuring independent testimony of what occurred at the interrogation. Secondly, it gives disadvantaged persons access to advice from an independent and responsible third person before answering Police questions. The author says that given that independent evidence of what transpired during an interview can now be provided by visual and audio recording, it is arguable that it is the latter objective that is of paramount importance.
>
> [11] In *R v Warren* [1982] 2 NSWLR 360 at 367 the Court of Criminal Appeal suggested, with respect to a provision similar to s 18 that required interviews only be conducted in the presence of certain adults, that the purpose of the section was to avoid the considerable disadvantage at which a person under 18 could be, or feel to be, if alone in a Police Station being questioned by mature men. In *R v Cotton* (1990) 19 NSWLR 593 at 595, Hunt J accepted the view of Roden J in *R v Williams* (unreported 9 August 1982) that such a provision was seen as a protection of an accused who was under 18 years against himself or herself rather than against any impropriety on the part of the Police. As I understand these authorities, provisions of this nature seek to ensure that the young person understands and can exercise the privilege against self incrimination and is not overborne in the interview process. In my view, the same purpose is apparent in s 18 of the *Youth Justice Act*."

35. As I have said, Mr Harrison was not provided with a proper explanation as to the role of being a "support person" for JB. If he did not understand that the essence of the role was to provide independent advice as to the privilege against self-incrimination or that he was here to ensure the interview was fairly conducted, then he could not properly exercise it.

Was there an inducement in relation to the admission?

36. Although the audio is not entirely distinct, after Senior Constable Arnott advises JB that he does not have to answer questions Mr Harrison is heard to say something like "tell the truth" or "that should be the truth". The word "truth" at least is distinct. I am satisfied that what Mr Harrison said words to JB about telling the truth because he was asked this in cross examination and agreed saying he had said it because "the truth will set you free".

37. Although JB had previously indicated that he understood the caution, and in my view he did previously appear to understand there was a right not to speak, Senior Constable Arnott did not then remind JB that he did not have to answer questions.

38. In *LLH* [2002] NTSC 47 Mildren J considered the role of "a prisoner's friend" in association with Police general orders that set out the explanations that were to be given to the "friend" at the commencement of the interview[5]. In my view, part of that explanation, consistent with the view I expressed in *Police v DM and SKL*, is to ensure that the support person understands the privilege against self-incrimination so that he or she can, as well as ensuring that questions are asked and answered with clarity, assist the youth in that understanding and subsequent exercise, if any.

39. In *LLH* it was held that the purpose of recording the explanation of the role to a prisoner's friend (as required by the General Order) was to ensure that the police do in fact provide a proper explanation and are in a position to prove that fact so that it does not become an issue. In JB's case, no explanation of the role of support person was given in the recorded interview. Mr Harrison's evidence demonstrated his lack of understanding of his role. Given the explanations of each of the officers in their evidence as to what they thought was meant by a support person one wonders whether

[5] The case predates the *Youth Justice Act* but concerns an interview with a youth.

either of them could have provided a proper explanation to Mr Harrison as neither appear to understand the role.

40. In *LLH* Mildren J said

> "There is no doubt that a statement made by a person in authority to a suspect in police custody to the effect that "it would be best if you confessed" is an inducement. It is equally clear that such a statement made by a person not in authority to a suspect not made in the physical presence of any person in authority is not an inducement: see *Deokinnan v The Queen* [1969] 1 AC 20. If an inducement is made by a person not in authority in the physical presence of a person in authority, the inducement will render the confession involuntary unless the person in authority disassociates himself from the inducement: see *R v Cleary* (1964) 48 Cr App R, 116; *R v Moore* (1972) 56 Cr App R, 373".

41. *LLH* was decided prior to the enactment of the *Evidence (National Uniform Legislation) Act*. Previously the common law required the prosecution to prove that an admission was voluntary for it to be admissible. *LLH* is a decision that goes to the voluntariness rule. At common law even if an admission was voluntary there were further discretions to exclude evidence, including admissions, that were obtained improperly or unfairly or where there was unlawful conduct involved. The exercise of these discretions placed the burden on the defendant to show that the evidence should be excluded.

42. The voluntariness rule and the common law discretions to exclude evidence have been replaced by provisions of the Uniform Evidence Acts of which the *Evidence (National Uniform Legislation) Act* is one[6]. This is due to section

[6] *R v Truong* (1996) 86 A Crim R 188 at 192

56(1) providing the primary rule for admissibility of evidence, which is that except as otherwise provided by the Act, evidence that is relevant in a proceeding is admissible in the proceeding. It is a question then of turning to the provisions of the Act which govern the admission or exclusion of relevant evidence.

43. Section 84 sets a threshold with respect to admissions generally so that an admission will not be admissible unless the court is satisfied that it was not influenced by violent, oppressive, inhuman or degrading conduct or threats of that kind. In my view, although there are considerable problems with the way in which the interview was conducted, the admission could not be said to have been influenced by violent, oppressive, inhuman or degrading conduct or threats of that kind.

44. There are four provisions of the Act that have application to admissions. Section 85 makes specific provision in relation to the admissibility of admissions with respect to reliability. Section 90 provides a discretion to exclude an admission on grounds of unfairness. Further general discretions are provided by section 137 which requires the court to refuse to admit evidence where its probative value is outweighed by the danger of unfair prejudice to a defendant, whilst section 138 provides for a discretion to exclude improperly or unlawfully obtained evidence.

45. Section 85 applies to admissions made to "investigating officials". Police officers are investigating officials for the purposes of the provision.

> **85 Criminal proceedings – reliability of admissions by defendants**
>
> (1) This section applies only in a criminal proceeding and only to evidence of an admission made by a defendant:
>
> (a) to, or in the presence of, an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence; or

(b) as a result of an act of another person who was, and who the defendant knew or reasonably believed to be, capable of influencing the decision whether a prosecution of the defendant should be brought or should be continued.

Note for subsection (1)

Subsection (1) is inserted as a response to the decision of the High Court of Australia in Kelly v The Queen (2004) 218 CLR 216.

(2) Evidence of the admission is not admissible unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected.

(3) Without limiting the matters that the court may take into account for the purposes of subsection (2), it is to take into account:

(a) any relevant condition or characteristic of the person who made the admission, including age, personality and education and any mental, intellectual or physical disability to which the person is or appears to be subject; and

(b) if the admission was made in response to questioning:

(i) the nature of the questions and the manner in which they were put; and

(ii) the nature of any threat, promise or other inducement made to the person questioned.

46. Not all exhortations to "tell the truth" will amount to an inducement. In order to amount to an inducement that affects reliability, the exhortation must by inference hold out an expectation of hope or advantage.[7] On its own, Mr Harrison's exhortation may not have amounted to an inducement, although this needs to be viewed against a background that JB was a youth requiring the guidance of an independent adult with respect to maintaining a right to silence. Significantly though, when JB is asked what will happen if the magistrate hears the evidence he says "throw me in jail or something" to which Senior Constable Arnott responds "or can set you free or maybe a fine

[7] *R v Dixon* (1992) 28 NSWLR 215 at 230

or good behaviour or something like that". Whilst it is technically correct that the court could exercise a range of sentencing dispositions if JB were found guilty of an aggravated assault, in my view care should be taken in an interview in relation to suggesting minimal or no penalty as an outcome because that might influence the youth to believe that the matters the subject of the interview are not serious ones and therefore influence the decision as to whether to say something about the subject or not.

47. In my view, the decision in *LLH* remains a relevant authority to determine whether the admission is admissible. The exhortation to "tell the truth" was an inducement to JB to abandon the right to silence made in the presence of, and not corrected by, a person in authority. On the basis of *LLH*, this alone affects the reliability of the "admission" in the EROI. As such, it cannot be said to have been made in circumstances that make it unlikely that the truth of the admission was adversely affected. The record of interview is in my view on that basis alone not admissible.

48. However there are additional matters with respect to the manner of questioning that also go to the question of reliability. To begin with, Senior Constable Arnott reads a substantial portion of the statement of the alleged victim to JB and asks him to comment on it rather than inform him of the incident they are investigating and ask him to tell them about it. JB provides a description about why and how he came to physically contact GB's elbow and gets up to give a physical demonstration. This demonstration is not captured on camera so it is not possible to determine exactly what physical act has been demonstrated. JB variously uses "kick" and "knee" to describe what happened in the interview. JB speaks English reasonably well but it is obviously not his first language. Care needs to be taken about assuming what might be the natural or ordinary meaning of a word to English as first language speakers as having the same meaning to someone like JB. When JB resumes his seat he talks about and points to kneeing her "softly" in the

shoulder but that she brought her arm back and connected with his knee. Notwithstanding that, Senior Constable Arnott then asked him how hard he **kicked** his mother. There is then some conversation about how you cannot do that to your mother and Mr Harrison says something to the effect that that "that is what they call an aggravated assault". Finally at the conclusion of the interview Senior Constable Arnott says to JB "what is your reason for assaulting your mother? Answer as if you were talking to the judge."

49. Whether or not what physically occurred between JB and GB was an unlawful assault is the ultimate issue to be determined by the court. In effect what occurs in the interview is to convert JB's description of the physical act which he describes, in circumstances in which he says his mother told another boy to "go kill yourself, who cares" and against which JB says he was remonstrating, "me I don't like to see dead boys", into telling JB he has committed an assault and then asking him to provide his reasons for the assault thus obtaining an "admission" to the offence with which he is then charged.

50. In my view in these circumstances the "admission" has been made in circumstances that adversely affect the truth of the admission because of the distortion of the descriptions given by JB and the persuasion by his Uncle and Senior Constable Arnott that his actions amount to a crime for which he is then asked to provide his reasons for its commission.

Section 138 Improper Conduct

51. In the event that I am incorrect in determining that the principle in relation to involuntariness from *LLH* applies to determine the admissibility of the admission pursuant to s85, or that I am wrong in determining the application of s85 on the other issue of reliability that I have mentioned, I would nevertheless exercise my discretion pursuant to s138 not to admit the record of interview on the basis of impropriety.

52. Section 138 provides:

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) Without limiting subsection (1), evidence of an admission that was made during or in consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been obtained improperly if the person conducting the questioning:

(a) did, or omitted to do, an act in the course of the questioning even though he or she knew or ought reasonably to have known that the act or omission was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning; or

(b) made a false statement in the course of the questioning even though he or she knew or ought reasonably to have known that the statement was false and that making the false statement was likely to cause the person who was being questioned to make an admission.

(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 of a person

recognised by the International Covenant on Civil and Political Rights; and

(g) whether any other proceeding (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.

Note for subsection (3)(f)

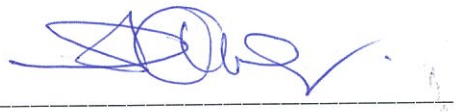
The International Covenant on Civil and Political Rights is set out in Schedule 2 to the Human Rights and Equal Opportunity Commission Act 1986 (Cth).

53. I am satisfied that the defendant established both that there was improper conduct in the manner of apprehension and remand and in the conduct of the interview. With some matters there was also a failure to comply with provisions of the *Youth Justice Act*. In summary, JB was arrested and transported with adults under "protective custody"[8] to the Watchhouse. No responsible adult was located and a remand warrant issued by the on call magistrate. He was not taken to a detention centre on the remand but kept at the Watchhouse for interview commencing at 2am. He had been drinking and was hungover. His "support person" did not understand his role and no proper explanation of it was given to him or to JB. JB was not told of his ability to obtain legal advice. The questioning was conducted in a way that made the "admission" ambiguous and had the potential to be misleading in terms of its truth. In total, there seems to have been little or no regard to the fact that he was a youth or to the provisions of the *Youth Justice Act*. It could well act as a teaching example of how not to apprehend and interview a youth. Having considered the probative value of the evidence (which in my

[8] The Police Administration Act allows for the apprehension of intoxicated persons where there is a reasonable belief that because of the person's intoxication, the person:
(i) is unable to adequately care for himself or herself and it is not practicable at that time for the person to be cared for by someone else; or (ii) may cause harm to himself or herself or someone else; or (iii) may intimidate, alarm or cause substantial annoyance to people; or (iv) is likely to commit an offence.

view is not high given the ambiguity around his answers) and the multitude of improper aspects of the interview against the fact that the charge is of a serious nature and the record of interview formed the only evidence against JB I am of the view that I should not exercise a discretion to admit the record of interview.

Dated this 8 day of November 2013



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