

CITATION: *Police V Darius Cebu* [2025] NTLC 16
PARTIES: *Police*
V
Darius CEBU
TITLE OF COURT: LOCAL COURT
JURISDICTION: CRIMINAL
FILE NO(s): 22337070
DELIVERED ON: 5 September 2025
DELIVERED AT: Darwin
HEARING DATE(s): 13 & 14 August 2025
DECISION OF: Judge Macdonald

CATCHWORDS:

EVIDENCE - police powers - exclusion of evidence - whether evidence obtained in circumstance of impropriety or unlawfulness - General Order - arrest - custody and transport - evidence excluded

Police Administration Act 1978 ss 14A, 123, 133AB
Summary Offences Act 1923 s 47
Evidence (National Uniform Legislation) Act 2011 s 138

Cebu v Rigby [2024] NTSC 72
Parker v Comptroller-General of Customs [2009] HCA 7
Robinson v Woolworths Ltd (2005) 158 A Crim R 546
Slater v The Queen [2019] VSCA 213
Wilson v Brown [2015] NTSC 89

REPRESENTATION:

Counsel:

Prosecution: Mr J. Banwell
Defendant: Mr P. Boulton SC

Solicitors:

Police: ODPP
Defendant: NAAJA

Decision category classification: B
Decision ID number: [2025] NTLC 16
Number of paragraphs: 46

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

No. 22337070

BETWEEN:

Police

AND:

Darius CEBU

Defendant

REASONS FOR DECISION

(Delivered 5 September 2025)

JUDGE MACDONALD

Background

1. At about 5:00pm on 20 October 2023 Mr Darius Cebu (Defendant) was at the Palmerston Markets. At least five members of NT police were also on 'foot patrol' at the markets at that time, including Senior Constable Gulam Abbas, and Senior ACPOs Andrea Gilmour and Harrold Calma. At least one member of the public made a complaint that a man in a wheelchair had harassed or abused them, which resulted in the members of police attending on the Defendant. The Defendant was in a patently public area of the Palmerston Markets at that time, being an open-air eating and food cart area, and was engaged by officer Abbas.¹
2. The Defendant was clearly wheelchair-bound, defiant, and to some extent muddled or illogical in his speech content. He was agitated and elevated in mood, with his communication being voluble, querulous and belligerent while being spoken to by officer Abbas. His loud speech was littered with profanity and could be properly characterised as offensive.
3. The Defendant had an averred aversion to members of police generally. The engagement did not result in officer Abbas being able to resolve the situation or ascertain any address of a safe place to which he and his officers could convey the Defendant. Officer Abbas made clear to the Defendant that he was required to leave the area. However, the incident, including disorderly behaviour, persisted.
4. Officer Abbas then wheeled the Defendant in his chair to a parking and loading area on the outskirts of Palmerston Market, which conveyance the Defendant was resistant to at some points. Following further conversation variously between officers Abbas, Calma and Gilmour on the one hand and the Defendant on the other, during which the Defendant persisted with the same demeanour and behaviour, he was arrested by officer Abbas for being "*disorderly in public*". That

¹ The location was on or adjacent to a footpath, and a large number of members of the public, including children, were present. The same may be said of the parking and loading area to which the Defendant was subsequently taken by officer Abbas.

was immediately following the Defendant saying to officer Gilmour; “*You nothing. You naked. You only pussy.*”

5. The arrest was effected by officer Abbas seizing the Defendant under the armpits, hoisting him over the rear of his wheelchair, carrying him bodily to a waiting paddy wagon, then tossing him into the cage of that vehicle, which had been reversed in by officer Calma. The Defendant’s wheelchair was left at the scene, for collection at a later time.²
6. The Defendant was then conveyed a short distance to the Palmerston Watchhouse sally port. Although initially calm prior to extraction from the cage of the paddy wagon, the Defendant then complained that his tooth had been broken and again became elevated in demeanour. It was implicit in the Defendant’s complaint that the damage to his tooth had occurred during the arrest process. He was taken charge of by Watchhouse Keeper Senior Sergeant Devrim Kanyilmaz, placed in an NT Police wheelchair and conveyed to the reception counter for processing into custody. That process included asking the Defendant a range of questions concerning his health, whether he was injured, intoxicated and the like. The Defendant’s obstreperous demeanour, including the use of abuse and profanity continued. The reception process, other than searching, was generally frustrated by the Defendant’s recalcitrance.
7. The Defendant was then wheeled to a holding cell which had a limited additional amenity for disabled persons. Officer Kanyilmaz had decided that the Defendant should not remain in his wheelchair while in the holding cell and, shortly following entry of the cell by the officers and the Defendant in his wheelchair, Officer Kanyilmaz placed the standard issue vinyl bed-mattress on the floor contiguous with the raised sleeping platform. That was following earlier conduct of a Risk Assessment by Officer Kanyilmaz, discussed further below, and obviously in preparation of placing the Defendant onto the mattress.
8. A request by the Defendant to remain in the NT Police wheelchair was declined, which resulted in a protest that the floor of the cell (even with the ‘mattress’) would exacerbate a problem he had with pressure sores. On viewing the BWF, that was the first occasion on which that health issue had been raised by the Defendant. Upon realising that the officers would not resile from their decision to remove his chair, the Defendant self-exited the chair onto the concrete floor and, in that process, became entangled in the footrests of the chair. Once extricated from the footrests officer Kanyilmaz placed two blankets on the mattress next to the Defendant, which resulted in the Defendant grabbing and hurling one blanket at that officer, and losing his balance, such that he was recumbent on his back on the floor of the cell. Officers Kanyilmaz and Quedley then seized a forearm each and sought to raise the Defendant to a sitting position, on the mattress. In that process the Defendant turned his head and bit down on Officer Quedley’s left thumb region.
9. It was that action by the Defendant which gave rise to the sole charge in the proceeding, being unlawful assault of a police officer in contravention of s 189A of the *Criminal Code Act 1983* (Code).

Issues for determination

10. The proceeding was heard over 13 and 14 August 2025, on a *voir dire* basis, with the evidence also being admitted for the purpose of the hearing proper if needs be. The issue on *voir dire* was whether the evidence of the alleged assault should be excluded in exercise of discretion under s 138 of the ENULA. In seeking to invoke s 138, the Defendant bears an onus of proving on the balance that the evidence sought to be excluded was either “*obtained improperly or in*

² Which decision may have been questionable, given the significance of that assistance to the Defendant. However, it became apparent from BWF that Palmerston Police Station has wheelchairs available for use of prisoners in need of mobility aid.

contravention of an Australian law” or “in consequence of an impropriety or of a contravention of an Australian law”. In either of those events, the burden then shifts to the Prosecution to persuade the court that, having regard to the criteria prescribed by s 138(3), the evidence should be admitted.³ That is, that “*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*”.

11. A range of contentions were advanced by the Defendant at hearing, primarily being;
- (i) Removal of the Defendant from the outdoor dining area of the Palmerston Market and conveyance to the outskirts parking and loading area was unlawful. That is the officers were not acting in exercise of any recognised power to deal with the Defendant in that way.
 - (ii) The arrest of the Defendant by officer Abbas was not authorised, justified or lawful, and was effected in a manner which rendered the arrest unlawful. In particular, neither the officer’s exercise of the power of arrest nor his use of force was lawful. That was put on the basis of lack of lawful authority, and asserted failure to comply with statutory instruments regulating the conduct of members of NT Police in the execution of their duties, and use of excessive so ‘unreasonable’ force.
 - (iii) The reception and processing into custody of the Defendant at the Palmerston Watchhouse was improper or unlawful, both through the flaws in the arrest which had earlier been effected, and due to failure to comply with statutory instruments regulating the conduct of members of NT Police in the execution of their duties.
 - (iv) Similarly, the manner of the officers dealing with the Defendant in their placement of him in the holding cell was improper and unlawful. In particular, failure to permit the Defendant to remain in his wheelchair in the cell, and consequent physical contact with him to relocate him to the mattress were improper and unlawful, respectively. Again, these contentions were put on the basis of lack of lawful authority, and asserted failure to comply with statutory instruments regulating the conduct of members of NT Police in the execution of their duties.
 - (v) Consequently, the Defendant contended that by application of s 138 of the ENULA the evidence of the bite inflicted on Officer Quedley should be excluded.
 - (vi) Alternatively, that the court could not be satisfied beyond reasonable doubt that Officer Quedley was acting in the execution of his duty at the time the Defendant bit him, such that the Prosecution cannot have discharged the onus of proof in relation to the charge.
 - (vii) The Prosecution’s position was to contend to the contrary in respect of each of the above propositions.

Legal considerations

12. The issues for determination involve the exercise of coercive force by members of NT Police, so some observations concerning relevant law are required. Members of NT Police hold and exercise a variety of powers conferred by the *Police Administration Act 1978* (PAA). That includes through ss 120, 123, 133AB and 133AC of that Act.⁴ There is also their sworn duty through the oath prescribed by the Schedule to the PAA, namely “*I will see and cause the Sovereign's*

³ *Parker v Comptroller-General of Customs* [2009] HCA 7 at [28] and *The Queen v Gehan* [2019] NTSC 91 at [8] and [9] per Grant CJ. See also *Kadir v The Queen* [2020] HCA 1.

⁴ Power to enter a place of entertainment, power of arrest, custody of persons arrested for an infringement notice offence, and dealing with persons in custody on such offences, respectively.

peace to be kept and preserved, that I will prevent, to the best of my powers, all offences against the Sovereign's peace and against all laws in force in the Northern Territory".

13. The powers conferred by the PAA are not exhaustive, including because members of NT Police retain residual powers and obligations at common law.⁵
14. Additional powers, authority and responsibilities are also conferred through other legislation, such as by provisions contained in the *Summary Offences Act 1923* (SO Act).⁶ At times a relationship exists between provisions of several Acts and other instruments, such that they must be read together. The interaction of s 133AB of the PAA, s 47 of the SO Act, s65D of the *Interpretation Act 1978* and r3 of the *Summary Offences Regulations 1994* is a relevant example.
15. Associated with the powers and obligations conferred on members of NT Police are the protections and exceptions conferred by legislation and common law, directed to enabling their performance and execution of duty. That includes various provisions contained in Part II of the Code concerning "*Criminal responsibility*".⁷ The usual principles concerning 'consent', and in respect of force "*used for and ... reasonably needed for the common intercourse of life*", are significantly altered and expanded through a person being under arrest and in police custody.⁸
16. In addition to the prescriptive terms of legislation, members of NT Police are also obliged to have regard to General Orders and Instructions issued by the Commissioner under s 14A of the PAA. The object or purpose of those statutory instruments is to "*secure the good government and efficient working of the Police Force*." Having regard to s 17 of the *Interpretation Act 1978*, the General Orders and Instructions are properly characterised as a "*statutory instrument*", of the lesser classification of "*administrative character*".⁹ Doctrine issued under s 14A of the PAA does not obtain the force of law, but constitutes best practice guidelines. Failure to meet the standards described by their terms risks untoward consequences, however conduct which does not strictly comply will not *per se* render an arrest unlawful.¹⁰ Similarly, the General Orders and Instructions cannot broaden or enlarge the powers of a member of NT Police, despite that their content provides guidance to best practice. The relevant statutory instruments in this case are *Arrest* (General Order) and *Custody and Transport* (Instruction), respectively.

⁵ *Gardiner v Marinov & the NTA* (1998) 7 NTLR 181 at 190 per Martin CJ and *Cintana v Burgoyne* [2003] NTSC 106 at [11] & [14] per Mildren J.

⁶ The offence for which the Defendant was arrested was "*disorderly behaviour*", being an alleged contravention of s 47 of the SO Act. That section does not expressly empower a member to remove a person alleged to be disorderly from a public place, although other sections of the SO Act expressly provide some unrelated powers to a member.

⁷ Particularly the "*Authorisation*" provided by s 26 and the "*Justification*" provided by ss 27 and 28.

⁸ For example, the analogy with accepted medical practice in clinical situations submitted at hearing bears no resemblance to what is authorised by law in the circumstances following arrest and custody. That submission was made in relation to interactions in the holding cell between officers and the Defendant, and ignores the coercive reality of arrest and custody. The provisions of s 187 of the Code are modified to that extent.

⁹ Section 17 defines "*instrument of a legislative or administrative character*" to "*includes regulations, rules, by-laws, orders, determinations, proclamations, awards, documents and authorities made, granted or issued under a power conferred by an Act*" and provides that "*statutory instrument*" means "*an instrument of a legislative or administrative character*."

¹⁰ *Heiss v The Queen* (1992) 2 NTLR 150 at 160 per Gallop, Martin and Mildren JJ and *Ashley v Balchin* (2006) 161 A Crim R 497 at [23] per Angel J.

17. Section 138 of the ENULA relevantly 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.

...

(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).

18. As noted earlier, the Defendant bears the onus of proving either impropriety or unlawfulness, in relation to the direct or consequential obtaining of the relevant evidence. In order to be “improper” conduct would ordinarily be characterised as “*not in accordance with truth, fact, reason or rule; abnormal, irregular; incorrect, inaccurate, erroneous, wrong*”.¹¹ In addition, the conduct sought to be impugned “*must be clearly inconsistent with the minimum standards which a society such as ours should expect and require of those entrusted with powers of law enforcement; it is not sufficient that the conduct merely contravene those standards in some minor respect*”.¹² In relation

¹¹ *Parker v Comptroller-General of Customs* [2009] HCA 7 at [29] per French CJ and *R v Lawrence* [2016] NTSC 65 at [93] per Grant CJ.

¹² *Robinson v Woolworths Ltd* (2005) 158 A Crim R 546 at [23] per Baston JA; *The Queen v Gehan* [2019] NTSC 91 at [8] and [9] per Grant CJ and *Mangurra v Rigby* [2021] NTSC 6 at [84] per Kelly J.

to “*contravention*”, to be ‘unlawful’, the conduct must be contrary to law, and not ‘authorised, justified or excused’.¹³

19. A further aspect of s 138 which is particularly pertinent in the circumstances of the Defendant’s contentions in this case is the requirement that the evidence sought to be excluded was either “*obtained*” through the asserted impropriety or unlawfulness, or “*in consequence*” of one of those flaws.

Findings

20. The Palmerston Markets on 20 October 2023 likely comprised “*land...being used for...entertainment*” within the meaning of s 120 of the PAA. Section 120(2) empowers a member to “*order any person who is ... disorderly ... to leave the land*”, with refusal to do so constituting an offence.¹⁴ At both the location of the initial incident and subsequently at the carpark loading area, officer Abbas made clear to the Defendant that he needed to leave the Markets. Although the attending officers were not able to ascertain the Defendant’s address, it is clear that at some point during the incident they became aware of his name. To that extent the alternative processes of a summons, or notice to appear, or infringement notice became real possibilities. However, the incident and the disorderly behaviour continued.
21. It is noted that the General Order makes clear that arrest “*should be an action of last resort*”, but may be appropriate “*to prevent the continuation or repetition of an offence*” or “*to prevent the risk of further offences which may cause a danger to the public*”. Regardless of whether on the basis of s 120 of the PAA, or in service of their oath of office, or having regard to common law powers and obligations, the conveyance of the Defendant from the area of the Palmerston Market where he was first encountered by officers to the outskirt parking and loading area was a valid exercise of the officers’ powers, and was both lawful and proper.
22. The arrest of the Defendant by officer Abbas was, of itself, also justified and lawful. However, the Defendant also contends that the method and force used in the apprehension, control and restraint constituting the arrest was unreasonable, excessive, unlawful, and constituted an assault.
23. During the several minutes of interaction leading up to the arrest, Officer Abbas displayed the patience of a saint. He sought to deal the Defendant in a humane and empathetic fashion, and was giving genuine consideration to removal of the Defendant in his offensive state to a safe and supportive environment somewhere other than the Market. However, the Defendant’s misbehaviour ultimately provoked Officer Abbas into an inflamed and uncontrolled state.
24. The arrest, which is depicted on BWF, was effected by Officer Abbas immediately following the Defendant uttering his misogynistic and offensive insults to Officer Gilmour. It was carried out by Officer Abbas alone, despite that the assistance of other officers present was available. Although effected in order to prevent continuation or repetition of offending behaviour, the arrest failed to meet both the common law and legislated requirements that only reasonable and necessary force be used. *General order – Operational Safety and Use of Force* did not comprise part

¹³ The High Court explained in *Parker v Comptroller-General of Customs* [2009] HCA 7 at [30] that “*the core meaning of ‘contravention’ [of a law] involves disobedience of a command expressed in a rule of law which may be statutory or non-statutory. It involves doing that which is forbidden by law or failing to do that which is required by law to be done. Mere failure to satisfy a condition necessary for the exercise of a statutory power is not a contravention. Nor would such a failure readily be characterised as “impropriety” although that word does cover a wider range of conduct than the word “contravention” [of law]*”, per French CJ.

¹⁴ Being 1.7 penalty units, with no alternative of imprisonment.

of the evidence at hearing.¹⁵ However, it is clear from viewing the BWF that the method and force employed to achieve the objective of securing the Defendant in the cage of the police vehicle was unreasonable and excessive. In addition paragraph [62] of the Instruction was totally ignored. That provides;

“When a person who uses a mobility device such as a wheelchair, walking frame or crutches is arrested, members should ask questions of the person to determine the safest manner in which to place the person into the rear of the police vehicle. Where a person has a physical disability, members should use appropriate lifting techniques or consider conveying the person in a police sedan.”

25. Due to the Defendant’s elevated and aggressive state, asking the questions counselled by [62] would almost certainly have been futile. Similarly, conveyance in a sedan would have presented as an unacceptable risk to the relevant officers. However, the Defendant’s overall presentation dictated that an appropriate and careful lifting technique (presumably using an officer either side, with the Defendant being ‘reversed’ into the cage) was essential, rather than the rigorous hoisting and tossing of the Defendant which occurred.
26. In relation to officer Abbas’ actions in effecting the arrest, the method employed and the force applied in that process were clearly and obviously excessive and unreasonable, and unlawful. The analysis and conclusions of her Honour Blokland J at [37] to [41] of *Cebu v Rigby* [2024] NTSC 72 are, respectfully, apt. The arrest constituted, on the balance, an assault. Due to the Defendant’s heavy impact with the floor the cage, the gravity of that assault may also be described as significant rather than minor or trifling.
27. The reception and processing into custody of the Defendant at the Palmerston Watchhouse was not improper or unlawful. True it is that various of the requirements of paragraphs [191] to [200] of the *Instruction* were not successfully attended to or accomplished. That included the mandated Custody Health Assessment, which is conducted by uniformed officers rather than clinical staff. However, that was generally due to the Defendant’s obstreperous, defiant and chaotic presentation. A strict application of the *Instruction* probably indicated that a medical examination or advice would have also been appropriate, although in the absence of rapport first being established such a course would have been frustrated.¹⁶ Nonetheless, the context of the custody advised by Officer Kanyilmaz in oral evidence at hearing was an intention to proceed to identify and locate a carer for the Defendant, then discharge him to their care. It was not intended to hold the Defendant for any significant period of time, for example under s 137 of the PAA.
28. Similarly, the Officers having custody of and handling the Defendant at the time he bit Officer Quedley in the holding cell were, with one qualification, acting entirely lawfully and in the proper course or execution of their duty.¹⁷
29. The qualification concerns the ultimate decision to not permit the Defendant to remain seated in the police wheelchair while in the holding cell. Watchhouse Keeper Kanyilmaz gave evidence that he conducted a Risk Assessment in relation to whether the Defendant could be left sitting in the wheelchair while in the holding cell, and that process determined the Defendant could not. That included on the basis of risk of harm to either the Defendant or others, or both. As the Defendant was to be placed in a cell by himself, “others” were the Officers on duty rather than other prisoners. Given the aggression or animosity being displayed by the Defendant on

¹⁵ Referred to at [23] of the General Order. That paragraph nonetheless points to the fundamental obligations.

¹⁶ For example, by reference to the Custody Awareness chart at [43] of the *Instruction*.

¹⁷ The Defendant’s submission that physical contact by the Officers with the Defendant in the holding cell was without consent, so an assault, ignores the distinctions referred to at paragraph [15] above.

processing into custody, that concern was a clear and present risk to Officers.¹⁸ Officer Kanyilmaz' evidence is accepted, as is the proposition that the Defendant is possessed of very sound upper-body strength. The evidence is also (through the BWF of the incidents at Palmerston Markets, the arrest, retrieval from the vehicle at the sally port, and in the Watchhouse and holding cell) that the Defendant is particularly unstable and incapable when not seated in a wheelchair.

30. Paragraphs [213] to [215] of the Instruction address the predicament of prisoners who have "Living Aids and Mobility Devices". Paragraph [214] mandates a Risk Assessment 'prior to removing any wheelchair from a prisoner'. That is, a mobility device should not be removed from a prisoner unless and until a Risk Assessment indicating the necessity for that course has been conducted. Paragraph [215] then provides;

"Where there are concerns of risk of injury to or by another person in custody then consideration should be given to placing the person in a single cell to allow them to retain the ... mobility device"

31. The object or purpose of paragraphs [214] and [215] of the Instruction, when read together, is to ensure that where practicable and safe to do so, a prisoner is permitted to remain in their wheelchair while in custody.¹⁹ No doubt Officer Kanyilmaz understood that the Defendant was far less mobile, or even immobile, without a wheelchair.²⁰ Associated with that was the Watchhouse Keeper's concern at the elevated and unpredictable features of the Defendant's presentation. Despite that the Defendant would be restricted in his capacity to use the wheelchair as a weapon for so long as he was seated in it²¹ (and may well have been largely incapable of that course when out of the chair), Officer Kanyilmaz's Risk Assessment was considered and, at the time of entering the holding cell, currently informed.
32. The difficulty with the ultimate decision and action to remove the Defendant's access to the wheelchair is that additional and significant information was provided to Officer Kanyilmaz following entry into the holding cell. This was through protestations of the Defendant when asked to vacate the wheelchair. The Defendant became very concerned at a medical issue, being the existence or development of pressure sores, which he stridently said the floor of the cell (even with the cushioning effect of the foam 'mattress') would exacerbate. It is noted that the Defendant had reasonable earlier opportunity to participate in and contribute to the Custody Health Assessment, and did not do so in any meaningful or material way. However, it is also clear from the BWF that no revision of the Risk Assessment was conducted following receipt of the medical information referred to, in order to review the earlier determination in case a conclusion consistent with the object or purpose of the Instruction was then indicated or required. Although it is not possible for the court (or perhaps even the Officer) to now conclude with any certainty what a revised Risk Assessment would have yielded, a real possibility of a change in the relevant

¹⁸ The BWF shows officers prepared for the processing into custody by donning spit shields, and while at the custody processing counter an officer held each arm, and at times pressure was applied to the Defendant's head and neck region to prevent any opportunity to spit directly. The Defendant was an extremely challenging prisoner.

¹⁹ The oral evidence given by the officers at hearing may have suggested a slightly different approach. However, it is clear a Risk Assessment for the purpose of deciding whether the Defendant could sit in the chair in cell was conducted, prior to him being conveyed to the cell.

²⁰ That inference is clearly available through viewing the BWF footage, including Officer Kanyilmaz's, from the sally port onwards. The importance to the Defendant of remaining in the chair would also have been clearly apparent to the officers after they had entered the cell with the Defendant, and heard his perspective concerning the proposal to place him on a 'mattress' on the cell floor.

²¹ Noting he would have been capable of using the chair as a 'vehicle', to ram the foot-rests into people and things.

determination existed at the time. A revised Risk Assessment having regard to the significant further information provided by the Defendant in the cell was strongly indicated. That includes having regard to various provisions of the *Instruction*, including paragraph [200] concerning “*Situational Awareness*”, and despite that the Defendant had hitherto been generally non-compliant and unresponsive to communications from the Officers.

33. It should be emphasised that the *General Order* and *Instruction* are not law. They are simply best practice guidelines, such that departure from their counsel does not produce unlawfulness.²² It is also my conclusion that the failure to revise the Risk Assessment was contributed to by the Defendant’s offensive and aggressive behaviour, with the Officers having a pressing need to release the Defendant into the security of the holding cell, with the possibility that his behaviour would then settle.
34. The impropriety of not reviewing the Risk Assessment in light of the new and significant information provided can properly be characterised as inadvertent or unintentional. That is despite the significance of the new information and the potential consequences of the decision for the Defendant’s health and well-being. The difficulty presented by not including the new information in a revised Risk Assessment satisfies the test set down by the High Court in *Parker*.²³
35. It is important to note that the Officer bitten was not the Officer who arrested the Defendant in the forceful and unlawful manner found. Nor was he the Officer who determined that the Defendant’s continued access to the wheelchair must be denied. Officer Quedley was clearly also seeking to deal with the very difficult Defendant in a humane and empathetic manner. At the time of the bite he was attempting to assist the Defendant from a supine to a seated position as a matter of comfort.
36. As observed above, a crucial requirement of s 138 is that the evidence sought to be excluded was either “*obtained*” through the asserted impropriety or unlawfulness, or “*in consequence*” of either deficiency. That requires a direct or consequential causal connection between the impropriety or unlawfulness and the evidence sought to be excluded.²⁴ I note the various decisions cited with approval in both *Wilson v Brown* at [80] and *Cebu v Rigby* at [62] to [71].²⁵ There is also the analysis in *Slater v The Queen*, discussing improper or unlawful conduct in the context of proximity to and distance from the evidence sought to be excluded, both in terms of the s 138(1)(b) test, and the balancing exercise required by s 138(3).²⁶
37. Here the relevant evidence was obtained many minutes following the unlawful arrest, and the victim of the Defendant’s offending took no part in that grave departure from the minimum standards expected and required by the community. Despite the shock and anger which the unlawful arrest undoubtedly engendered in the Defendant, which would have persisted for quite some time following the forceful arrest, it could not be concluded that the Defendant’s offending was “*closely related to*” or the direct product of the unlawfulness.²⁷ Nonetheless, the decision to

²² *Heiss v The Queen* (1992) 2 NTLR 150 at 160 per Gallop, Martin and Mildren JJ and *Ashley v Balchin* (2006) 161 A Crim R 497 at [23] per Angel J

²³ *Parker v Comptroller-General of Customs* [2009] HCA 7 at [29]

²⁴ I understand his Honour Justice Adams’ reference in *Director of Public Prosecutions v Coe* [2003] NSWSC 363 to “unless something more is shown than the mere causal link”, is simply to “obtained improperly” rather than to “in consequence of”, because the latter connotes causal connection.

²⁵ Being *DPP v AM* (2006) 161 A Crim R 219, *DPP v Carr* [2002] NSWSC 194, *R v Dalley* (2002) 132 A Crim R 169 and *Robinett v Police* (2000) 78 SASR 85.

²⁶ *Slater v The Queen* [2019] VSCA 213 at [43] to [50].

²⁷ *DPP v Carr* [2002] NSWSC 194

deny the Defendant the dignity of remaining in his wheelchair and, instead, to release him onto the floor of the cell, was a relevant factor in the overall chronology of events which led to the 'obtaining' of the evidence to be adduced in respect of the subject charge. That factor was part and parcel of the episode of custody and is connected (if not "entangled") with the evidence of the Defendant's offending. It has also been said that "A narrow construction should not be given to s.138(1)(a) and (b) nor one that is unduly broad".²⁸

38. The seriousness or otherwise of the consequential offending conduct and its proportionality to the improper or unlawful conduct giving rise to consideration under s 138 is also a relevant factor. Here the consequential offending is objectively serious, being an assault on a police officer. However, the particular features of the offending render the assault to be at the low end of the spectrum of such offences.²⁹ The contradistinction is well emphasised in the case of *Coe*.³⁰
39. The custodial episode was commenced by the unlawful arrest and relevantly concluded with the innocent impropriety of not conducting a revised Risk Assessment, leading to the inevitable result of the Defendant being on the cell floor. It was that last feature which apparently precipitated the Defendant assaulting Officer Quedley. Although finely balanced, an interconnectedness exists, and I consider the Defendant has discharged the onus to establish that the evidence was obtained in consequence of either a contravention or an impropriety. In this case each ground is made out, albeit that the impropriety lacked any bad faith. I am satisfied to the standards required by *Robinson v Woolworths* and *Parker v Comptroller-General of Customs*.³¹ The onus therefore shifts to the Prosecution to satisfy the court that the desirability of admitting the evidence outweighs the undesirability of admitting the evidence obtained in the way it was. That is having regard to the criteria provided by s 138(3) of the ENULA.³²
40. Both the probative value and importance of the relevant evidence are very significant, and carry very definite weight. The viability of the prosecution depends upon admission of that evidence, and no other evidence is available.³³ The objectively serious but low level nature of the offence is discussed above, and it is not my view that the offence is a grave example of criminal conduct.³⁴ I do consider that the Defendant has no defence arising under s 29 of the Code.
41. The "nature of the subject-matter" might be characterised in a number of ways. It could simply be noted that the proceedings are a criminal prosecution of an offence in which a significant public interest exists to bring offenders to justice. However, there is also the broader perspective of the whole of the custodial episode comprising the overall context.
42. The contravention identified is, in my judgment, very significant. Although it was committed in a dysregulated state, the Officer's actions were both deliberate and reckless. Conversely, the impropriety was simply inadvertence produced by an urgency to secure the Defendant into

²⁸ Ibid at [70], noting that a "but for" test was eschewed by the court in that matter.

²⁹ The bite did not break the skin through the rubber glove being worn, albeit that the glove was ruptured. The officer's response following the assault may well have been stoic and all too understanding, however the "harm" which ensued might be properly characterised as minor in the scale of assaults.

³⁰ *DPP v Coe* [2003] NSWSC 363 (which may not be found on Austlii)

³¹ *Robinson v Woolworths Ltd* (2005) 158 A Crim R 546 at [23] and *Parker v Comptroller-General of Customs* (2009) 83 ALJR 494 at [28] to [29].

³² Noting that the s 138(3) criteria are not exhaustive, and any particular matter properly relevant to the 'value judgment' required for the purpose of determining matters to which s 138 may apply can be taken into account.

³³ In contrast with the situation in *Kadir v The Queen* [2020] HCA 1 at [42].

³⁴ *R v MM* [2004] NSWCCA 364 at [54].

custody and place distance between him and the Officers charged with the challenging and unpleasant task of dealing with him. Nonetheless, the contravention does to a material extent inform the whole of the custodial episode preceding the assault by the Defendant.

43. The excessive force applied to the Defendant upon arrest contravened rights recognised by the International Covenant on Civil and Political Rights, including the right to security. To a much lesser extent, the undignified predicament in which the Defendant found himself once in the holding cell, could also be said to be inconsistent with one or more rights recognised by the Covenant.
44. The possibility of some other proceeding in the circumstances of the arrest is real. Officer Abbas could not say whether disciplinary proceedings had ensued, but suggested he may have been counselled. Speculation beyond noting the possibility would be inherently imprecise. What can confidently be stated is that, given the genesis of the evidence, no other means existed by which the relevant evidence may have been obtained.
45. The very significant public interest in the successful prosecution of people who assault members of police is well recognised. Exclusion of the relevant evidence would frustrate that important objective. There is also the importance which must be attached to ensuring that law enforcement Officers entrusted with powers which abrogate fundamental liberties pay close attention to the conditions and limitations on the exercise of those powers.³⁵ Here the contravention was deliberate rather than through inattention, albeit that some explanation exists. However, having regard to the relative gravity of the contravention, and noting that the impropriety found was simply one of inadvertence, I consider the Prosecution has not discharged the onus to demonstrate or satisfy the court that the desirability of admitting the evidence outweighs the undesirability of admitting the evidence obtained in the way it was. That is despite that the relevant evidence was not obtained directly through the contravention.
46. I therefore order that the relevant evidence is excluded from the proceeding.

³⁵ *The Queen v Gehan* [2019] NTSC 91 at [67]. See also *The Queen v Bonson* [2019] NTSC 22 at [42] to [49] and [60] to [65].