Children's Court
New South Wales

Case Title:	**Police v RD and RC**
Medium Neutral Citation:	
Hearing Date(s):	25 June, 18 July
Decision Date:	
Jurisdiction:	Children's Court
Before:	Mulroney CM
Decision:	Admit evidence obtained by use of listening devices on 3 September 2013
Catchwords:	Evidence – admissions obtained by use of listening device – young people not yet charged – whether improper or unfair Surveillance Devices - compliance with warrant Detention centres – duties of Juvenile Justice authorities
Legislation Cited:	Surveillance Devices Act 2007 Children (Detention Centres) Act 1987 Law Enforcement (Powers and Responsibilities) Act 2002
Cases Cited:	*R v KS & Said* [2003] VSC 418 *JB v Regina* [2012] NSWCCA 12 *Hartnett v State of NSW* [1999] NSWSC 265 *Re Tracey* [2011] NSWCA 43 *R v Swaffield; Pavic v The Queen* [1998] HCA 1; (1998) 192 CLR 159; (1998) 151 ALR 98; 72 ALJR 339; 96 A Crim R 96. *R v Hebert* [1990] 2 SCR 151 *Pavitt v Regina* [2007] NSWCCA 88, (2007) 169 A Crim R 452 *R v LDV (No. 2)* [2013] NSWDC 215
Parties:	Police RD and RC

Representation	
Prosecutor	Pearce
RD	O'Neill
RC	Munro
Publication Restriction:	Section 15A Children (Criminal Proceedings) Act 1987

JUDGMENT

Background

1 It is alleged that in the early hours of 1 April 2013 the victim approached his parked motor vehicle and unlocked it. He entered the vehicle and put the key in the ignition. A person appeared at the open door of the vehicle armed with a small knife and demanded his keys. The victim surrendered his keys. A demand was then made for his wallet. He sought to run away but was surrounded. A further demand for his wallet was made and his refusal was followed by a blow to the face. He handed over his wallet, which included a MasterCard. The offenders entered the vehicle and drove it away.

2 It is further alleged that:

(a) at about 11am that day the vehicle was detected exceeding the speed limit at Mt Pritchard.
(b) Later again at 2.18pm that day CCTV recorded the stolen vehicle enter a supermarket car park.
(c) RD and RC are recorded leaving the vehicle with two others.
(d) RC uses the stolen MasterCard to purchase a drink and the four then return to the vehicle.
(e) Other similar fraud offences are committed over the next 2 days.

3 RC and RD are each charged with robbery being armed with an offensive weapon and aggravated assault with intent to take/drive motor vehicle on this date. RD is also charged with drive conveyance taken without consent, drive whilst disqualified from holding a licence, dishonestly obtain property

by deception (x3) and goods in custody. It is also alleged that on 11 June 2013 RC participated in an aggravated break enter and steal offence at Woollahra.

4 At that time no charge had been laid against either regarding the incidents outlined above. At no time prior to 3 September was either formally interviewed about the incidents, despite the evidence available to investigators about their possible involvement.

5 On 3 September 2013 RD and RC were in detention at Cobham Detention Centre. They were detained for reasons not related to these proceedings. A listening device or devices in or about one or both adjacent cells occupied by each of the young people. Conversations between each of the young people were recorded and are sought to be admitted in evidence in these proceedings.

6 It is submitted by the prosecution that the only way that the conversations can be understood is that each of the young people was an active participant in the offences with which they have been charged.

The Surveillance Device process

7 Police obtained a warrant from a Justice of the Supreme Court pursuant to the Surveillance Devices Act on 29 August permitting the use on or in nominated premises being "any cell occupied by RD at Cobham Juvenile Justice Centre ..." of "two listening device" (LD) during the period 5.10pm 29 August 2013 to 5.10pm 28 September 2013. A warrant in identical terms was obtained regarding RC.

8 Senior Constable Steel was nominated as the law enforcement officer primarily responsible for executing the warrant. The offences of robbery being armed with an offensive weapon and aggravated assault with intent to take/drive motor vehicle were the offences in respect of which the warrant was issued.

9 During the currency of the warrants LDs were installed on or in adjacent cells at Cobham Detention Centre. Neither of RC or RD occupied these cells at the time of the installation of the LDs. Each was moved to one of the cells shortly after installation.

10 Both before and after the issue of the warrants there was a process of consultation between police (Det Vavayis and Snr Const Steele) and Juvenile Justice (Mr Salau, Mr Hearne and Ms Marchant) regarding appropriate places to install the LDs and the movement of the young people. It is not necessary to go into the details of this consultation although not all of the parties above were involved at each step of the process.

11 On 3 September 2013 RD was interviewed by Senior Constable Steele and Detective Senior Constable Healey at Cobham Detention Centre. RD's mother was present. The interview was recorded. RD was offered the opportunity to obtain legal advice, which he declined. RD was told that he didn't have to say or do anything if he didn't want to, that anything said or done would be recorded by audio and that the recording could be used in court. He acknowledged each of these pieces of advice.

12 The interview did not comply with the provisions of the Law Enforcement (Powers and Responsibilities) Act. No information was given to RD's mother regarding her role as a support person by an independent officer. No opportunity was given to RD and his mother to confer in private before the interview.

13 After the interview RD was returned to the cell. Shortly after that he and RC had conversations that were recorded by one or more of the LDs.

14 Transcripts of the conversations were tendered on the voire dire hearing. The transcripts are identified by time. In the transcripts RC is V1 and RD is

V2. I will identify them as RC and RD The relevance of the transcripts is as follows:

20.35.50 – 20.37.40 there is conversation which is capable of being understood as admission that each of the young people was present

20.39.20 – 20.40.00 there is reference to a 4WD and to Jake. The vehicle stolen was a four wheel drive vehicle and one of the alleged co-offenders is named Jake.

21.00.29 – 21.01.34 I extract parts that might be relied on.

RC ....what about Troy bro?
RD What?

RC Fucking saying he was gonna do it, didn't do it
RD Do What?
RC Like he was going to open the door and rip the cunt out ..
RD Oh yeah
.....
RD Walking home from my ... and that
.....
RD See this Asian cunt. Get the fuck out of the car, get the fuck out of the car ..... Troy
.....
RD I'm just sitting there ...
RC Yeah
RD Where the fuck's the handbrake, where the fuck's the handbrake
RC We were fucking stressing ay?
RD I was stressing ...
RC All the boys were like, fuck where's the handbrake bro ...

21.05.00 – 21.08.40 is capable of being understood as a detailed admission by RC regarding the aggravated break enter and steal offence with which he is charged.

Objections on the voire dire

15 Admission of the transcript of the conversations into evidence is objected to. It is submitted that

(1) The terms of the listening device warrant were not properly complied with;

(2) The evidence was obtained in breach of the obligation created by the Children (Detention Centres) Act for "the welfare and interests of persons on remand or subject to control shall be given paramount consideration"; and

(3) The process employed by investigators with respect to two young people in custody was so improper or unfair as to require rejection of the evidence.

16 The relevant parts of the Evidence Act are:

Section 90 Discretion to exclude admissions

In a criminal proceeding, the court may refuse to admit evidence of an admission, or refuse to admit the evidence to prove a particular fact, if:

> (a) the evidence is adduced by the prosecution; and
> (b) having regard to the circumstances in which the admission was made, it would be unfair to a defendant to use the evidence."

Section 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."

Was there improper compliance with the listening device warrant?

17 As has previously been set out, the warrants authorised the placement of LDs on or in any cell occupied by the relevant young person. It is submitted on behalf of each of the young people that at the time of the installation of the LDs the cells were not occupied by either of the young people. At the time of the installation they were each in other cells and later transferred to the cells in or on which the LDs had been installed.

18 Given the serious nature of the installation of a LD, it is necessary that any warrant authorising such a step is strictly complied with. *Hartnett v State of New South Wales* [1999] NSWSC 265 at [27] was relied upon, however this paragraph records a submission by counsel, not a ruling by the court.

> 27 Finally, Mr Donovan QC submitted that the Courts have not taken as strict a stand on the execution of search warrants as they have on their issue, but in *Crowley v Murphy* (1981) 52 FLR 123, the Court emphasised the need for strict compliance with the terms of the search warrant in its execution.

19 In fact in *Crowley v Murphy*, Lockhart J cited the observation of Lord Cooper in *Lawrie v Muir* [1950] SLT 37, at 39-40:

> From the standpoint of principle it seems to me that the law must strive to reconcile two highly important interests which are liable to come into conflict - (a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and (b) the interests of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from Courts of law on any merely formal or technical ground. Neither of these objects can be insisted upon to the uttermost. The protection of the citizen is primarily protection for the innocent citizen against unwarranted, wrongful and perhaps high-handed interference, and the common sanction is an action of damages. The protection is not intended as a protection for the guilty citizen against the efforts of the public prosecutor to vindicate the law. On the other hand the interest of

> the State cannot be magnified to the point of causing all the safeguards for the protection of the citizen to vanish, and of offering a positive inducement to the authorities to proceed by irregular methods."

20 With due respect to those who made the submission, the objection is not even formal or technical but pedantic. It is certainly not "unwarranted, wrongful [or] high-handed". At the relevant time of the operation of the LD it was placed in accordance with the warrant. The cells were in fact occupied by each of RC and RD.

21 The second submission is that Senior Constable Steel was the person authorised to carry out the warrants and that he did not attend the detention centre to observe the placement of the LDs or tell the officers placing the devices where to do this. The terms of the warrants provide that Senior Constable Steel "is the law enforcement primarily responsible for executing the warrant."

22 In *Hartnett*, supra, at [8] the warrants "named Sergeant Sullivan, and only Sergeant Sullivan, as the person authorised to execute them." In fact a team comprising police and officers from the Department of Community Services executed the warrants at a number of locations in a co-ordinated action involving the removal of a number of children suspected of being in need of care. The court found that he in no way was involved in the "execution" of the warrants.

23 In this instance the wording is different. It requires "primary responsibility" to be exercised by Senior Constable Steel. He agreed that he did not instruct the police installing the devices about precisely where to place them. This is hardly an issue as the terms of the warrant are clear in that respect. To suggest that he needed to either direct the location or approve the precise location is an unnecessarily rigid approach to responsibility. He had organised police with the appropriate technical skills. He had followed up on original discussions between Juvenile Justice staff and Detective Vivayis and organised co-operation between custodial management and

the installers. I am satisfied that this amounts to primary responsibility. I am satisfied that the warrants were properly complied with.

Was the Children (Detention Centres) Act breached?

24 The Children (Detention Centres) Act 1987 No 57 provides that:

> **4 Objects of Act**
>
> (1) The objects of this Act are to ensure that:
>
> (a) persons on remand or subject to control take their places in the community as soon as possible as persons who will observe the law,
>
> (b) in the administration of this Act, sufficient resources are available to enable the object referred to in paragraph (a) to be achieved, and
>
> (c) satisfactory relationships are preserved or developed between persons on remand or subject to control and their families.
>
> (2) In the administration of this Act:
>
> (a) the welfare and interests of persons on remand or subject to control shall be given paramount consideration, and
>
> (b) it shall be recognised that the punishment for an offence imposed by a court is the only punishment for that offence.

25 It is argued on behalf of RC and RD that the Juvenile Justice authorities responsible for the detention centre (hereinafter called JJ) had a duty so safeguard the welfare and interests of RC and RD, and therefore had a duty to advise them with regard to the LDs. It was not suggested that they should have refused to allow the execution of the warrants, but it is submitted that active involvement in the planning of the installation was contrary to the paramount consideration set out in section 4(2).

26 The provisions of the Act should be read in the context of the objects set out in section 4(1). These focus on rehabilitation and maintenance of family relationships. The Act does not place JJ *in loco parentis*. The paramount interest provision is to be read in the context of rehabilitation and maintenance of family relationships and not as an absolute and unfettered provision. No further guidance is available from the Act or Regulations about what section 4(2)(a) means.

27 In *Re Tracey* [2011] NSWCA 43, Spigelman CJ affirmed the applicability of the UN Convention on the Rights of the Child (CROC), to which Australia is a State Party, in child protection proceedings at pars [16] to [49]. In that case the paramountcy principles in the Children and Young Persons (Care and Protection) Act 1998 were in issue. There are other United Nations documents which may be of assistance in understanding the legislative provision in issue in this case. They are the Standard Minimum Rules for the Treatment of Prisoners, the Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), and the Rules for the Protection of Juveniles Deprived of their Liberty.

28 CROC includes the following provisions:

> **Article 37**
> States Parties shall ensure that:
> .....
> 3. Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
> 4. Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.
>
> **Article 40**
> 1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
>
> 2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;
(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
(i) To be presumed innocent until proven guilty according to law;
(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;
(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;
(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;
(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;
(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;
(vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;
(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt

with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

29 The Beijing Rules include the some fundamental principles[1] as well as more detailed provisions. Included in one or more of the three sets of rules are provisions regarding basic matters such as food and accommodation, as well as provision of programs, access to legal advice and segregation of young prisoners from adults. None specifically addresses use of listening devices. None provides any suggestion that the JJ authority is *in loco parentis* or has any responsibility for general advice or guidance.

30 Save for the listening device installation infringing the right to privacy and perhaps the right to remain silent, I do not see any relevant obligation imposed here which would require the Juvenile Justice authorities to warn RC or RD about the existence of the devices or in more general terms to be guarded about their discussions. The specific provisions of the Surveillance Devices Act outweigh these considerations. JJ authorities did not have any responsibility to advise RC or RD about the existence of the LDs or to warn them more generally about the need to be careful about what they discussed.

---

[1] 1. Fundamental perspectives

1.1 Member States shall seek, in conformity with their respective general interests, to further the well-being of the juvenile and her or his family.

1.2 Member States shall endeavour to develop conditions that will ensure for the juvenile a meaningful life in the community, which, during that period in life when she or he is most susceptible to deviant behaviour, will foster a process of personal development and education that is as free from crime and delinquency as possible.

1.3 Sufficient attention shall be given to positive measures that involve the full mobilization of all possible resources, including the family, volunteers and other community groups, as well as schools and other community institutions, for the purpose of promoting the well-being of the juvenile, with a view to reducing the need for intervention under the law, and of effectively, fairly and humanely dealing with the juvenile in conflict with the law.

1.4 Juvenile justice shall be conceived as an integral part of the national development process of each country, within a comprehensive framework of social justice for all juveniles, thus, at the same time, contributing to the protection of the young and the maintenance of a peaceful order in society.

1.5 These Rules shall be implemented in the context of economic, social and cultural conditions prevailing in each Member State.

1.6 Juvenile justice services shall be systematically developed and co-ordinated with a view to improving and sustaining the competence of personnel involved in the services, including their methods, approaches and attitudes.

31 It is also worth observing that had RC and RD been at liberty and a listening device installed in the home of one of them, it is highly likely that that it would have been done without the knowledge of any parent or carer. To this extent RC and RD are not disadvantaged by their being in detention.

Was the use of the listening devices improper or unfair?

32 It was submitted that I should follow the example of *R v KS & Said* [2003] VSC 418. In that case Coldrey J refused to admit evidence in similar circumstances to those or RC and RD. A LD warrant was obtained under Victorian legislation similar to that which applies in NSW. The young person had been charged with murder. Another young person had been deliberately moved to his with the purpose of "stimulating conversation" i.e. encouraging discussion of the murder. Part of the conversation was as follows (RW was the other young person):

> RW: ... Who'd ya knock? Tell me. KS : Ha. RW: Who'd ya knock? KS : My Mum's boyfriend. RW: Tell me. KS : Nah, I don't want to talk about it man.

33 The specified location in the warrant was "Any cell or visitor's booth occupied from time to time by [KS]". Coldrey J observed that:

> 13 It is clear from my summary of events that the listening device warrant was applied for by investigating police using the appropriate legal procedures and the device itself was installed subsequent to the lawful granting of a warrant to do so by a Supreme Court Judge. It was also clear that the Centre authorities cooperated with the police to facilitate the installation of the listening device in room 12/13. They could hardly have done otherwise, faced with a warrant issued out of the Supreme Court.

34 Coldrey J went on to consider the ramifications of the actions of the police and juvenile justice authorities.

> 31 A number if the major authorities on what may be termed the "eavesdropping cases" have been gathered and reviewed by Olsson J in *R v Burns and Ors.*

32 The thrust of these cases is to the effect that admissions recorded by way of electronic device will be admissible in evidence in the absence of subterfuge or other improper behaviour by the investigating authorities, and where such authorities have played an essentially passive role. The mere fact that the incriminatory material is obtained subsequent to the exercise of a right to silence is not an impediment to admissibility.

33 Care must be taken in approaching the few authorities cited, since the factual situations vary greatly and the legal context in which they were decided may be regarded as different from that governing the operations of investigating officials in Victoria.

34 In the circumstances of the present case, it cannot be argued that what the police investigators did in having a listening device installed was illegal. Indeed, they had proceeded correctly in obtaining the warrant of a Supreme Court judge to do so. The admissions themselves were not involuntary and on the evidence before this court, a finding cannot be made that they were obtained by any form of interrogation conducted at the behest of the investigating police.

35 However I do not regard that as an end to the matter. The cases cited by Olsson J all involve adult offenders. In this case, the offender was a diminutive 15 year old juvenile. He had expressed the wish to investigating police to exercise his right to silence, and had done so when interviewed on 8 May.

36 It appears from the material that, as early as 1 May, the police were preparing the ground to utilise a listening device as a "fall back" position. Having obtained no admissions directly from the accused, that course was pursued. It was pursued effectively in contravention of the right to silence accorded to the accused by legislation.

.....

39 Both the legislature, (by the enactment of such provisions as s.464ff of the Act[2]), and the Courts, have recognised that protection is to be accorded to juveniles who lack the maturity and judgement of adults. These are qualities which might enable adults to remain silent about matters which are to their disadvantage.

40 Having exercised his right to silence under the legislation, the accused may well have continued to do so had the authorities not required him to share his room with another inmate. It is perhaps

---

[2] CRIMES ACT 1958 (Vic) - SECT 464E Persons under 18 years

(1) If a person in custody is under the age of 18 years, an investigating official must not, subject to subsection (2), question or carry out an investigation under section 464A(2) unless—

(a) a parent or guardian of the person in custody or, if a parent or guardian is not available, an independent person is present; and

(b) before the commencement of any questioning or investigation, the investigating official has allowed the person in custody to communicate with his or her parent or guardian or the independent person in circumstances in which as far as practicable the communication will not be overheard.

> trite to observe that there will inevitably be great psychological pressure on an individual to talk to, and establish an accord with, inmates with whom that person is forced to co-exist within an institution. That imperative is likely to increase if that inmate is one with whom a room must be shared. These are psychological pressures to which a juvenile is likely to be particularly vulnerable.
>
> 41 In *R v Heaney and Welsh*[5], I endeavoured to analyse the current application of the fairness and public policy discretions. I remarked (at p.644):
>
> > "Putting aside the issue of voluntariness, the current approach of the majority of the High Court to the exclusory discretions seems to be as follows. The fairness discretion encompasses considerations of the effect of the conduct of law enforcement officers upon the reliability of the impugned material. The term 'law enforcement officers' may be regarded as including persons acting as their agents. The fairness discretion will also come into play where some impropriety by law enforcement officers or their agent has eroded the procedural rights if the accused, occasioning some forensic disadvantage. Those procedural rights include the right to choose whether or not to speak to the police. Importantly, the method of eliciting the admission or confession will clearly be relevant in determining whether or not it would be unfair to an accused to admit it into evidence. The discretion to exclude evidence on the grounds of public policy may be enlivened where no unfairness to the accused is occasioned, but nonetheless, the method by which the confessional evidence has been elicited is unacceptable in the light of prevailing community standards. This broad discretion will involve a balancing exercise."
>
> 42 In my opinion the procedures embarked upon by the police in conjunction with the authorities at the Juvenile Justice Centre ultimately had the effect of subverting the accused's procedural rights. Moreover, the forensic disadvantage occasioned is such that the impugned material should not be admitted into evidence.

35 The provisions of the Victorian legislation referred to by Coldrey J. above are less stringent than the provisions of Section 13 Children (Criminal Proceedings) Act or Part 9 Law Enforcement (Powers and Responsibilities) Act. It is also worthy of note that the common law, rather than equivalent provisions to the Evidence Act (NSW), applied. Nevertheless in the circumstances of this case the Evidence Act reflects the common law.

36 Included in the cases reviewed in *R v Burns and Ors* was the decision of the High Court in *R v Swaffield; Pavic v The Queen* [1998] HCA 1; (1998) 192 CLR 159; (1998) 151 ALR 98; 72 ALJR 339; 96 A Crim R 96. The court came to different conclusions regarding these appeals because of the application of common principles to different facts. In *Swaffield* an undercover police officer posed as the brother in law of a man in trouble for burning a car. Swaffield had not been charged. No caution had been administered. The Court found that the process was a violation of his right to choose to speak to police.

37 In *Pavic* the accused had been arrested, cautioned and interviewed (at which stage he exercised his right to silence) but not charged with murder. At the instigation of police a friend of Pavic spoke with Pavic and told him of the recovery by police of bloodstained clothes left by the friend with Pavic. Pavic made inculpatory statements. The Court found that the recorded statements were properly admitted.

38 Toohey, Gaudron and Gummow JJ noted the following:

> [69] – [70] ..... the Chief Justice asked counsel to consider whether the present rules in relation to the admissibility of confessions are satisfactory and whether it would be a better approach to think of admissibility as turning first on the question of voluntariness, next on exclusion based on considerations of reliability and finally on an overall discretion which might take account of all the circumstances of the case to determine whether the admission of the evidence or the obtaining of a conviction on the basis of the evidence is bought at a price which is unacceptable, having regard to contemporary community standards.
>
> Putting to one side the question of voluntariness, the approach which the Court invited counsel to consider with respect to the common law in Australia is reflected in the sections of the Evidence Acts to which reference has been made, when those sections are taken in combination. The question which arises immediately is whether the adoption of such a broad principle is an appropriate evolution of the common law or whether its adoption is more truly a matter for legislative action. Subject to one matter, an analysis of recent cases, together with an understanding of the purposes served by the fairness and policy discretions and the

rationale for the inadmissibility of non-voluntary confessions, support the view that the approach suggested by the Chief Justice in argument already inheres in the common law and should now be recognised as the approach to be adopted when questions arise as to the admission or rejection of confessional material. The qualification is that the decided cases also reveal that one aspect of the unfairness discretion is to protect against forensic disadvantages which might be occasioned by the admission of confessional statements improperly obtained.

[74] One matter which emerges from the decided cases is that it is not always possible to treat voluntariness, reliability, unfairness to the accused and public policy considerations as discrete issues. The overlapping nature of the unfairness discretion and the policy discretion can be discerned in Cleland v The Queen[106]. It was held in that case that where a voluntary confession was procured by improper conduct on the part of law enforcement officers, the trial judge should consider whether the statement should be excluded either on the ground that it would be unfair to the accused to allow it to be admitted or because, on balance, relevant considerations of public policy require that it be excluded. That overlapping is also to be discerned in the rationale for the rejection of involuntary statements. It is said that they are inadmissible not because the law presumes them to be untrue, but because of the danger that they might be unreliable[107]. That rationale trenches on considerations of fairness to the accused. And if admissibility did not depend on voluntariness, policy considerations would justify the exclusion of confessional statements procured by violence and other abuses of power.

39 They went on to cite with approval, at [85] – [86], a Supreme Court of Canada case of *R v Hebert* [1990] 2 SCR 151in which it was held that

[85]

.... "The common law rules related to the right to silence suggest that the scope of the right in the pre-trial detention period must be based on the fundamental concept of the suspect's right to choose whether to speak to the authorities or remain silent."

.....

The idea that judges can reject confessions on grounds of unfairness and concerns for the repute and integrity of the judicial process has long been accepted in other democratic countries without apparent adverse consequences. ... The jurisprudence on the rights of detained persons can only benefit, in my view, from rejection of the narrow confessions formula and adoption of a rule which permits consideration of the accused's informed choice, as well as fairness to the accused and the repute of the administration of justice."

> [86] Dealing with the use of undercover agents, McLachlin J drew a distinction between observing a suspect and actively eliciting information in violation of the suspect's choice to remain silent. She said[123]:
>
> > "When the police use subterfuge to interrogate an accused after he has advised them that he does not wish to speak to them, they are improperly eliciting information that they were unable to obtain by respecting the suspect's constitutional right to silence: the suspect's rights are breached because he has been deprived of his choice. However, in the absence of eliciting behaviour on the part of the police, there is no violation of the accused's right to choose whether or not to speak to the police. If the suspect speaks, it is by his or her own choice, and he or she must be taken to have accepted the risk that the recipient may inform the police."

40 There are a number of authorities subsequent to *R v KS and Said* that are relevant to this question. These include *R v Sophear Em* [2003] NSWCCA 374 and *EM v The Queen* [2007] HCATrans 65. They are helpfully analysed in *Pavitt v Regina* [2007] NSWCCA 88, (2007) 169 A Crim R 452.

41 In *Pavitt v Regina* the accused was alleged to have committed a number of sexual assaults on the complainant. A warrant was obtained to listen to a telephone conversation between the accused and the complainant. No charge had been laid and McColl JA and Latham J, Adams J *contra*, held that:

> 70 In our view, without being exhaustive, the following propositions relevant to the present case can be extracted from the authorities to which we have referred concerning the admissibility of covertly recorded conversations:
>
> > (a) The underlying consideration in the admissibility of covertly recorded conversations is to look at the accused's freedom to choose to speak to the police and the extent to which that freedom has been impugned: Swaffield (at [91]) per Toohey, Gaudron and Gummow JJ; (at [155]) per Kirby J.
> >
> > (b) If that freedom is impugned, the court has a discretion to reject the evidence, the exercise of which will turn on all the circumstances which may point to unfairness to the accused if the confession is admitted: Swaffield (at [91]); a

conclusion that some or all of the Broyles factors were present did not lead to the admissions being excluded in either Pavic or Carter's cases;

(c) Even if there is no unfairness the court may consider that, having regard to the means by which the confession was elicited, the evidence has been obtained at a price which is unacceptable having regard to prevailing community standards: Swaffield (at [91]).

(d) The question whether the conversation was recorded in circumstances such that it might be characterised as either unfair and/or improper include whether the accused had previously indicated that he/she refused to speak to the police;

(e) The right to silence will only be infringed where it was the informer who caused the accused to make the statement, and where the informer was acting as an agent of the state at the time the accused made the statement. Accordingly, two distinct inquiries are required:

> (i) as a threshold question, was the evidence obtained by an agent of the state?
>
> (ii) was the evidence elicited?

(f) A person is a state agent if the exchange between the accused and the informer would not have taken place, in the form and manner in which it did take place, but for the intervention of the state or its agents: Broyles[3] (at [30]);

(g) Absent eliciting behaviour on the part of the police, there is no violation of the accused's right to choose whether or not to speak to the police. If the suspect speaks, it is by his or her own choice, and he or she must be taken to have accepted the risk that the recipient may inform the police: Hebert;

(h) Admissions will have been elicited if the relevant parts of the conversation were the functional equivalent of an interrogation and if the state agent exploited any special characteristics of the relationship to extract the statement; evidence of the instructions given to the state agent for the conduct of the conversation may also be important: Broyles.

(i) The fact that the conversation was covertly recorded is not, of itself, unfair or improper, at least where the recording was lawful.

---

[3] [1991] 3 SCR 595. Another Supreme Court of Canada case referred to by Toohey, Gaudron and Gummow JJ.

Was the evidence obtained by an agent of the State?

42 The conversation between RC and RD was certainly one which was prompted by the action of police interviewing RD and then placing RC and RD in adjacent rooms. This is not the same situation as most of the cases as there was no person taking part in the conversation whose presence was organised the police. In *Broyles*, supra, the friend was found to be an agent of the State "because parts of the conversation were in the nature of an interrogation, not just parts of a conversation which flowed naturally." Here there is nothing other than a conversation between two young people who apparently knew each other well.

43 In *R v KS and Said* the young person who was moved into the same cell as KS was not in any way briefed or encouraged by the police. Nevertheless his questioning was akin to interrogation. The significant difference between the circumstances of that case and those of RC and RD is that RC and RD were well known to each other. Their conversation is in the nature of mutual bragging.

44 It was submitted that JJ was an agent of the State. There is a difference between co-operation with setting up circumstances in which an incriminating admission might be made and direct participation in the conversation which produces the admission. To be an agent of the State in the sense that it is used in the cases cited above there needs to be direct participation.

45 The conversation between RC and RD was not obtained as a result of involvement of an agent of the State.

Were the circumstances which produced the conversation a result of improper behaviour by JJ?

46 It is argued that the behaviour of JJ was improper because it was in breach of JJ guidelines. Extracts from the JJ Client Protection & Wellbeing

Policy and the JJ Code of Conduct were tendered, as was a document outlining detainee placement procedures at the detention centre. The policy is introduced as follows:

> Juvenile Justice NSW is responsible for the management of young offenders in the community or in custody. It is committed to the promotion of the safety, welfare and wellbeing of children and young people. Juvenile Justice also shares responsibility with service delivery partners to ensure that children and young people are protected from abuse and neglect.
>
> The Code of Conduct (code) does not attempt to provide a detailed and exhaustive list of what to do in every aspect of our work, instead it represents a broad framework that will help all staff decide on an appropriate course of action when faced with an ethical issue or professional decisions.
>
> Part One of this code recognises that not all ethical and professional decisions are straightforward.

Part of the code of conduct states:

> **2.2 Professional behaviour towards clients**
> **Intent: Staff are obliged to maintain professional and therapeutic relationships with clients and their families, to ensure best outcomes are achieved.**
> You must act with integrity, impartiality and compassion towards clients and their families.
> All official dealings with clients and their families should be professional, transparent, accountable and fair.
> The professional relationship between staff and clients relies on trust and the obligation of staff to act in the best interests and welfare of the client.
> The therapeutic context should be a safe one for clients. A proper and professional relationship is one where the welfare and rehabilitation of the client is the primary concern.
> All clients have a right to a safe physical and emotional environment. As a staff member, you are expected to always behave in ways that promote the safety, welfare and well-being of children and young people. You must actively seek to prevent harm to children and young people, and to support those who have been harmed. While not all staff are required to manage and supervise clients, it is important for all staff to understand and observe child protection legislation and to comply with the agency's policies, procedures and guidelines relating to child protection.

It was argued that the conduct of JJ was inconsistent with the maintenance of trust with detainees and of the obligation to act in the best interests of RC and RD.

47 I do not read the policy as having the meaning proposed. Its focus is on child protection and general wellbeing, not on civil rights. There is no specific provision regarding protection of legal interests. Of course when it became knowledge that a LD had been placed in a cell and the product was proposed to be used against a detainee that would have a negative impact on trust between detainees and staff. The Code is expressed as a guideline, not a regulation. There was no impropriety in the actions of JJ staff.

Was the conduct of the police improper?

48 One possible area of impropriety is the use of the LDs on young people per se. Another possibility is that mere use may be appropriate, but circumstances where young people were clearly suspects and no effort was made to interview RC that the process was improper because he doesn't have an opportunity to speak or to be advised about his rights to speak or not to speak in the context of these particular circumstances.

49 It should be noted that the approval of the use of a LD does not assume that the product will be admissible in court. It does however provide a clear scheme whereby police can lawfully investigate crimes. It provides an answer to the allegation of illegality but not impropriety.

50 In *R v Swaffield; Pavic* v The Queen, Kirby J observed that:

> [155] I agree in the approach expressed by the Supreme Court of Canada. ..... The test propounded is consistent with the general approach which our law has taken towards deception by law enforcement officials. Subterfuge, ruses and tricks may be lawfully employed by police, acting in the public interest. There is nothing improper in these tactics where they are lawfully deployed in the endeavour to investigate crime so as to bring the guilty to justice. Nor is there anything wrong in the use of technology, such as telephonic interception and listening devices although this will commonly require statutory authority. Such facilities must be employed by any modern police service. The critical question is not whether the accused has been tricked and secretly recorded. It is not even whether the trick has resulted in self-incrimination,

> electronically preserved to do great damage to the accused at the trial. It is whether the trick may be thought to involve such unfairness to the accused or otherwise to be so contrary to public policy that a court should exercise its discretion to exclude the evidence notwithstanding its high probative value. In the case of covertly obtained confessions, the line of forbidden conduct will be crossed if the confession may be said to have been elicited by police (or by a person acting as an agent of the police) in unfair derogation of the suspect's right to exercise a free choice to speak or to be silent. Or it will be crossed where police have exploited any special characteristics of the relationship between the suspect and their agent so as to extract a statement which would not otherwise have been made."

51 This expresses the forensic practicalities of circumstances such as the present. It is consistent with the reasoning of Toohey, Gaudron and Gummow JJ in that case. There was no "eliciting" in the present case. Certainly the police, with JJ co-operation, created circumstances which made an incriminating conversation more likely. There was, however, no police officer or any person organised by police who led RC or RD to the conversation. They did it to themselves.

52 As noted above, in *Pavitt* the court stated that

> (g) Absent eliciting behaviour on the part of the police, there is no violation of the accused's right to choose whether or not to speak to the police. If the suspect speaks, it is by his or her own choice, and he or she must be taken to have accepted the risk that the recipient may inform the police

53 The current circumstances are analogous. If RC had informed on RD or vice versa there would be no objection available. They have each taken the risk that their conversation would come to the notice of police.

54 It was submitted that I should have regard to the decision of Judge Colefax in *R v LDV (No. 2)* [2013] NSWDC 215. It has no application so the current situation. The first reason for this is that there were clearly "agents of the State", being the complainant and her father, involved. More significantly, in that case His Honour sought to distinguish the line of authorities to which I have referred above because of the absence of an explicit statement in the Surveillance Devices Act regarding the abrogation of the

accused's right to silence. This fails to recognise that the relevant provisions of that Act are quite similar to those of its predecessor, the Listening Devices Act 1984. In *Pavitt* the LD was issued pursuant to the Listening Devices Act.

55 Also of significance is that His Honour places reliance on the disapproval of the use of trickery in *Swaffield* at [80-82]. The trickery referred to was the deliberate misrepresentation by an agent of the State. The steps taken in this case do not amount to the sort of trickery criticised in the authorities.

If there was impropriety

56 If I am wrong about the existence of impropriety, I would nevertheless find that the desirability of admitting the evidence outweighs the undesirability of admitting evidence. The conversations relating to the events of 1 April are probative, in the context of other evidence, of the presence and knowledge of RC and RD at the scene of the offences of robbery being armed with an offensive weapon and aggravated assault with intent to take/drive a motor vehicle. They are important as being the only evidence directly showing that they were present there, as opposed to only being involved shortly after. The offences are very serious.

57 If there has been impropriety by either police or JJ I am satisfied that it is not deliberate or reckless. It would appear that all involved operated on the basis that the LD warrants were to be obeyed.

58 It is also clear from the state of the evidence that without the product of the LDs the prosecution would need to rely on inferences to be drawn from the involvement of RC and RD with the stolen vehicle shortly afterwards and the possession and use of the stolen credit card by RD to purchase items for himself, RC and another young person shortly afterwards. This information could not have been obtained in any other way.

59 The evidence regarding the aggravated break enter and steal offence alleged against RC obtained by the LD is relevant, highly probative, and is the only clear evidence of RC's involvement in the offence.

Is the exercise of the fairness discretion different for a young person?

60 At the time of the use of the LDs RC was 16 and RD was 17.

61 In *JB v Regina* [2012] NSWCCA 12 the circumstances of the admission occurred independently of any action of the police seeking to produce an admission. A young person was charged with murder. A youth worker was called to the police station to act as a support person for him. During a discussion between the young person and the youth worker, the young person made admissions to the murder. The trial judge ruled that this evidence was to be admitted, and this decision was affirmed on appeal. The Court of Criminal Appeal recorded that:

> 13 Prior to the empanelment of the jury, there had been a voir dire hearing on the issue as to whether the court should allow the admission into evidence at trial of the statements made by the appellant to Mr Clayton. Ultimately, her Honour determined that there was no unfairness in admitting the statements made by the appellant to Mr Clayton. She found that the admissions the appellant had made fell into the category of "unguarded incriminating statements". It was inherent in her Honour's ruling that she considered that the appellant's freedom to speak or refrain from speaking had not been compromised in any way by the circumstances of Mr Clayton's visit to him as a support person.
>
> 24 In *Em v The Queen* [2007] HCA 46; 232 CLR 67, Gummow and Hayne JJ described the discretion given by s 90 as a "safety net" provision. Their Honours also stated (at 109):
>
> > "When it is 'unfair' to use evidence of an out-of-court admission at the trial of an accused person cannot be described exhaustively. 'Unfairness', whether for the purposes of the common law discretion or for the purposes of s 90, may arise in different ways."
>
> 25 In the joint judgment of Gleeson CJ and Heydon J in *Em v The Queen* , their Honours traced the origins of s 90 to the Australian Law Reform Commission's Report on Evidence (Report No 38, 1987) and to the common law discretion discussed in R v Lee (1950) 82 CLR 133 at 151-155. The Report had said:

> "The Lee discretion focuses on the question of whether it would be unfair to the accused to admit the evidence. The discretion to exclude illegally or improperly obtained evidence requires a balancing of the public interest. It would, therefore, be less effective than the Lee discretion. In the situation where the confession was obtained because the accused proceeded on a false assumption, there is a need for a discretion to enable the trial judge to exclude evidence of admissions that were obtained in such a way that it would be unfair to admit the evidence against the accused who made them. Such a discretion should be added to the proposal."

26 Their Honours, having referred to the Report, continued (at 56):

> "The language in s 90 is so general that it would not be possible in any particular case to mark out the full extent of its meaning. Whether or not the appellant is correct to submit that the primary focus of s 90 was on incorrect assumptions made by accused persons, there is no doubt that it is one focus of s 90 and it is one which is relevant to the way in which counsel submit the appellant's incorrect assumption should be viewed. In any particular case, the application of s 90 is likely to be highly fact-specific."

27 In the Court of Criminal Appeal (*R v Sophear Em* [2003] NSWCCA 374) Howie J (with whom Ipp JA and Hulme J) observed that:

> "Section 90 in effect confers on the trial judge a discretion to reject evidence of admissions where to admit them would result in an unfair trial for the accused. It is unfairness arising from the use of the admissions by the prosecution that is central to the discretion under the section and not whether the police unfairly treated the accused. The purpose of the discretion is the protection of the rights and privileges of the accused. It is concerned with the right of an accused to a fair trial and includes a consideration of whether any forensic advantage has been obtained unfairly by the Crown from the way the accused was treated (*R v Swaffield ; Pavic v The Queen* [1998] HCA 1; 192 CLR 159 at [78])."

62 A support person in this situation is in a position of trust, but not one with the same protections as the lawyer-client relationship. The court recognised that the support person was there to protect against misbehaviour by police, especially such as would take advantage of the vulnerability of a young person. The court also acknowledged that the discussion with the youth worker had to take place in circumstances which

allowed privacy. Even so, the admission of the evidence was not found to be unfair. I would think that

63 There is no explicit discussion of the role of JB's youth, but clearly it was considered. It is not possible to determine fairness in the absence of considering the circumstances of the individual involved, so the youth of RC and RD is relevant. No particular advantage was taken of their youth in this situation. I have regard to the fact that their judgement would not be that expected of an adult.

The absence of a caution and LEPRA procedures

64 RD was cautioned and interviewed shortly before the conversations recorded by the LD. Although the full procedure under the Law Enforcement (Powers and Responsibilities) Act (LEPRA) was not complied with, he was certainly made aware when questioned at the detention centre of his right not to speak and of his right to seek legal advice. No unfairness arises because the interview was not fully compliant.

65 RC was not cautioned or advised of the availability of legal advice. The question arises as to whether there is any policy basis for rejecting the evidence with respect to RC. There is a public interest in serious offences being prosecuted. It is arguable that there is also a public interest in young offenders being held accountable for their behaviour so that they might be rehabilitated. There is certainly a public interest in a fair trial. In *R v Sophear Em* Howie J emphasised that the focus is on any unfairness to the accused rather than a focus on the fairness of police treatment of the accused. I am not aware of any case which requires

66 The circumstances of the present case can be distinguished from *R v KS and Said* because:

- Coldrey J saw the use of the LD as an exercise in evidence augmentation. In this case there was a significant gap in available

evidence regarding the presence and involvement of RC and RD, and

- The person who prompted the admission was placed in the same cell as KS. Coldrey J observed that

> [40] ..... there will inevitably be great psychological pressure on an individual to talk to, and establish an accord with, inmates with whom that person is forced to co-exist within an institution. That imperative is likely to increase if that inmate is one with whom a room must be shared. These are psychological pressures to which a juvenile is likely to be particularly vulnerable.

There is no evidence of such pressure on either or RC or RD.

67 Furthermore, I am not satisfied that *R v KS and Said* represents the current law.

Conclusion

68 I am satisfied that there was appropriate compliance with the LD warrants and with the Children (Detention Centres) Act.

69 In the present case RC and RD were not directly manipulated to a position where either of them made an "elicited" statement. All of their conversation was of the nature of "unguarded incriminating statements". I find that the in the circumstances of this case use of the LDs was neither improper nor unfair.

70 The LD transcripts are to be admitted.