

AUSTRALIA / JUDGMENT

R v Parsons (a pseudonym) [2024] NSWDC 578

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District Court

New South Wales

Medium Neutral Citation: R v Parsons (a pseudonym) [2024] NSWDC 578

Hearing dates: 22, 23, 24, 25 January 2024

Date of orders: 16 February 2024

Decision date: 21 February 2024

Jurisdiction: Criminal

Before: Beckett DCJ

Decision: Product derived from seizure of accused's mobile phone be excluded from evidence:
[155]

Catchwords: CRIME – EVIDENCE: ADMISSIBILITY

Investigating office - questioned - protected suspect - questioning - Aboriginality - intellectual
impairment - consent - improper conduct

Legislation Cited: Crimes Act 1914 (Cth) ss 3AA, 3D(1), 3H, 3LA, 3ZD,

Criminal Code (Cth) ss 474.22(1), 474.22A(1), 474.26(1)

Evidence Act 1995 ss 138.

Law Enforcement (Power and Responsibilities) Act 2002

Cases Cited: Australian Securities and Investment Commission (ASIC) v Sigalla (No 2) [2010]
NSWSC 792

Bunnings v Cross (1978) 141 CLR 54

DOKLU v The Queen [2010] NSWCCA 309

DPP v Langford [2012] NSWSC 310

DPP v Marijancevic [2011] VSCA 355

Kadir v The Queen [2020] HCA 1, 375 ALR 80

Nean v R [2023] NSWDC 34

Parker v Comptroller – General of Customs [2007] NSWCA 348

Pavitt v The Queen (2007) 169 A Crim R 452

R v Camilleri [2007] NSWCCA 36

R v Dalley [2002] NSWCCA 284

R v FE [2013] NSWSC 1692

R v Helmout [2001] NSWCCA 372

R v Hung [2014] NTSC 19

R v Phung v Huynh [2001] NSWSC 115

Robinson v Woolworths Ltd (2005) 158 A Crim R 546

H, SA v Police [2013] SASCF 86

Strickland (A Pseudonym) v Commonwealth Director of Public Prosecutions (2018) 266 CLR 325

Category: Procedural rulings

Parties: Director of Public Prosecutions (Crown)

T. Parsons (Accused)

Representation: Counsel:

Mr A. Wong (Crown)

Mr R. Pettit (Accused)

Solicitors:

C. Niagos - Commonwealth Office of Director of Public Prosecutions (Crown)

D. Thomas - Legal Aid NSW (Accused)

File Number(s): 2022/00167514

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Judgment

1. Thomas Parsons (a pseudonym) ("TP") (the accused) is charged with the following five counts:

Count 1: Use a carriage service to make available child abuse material, contrary to s 474.22(1) of the Criminal Code (Cth).

Count 2: Use a carriage service to procure a person under 16 to engage in sexual activity, contrary to s 474.26(1) Criminal Code (Cth).

Count 3: Possess child abuse material using a carriage service, contrary to s 474.22A(1) of the Criminal Code (Cth).

Count 4: Possess child abuse material using a carriage service, contrary to s 474.22A(1) of the Criminal Code (Cth).

Count 5: Possess child abuse material using a carriage service, contrary to s 474.22A(1) of the Criminal Code (Cth).

1. The events are all alleged to have occurred between 23 March 2022 and 9 June 2022.
2. A plea of not guilty has been entered in respect of the offences. The matter has not yet been allocated a trial date.
3. The accused by Notice of Motion dated 3 November 2023 seeks orders that all items found consequent to the execution of a search warrant pursuant to s 3E Crimes Act 1914 (Cth) ("CA") of an address in South Sydney ("the premises") on 8 June 2022 be excluded from evidence pursuant to s 138 of the Evidence Act 1995 (Cth) ("EA").

THE EVIDENCE

1. Tendered on the application under the affidavit of Daniel Thomas Solicitor affirmed on 3 November 2023 were portions of the Crown brief in addition to various documents obtained on subpoena. In addition, over three days oral evidence was adduced from four officers involved in the search of the premises. Also tendered was a transcript of the recording of the relevant search. For ease of identification, I have marked each of the various attachments as separate exhibits (numbered 1 – 20). A recording of the search warrant was played during the hearing (exhibit A).
2. A summary of the Crown case taken from the Crown case statement is to the effect that an investigation by Eastern Beaches Detectives into possible possession of child abuse material relating to the accused commenced on 30 May 2022. A search warrant was issued on 8 June 2022 at the premises where he resided with his father and younger 17-year-old sister. It is not in dispute that the accused is Aboriginal and suffers from an intellectual disability. He was 19 years old at the time of the search. During the search the accused and his sister were present with his father attending part way through its execution. The accused provided the

PIN code to his mobile phone which amongst other items was seized. Various items were removed from the premises and subsequently examined later that same day. His apple iPhone was found to contain Category one and two child abuse material ("CAM"). The accused was asked to attend the Maroubra Police Station the next day where he attended with his father. On his arrest the accused was explained his rights under Part 9 of Law Enforcement (Power and Responsibilities) Act 2002 (NSW) ("LEPRA") and his father acted as a support person. The Aboriginal Legal Service were contacted, and custody management records recorded the accused as cognitively impaired. The accused declined to participate in an electronically recorded interview. He was charged with offences as set out above based to a large part on the location of various items on his apple iPhone.

3. The application for the search warrant was marked as exhibit B. Evidence was called from police witnesses Detective Senior Constable Witts ("DSC Witts"), the case officer during the search but not the officer in charge. During DSC Witts' evidence notes taken during a conference between him and counsel and CDPP solicitors were tendered and marked exhibit 21; an extract from the NSW Police Handbook was marked exhibit 22; and the officer's duty book was marked exhibit 23. Constable Eid, an officer during the search was called as was Senior Constable Rainen, the officer in charge of the investigation. Constable Cooper, the exhibit's officer during the search, was called and an operational order for a search warrant was tendered and marked exhibit 24.

The search warrant application

1. The search warrant application (exhibit B) specified further information identifying the accused as the "POI", his date of birth and that his name had been picked up by national agencies working in the child and exploited children agencies. An associated mobile phone number and email addressed containing the accused's name were identified. The CAM referred to was stated to fall within the Interpol baseline categories 1 and 2. The Telstra service of the device used to upload the CAM material and the mobile device used was identified as a service in the name of the accused and his father ('KP'). The application also referred to the accused being "known" for sexual offending but had been found "not guilty". He was also referred to as frequenting places involving children given his involvement in youth sport and several young children had involvement in the home address. The document referred to it being "highly likely that the POI would still have in their possession CAM" and stated that the officer believed that the premises "will contain evidence of the offending of the accused".

The warrant

1. The search warrant application made on 7 June 2022 (exhibit B), which stated that there were reasonable grounds for suspecting that at the premises:

1. First Condition: Things which are computers and mobile phones and other forms of electronic storage on which child abuse material would be found.
 2. Second Condition: things that related to the accused (DOB), internet and telephone accounts held in his name and related to his address and email accounts in his name.
 3. Third condition: things as to which there are reasonable grounds for suspecting that they will afford evidence as to the commission of the following indictable offences: S 474.22 Commonwealth Criminal Code Act 1995 ("CCC") – Using a carriage service to transmit child abuse material.
1. The search warrant indicated that the search officers were authorised to search for CAM on (inter alia) computers and mobile phones which related to the accused identified by name and date of birth, in respect of the mobile number ending "9428" and specified email accounts which incorporated the name "TP". The offence identified as having been committed was use carriage service to transmit child abuse material, s 474.CCC Act 1995.

The execution of the search warrant

1. It is agreed between the parties that prior to the execution of the search the property where the accused was residing was initially opened by the State Tactical Response unit, being men armed and dressed in what is otherwise known as riot attire. At the time of entry, only the accused was home and his 17-year-old sister ('SP').
2. A viewing of the recording is essential to a full understanding of the issues raised on the application.
3. The premises comprise a 2-bedroom apartment. The transcript of the recording indicates that there were 10 police officers present for the search although not always in the same room at the same time.
4. The transcript of the search reads as follows. I have placed in square brackets and capitals observations that I have made from a viewing of the recording of the search. I have underlined those words that have played a considerable part in the arguments of the respective parties:

List of persons:

TP

SP

KP

WITTS: Plain Clothes Senior Constable Marcus WITTS

EID: Constable Christopher EID

WARD: Senior Constable Matthew WARD

ATCHISON: Constable Hayley ATCHISON

LOGAN: Constable Allanah LOGAN

NELSON: Senior Constable Aaron NELSON

COOPER: Senior Constable Mathew COOPER

MALE1: Older Gentleman with Black Suit Jacket and Navy Blue Shirt

MALE 2: Officer in Uniform (Seen during 'Nokia' conversation) [THIS IS INSPECTOR AGNEW]

MALE 3: Unknown – (Out of Camera Scope for Two Phrases)

Video: 00018

WITTS: Ok so the time is 8:11am on Wednesday the 8th of June 2022. My name is Plain Clothes Senior Constable Marcus Witts, and we are here today at [address]. We are currently here with the permission and authority of a Commonwealth search warrant, which was issued by Waverly Local Court. I am in possession of the search warrant, and I will explain everything to the occupants. Just a bit of information for the video camera – I will let you know that at 8:01, STR conducted an entry into the unit. At the time, the front door was unlocked and STR opened the front door and conducted an entry. No damage has been caused to the front door. Upon entry they've located two occupants of the unit, being one, SP – and just for the record she is 17 years of age, and also the target of the operation today being TP. No injuries or anything was sustained and no dramas with concern by the entry at the time, so SP and TP I will let you know – as I said – I am Plain Clothes Senior Constable Marcus Witz, I am investigating the possession, distribution of child abuse material by a carriage service, ok. TP, in particular to you, I am going to let you know that you do not have to say or do anything if you do not want to – do you understand that? [CAUTION 1]

TP: Yes

WITTS: Anything you do say will be recorded on this video camera and can be used as evidence in court. Do you understand that?

TP: *Nods*

WITTS: Ok do you have any questions about anything in relation with what I have explained to you this morning?

TP: *Shakes head* [ACCUSED AND SISTER SEATED WITH HEADS DOWN]

WITTS: Nope? So, mate when I just ask you questions, I will ask, I understand that you are putting your head down. If you don't want to answer, you can just say "no I don't want to answer", but if you can verbalise your answers that would be great for the video recording, ok. Just for the video recording TP, can you just introduce yourself to the video for me?

TP: [Name]

WITTS: And just your date of birth?

TP: 26th of the 12th 2002

WITTS: and just your current residential address?

TP: [address]

WITTS: What is your current telephone number?

TP: I don't have one.

WITTS: You don't have one? Do you have an email address?

TP: Nope.

WITTS: Ok SP, do you have a mobile number?

SP: Yeah.

WITTS: Yeah – do you want to provide that number for me?

[SP DENIES ACCESS]

SP: No.

WITTS: No – ok that's alright. Just in relation to the video, I will just let you know that I made contact with KP, being the father of the two occupants here. He is currently at the gym and he is going to be making his way back here. At the time of speaking with him, I did not explain anything to him in relation to why we were here, except I did outline we do have a search warrant to search the premises. Prior to conducting any search, one thing I will do is read out what we are actually searching for. So the offence that we are investigating is the use carriage service to transmit child abuse material, under the Commonwealth Criminal Code Act 1995. So TP and SP, in relation to the items that we are looking for today, the search warrant we are here to locate certain items that may be within the property, ok? So these items are, and include, personal or laptop computers, mobile telephones, SIM cards, computer hard drives and equipment, faxes or any other electronic storage medium, digital DVDs, film, mega disks, floppy disk, compact disks, magazines, books, thumb-drives, USBs, flash cards, memory cards, memory sticks, and anything that is possible to store any images, or child abuse material, videos and still cameras, video tapes and documents. All of these items relate to the possession and dissemination of child abuse material and anything which indicates email accounts, internet access, records, accounts, computer access logs, personal records, photographs, and address books. The items we are looking to seize relate to one being TP, and we are also looking for internet email accounts being linked to TP [email 1] and an email account details being TP [email 2] . Just prior to commencing, do you have any questions or anything in relation to the items that we are searching for today guys?

TP & SP *Shakes Head*

WITTS: Ok, just prior to the commencing of the search warrant, what I will do is, I will introduce all of the police here. As I said, I am Plain Clothes Senior Constable Marcus Witts, I am the case officer here today. On video, we have Senior Constable Aaron Nelson, we have Constable Eid, we have Senior Constable Ward, and on exhibits we have Senior Constable Cooper. Senior Constable Cooper will be recording any items those will be recorded in the exhibit book. Also present, is Senior Constable Atkinson and Senior Constable Logan – they are also assisting in searching. Today we also have an independent officer being an Inspector Agnew. He is independent to the investigation, he is here purely for the purpose that the search warrant is conducted fairly, and in an appropriate manner. If you have any questions or any concerns raised in the search warrant, you can raise it with him, however, I ask that they be raised with him at the completion of the search warrant. Today we are video recording the search warrant. You can decline to be video recorded, however, we must record the actual processes of the search warrant itself. Do you guys have any questions?

Time Check – 5:20

TP & SP: *Shakes Head*

WITTS: OK. Just prior to the commencement of the video, we will just do a quick walk around. So, I will just get you just standing in the living room area of the unit complex. We have a kitchen area, into a laundry area just down the side here. TP and SP, what I will get you to do is just point out exactly who lives in each room. So, what we will do is, we will walk down here – we have a bathroom on the right-hand side, some cupboards, toilet, we have a bedroom here on the right. SP, is your bedroom just down here on the right-hand side? The one with the Pink?

SP: Yeah.

WITTS: Yep. We have another bedroom here. Is that your fathers or yours, TP?

TP: What one?

WITTS: The one next to SP's.

TP: It's Dads.

WITTS: Your Dads. And then the third room being there. Now TP, we are just going to confirm that the one with the Sony Boom Box next to the bed is your bedroom.

TP: *inaudible*

WITTS: Yep. So guys, do you understand obviously what the search warrant allows us to do?

TP: *Inaudible*

WITTS: Ok so like those items that I said we are searching for, this gives us the power and authority to search these premises, locate those items, and examine those items to see what we find on them. One thing I will be asking for is assistance with the search in relation to certain items that we are looking for. TP, I will be honest with you – the items we are looking for laptops, mobile phones, SIM cards and USBs, which are most likely in your direct possession, ok. Any assistance you could provide us would be great, further to that one thing I will outline is that what we have here is a Commonwealth search warrant, I will be requesting your assistance with providing us access to those devices, ok. Do you understand, like with mobile phones, I understand that some have passwords, computers have passwords? If you give us access, and permission to access those, we obviously can speed up the process of being able to conduct our examination, ok. Is there any passwords for your phone or mobile devices – you said that you did not have a phone, is that correct?

TP: I do but I don't have a SIM card. [FIRST REQUEST FOR ACCESS]

WITTS: You don't have a SIM card, ok. Is that phone in your room?

TP: No.

WITTS: Whereabouts is it?

TP: Just like, over there. *Points to lounge*

WITTS: Just over there? Ok.

EID: There is a phone under the pillow just for the camera as well.

WITTS: Alright. Ok so the time is 8:19am, we will now conduct searching. So, guys, just while searching is being conducted, can I please ask you guys just to stay here? If you need anything, just ask. We are happy to facilitate whatever you need. I understand that your dad is going to be coming home soon, and just for the video recording, I will leave the search warrant just to have a conversation with KP when he gets here. Like I said, the time is now 8:20am, we will now commence the search. Yeah – we will start with the mobile phone if possible. SP, do you have a mobile phone?

SP: Yeah.

WITTS: In your room?

SP: Mhm *nods*

WITTS: Ok alright – what we might do is obviously just confirm some of the information on your phone, as far as the phone number, SIM card, have a review of the images and stuff like that and then we will *inaudible*, and I will explain more once your dad gets here. Hey KP, how are you? [FATHER ARRIVES]

KP: *inaudible*

WITTS: G'Day KP. So, mate I will just let you know that I am Senior Constable Marcus Witz, we have just got a video –

KP: *inaudible*

WITTS: So, we have got a video that is recording what is going on here today. Mate, I have just explained to them that we are here in relation to a search warrant.

KP: For what?

WITTS: For, we are searching for items in connection to the offences of possessing and distributing child abuse material.

KP: Fair dinkum?

WITTS: Yep.

KP: Is that you? *Towards TP*

TP: No. I have –

WITTS: - So KP, I will let you know that I have cautioned TP, and I have let him know that he doesn't have to say or do anything if he doesn't want to, anything he does say will be recorded on the video – it can be used as evidence in Court, ok? So we are obviously investigating the possession and production of child abuse material, and using a carriage service to disseminate those images.

WITTS: So basically, putting them up on the internet, ok. So there has been a number of images that have been uploaded onto a Google platform, which are being categorised as child abuse material, ok.

Time Check – 10:00

KP: *Seemingly shakes head in disbelief*

WITTS: So a lot of the accounts and phone numbers –

KP: *Towards TP* We have just been through this. You are getting counselling.

TP: I fucking –

WITTS: - So, what we are here to look for is obviously items which are more or less TP's – mobile phones, laptops, USBs –

KP: - He doesn't use them, doesn't have them, it would be only the phone, mate.

WITTS: Only the phone?

KP: *Nods*

WITTS: Ok. What I will do is ask for your assistance in the matter is obviously, SP has a phone, we do have to examine some of her items. If you can assist us with providing us passwords and access –

KP: - I don't have the passwords – [SEEKING ASSISTANCE TO BOTH ACCUSED AND SP's PHONE AFTER SHE HAS DENIED ACCESS]

WITTS: - Yeah I know but obviously being your daughter, I was hoping to be able to speak with you, if we can obviously stream line this process as quick as possible, we don't want to interfere too much, however, at this point in time I will let you know that TP is not under arrest at this point in time – we are purely conducting a search warrant to seize items, ok. What happens from then, if we discover certain items, I will obviously discuss that –

KP- So we're – yeah, that's alright –

WITTS: - OK. TP has obviously identified this as being his mobile phone, however there isn't a SIM card.

KP: There's what?

WITTS: There is no SIM card in it apparently. Is that going to be true? Or is there a SIM card or anything?

KP: *Towards TP* Where is the SIM card?

TP: *Shrugs*

KP: You took it out? Huh?

TP: I don't know.

KP: So here's – and the problem with him is – he is 19, but the brain functions as a 12 year old.

WITTS: I fully understand, but obviously –

KP: Nah I understand - I am just saying, we have just been doing courses where he is having counselling for what happened previously when there was a charge and a thing and that, and you know, we have been going for like, three months –

WITTS: Yeah, I understand –

KP: He just can't register in the brain; he just can't register in the brain.

WITTS: So, mate to be straight up with you –

KP: Is it on? - *Points at phone in C1's hand*

EID: It is on –

KP: Just open it up, TP.

EID: TP (inaudible)

WITTS: So, KP, obviously what we have got is a Commonwealth search warrant, so basically with a Commonwealth search warrant, there is a proviso under a 3LA order. I will explain that in the simplest terms. We can apply for an order to obtain passwords, however, obviously, the opportunity to be able to do that, is obviously going to delay it as much as possible, but what we want to do, is obviously, facilitate it as quick as possible. The phone numbers that we are looking for that are linked to it, there is two mobile phones, and two email addresses, but we are also examining –

KP: What's the mobile numbers?

WITTS: So, the numbers are [numbers provided]

KP: - Don't know that number –

WITTS: and [numbers provided]. So, in full transparency, your name is listed on one of the accounts as well.

KP: Mine?

WITTS: So, at some stage, we will have to look through your phone (inaudible). [STATES WANTS ACCESS KP's PHONE]

KP: On my phone?

WITTS: Yes.

KP: On Google? –

WITTS: No, so it's his account details with one of the phones. Are you listed on one of the accounts or something? As like an adult? Did you set up his phone when he was younger?

KP: Yeah, years and years ago.

WITTS: Yep – so that may be what it is coming from, and that's the only reason why your name is linked to these accounts. But obviously from our investigation we have been able to identify email accounts which is in TP's name. So we still have checks and balances on that side of it, but what we are going to do is just seize items, and –

KP: So, what was that (inaudible)[#]?

WITTS: Yep.

KP: Yeah, that's mine.

WITTS: [#] sorry.

KP: [#] I don't know who that is mate.

WITTS: [#] is the other one, and then the email address is [email address]

KP: Yeah, the [#] is TP's. What was the other one?

WITTS: [#]. Ending in [#].

KP: [#]?

WITTS: So, [#] – that's alright.

KP: *Mumbles* I don't know who the [#] is mate, yeah, nah.

WITTS: Sometimes they add multiple numbers that don't associate (inaudible), that is all good.
So, TP, that's your phone. Do you agree?

TP: Yep.

WITTS: So, Chris is that turning on? Or anything?

EID: Yeah, so just for the camera, it is on there is a service bar, and it is also connected to Wi-Fi with multiple notifications. The time is 8:26 the phone will be seized, and TP, I will ask if it does have a password.

TP: Yes, it does.

WITTS: Yep – what is that password? [2ND DIRECT REQUEST FOR PASSWORD]

TP: [#] [ACCUSED STARTS PROVIDING P/WORD]

EID: [#]

TP: [#]

EID: [#]

TP: [#]

EID: [#]

WITTS: So, Chris Eden, is one of our searching officers – this gentleman here. So, what he will do now is just do a quick examination of that phone, seeing whether we can identify any of that material which is obviously of interest to the investigation. What I will do is, I will get the other searching officers to continue with the search –

Time Check – 15:00

KP: So, what's the images? Of what?

WITTS: So, I will explain that. I will have a chat with you off camera and explain the full details. I just don't want to explain anything in front of TP at this point. Can you (inaudible) the phone just there? Can you guys start with TP's room? KP, mate –

KP: He doesn't have a room. That is where he sleeps.

WITTS: Yeah so, he has identified the room down the back here as his. Just while we are searching, (inaudible) but, we have just got to, if we can try and limit the amount of people coming down here to conduct a search of these rooms, and this room, to try and find any devices. I will just come out. [ACCUSED MOVED AWAY FROM FATHER INTO ONE OF THE BEDROOMS]

KP: Nah – I am going to watch.

WITTS: Yeah sweet – just come in here and I will have a chat with you. So just for recording, I am just going to explain what the type of images, and the investigation we are actually investigating in fairness of KP being the adult and the owner of the unit. So, we just wont have this recorded on video camera.

AN (CAMERA) Moves to Living Room – 16:14 [FATHER TAKEN OFF CAMERA TO SEPARATE ROOM]

EID: Is it your date of birth, is it?

TP: Nah. Can I try [#]... Can I see it actually, so I know what – [ACCUSED STARTS ENTERING PASS/WD IN ABSENCE OF FATHER]

EID: I will hold the telephone just for the camera, the phone is on aeroplane mode.

COOPER: Just let him do it with his face so he doesn't lock it. [OFFICER HOLDING PHONE UP TO ACCUSED'S FACE]

TP: It's not, when it has been like that.

EID: Just leave it for a second.

TP: It won't do it because it says –

EID: Do you know the password?

TP: I do, but I am trying to remember it.

EID: I don't want you to keep trying to lock the phone. TP, so did you want me to give you a minute?

TP: Yeah – I am not trying to lock the phone. [POLICE OFFICER BEHIND ACCUSED RECORDING HIM PUTTING IN HIS PASSWORD, APPARENTLY UNBENOWNST TO THE ACCUSED]

EID: No, I understand – did you want a minute?

TP: Yes please.

EID: Do you know what it is?

TP: *mumbles*

MALE2: Just wait until his Dad comes out mate. [MALE 2 IS INSPECTOR AGNEW: INDEPENDENT OFFICER]

EID: Oh ok. [FATHER AND DSC WITTS RETURN]

WITTS: Password?

EID: Nah it didn't work.

WITTS: Didn't work?

KP: Give him the number TP. [FATHER DIRECTS ACCUSED]

TP: Usually it has the fucking face lock and he locked it.

KP: The what?

TP: The Face-ID.

KP: (inaudible)

TP: But then there's the (inaudible), you need the passcode.

MALE2: (inaudible)

EID: I have just turned the Wi-Fi off and put it in aeroplane mode.

KP: (inaudible)

TP: I didn't fucking do it.

KP: You did.

TP: I fucking (inaudible)

KP: There will be no phone ever again.

MALE2: Give him an old Nokia. Give him an old Nokia.

KP: (inaudible) he doesn't understand the brain, the brain it doesn't work. (inaudible)

MALE2: Yeah

KP: You could be talking to him; you might be thinking you're talking to someone, but you can be talking to someone (inaudible).

MALE2: Yeah

KP: (inaudible) It just doesn't register.

MALE2: You cold mate? Want to put some trackies on or something?

Time Check – 20:00

TP: Yes.

KP: So that phone is that is his -

WITTS: - That's everything?

KP: That's it mate. That's his 24/7. He plays the game on Play Station, Xbox or whatever it is –

WITTS: - Yep. So, there is no – so TP obviously the password you have given us isn't working. The password you have given us is your date of birth, is that correct?

TP: *Nods*

WITTS: Is there any other numbers, passwords you can think of? [ASKED FOR PASSWORDS X 3]

KP: Just give the passwords mate, because they will get them unlocked anyways

TP: (inaudible) I'm trying to fucking remember.

KP: You do remember, just do it mate. You're panicking.

TP: Try [#]

WARD: What did you say mate?

TP: repeats [#]

WARD: [#]

TP: [#]

WITTS: So [#]. I appreciate that and thank you for your co-operation. So, what we will do is, SP, whereabouts is your phone just quickly?

SP: *Points*

WITTS: What we will do is, if you just want to go with (inaudible) and just grab your phone, and just confirm email addresses, phone numbers and that. KP, if you don't mind, (inaudible) if you can get your phone out – what I will do is, I will just confirm the email addresses which are associated on that phone, the mobile phone number, and also, I will just have a quick look at your images if that's alright.

KP: (Inaudible)

WITTS: If you don't mind, I will just have a quick look, I will stand like that so you can see. What I will do is, I will just take some photos.

KP: Mhm.

22:00 – 24:26 - *murmuring – unable to transcribe*

WITTS: I appreciate that. Do you have SP's phone? [ACCESS TO SP's PHONE]

LOGAN: Yep.

WITTS: Can I just have a look through?

LOGAN: I have got photographs of her phone number.

WITTS: Yeah, just the card and that, and also the email addresses.

LOGAN: Yeah, I don't know how to get to the email address through mail.

WITTS: Yeah, that's all good.

24:50 - 25:08 - *murmuring – unable to transcribe*

MALE2: SP, is there anything private on your phone that you don't want us to see?

SL: *Shakes Head*

MALE2: Nah? That's all good.

25:18 – 25:48 - *murmuring – unable to transcribe*

ATCHISON: KP, do you want to just come out now?

LOGAN: (inaudible)

WITTS: Yeah, that's fine. Thank you for that SP. So KP, what we are going to do is just a quick look over (inaudible). Do you have any laptops in the house?

KP: Yeah.

WITTS: Whereabouts is that?

KP: There.

WITTS: Yep. Any in the bedrooms that you're aware of?

KP: SP, just grab your school one.

WITTS: Oh, it's just the one that the school provided you?

SL: (Inaudible)

ATCHISON: (referring to laptop) How do you turn this one on?

SL: I think it is dead.

ATCHISON: Do you have a charger for it?

SL: No.

ATCHISON: How do you use it?

SL: This is like my old one from school and that's my new one. (*points at another laptop*)

ATCHISON: When was the last time you used this?

SP: About like, three years ago.

ATCHISON: And there is no charger here?

SP: No.

ATCHISON: Ok.

MALE2: Are they Chrome Books or are they normal computers?

SP: They're chrome books.

MALE2: Hey?

SP: They're chrome books.

MALE2: I don't know if they can (inaudible).

WITTS: So, this one hasn't been on for a while?

SP: A while, yeah.

27:53 – 28:13 - *murmuring – unable to transcribe*

SP: Can I go back to the bathroom?

ATCHISON: Yep.

28:17 – 29:06 - *murmuring – unable to transcribe*

WITTS: Just confirm their education command.

ATCHISON: That one doesn't turn on.

WITTS: There should be a serial number on the back.

29:17 – 30:07 – *murmuring – unable to transcribe*

COOPER: We will have to turn it on and have the Wi-Fi on. I can't really see an issue with putting the wi-fi on.

WITTS: Yeah, he is here. If he is here, he can have the wi-fi on. While we are here.

30:22 – 31:50 – *murmuring – unable to transcribe*

KP: Oh, that hasn't worked in years. (*referring to an iPad*)

WITTS: We will probably just have to plug it in and charge it up to see if it works.

KP: Yeah – keep that up there.

WITTS: Yeah, so what we will do is, KP has just been assisting me with just identifying any sort of electronic devices that TP may have. So what we will do is, we will just do a quick search of here and just identify that there is an iPad which is has not been working for a while.

KP: Do you want to grab those phones? Or?

WITTS: Yeah, so we will just grab the serial numbers of those phones, and then we will go from there.

KP: I think I have a phone up here (inaudible)

WITTS: Just for the recording, KP has identified those three mobile phones which were just in this cupboard here. They do look old, he has outlined that they have not worked for years, a lot of the phones and devices he has identified in here are not working. So what we will be doing is just securing serial numbers on them and just, we wont be seizing these ones.

LOGAN: This iPad as well, it doesn't work?

KP: It hasn't worked for years, love.

LOGAN: It doesn't turn on?

KP: Hasn't worked for years, honestly, these are just old ones that we have had on our plans and then upgraded. Then we have just, yeah, kept them. They are his bags where he keeps his hoarding stuff.

Evidence of DSC WITTS

1. DSC Witts provided two statements (marked exhibit 11 and 16). The first statement was prepared in February 2023 to the effect that on 7 June 2022 he had been tasked by Senior Constable Rainen ("SC Rainen") to participate in an investigation into a possible possession of CAM by the accused. He said he reviewed the material that had been gathered and applied for a Commonwealth search warrant. He said that after entry was made to the premises the accused's father was contacted due to the accused's younger sister (being 14 years of age) and access was granted to the phone during the search. He stated that access to the phone at the scene indicated content relating to people either naked or involved in sex acts rather than CAM, they did not arrest the accused. After returning to the station the mobile device was more comprehensively examined and a decision was made to have the accused attend the station the next day.
2. DSC Witts' second statement was dated 15 January 2024, a week before the hearing, drafted after a meeting with the solicitor and counsel for the Commonwealth ODPP. In that statement DSC Witts said he had been unaware that the accused suffered from any intellectual impairment at the time he attended the Maroubra property. He said during the conduct of the search the accused appeared to understand everything that was said to him.

He said that he did not consider it appropriate to arrest the accused during the search because he had not formed the view that there was evidence of a criminal offence, only intelligence that had been the basis for obtaining the warrant to search and that a viewing of the seized items was necessary to determine if they obtained CAM. He said that he ran through the warrant which included reading through his standard procedures. He stated he believed the accused understood the caution administered to him at the beginning of the search because he could provide appropriate responses. DSC Witts said that he sought the occupants' assistance to their devices in order to determine if a s 3LA CA order was required, as if access was granted to the devices there were no grounds for seeking such an order. He said he made reference to "speeding up the process" because without the access the process of determining if the devices contained CAM would be "severely delayed as digital forensic experts would be required for the analysis", and that any conversation with the accused's father was again "to seek the occupant's assistance without having to seek a 3LA order". He said: "I explained there would be delays so that I could be fully transparent with KP as to the review of the mobile phones would be taking longer than needed". The officer denied he had placed any pressure on the accused to provide the passwords or told the accessed he had to provide them, nor did accept he had suggested that police would inevitably provide access to the phone. He denied he had suggested it was in the accused's best interest to provide access to the phone seized.

3. DSC Witts said that the practice in obtaining a 3LA order was to obtain a refusal at first to satisfy the authorising officer that all reasonable steps had been taken to obtain it voluntarily. He re-iterated that he did not consider the accused to be a "protected suspect" at law because he did not have evidence of the commission of an offence only a warrant to seize items and to review them for CAM. He did not receive confirmation of the presence of such material until the next day. He stated that during the period of the search he had specifically told the accused he was not under arrest, and they were "purely conducting a search warrant" and that had any of the occupants sought to leave the property, he would have let them. He said because the accused did not meet the definition of a protected suspect, and was not under arrest, he did not need to be advised about any right to communicate with a friend or legal practitioner, or as an Aboriginal, to elect a support person. He said the accused's father was present for the interview and he had been told that the accused was free to leave.
4. DSC Witts was called to give evidence on the application. In chief, the witness said he had reviewed co-ordinating instructions prior to execution of the warrant which included that the accused was not to be placed under arrest "at this stage" and that this decision had been made earlier by the OIC SC Rainen. He said that the purpose of the search warrant was to gather evidence in respect to the possibility of criminal offences and up until that point they had no evidence to suggest that there had been any criminal offence, only that various devices might possibly contain CAM and that the information that the police relied upon to obtain the search warrant was intelligence only and was not sufficient to arrest anyone on.

5. He said that he had applied for the search warrant himself based upon the official COPS system which he believed would be quite reliable. Despite considering it reliable he did not put it in the category of "evidence". Whilst the intelligence nominated the accused as the target, the intel identified an IP address and phone numbers also related to the accused's father KP. At that stage he said there was no confirmation who was responsible for using the mobile phone, or whether the CAM was from a computer or a phone. He said that was why the application used the words "whomever was using the internet at those premises..."
6. He agreed he was the officer responsible for determining if the accused was arrested or not during the execution of the search warrant itself. He determined not to put the accused under arrest during the execution of the warrant because the plan was to execute the warrant and seize the items which they could identify as potentially containing CAM and then to examine them and review the content to ensure they met that definition. The officer was asked about why he had not arrested the accused at the scene following a search of the accused's phone. He said he was not confident that the content that they were able to access at the scene met the definition of CAM, so they determined that they would do a more thorough examination of the item back at the station. Had he viewed CAM on the items at the scene then the accused would have been arrested at that point and conveyed back to the station. He said it was later that day back at the station that Officer Cooper showed him CAM content found on the phone and it was at that point that he asked the accused to present himself at the station the next day where he was later arrested.
7. He said he did not at any stage of the execution of the search warrant consider that the accused was "in the company of police for the purpose of being officially questioned for a Commonwealth offence" as he was only suspected of it at that time. He did not consider asking for a passcode fell under the definition of "official questioning" for such an offence. They were not at the scene to question but rather purely to obtain the electronic devices;
8. If the accused had asked to leave during the search warrant then he would not have stopped him: He said he would have said goodbye to him and told him that they would be contact once the devices had been reviewed: He said that he explained to the accused, his father and sister that they were free to leave as no one was under arrest: He said that this occurred 10 minutes and 48 seconds after the search warrant had commenced when he explained to the accused he was not under arrest.
9. DSC Witts said when he was asking for "assistance" during the search he was asking if they would give assistance to the investigation by providing passwords of their own free will. That when he said the provision of passwords would "speed up the process" he meant that it would make the extraction "a lot quicker than if you don't have access" and that if there was nothing on the phone they would get their phone back faster. He denied that he told the accused that it was in his best interests to provide the passwords.

10. DSC Witts said the process of getting access to a phone, if access was not granted, was a "bit of a process basically because the digital forensics unit people will go to the tech expert people and get [it] examined by them". He said that he didn't know how long it would take", it could be anywhere from a month up to 12 months, depending" and that there was no guarantee that the digital forensics would be able to access the content on the phone.
11. The officer denied at any time during his discussion with KP that he was seeking his assistance to obtain the password to the accused's phone. He said that by the time he had a discussion with KP in the separate room, the accused had already provided access to his phone. He said the purpose of the discussion was to explain why they were there and what the search related to. He denied that at any stage he told the accused that he should provide his phone password because police would be able to access his phone whether or not he did so. He said he understood there was no guarantee that access would be granted. He said he didn't have any reason to intervene when the accused's father directed the accused to, "just give the passwords mate because they'll get them unlocked anyways," as he considered it to be a conversation between father and son and he didn't think much about it. He considered it a decision for the accused whether he provided the PIN code or not.
12. He said that prior to executing the search warrant he had not had any dealings with the accused and could not recall having any conversation about him suffering from an intellectual impairment or learning difficulty. He said during his interactions with the accused he did not form the opinion that he failed to understand anything that he told him, he considered the responses to be appropriate.
13. He said it was his responsibility to decide whether to obtain an order under s 3LA CA to get access to the phones, but he tries not to obtain such an order. He said it was his experience that the appropriate course was to ask if the person being searched would consent to providing access voluntarily, before seeking such an order. The refusal to provide consent would strengthen the subsequent application for such an order. He said this was how he had been taught to do it and that's how he'd been instructed was "the practice".
14. He believed his caution to the accused that he did not have to say anything or do anything made clear to the accused that he did not have to provide a password or anything in relation to access to his phone and that providing this information was a matter for him.
15. Under cross-examination, DSC Witts said that he was aware that in order to get the search warrant the person issuing it needed to be satisfied that there were reasonable grounds for suspecting that the evidence found would support a Commonwealth offence: and that the warrant specified a Commonwealth offence.
16. He agreed that AFP material set out in the search warrant application contained information that a person was posting CAM using a google account that contained the accused's name and the user account had the accused's date of birth and the information received by him contained in the intel, identified the material uploaded to the Google Platform was category 1 and 2 CAM on the Interpol Baseline Scheme. However, he didn't consider this as evidence,

but merely intelligence, albeit reliable intelligence, which he had never known to be wrong. He agreed the accused was identified in the intel as being the "person of interest", or "target", and he was recorded in the intel as being known for sexual offending. The intel referred to it being "highly likely" that the accused would have CAM in his possession. In relation to why the accused was not arrested at the scene, the officer said he believed based on the intelligence that the premises where the accused agreed he resided would contain evidence of the offending but that he did not have the actual evidence of that until the phone had been seized and the CAM located. He agreed during the search he was asking about uploading of CAM and focused on the accused because the intel he had accessed suggested it was the accused who had done this. Whilst he believed at that stage that the accused's phone was going to contain the evidence of CAM, he didn't think they actually had the "evidence" of it whilst at the premises because Officer Cooper had looked through the phone and was not sure that the images he could see at that time met the definition of CAM. Nonetheless, he thought there "was more than likely probably going to be some material". He agreed that he used the language in the COPS post search, that a "full review of the exhibits will be conducted in order to identify the appropriate offences", because at that stage his suspicion had hardened into a belief that there was evidence sufficient to establish an offence. However, he disagreed that there was an "overwhelming inference" that the accused had been uploading the CAM, only a "strong indication" that there would be this material. He insisted that at the time of the search no evidence had been actually located of this activity. He agreed with the proposition that he believed there would be evidence in existence to establish that the accused had committed an offence before the search warrant took place and that one of the reasons intel was not used to found an arrest was that it could expose police methodology, but otherwise he understood that some information was used for intel only and not as evidence.

17. As to whether the accused was aware he could leave the premises, the officer agreed that the specially trained resource team ("STR") had forced entry into the accused's home immediately prior to the searching officers entering the premises. He agreed that they wore SWAT team arsenal with helmets, black masks that covered their eyes and a police issued uniform in the form of body armour. He agreed that Inspector Officer Agnew was the independent officer, present to see that the search warrant was conducted fairly and in an appropriate manner. He denied that the words he used to explain officer Agnew's role "if you have any questions or concerns...we ask that they be raised at the completion of the search warrant" suggested that the accused was not free to leave the home, although he agreed that it suggested that he shouldn't raise concerns whilst the search was taking place. After a playing of the recording, DSC Witts confirmed Inspector Agnew was positioned outside the door of the apartment and that during the entirety of the search warrant there were either one or 2 officers positioned in or just outside the front door, being the point of exit. He said there was no agreement that certain officers would be at the front door but that everyone had particular roles and that given the size of the apartment several officers were congregated at the front door. He agreed there were up to seven police officers in the lounge

room at certain times together with the accused and his sister. He agreed they were directed to "just stay here" and told that they were "happy to facilitate anything they needed" they just "had to ask". He disagreed these words carried the inference that they were not free to leave. He agreed he hadn't told the accused that he was in fact not under arrest, and that he had only advised his father of this when he arrived. He said that the accused and his sister ought to have inferred from what he told his father, that the accused was free to leave if he wanted to. He agreed that as at 23 minutes and 31 seconds into the search footage there were 6 officers in the loungeroom, and the accused and his sister were situated in the middle and that they had been in the same position the entire time. Despite the number of police and their positioning in the unit, including at the front door, he maintained that the accused and his sister would have been allowed to leave.

18. As to whether he considered the accused to be a "protected suspect", DSC Witts said that he had specifically turned his mind to this issue whilst at the scene but had determined that he was not as he was not under arrest, and they did not have the evidence that he had committed a criminal offence at that time. He then said he did not specifically turn his mind to the legal definition; he said he has since become aware of what the obligations are if a person is a "protected suspect" but did not know this at that time. He agreed it was an important matter to know if a person of interest constituted a "protected suspect" in terms of how that person is treated, including from an operational standpoint. He conceded he did not run through in his own mind, nor discuss with others, whether the accused fitted that definition. He agreed he had not referred to the term "protected suspect" until he wrote his second statement for court several days before the hearing and that this had arisen after a conference with counsel where the term had been raised. He denied that he had in effect tailored his second statement to avoid the evidence being excluded from court.
19. As stated, DSC Witts said he had no knowledge that the accused had an intellectual impairment. He agreed that there was a warning in red at the top of the intelligence report that stated "Suffers from a mild intellectual disability including ADHD/learning difficulties/social anxiety disorder" but said that he had not read the intelligence report, only the COPS narrative. He agreed that this information would have been an important consideration as to the execution of a search warrant; including how to communicate with the person. He agreed that he learnt early during the search that the accused had that condition as he was told the accused's father. He agreed that none of the officer's present asked any clarifying questions of the accused's father about his disclosed cognitive impairment. He agreed that it was not raised with the independent officer Inspector Agnew. He agreed that he made no allowance for his intellectual functioning in how they treated the accused and that he had not repeated the caution or asked the accused if he understood what the caution meant. He disagreed that he did not ask any questions about the impairment because he was concerned it might make it harder to get access to the accused's PIN code.

20. The officer agreed that the NSW Police Force Handbook 2019 referred to dealing with people with disabilities and stated that consideration ought to be given to the operation of LEPR and whether the person was a vulnerable person under LEPR. He agreed he had not considered if the person was a vulnerable person under that Act, and said that his questioning was restricted only to getting access to the phone. He agreed he had not made any adjustments in his communication with the accused to ensure his communication was effective. As to contacting a support person he said he had contacted the accused's father, but acknowledged that his father could be a witness, or likely be one. He agreed that he did not ask the accused to repeat what he had said to ensure he understood what was being put to him, nor did he remind him beyond telling him once that he did not need to answer questions. He agreed he did not keep in mind that some people with impaired intellectual functioning might be susceptible to authority figures.
21. Returning to his decision not to arrest at the premises, DSC Witts said that decision was made by Officer Rainen prior to the search. He said normally they would not arrest as the purpose of the search warrant was to gather evidence only. He agreed that had the accused been arrested he would have been taken to Maroubra Police Station and Part 9 LEPR would have "kicked in" and he would have been advised of his relevant rights before any interview was conducted. He agreed that the custody management record from the day after the search warrant made reference to the accused's vulnerability identified as "impaired intellectual functioning" and "Aboriginality". He agreed that as a result of those identified matters the Aboriginal Legal Service was required to be contacted and that he would be provided a support person. He agreed had the accused been considered a "protected suspect" these protections would have been engaged during the search. He agreed that had the accused been arrested during the search warrant Part 9 LEPR would have been enlivened. He denied that he did not put the accused under arrest in order to avoid providing him with his Part 9 rights and make it easier to get access to the PIN code. He denied that he was attempting to avoid the protections that were provided by these provisions, because he knew they would make it more difficult for police to access the accused's PIN code to his phone. He denied he deliberately gave the accused the impression that he wasn't free to leave the premises in order to make it easier to get his PIN code.
22. DSC Witts was asked about the purpose of the questioning, and he repeated that he did not think the accused was in his "company for the purpose of being questioned about a Commonwealth offence", only that the accused was in the "company of police". He said all he was doing was seeking the accused's assistance to access his device, but acknowledged he was questioning the accused about a Commonwealth offence.
23. As to his power to obtain access to the devices, DSC Witts was taken to the transcript of the search and agreed he had told the accused at the commencement of the search that he had the "power and authority to examine items". He said he was explaining the purpose of the search warrant and that he had repeated that he had a Commonwealth search warrant and requested the accused's assistance with providing access to those devices. He denied that he

did this to create an impression that he had the power to compel his assistance to access the devices. As to the officer's discussion with KP he denied that his choice of language concerning avoiding "delay" and "facilitating" access, gave the impression that the police were going to get the passwords to the devices "one way or the other". He denied it was a way of conveying to KP that he "might as well" provide the passwords to him. He accepted that obtaining an order pursuant to s 3LA CA was not guaranteed and that the magistrate had to be persuaded that such an order was justified. Whilst he agreed he could have applied for such an order before the search warrant, his practice was not to do so but to wait to see if access to the device was given consensually, and only then, apply if access was denied. He agreed that it was not a precondition as to whether a suspect refused to give a password, (stipulated by the relevant legislation).

24. DSC Witts was asked questions concerning his over overriding determination to obtain access to the devices during the search regardless of the legal barriers. He agreed he asked SP for her password for her mobile phone despite her saying that she did not want to provide access to her phone early in the search. He agreed he nonetheless advised her that the police would be "accessing her phone and reviewing its images". He denied this created the impression that he would be obtaining access to her phone regardless of her declining to provide access. He agreed that he then spoke to KP about providing "assistance" to passwords and thereby access to both the accused and SP's devices, after having said that he "had to" examine images on her mobile device. He denied that he didn't care how he obtained access to the accused's mobile telephone, stating that he was simply asking for their father's assistance in the process. He said that his purpose was to gather evidence and in that process, he was seeking their assistance. He said that they could have denied access which they were entitled to do.
25. As to the accused's provision of access to his phone, DSC Witts agreed that accused was providing passwords that didn't work. He agreed that at this time KP told him the accused was intellectually disabled, but he said he did not consider the accused's intellectual deficits at the time as he believed the accused was giving appropriate assistance and responding. When the accused's father was directing the accused to provide the officers with the access PIN to his device, he didn't turn his mind to whether it was appropriate to re-caution the accused at that point. He said that he thought that both of them were aware of the accused's right to silence at that point. He agreed that he didn't decide to caution him by using different language because of the recent information that he had received as to the accused's intellectual disability. Similarly, he agreed that he did not correct the accused's father when he directed his son to provide the PIN code on the basis that "they will get them unlocked anyways". He said he did not intentionally mislead KP in this regard and repeated his previous evidence that he considered this to be a private discussion between father and son. He disagreed that he didn't jump in to correct the error because his father was ensuring they were getting access to items which he considered the aim of the exercise. He denied that he was using the father to achieve the goal of access to the mobile device. He agreed that he had recorded in his police notebook 9 days after the search that the accused's father had

"assisted" in providing the password to the accused's mobile phone. He denied that he had deliberately used the accused's father for this purpose.

26. DSC Witts maintained that all three occupants of the apartment had a free decision as to whether to provide access by way of a PIN code to their phones. He conceded he had not taken into account the accused's disability in that assessment at the time.
27. DSC Witts was re-examined by the Crown regarding the giving of a caution during the search warrant. He said that he had done so because the accused was suspected of possessing child abuse material. He corrected his evidence given in cross examination that might have inferred that he believed the accused had committed an offence during the search stating they only had intelligence but no actual evidence of the commission of a criminal offence at that point and was not a "protected suspect". He said that during the search warrant he did not believe he had the lawful power to arrest. He said that he had not engaged the principles set out in the NSW Police Force Handbook concerning interviewing people with impaired intellectual functioning, because he did not consider that he was asking "questions" about the possession of CAM. DSC Witts said he was of the view that KP was "fed up" with his son and wanted to assist where he could.
28. In questions I raised with the officer as to the general police practice concerning the application for a s 3LA CA order, the officer said that he had been trained to request such an order after an opportunity had been provided to the person to provide access voluntarily. He said that he had been trained and instructed to do that on the basis that it would strengthen any application to get one. He said this was a practice that was part of his training and experience whilst attending other searches and for applying for those orders. As to whether he was trained about how to ask for access to a mobile phone and to explain about the s 3LA CA process, he advised there was no specific training in these matters, but he applied the same process as he would for any search: he would always ask the person if they would voluntarily identify where the item the subject of the search was located. He agreed that had he been at a search just to seize item and review it then generally he would not arrest the person unless they found evidence to justify the arrest at the time.

The evidence of Constable Christopher EID

1. Constable Eid provided a statement marked exhibit 17. He indicated that prior to this search he had not participated in a search warrant as either a case or lead officer, nor had he been involved in a Commonwealth search warrant, nor had he ever sought a s 3LA CA order in relation to such a warrant. He said the decision to arrest was a matter for the case officer. He said he also was unaware during the search that the accused had any intellectual or learning disability.
2. Constable Eid said that he believed that during the search the accused was voluntarily providing the passcode to his phone.

3. Constable Eid, he said he took guidance from DSC Witts. He agreed that the term "protected suspect" was not mentioned to him that day. He said he couldn't recall any comments from the accused's father suggesting that he had impaired intellectual functioning. He was taken to the relevant transcript where this was raised by KP in his presence and stated that it didn't impact him, as he was guided by the case officer. He denied that he chose to ignore it.
4. Constable Eid was taken to that part of his statement where he said that he understood that the accused wanted to "assist" the accused to provide access to his phone and said that he took the phone to him to allow him physically to use the touch screen to enter the password. He said he was worried that the phone might lock if the password was entered incorrectly. He said that he was attempting to have the phone unlocked through facial recognition. He said that he couldn't remember if he had asked the accused whether he would like to use facial recognition to open the phone. He agreed that the search warrant footage suggested that he was directed by DSC Cooper that he hold the phone up to the accused's face to see if that would open the phone. It was put to him that he was trying "whatever means necessary" to have the accused unlock the phone and the officer agreed "I was trying to unlock the phone, yes", and to "stop the accused locking it". He said he was trying to facilitate the accused in voluntarily assisting to provide his password.
5. Constable Eid agreed that the footage of the search showed him that at the point he was holding the phone up to the accused to have him enter his passcode, it looked like there was an officer standing immediately behind him filming the accused entering the code into the phone. He said the officer was Senior Constable Ward. He agreed the accused was apparently unaware that it was happening at the time. He agreed that he had not asked the accused if he minded having the phone held up to his face. He said that because the accused had asked to see the phone, he understood that to mean that he wanted to assist. He denied that the accused at this point of the interview had his head bowed forward and looked intimidated, although he conceded that at the point this interaction was occurring the accused was surrounded by four police officers and was not in the presence of his father. He denied that they were pressuring him to open his phone, stating they were simply asking him a question. He said he didn't know if the accused was free to leave at this point. If he had wanted to leave, then he would have raised it with the case officer but denied he would have stopped him.

The evidence of Senior Constable RAINEN ("SC Rainen")

1. SC Rainen was called as the officer with carriage of the matter. She said that she was unable to undertake the warrant due to rostering issues and asked DSC Witts to take carriage of it. She said she explained to him the grounds for the warrant and where the relevant information was located and that the operational documents had all been completed and that there was no need for him to complete any of those. She said that she had given him general information about the warrant which included the information in the operational orders and as to who was likely to be at the premises and that she gave him the COPS event

number that related to the matter which outlined what was in the application.

2. She said that she informed DSC Witts that at this point of the application there was no basis to put the accused under arrest, as the purpose of the search warrant was simply to locate the devices that might have had evidence of the offence. She said the intelligence was to the effect that there may have been devices at the premises that had been used to upload or download CAM. She said she told him about the documents but didn't physically show them to him.
3. In cross examination, the officer stated she had access to various documents during her initial involvement in the investigation of matters concerning the accused including an intelligence report prepared by the Child Protection Triage Unit. She agreed that it contained warnings in red letters on the first page that the accused suffered from a mild intellectual disability, including ADHD, learning difficulties and social anxiety disorder. She said that she was aware of these warnings when she provided DSC Witts with a briefing on the target. She agreed it was important information particularly on arrest where it was a possibility that the accused could be questioned during the search. She said that she believed she had advised DSC Witts that she had seen information that suggested the accused may have an intellectual disability but could not recall the exact conversation. She said that it was something that she would have done and that she had a memory of mentioning it to him. She couldn't remember if she reminded DSC Witts that certain obligations attached to people with these disabilities. She repeated however that she had mentioned the accused's cognitive issues to him.
4. She said that she provided DSC Witts with a draft of the grounds for the search warrant, and the police COPS event number, stating that the intelligence report containing the warning was linked to the COPS police event and readily accessible from it. She said that she assumed that the officer would have looked at it.
5. She said she did not have any discussions with DSC Witts about whether the accused would be categorised as a protected suspect or the prospect that various obligations might arise. She said she was aware of those obligations but didn't turn her mind to ensuring that DSC Witts was also aware of them. She said she didn't think he would be arrested unless they found evidence and so therefore the protected suspect provisions may not arise until they located the evidence and arrested him. Her understanding is that the provisions did not apply unless he was arrested.
6. She agreed that it did arise in some cases that passcodes were sought during search warrants where the suspect was not under arrest. She said it was her experience that an application for a s 3LA CA order were generally made where there had been a refusal to provide the password.

Evidence of Detective Senior Constable Cooper ("DSC Cooper")

1. DSC Cooper said he assisted in the execution of the search warrant acting as the exhibits officer. He said he was not aware prior to the search that the accused had an intellectual impairment or learning disability but found this out when KP said that he had some sort of learning or mental disability, which was some point during the execution of the warrant. The day after when the accused was in custody after his arrest that factor was "made official" and recorded by the custody manager and arrangements were made to cater for those needs.
2. From review of the search warrant recording, DSC Cooper confirmed that his direct involvement was when the accused was attempting to enter into his phone his passcode and his only function at that time was to ensure the accused didn't delete data in the process. He didn't hear anyone tell the accused that if he didn't provide the pass code that they would "inevitably" obtain access but recalled hearing his father say something along those lines to the accused. He did not hear anything about it being against his interest if he did not provide the access code. He did not see the accused's father pressuring the accused to provide the code but saw him basically tell the accused to provide it. He saw both officers Witts and Eid ask the accused to provide the code but did not see them apply any pressure on him to do so. He denied seeing the officers put pressure on the accused's father to get the passcode from his son.
3. He agreed he discussed with another officer the content located on the iPhone once they obtained access and considered the content "borderline" only.
4. Under cross-examination, DSC Cooper confirmed he had become aware of the accused having an intellectual disability from the accused's father, not with it being discussed amongst the team prior to entry. He was aware that this disability prompted the requirement to adopt various obligations under LEPR as a vulnerable person, and that as an Aboriginal he had particular entitlements if under arrest. He said these were put into place when the accused was arrested the next day.
5. He agreed that the footage from the search warrant indicated that he said to Constable Eid when they were attempting to get access to the accused's mobile phone: "Just let him log in with his face code so it doesn't lock it". He agreed that he said this to give Constable Eid the option to put it in front of the accused's face. He said he did this because he was concerned that the incorrect PIN was being entered which could wipe data from the telephone. He agreed that the recording showed Constable Eid hold the phone in front of the accused and him directing Constable Eid "let him log in with his face". The officer provided no opinion when it was suggested that the accused appeared to have "no choice" about providing his face as a means to get access to his telephone.
6. As to the process of getting access to a phone without a PIN code, DSC Cooper agreed that his understanding was that some codes could be accessed including modern telephones without a code through the experts but that would cause delays and that there were some

phones that simply could not be accessed, or so he believed. He said it was generally important to a person whose phone was being accessed to have it back quickly and that was when it is explained to them that it can take an extended period of time in the absence of co-operation. He agreed that persistent efforts were made by the police to get the PIN code to access the accused's phone but disagreed that the accused was overly pressured.

7. In re-examination, DSC Cooper said that when he had said, "just let him log in with his face code so he doesn't lock it" it was an attempt to stop the data being lost as some phones could delete data or lock apps or reset the phone if a code was entered incorrectly.

Other evidence

1. Lastly, a statement of Detective Sergeant Boyling was tendered, marked exhibit 18. It indicated that he was present at the search and assigned the role of forward commander. He said that he was positioned mostly at the front door during the search, together with Inspector Agnew.

THE APPLICATION OF THE ACCUSED

1. Counsel for the accused relied upon three sets of (lengthy) written submissions and made oral submissions.
2. As stated, the accused objects to the admissibility of the content of the evidence contained within his iPhone and to the answers provided concerning the content in the trial proceedings. It is submitted that the access to the content of the mobile phone was obtained in contravention of Australian law (per s 138(1)(a) EA) (the first limb of s 138 EA), and that the discretion provided by that provision ought be exercised to exclude the content of the iPhone and answers provided concerning it (the second limb).

The first limb – unlawful/improper conduct

1. As to the first limb, the accused asserts (at [27] of its first set of submissions) two separate conclusions ought be arrived at from the evidence. Firstly, that NSW Police Force ("the police") did not have the authority, under Part 1AA CA to compel the accused to provide his PIN code without a s 3LA CA order. Secondly, to the extent it is suggested the accused consensually provided his PIN code – it was invalid consent, as such consent was vitiated by the conduct of the investigating police, and with tacit police encouragement, the accused's father. Thirdly, it is asserted the police ignored their obligations created by Part IC CA. If this occurred, this would constitute an impropriety pursuant to s138 EA.

Submission as to misleading and coercive conduct

1. The accused submitted that the investigating officers during the search had a number of powers derived from the warrant (namely to search for and seize certain electronic devices, but that their available powers did not include an order pursuant to s 3LA CA to require a specified person to provide information or assistance reasonably necessary to allow an

officer to access, inter alia, data held on a computer or data storage device. Such an order could only be made by a magistrate after they had been satisfied of certain specified criteria (set out in s 3LA(2) CA), relevantly that there are reasonable grounds for suspecting that evidential material is held on, or accessible from, the device and the specified person is reasonably suspected of having committed the offence stated in the relevant order and the person is the owner or lessee of the computer; and that the specified person has relevant knowledge of the device. The accused submitted that the power to compel the provision of information or assistance was a significant one and the failure to abide by it carried a maximum penalty of 5 years, or relevantly 10 years for a serious offence. He submitted that the statutory provision provided a significant power as it abrogated the fundamental common law right to refuse to answer questions and the privilege of any person to answer any questions that may incriminate them: *Strickland (A Pseudonym) v Commonwealth Director of Public Prosecutions* (2018) 266 CLR 325, at [95], [101] and [273].

2. The accused submitted that the arresting officers were "patently aware" that they did not have a s 3LA CA order, noting their reference to the availability of such an order during the search. The accused submitted that the availability of such an order was referred to during the warrant in a conversation with KP, in such a way as to encourage the accused through his father to provide the PIN code access to the accused's mobile phone. It was submitted that the words were used in such a way as to imply there was an inevitability to police gaining access to the phone one way or the other and that failure to provide the PIN would be against his interest as it would result in a delay in him getting his device returned. The accused made reference to the words to KP, initially and to the accused directly:

[To KP] "...there is a proviso under a s 3LA order. I will explain that in the simplest of terms. We can apply for an order to obtain passwords, however... the opportunity to be able to do that, is obviously going to delay it as much as possible, but what we want to do is...facilitate it as quick as possible."

[To the accused]: "...If you give us access and permission to access those we obviously can speed up the process of being able to conduct our examination, okay"

1. The accused submitted that the response of the accused's father, by directing his son to provide the PIN code "because they will get them unlocked anyways", supported the natural inference that this was the impression the police officer meant to convey.
2. The accused submitted that DSC Witts did not have the power under s 3G CA to compel the accused directly, or to use another person (such as the accused's father) to assist in extracting the passcode to the mobile device from the accused, making reference to the four specific instances the accused's father directed the accused to provide access to this phone. The only power to compel production resided in s 3LA CA for the reasons set out in detail in the accused's submissions (at [47] – [60]), which I will not recite as the point was not really in issue between the parties.

3. The accused submitted that the police acted outside their power and unlawfully, in compelling the accused to provide his PIN code in the absence of a s 3LA CA order. He submitted that it was not improper or unauthorised to request a password to be voluntarily provided, but that where conduct may trespass into impropriety or acting ultra vires, was where the act of coercion or suggestion of a requirement, or trickery that the passwords should be provided. The accused by analogy referred to involuntary admissions made via coercion, threat, trickery or misleading statements or otherwise which also can be categorised as having been made without true consent and thereby are obtained improperly or ultra vires to any lawful power. By reference to H, SA v Police [2013] SASCF 86 ("H, SA v Police") the accused, pursuing the analogy, submitted relevantly that a confession procured by coercion in some form including by overbearing someone's will but also by persistent importunity, sustained or undue insistence or pressure was deemed to be involuntarily given. At [76] of H, SA v Police Blue J (Nicholson J agreeing) said:

In very general terms, the general rule applies where, due to coercion, the confession is not made in the free exercise of the will of the confessor; whereas the specific rule can apply where the confession is made in the exercise of free will by the confessor but induced by a representation of a promise or threat by a person in authority. However, there is no bright line between an act which is not the exercise of free will and an act of free will induced by a representation of a threat. This is why there is an overlap between the general and specific rules where the confession is induced by fear of a threat.

1. Of particular significance to the accused's argument was that in the case of H, SA v Police the coercion considered to have been exerted, was not only by the police involved in questioning the accused, but also the accused's father and a third party, Mr Kaplanis. The combination of the coercion meant that the accused's will was found to be overborne. Also relevant to this assessment, in light of the forms of asserted coercion, was consideration of (inter alia) the accused's intelligence, executive functioning and the length of time and circumstances of the interviewing process (at [113]).
2. By further analogy, the accused submitted that consent obtained for a search also required consideration of the context in which consent might seemingly be granted. Chief Justice Barwick in *Bunnings v Cross* (1978) 141 CLR 54 at [64], stated in relation to consideration as to the voluntariness or otherwise to undertaking a breathalyser test: [emphasis added]

The patrolman did not cause the applicant to engage in the breathalyser test by any direction or command. Or by any representation or any trick or improper behaviour

...

Of course, a fine line divides such a willingness from a willingness the product of coercive conduct: and in deciding whether the willingness was uncoerced, it is proper to remember the apparent authority of a patrolman and the situation of the motorist who has been "taken" to the police station.

1. The accused also made reference to improprieties arising from false representations made in the context of obtaining access to premises to search based upon a misstatement of the powers allowed by a warrant: *Parker v Comptroller – General of Customs* [2007] NSWCA 348 at [56].
2. The accused submitted that the context of the conduct at hand concerned a cognitively impaired 19-year-old Aboriginal man surrounded by police officers and his father. The authority of the officers in that context was, it was submitted, likely to overbear the accused by trickery, misleading statements and requests which were in context likely to have been understood as directions or commands.
3. The accused submitted that the police acted improperly by inducing the accused to provide his PIN code, by creating the false impression in the accused's mind that he was legally required to produce the passcode to his phone either because there was an order to do so, or that the order would inevitably follow, or that they would inevitably gain access to it at any rate. The sustained pressure and misleading statements by people in authority, to a person who was vulnerable (and to his father) resulted in any consent being invalid.

Asserted contravention of the protected suspect provisions under s 23B of the Act

1. The second argument was that the police failed to afford the accused the protections he was owed under Part IC CA which acted in addition to any provisions applicable under LEPR, s 23A(5) CA. The accused submitted that he was entitled to these protections because he was a protected suspect as defined under s 23B CA and as such, it was necessary that Police afford him the protections set out in ss 23F, 23G, 23H and 23U CA.
2. The accused submitted that the offender satisfied the "protected suspect" definition because the officers constituted, as members of the NSW Force (or AFP officers) "investigating officials" pursuant to s 23B and pursuant to s 23B(2) they were in the company of the accused "for the purpose of being questioned about a Commonwealth offence"; the accused had not been arrested; and the investigation officials believed that there was sufficient evidence to establish that the person had committed the offence. Section 23B(6) provided that a reference to "questioning" included not only questioning the person but also carrying out "an investigation...to investigate the involvement (if any) of the person in any Commonwealth offence". It was submitted that the combination of s 23B(2)(a) and (6) allowed for the operation of the provision in a wider sense than s 23B(2)(a) might allow for if read alone, namely that it extended to carrying out an investigation concerning the involvement of the person in a Commonwealth offence, with reference to Hiley J's comments in *R v Hunt* [2014] NTSC 19, at [125] where his Honour stated "s 23B(b)(a) had this effect even before there was any "questioning" in the more usual sense, or in the narrower sense referred by Howie J in *R v Naa*". The accused relied upon the asserted persistent questioning of the accused about access to the PIN code to his phone, whilst in their company.

3. As to the requirement that one of the three 23B(2)(c) CA criteria also apply, the accused argued that the official believed that there was "sufficient evidence to establish that the accused had committed the offence"; and/or that the official had been "given the accused reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so". The accused submitted that none of the s 23B(2)(d) CA factors had application. The accused relied upon DSC Witts direction to the accused and his sister to the effect that they ought stay in the lounge area and that if they needed something they just had "to ask". The accused submitted the clear inference was that they were not free to leave, or at least there were reasonable grounds for that belief, satisfying s 23B(2)(c)(iii) CA.
4. The accused submitted that the effect of satisfying the protected suspect provision under s 23B CA meant that the full suite of obligations provided by Part 1C were engaged including those set out under s 23H CA arising from his Aboriginality, including: the need for a caution to inform him of his right to communicate with a friend or relative or legal practitioner and to give him reasonable facilities to allow for in that process; to defer questioning for a reasonable time to allow for communication with a legal advisor; to inform the accused as to the notification of a representative of an Aboriginal legal assistance organisation; not to question the accused until they had communicated with them; not to question the person unless an interview friend was present who they have had an opportunity to communicate with where they could not be overheard. The accused was denied, it was asserted, the rights provided by this provision arising from his Aboriginality noting in particular the interaction of the accused's intellectual difficulties. The accused relied upon the comments of Wood CJ at CL in *R v Phung v Huynh* [2001] NSWSC 115 that special legislative provisions are provided for the protection of Aboriginal persons to protect them from any disadvantage inherent in their uniquely vulnerable societal status, as well as to protect them from any form of police impropriety, at [34]. The accused relied upon a judgment of Buscombe J of this court in *Nean R* [2023] NSWDC 34 at [132] to submit that these principles applied to adults as well as children, and upon comments made by the Court of Criminal Appeal in *R v Helmout* [2001] NSWCCA 372 that referred to breaches of similar provisions under LEPR as "serious matters", at [36].
5. The accused submitted that the accused was both Aboriginal and cognitively impaired and could be seen to be easily pressured by authority as was apparent from the footage, showing him to be effectively surrounded by officers. Rather than providing advice it was submitted he was subject to the pressure from police and from his father on the encouragement of police, which taken together meant that his will was overborne. Part IC it was submitted was enacted for the precise purpose of preventing the very events as occurred in this case.

The second limb: s 138 EA discretion

1. Based upon the three grounds upon which it was asserted the police acted improperly and/or unlawfully the accused submitted that the balancing exercise to be undertaken under s 138 (3) EA strongly favoured exclusion of the evidence. The accused conceded that the

offence was serious in nature, although submitted the objective criminality did not fall at the serious end of the scale, noting the relatively low quantity of images and the lack of sophistication of the conduct. The accused conceded that the evidence had probative value and was important but submitted that the extent of the impropriety was significantly grave, involving deliberate and widespread disregard for the limits on police power and denial of a vulnerable accused his legislated protections. The accused submitted that the evidence established a pattern of misconduct, noting that there is a danger that law enforcement agencies may believe they can routinely commit minor breaches without suffering the consequence of evidentiary exclusion", making reference to considering if the breach is an example of a "pattern of misconduct" (ALRC 26, vol, [964]). The accused asserted the breach was not minor nor isolated, but deliberate. The accused submitted that the contravention was arguably in contravention of Articles 17 (right to the protection of the law against unlawful interference with a person's privacy and/or home and 26 (all persons are entitled to the equal protection of the law).

2. As to the crucial final criteria under s 138(3)(h) EA the accused submitted that the evidence might well have been obtained without the impropriety, by utilising the power provided by s 3LA CA to apply for an order to a magistrate to compel the accused to provide the PIN access to his iPhone on the satisfaction of the grounds provided under s 3LA(2)(a) – (c) CA.

The Crown's response

1. The Crown filed submissions in reply. The Crown conceded the accused was Aboriginal and suffered from a cognitive impairment, although the extent of the impairment was unknown. Whilst the Crown concedes that the police did not have the power to compel the accused to provide his PIN code, the Crown submitted the accused voluntarily provided access to his iPhone and there was no vitiation of his consent by virtue of any actions by police. The Crown submitted that there was a "request for assistance" and "permission to access" and access was granted without force or compulsion.
2. The Crown denied there was any irregularity or abrogation of the Commonwealth legislation concerning the execution of the search warrant. The Crown submitted the accused was appropriately cautioned twice about his right to silence and asked if he understood the caution, which was responded to in the affirmative. Later he was again told that if he didn't want to answer a question he could just say "no". The Crown relied upon the indication by DSC Witts that he respected an indication from SP said that she didn't want to provide her phone number, by his response, "Ok that's alright". The officer also told the accused he could decline to be video recorded and told his father, in the presence of the accused, that he did not need to say or do anything if he did not want to.
3. Further, the Crown argued the accused had voluntarily provided his PIN code to his iPhone after police had cautioned him. It was disputed that the police at any time gave the accused the impression that the accused must provide his PIN code, rather DSC Witts used the word "assistance" in seeking his co-operation. The statement that the provision of the PIN code

would "speed up the process" was submitted to be a statement of the obvious, that the process would be streamlined if the police had the passwords to the devices. The Crown denied there was any suggestion that the provision of the passwords would be in his best interests, or that the accused had no choice in the matter.

4. The Crown submitted that the suggestion that the police used the accused's father to pressure the accused to provide the password is rebutted by the provision of numbers to the password provided by the accused independent of his father, as it initially took place before the accused's father had presented at the scene:

EID: "the time is...the phone will be seized and TP I will ask if it does have a password"; Accused: "yes it does"; EID: "Yep, what is the password?": Accused: "#". [When that code did not work he asked the police] "try #". [provides #].

1. The Crown denied that the police had engaged in any form of trickery or misleading statements, denying that the police made any statement to the effect that the police will inevitably get access to his PIN code. Further, it is submitted that the police advised the accused, and his father specifically, that there was the s 3LA provision which would provide "the opportunity" to apply for an order to obtain the passwords, militating against any suggestion that he was telling them that the obtaining of an order was inevitable. The Crown submitted the reference to doing things "quickly" and not delaying was a truthful account that providing the password would "speed up the process". Whilst it may have been in the interests of the police, it was submitted nothing DSC Witts said would have led to the impression that delay would be against the accused's interest.
2. The Crown submitted that despite the role played by KP in encouraging his son to provide the police with his PIN code, this did not vitiate the accused's consent. The Crown referred to the accused's father directing the accused to "open" the phone even before the police advised him as to the ability to apply for a s 3LA CA order. After the explanation by the police to KP concerning s 3LA it is submitted that any advice he gave to his son to provide the PIN code was accepted by the accused for good reasons, not because of any misleading statements by the police, but because the accused trusted his father's advice and believed he had his best interests at heart. The Crown asserted just because the accused chose to take his father's advice, in the same way as if someone encouraged a person to make an admission, it did not make any subsequent admission unlawful. The Crown submitted with reference to *Pavitt v The Queen* (2007) 169 A Crim R 452 ("*Pavitt v The Queen*"), that in respect of the making of admissions, 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 they made the statement (at [70]).

3. The Crown referred again to the observation that prior to his father encouraging the accused to provide the PIN code, had the accused already himself attempted to provide the code to police (telling them his date of birth). The Crown denied that the accused's father had acted as an agent of the state in the Pavitt sense as he had not been asked by the police to encourage his son to provide his PIN code.
4. The Crown conceded that DSC Witts had in relation to SP's phone, said "we do have to examine some of her items" and in response to KP's statement that he didn't have the passwords, said "yeah I know but obviously being your daughter, I was hoping to be able to speak with you, if we can streamline this process....". The Crown conceded that by these words it was open to infer the officer was hoping to obtain KP's assistance in respect of his daughter's PIN code but that there was no such "assistance" requested to obtaining access to the accused's'.
5. The Crown submitted it was not known the extent of the accused's cognitive impairment and whether it was such that he could not understand the caution given to him, with reference to *DOKLU v The Queen* [2010] NSWCCA 309 at [36].
6. As to the assertion by the accused that the police had failed to afford any protections to the accused under Part 1C CA, the Crown (initially at least) submitted that whilst they accepted pursuant to s 23B(2) that the accused was in the company of an investigating office for the purpose of being questioned about a Commonwealth offence, and that the accused had not been arrested, the Crown does not accept: (1) that the police believed there was sufficient evidence to establish that the accused had committed an offence (noting they did not arrest him at the premises)(S 23B(2)(c)(i)); and (2) that the police gave the accused reasonable grounds for believing that he would not be allowed to leave if he wished to (per s 23B(2)(c)(iii)).
7. As to the exercise of discretion under s 138 EA, the Crown asserts that should the Court find the evidence from the phone was obtained improperly or unlawfully, that notwithstanding that finding the content of the phone should be admitted due to the high probative value of the evidence, noting it proves the commission of the offences (namely the Cellebrite analysis showed the presence of almost 19,000 images and about 2500 video files of which 2445 images and 387 video files, constitute CAM). Snapchat messaging and sharing of CAM was disclosed including evidence the accused was engaging in sexualised conversations with a male which were categorised as procuring (noting the person with whom the offender communicated held himself out as being "14" and "at school"). The evidence was submitted to establish the case against the accused and its importance to the Crown case as there is no other evidence to establish the Crown case. It is submitted the offending is objectively serious and goes beyond mere possession of CAM, which on its own is very serious but indicated that he had shared the material and transmitted it to a person (purportedly) under the age of 16 years intending to procure him for sexual activity. The Crown submitted that the fact that the police may have obtained a s 3LA CA order was an equivocal factor and was explained by the simple fact that the application for the order would delay proceedings and

burden the court when the accused was willing to otherwise provide it.

8. As to the earlier concession by DSC Witts under cross-examination, that the accused was with the police for the purpose of being questioned about the suspected Commonwealth offence, the Crown submitted that it was still open for the Court to find, having regard to all the evidence, that the accused was not in the company of an investigating official for the purpose of being questioned about a Commonwealth offence.

Accused's submissions in reply

1. Following the taking of oral evidence on the application, the accused put on further submissions in reply.

S 23B(2)(c)(i) CA belief that there was sufficient evidence to establish the accused committed the offence

1. As to s 23B(2)(c)(i) CA, the accused submitted DSC Witts held the belief that there was sufficient evidence to establish the accused committed the offence, and if he didn't, he ought to have, see *Adamson J in R v FE* [2013] NSWSC 1692 ("R v FE") at [100]. Although the test required a subjective belief, the accused submitted the test did not require the police officer's belief to be based on an assessment of the sufficiency of evidence, but rather whether the officer believed that there was sufficient evidence that the accused was "more likely than not" to have committed the offence of possess child abuse material using a carriage service, contrary to s474.22A(1). It was submitted that the belief was founded on a number of bases: the information provided on the search warrant application referred to "reasonable grounds for suspecting" the accused had committed an offence; the objective evidence that was provided by the intelligence reporting contained in the COPS entries that the person uploading the material was using the name of the accused and email addresses containing his name; and the report from the Child Exploitation Internet Unit for Investigation Report that it was "highly likely the POI would have CAM in their possession". Based upon the combined intelligence the officer had access to in order to apply for the warrant, the accused submitted that the officer must have had, or at the very least ought to have had, the necessary belief that sufficient evidence existed to establish the accused had committed the offence is charged.
2. The accused submitted that the distinction between intelligence and evidence drawn by DSC Witts was artificial and whether or not the police chose to use certain evidence in order to preserve intelligence sources was irrelevant to the statutory test: such material remained "evidence" for the purposes of that test.
3. The accused submitted that the evidence of DSC Witts to the effect that he did not have a requisite belief at the time, ought be rejected as his second statement in which the issues concerning the matters relevant to whether the accused was considered a protected suspect, had arisen after the fact in a context where he had become aware it had become a significant issue raised by the accused. It was submitted that the officer had effectively reconstructed

his evidence, perhaps unintentionally, in a self-serving way in this regard. The accused submitted that the assertion by the officer that he had no information to support arresting anyone was "patently false" in circumstances where the officer had clear evidence that the accused had committed the offences charged as provided by the intelligence sources relied upon in aid of obtaining the warrant.

S 23B(2)(c)(iii) the official has given the person reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so

1. The accused responded to the oral evidence of DSC Witts that he had "explained" to the three occupants of the premises that they were "free to leave" submitting such a claim was inconsistent with the objective video footage. The accused made reference to the circumstances in *R v FE* where Adamson J had held the provision was satisfied where the accused, in that case, aged 15, had been told to "wait" in the office of a police station, ([101]-[102]). The test it was submitted for this provision was an objective test assessed by reference to the context, including the age of the accused, and in respect of this matter, his intellectual impairment and Aboriginality, noting the vulnerability recognised in the legislation for this status. The accused submitted that the reasonable grounds arose from the presence of a large number of police; the request to remain in the lounge area at the premises during the search; and thirdly the existence of the warrant which may give rise to the belief held by ordinary people that they are not free to leave. More precisely it was submitted the accused was specifically never told that he could leave the premises despite being cautioned; the accused was told at the commencement of the search warrant that any complaints ought be raised "at the completion of the warrant"; and the accused was asked for "his assistance with the search", all of which created the impression that his presence was required. Most specifically the accused was asked "just to stay here. If you need anything just ask". As to context the accused was repeatedly asked questions; was a young Aboriginal man known to have a cognitive impairment; was surrounded by multiple police officers; and in addition could be observed during the search to be repeatedly looking down at the ground with his head in his hands, described as "quiet, subdued and evidently nervous". The accused submitted he was in a uniquely vulnerable position particularly in light of the position of authority of the police as against his impairment, age and social status.
2. It was submitted that the accused in the circumstances could not have held any other belief other than that he was not allowed to leave if he wanted to.

Consent issue

1. The accused repeated that it was the combined conduct of police and the accused's father that rendered any apparent consent to the provision of the PIN code involuntary, noting the test under s 138EA concerned whether the evidence was obtained improperly or unlawfully by any person or combination of persons, and did not apply only to police.

2. The accused made further submissions about the police conduct that indicated the police attempted to gain access to the phone involuntarily by using the face lock feature on the phone without the accused's consent. This conduct included putting the device in front of the accused's face without his consent in an attempt to unlock the phone. The accused submitted this conduct was to be considered together with the fact the accused had reasonable grounds for believing he was not free to leave, the repetitive attempts to have him provide his access code; the misrepresentations as to the ability of the authorities to obtain access to the phone; the command and overbearing nature of his father, all of which were to be considered together with the accused's personal vulnerabilities and police pressure. All of these factors, it was submitted, combined to over bare his will. The accused submitted, in line with Barwick CJ's comments cited above in *Bunnings v Cross*, to the effect that coerced willingness was not willingness at all. It was submitted these combined acts, when taken together with the misleading statements by police, failed to afford the accused the protections he was entitled to as a protected suspect and were otherwise improper and/or unlawful.

Further supplementary Crown submissions going to the issue of whether the accused was in "the company of an investigating official for the purpose of being questioned about a Commonwealth offence": S 23B(2)(a)

1. Additional supplementary submissions arose following oral submissions on 24 January 2024 to the effect that the Crown asserted that there was an issue as to whether the accused was being questioned "about a Commonwealth offence" as the questions posed by DSC Witts may have concerned state-based offences or Commonwealth offences. The Crown noted the accused's complaint that the Crown was resiling from an earlier concession that the accused was in the company of the official for the relevant purpose relating to Commonwealth matters.
2. The Crown submitted that the concession was made before the further evidence had been obtained from DSC Witts and prior to his oral evidence to the effect that one of the reasons he was not of the view the accused satisfied the definition of a protected suspect, was that he had not yet formed a view as to which offence the accused might be charged with. The Crown submitted that despite the fact DSC Witts had conceded in cross examination that the accused was in "police company" for that very purpose, it was still open to the Court to find, having regard to all the evidence, that the accused was not in the company of investigating officials for that purpose.

Accused's reply to the Crown's supplementary submissions.

1. The accused's response to the Crown argument concerning s 23B(2)(a) CA raised the issue of procedural unfairness as to the withdrawal of the concession. The accused submitted otherwise that the interaction between s 23B(2)(a) and (6), as to the definition of "questioning", expanded the term to include "investigation", was satisfied by the police evidence about them attempting to question the accused in the process of having him assist

in the execution of the warrant. The accused relied upon the contents of the search warrant application which referred to a suspicion the accused had uploaded CAM and had possessed such material on a telephone device; being a reference to investigation of specified Commonwealth offences.

RELEVANT STATUTORY PROVISIONS

1. During legal argument counsel relied upon a number of legislative provisions relevant to the circumstances of the search of the premises and the questioning of the accused. For the purposes of consideration of the various issues, I have set them out in full.
2. Part 1AA CA concerns powers conferred to search, information gathering and other powers. Division 2 concerns search warrants. Section 3LA CA provides for a constable to seek orders in respect of requiring a specified person to provide information concerning a computer or data storage device. The provision relevantly provides as follows:
 - (1) A constable may apply to a magistrate for an order requiring a specified person to provide any information or assistance that is reasonable and necessary to allow a constable to do one or more of the following:
 - (a) access data held in, or accessible from, a computer or data storage device that:
 - (i) is on warrant premises; or
 - (ii) has been moved under subsection 3K(2) and is at a place for examination or processing, or
 - (iii) has been seized under this Division;
 - ...
 - (2) The magistrate may grant the order if the magistrate is satisfied that:
 - (a) there are reasonable grounds for suspecting that evidential material is held in, or is accessible from, the computer or data storage device; and
 - (b) the specified person is:
 - (i) reasonably suspected of having committed the offence stated in the relevant warrant; or
 - (ii) the owner or lessee of the computer or device; or
 - (iii) an employee of the owner or lessee of the computer or device; or
 - (iv) a person engaged under a contract for services by the owner or lessee of the computer or device; or
 - (v) a person who uses or has used the computer or device; or
 - (vi) a person who is or was a system administrator for the system including the computer or device; and

- (c) the specified person has relevant knowledge of:
 - (i) the computer or device or a computer network of which the computer or device forms or formed a part; or
 - (ii) measures applied to protect data held in, or accessible from, the computer or device....
- 1. The penalty applicable at the time for failing to comply with an order under s3LA(2) CA was imprisonment for 2 years.
- 2. Part IC CA establishes a unique regime under the Act, imposing obligations on investigating officials of Commonwealth offences: s 23(1)(b). It does not exclude or limit the application of any state law, such as the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) (LEPRA), "so far as it can operate concurrently with this part": s 23A(2) CA. Any provisions protective of individuals are "in addition to, and not in derogation of, any rights and freedoms of the individual under a law of the Commonwealth or of a State".

Part IC—Investigation of Commonwealth offences

Division 1—Introduction

23 Outline of this Part

- (1) This Part:
 - (a) provides for the detention of people arrested for Commonwealth offences (see Division 2); and
 - (b) imposes obligations on investigating officials in relation to:
 - (i) people arrested for Commonwealth offences; and
 - (ii) certain other people who are being investigated for Commonwealth offences; (see Division 3).

23A Application of Part

- (1) Any law of the Commonwealth in force immediately before the commencement of this Part, and any rule of the common law, has no effect so far as it is inconsistent with this Part.
- (2) This Part does not exclude or limit the operation of a law of a State or Territory so far as it can operate concurrently with this Part.
- 1. The following (relevant) definitions are contained within s 23B CA [emphasis added]:

23B Definitions

- (1) In this Part:

...

Commonwealth offence means:

- (a) an offence against a law of the Commonwealth, other than an offence that is a service offence for the purposes of the Defence Force Discipline Act 1982; or
- (b) a State offence that has a federal aspect.

...

inform, in relation to an investigating official informing a person who is under arrest or a protected suspect, means notify the person:

- (a) in a language in which the person is able to communicate with reasonable fluency; and
- (b) in a manner that the official has reasonable grounds to believe is a manner that the person can understand having regard to any apparent disability the person has.

investigating official means:

- (a) a member or special member of the Australian Federal Police (other than a member or special member of the Australian Federal Police who is engaged in covert investigations under the orders of a superior); or
- (b) a member of the police force of a State or Territory (other than a member of the police force of a State or Territory who is engaged in covert investigations under the orders of a superior); or
- (c) a person who holds an office the functions of which include the investigation of Commonwealth offences and who is empowered by a law of the Commonwealth because of the holding of that office to make arrests in respect of such offences (other than a person who is engaged in covert investigations under the orders of a superior).

protected suspect has the meaning given by subsection (2).

question has the meaning given by subsection (6).

...

(2) A person is a protected suspect if:

- (a) the person is in the company of an investigating official for the purpose of being questioned about a Commonwealth offence; and
- (b) the person has not been arrested for the offence; and
- (c) one or more of the following applies in relation to the person:
 - (i) the official believes that there is sufficient evidence to establish that the person has committed the offence;
 - (ii) the official would not allow the person to leave if the person wished to do so;

(iii) the official has given the person reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so; and

(d) none of the following applies in relation to the person:

(i) the official is performing functions in relation to persons or goods entering Australia, and the official does not believe that the person has committed a Commonwealth offence;

(ii) the official is performing functions in relation to persons or goods leaving Australia, and the official does not believe that the person has committed a Commonwealth offence;

(iii) the official is exercising a power under a law of the Commonwealth to detain and search the person;

(iv) the official is exercising a power under a law of the Commonwealth to require the person to provide information or to answer questions; and

(e) the person has not ceased to be a suspect under subsection (4).

...

(6) In this Part, a reference to questioning a person:

- (a) is a reference to questioning the person, or carrying out an investigation (in which the person participates), to investigate the involvement (if any) of the person in any Commonwealth offence (including an offence for which the person is not under arrest); and
- (b) does not include a reference to carrying out a forensic procedure on the person under Part ID.

1. Division 3 concerns the obligations of investigating officials

23F Cautioning persons who are under arrest or protected suspects

- (1) Subject to subsection (3), if a person is under arrest or a protected suspect, an investigating official must, before starting to question the person, caution the person that he or she does not have to say or do anything, but that anything the person does say or do may be used in evidence.
- (2) The investigating official must inform the person of the caution in accordance with subsection (1), but need only do so in writing if that is the most appropriate means of informing the person.
- (3) Subsections (1) and (2) do not apply so far as another law of the Commonwealth requires the person to answer questions put by, or do things required by, the investigating official.

23G Right to communicate with friend, relative and legal practitioner

- (1) Subject to section 23L, if a person is under arrest or a protected suspect, an investigating official must, before starting to question the person, inform the person that he or she may:

- (a) communicate, or attempt to communicate, with a friend or relative to inform that person of his or her whereabouts; and
- (b) communicate, or attempt to communicate, with a legal practitioner of the person's choice and arrange, or attempt to arrange, for a legal practitioner of the person's choice to be present during the questioning;

and the investigating official must defer the questioning for a reasonable time to allow the person to make, or attempt to make, the communication and, if the person has arranged for a legal practitioner to be present, to allow the legal practitioner to attend the questioning.

- (2) Subject to section 23L, if a person is under arrest or a protected suspect and wishes to communicate with a friend, relative or legal practitioner, the investigating official must:
 - (a) as soon as practicable, give the person reasonable facilities to enable the person to do so; and
 - (b) in the case of a communication with a legal practitioner—allow the legal practitioner or a clerk of the legal practitioner to communicate with the person in circumstances in which, as far as practicable, the communication will not be overheard.
- (3) Subject to section 23L, if a person is under arrest or a protected suspect and arranges for a legal practitioner to be present during the questioning, the investigating official must:
 - (a) allow the person to consult with the legal practitioner in private and provide reasonable facilities for that consultation; and
 - (b) allow the legal practitioner to be present during the questioning and to give advice to the person, but only while the legal practitioner does not unreasonably interfere with the questioning.

23H Aboriginal persons and Torres Strait Islanders

- (1) Subject to section 23L, if the investigating official in charge of investigating a Commonwealth offence believes on reasonable grounds that a person who is under arrest, or who is a protected suspect, and whom it is intended to question about the offence is an Aboriginal person or a Torres Strait Islander, then, unless the official is aware that the person has arranged for a legal practitioner to be present during the questioning, the official must, before starting to question the person:
 - (a) inform the person that a representative of an Aboriginal legal assistance organisation in the State or Territory in which the person is located will be notified that the person is under arrest or is a protected suspect (as the case requires); and
 - (b) notify such a representative that the person is under arrest or is a protected suspect (as the case requires).

(1A) To avoid doubt, the obligations imposed by subsection (1) do not limit and are not limited by any other obligations imposed, or rights conferred, by this section.

(1AB) If a representative of an Aboriginal legal assistance organisation is notified under subsection (1), the investigating official must not question the person until the earlier of the following times:

- (a) the representative has communicated with the person;
 - (b) 2 hours have elapsed since the representative was notified.
- (2) Subject to subsection (7) and section 23L, if an investigating official:
- (a) interviews a person as a suspect (whether under arrest or not) for a Commonwealth offence, and believes on reasonable grounds that the person is an Aboriginal person or a Torres Strait Islander; or
 - (b) believes on reasonable grounds that a person who is under arrest or a protected suspect is an Aboriginal person or a Torres Strait Islander;

the official must not question the person unless:

- (c) an interview friend is present while the person is being questioned and, before the start of the questioning, the official has allowed the person to communicate with the interview friend in circumstances in which, as far as practicable, the communication will not be overheard; or
- (d) the person has expressly and voluntarily waived his or her right to have such a person present.

(2A) The person suspected, or under arrest, may choose his or her own interview friend ...

...

In any proceedings, the burden lies on the prosecution to prove that an Aboriginal person or Torres Strait Islander has waived the right referred to in subsection (2) or (2A), and the burden is not discharged unless the court is satisfied that the person voluntarily waived that right, and did so with full knowledge and understanding of what he or she was doing.

...

- (6) The rights conferred by this section are in addition to those conferred by section 23G but, to the extent (if any) that compliance with this section results in compliance with section 23G, the requirements of section 23G are satisfied.

...

(8) An investigating official is not required to comply with subsection (1), (2) or (2B) in respect of a person if the official believes on reasonable grounds that, having regard to the person's level of education and understanding, the person is not at a disadvantage in respect of the questioning referred to in that subsection in comparison with members of the Australian community generally.

(9) In this section:

interview friend, in relation to a person to whom subsection (2) applies, means:

(a) a relative or other person chosen by the person; or

(b) a legal practitioner acting for the person; or

(c) a representative of an Aboriginal legal assistance organisation in the State or Territory in which the person is located.

1. It is noteworthy that LEPR provides under Part 9 for the rights of a suspect who is in the company of a police officer in connection with an investigative procedure but who is not detained (s 109 LEPR). Division 3 of Part 9 requires relevantly is titled "Safeguards relating to persons under arrest and protected suspects". Section 112(1) allows regulations to made modifying the application of Part 9 of the Act to Aboriginal people and in relation to vulnerable persons as defined at Regulation 28, including persons who have impaired intellectual functioning and Aboriginal persons. Clause 31 provides for a protected suspect who is a vulnerable person is entitled to a support person during any investigative procedure (which is not defined).
2. As to the treatment of people with intellectual disabilities the NSW Police Handbook provides that such persons are inter alia to be spoken to in clear, slow language and to be regularly checked that they understand by asking the person to repeat what has been said to them and to periodically remind a suspect of the caution and confirm their understanding. The Handbook warned that such person are: "susceptible to authority figures and tend to give answers they believe are expected".

Discretion to exclude: s 138EA

1. Section 138 EA relevantly provides as follows [emphasis added]:

(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.

1. In *Kadir v The Queen* [2020] 375 ALR 80, at [12] – [14] the Court held [emphasis added]:

In the event, s 138 enacts a "discretion" which is wider than the modified *Bunning v Cross* discretion discussed by the ALRC in the Interim Report. *Bunning v Cross* is an exclusionary discretion that applies in criminal proceedings and requires the court to balance the desirable goal of convicting wrongdoers against the undesirable effect of giving curial approval, or even encouragement, to the unlawful conduct of those whose task it is to enforce the law. Section 138 provides for the conditional exclusion of evidence obtained by, or in consequence of, impropriety or illegality in any proceeding to which the Act applies. Notably, the exclusion is not confined to evidence that is improperly or illegally obtained by police or other law enforcement agencies. The "discretion" conferred is to admit the evidence, should the court be persuaded that the balance of the competing public interests requires that outcome.

As s 138 is not confined to criminal proceedings or to evidence obtained by, or in consequence of, the misconduct of those engaged in law enforcement, the public interests that the court is required to weigh are broader than those weighed in the exercise of the *Bunning v Cross* discretion. The desirability of admitting evidence recognises the public interest in all relevant evidence being before the fact-finding tribunal. The undesirability of admitting evidence recognises the public interest in not giving curial approval, or encouragement, to illegally or improperly obtaining evidence generally. In a criminal proceeding in which the prosecution seeks to adduce evidence that has been improperly or illegally obtained by the police (or another law enforcement agency), the more focussed public interests identified in *Bunning v Cross* remain apt.

Recognition that s 138 is not confined to evidence obtained by the improper or illegal conduct of the police raises a number of issues. Whether evidence has been obtained improperly in such a case is determined by reference to "minimum standards of acceptable police conduct ...

1. As was recognised by the Court in *Kadir* (at [15]) the Evidence Act does not provide guidance as to the relative weighting of each of the provisions contained within s 138(3).
2. The application of s 138 EA to evidence requires two determinations:
 1. First limb — a determination of whether the evidence obtained was obtained unlawfully, improperly, or in consequence of such per s 138(1); and
 2. Second limb — if so, a determination of whether the evidence should be admitted despite the impropriety or unlawfulness, taking into account the factors listed under s 138(3).
1. Police behaviour if not unlawful can still nonetheless constitute an impropriety. Impropriety has been defined as behaviour "quite" or "clearly inconsistent" with "the minimum standards which a society such as ours should expect and require of those entrusted with powers of law enforcement": *Robinson v Woolworths Ltd* (2005) 158 A Crim R 546 per Basten JA, [23]. If either unlawful or improper the Court must consider the factors under s 138(3) in the exercise of its discretion whether to admit the evidence. That discretion requires a balancing between whether "the desirability of admitting the evidence is outweighed by the undesirability of admitting the evidence given the way in which it was obtained": at [149] – [155].
2. The onus is on the party seeking exclusion of the evidence to establish that it was improperly or illegally obtained. If that onus is met, it is for the party seeking admission of the evidence to satisfy the court that the desirability of admitting such evidence outweighs the undesirability of admitting it, given the way in which it was obtained: *Parker v Comptroller General of Customs* (2009) 252 ALR 619; [2009] HCA 7 at [28].

CONSIDERATION AND FINDINGS

1. As I observed at the commencement of my remarks in this matter a viewing of the footage is optimal to the determination of the issues taken in combination with the oral evidence of the witnesses and an examination of the application for the search warrant and the search warrant itself.
2. What is not in issue is that the accused is a First Nations man and that he has an intellectual impairment, although as the Crown stated at the outset, the extent of the impairment is not known.

The first limb: unlawful and/or improper conduct

Preliminary findings

1. The officer in charge of the investigation SC Rainen was aware of the accused's intellectual impairment. Despite DSC Witts' lack of recollection as to whether he was aware of the impairment prior to the search, I find on the balance of probabilities that he was aware of it based upon the following evidence: the officer in charge of the investigation SC Rainen believed that she had advised him of that fact, although unsurprisingly she could no longer recall the exact conversation, she nonetheless retained a memory of it being mentioned to him. Secondly, it seems inconceivable that DSC Witts did not access the State Intelligence report during the process of making the formal application for the search warrant or for preparing for the search itself. That document carried essential information concerning the accused, his family members, the details of the premises and the location of the apartment building, in addition to the intelligence relating to his suspected conduct. The officer seemed to be conscious of the various family members during his interactions at the premises during the warrant noting that the intelligence material contained clear photographs of each of the family members. Further, DSC Witts put on the record early in the search warrant that he had rung the accused's father supportive of an inference that he had some knowledge of the accused's vulnerability. Finally, I note that the officer seemed unsurprised when KP's attended the premises part way into the warrant and warned the officer of his son's cognitive impairment, the officer asked no questions about the condition and made no changes to the way he dealt with the accused or how he approached getting access to his device. Assuming therefore that he had access to that document, then he likely saw the notification warning in red situated at the top of the first page that the accused suffered from "a disability" and, further down the page, under "physical appearance" that he was Aboriginal.
2. If DSC Witts did not have the conversation that SC Rainen recalled, and he had not had access to the State Intelligence officer, then at the latest he became aware of that fact once KP arrived at the premises part way through the search and told him of the fact. As just observed, with the information of the intellectual impairment having been clearly communicated to him, it made no difference to the officer's approach to the accused, nor

the explanations given to him. He did not advise officers Cooper or Eid who were apparently tasked with obtaining access from the accused to the mobile device that he had the impairment and that it might be relevant to how he was questioned or his broader protections.

3. It appears more likely that despite having the knowledge that the accused had the intellectual disability, DSC Witts failed to consider how the information he had (regardless of the source) impacted the manner in which he executed the search particularly as to the investigations that called for interactions with the accused. Whilst in evidence the officer stated he was aware of the various obligations that arose in the NSW Police Handbook concerning vulnerable accused, particularly as to how he communicated with the accused, it is unclear how he put any of those guidelines into action.
4. The other finding I make prior to addressing the substantive arguments, is that the investigating officers had a clear goal in executing the search warrant at the premises: firstly, to locate the data storage devices present at the scene; secondly, to get access to those devices, in particular by the provision of the relevant PIN code. This conclusion is based upon the outline of the purpose of the search given by DSC Witts on entry of the search identifying the accused as the "target"; noting that the first question posed to the occupants was that the items the subject of their interest concerned mobile telephones, laptops and SIM cards; and the first request made of the accused concerned the provision of access by passwords to mobile phones and computers, with the focus being on the accused's mobile phone thereafter.
5. I will consider first whether the accused constituted a protected suspect under s 23B CA, before considering the broader argument concerning consent

Interaction of s 23B(2) CA: determining if the accused was a protected suspect

1. The provisions contained in s 23B(2) CA are conjunctive. For the purposes of working only through the matters in issue, it is clear that s 23B(2)(b), the accused had not been arrested at the relevant time, and that none of the provisions set out in (2)(d), or (3) - (5) have application.

Question 1: was the accused in the company of an investigating official for the purpose of being questioned about a Commonwealth offence: S 23B(2)(a)?

1. As to s 23B(2)(a) CA, I am satisfied that the accused was "in the company of an investigating official" at the time he was being asked questions about access to his mobile phone. The officers, including DSC Witts, were "investigating officials" as set out in s 23B(1) definitions, being members of the NSW Police Force meeting the definition of "member of the police force of a State". There is no issue that during the search the accused was "in the company" of that officer and several others. DSC Witts conceded as much.

2. The reference to the word "questioned" contained in s 23B(2) CA must be read in light of the definition of question at s23B(1) which makes reference to ss (6)(a) which relevantly provides that "In this Part, a reference to questioning a person relevantly "is a reference to questioning the person, or carrying out an investigation (in which the person participates), to investigate the involvement (if any) of the person in any Commonwealth offence (including an offence for which the person is not under arrest)". I accept that the provision has application to questions asked by the police in respect of their investigations into the involvement of the accused in any Commonwealth offence.
3. The purpose of DSC Witts, and others, talking with the accused at the commencement and during the course of the execution of the search warrant was to advise the accused of the purposes of the search and, subject to the accused's response to the caution as to his right to exercise his right of silence, to answer questions about obtaining access to his telephone and computer devices. As stated, these were the focus of the search warrant. In these circumstances, the interactions between DSC Witts, Eid and Cooper and the accused were in the nature of both questioning for the purposes of investigation as to the suspected involvement of the accused in an offence or offences.
4. Relevantly, the term "Commonwealth offence" appears in s 23B(1), (2)(a) and ss (6). As to whether the questions and/or the investigation related to any Commonwealth offence I am satisfied they were. The focus of the search warrant can be gleaned from what the intelligence disclosed and what was consequently included in the search warrant application and search warrant itself: namely the suspected uploading of CAM via the internet; the use of carriage services to transmit CAM and possession of CAM. The third condition of the search warrant application (exhibit B) allowed for seizure of "things as to which there are reasonable grounds for suspecting that they will afford evidence as to the commission of the following offences against the law of the Commonwealth: Use Carriage service to transmit CAM, section 474.22 CCC". These same words were contained in the search warrant itself.
5. The evidence is clear in this instance that the police were investigating and expecting to locate evidence concerning the commission of a Commonwealth offence, most particularly possession and transmission of CAM in contravention of the CCC, even if it meant that in the process the conduct, they discovered might additionally indicate that a State offence had been committed.
6. There is nothing in the provision that precludes the application of the provisions set out in s 23B(2) where evidence may be located that potentially also concerns a State offence. The definition of "Commonwealth offence" relevantly appears to cater for this situation to provide flexibility: "Commonwealth offence means: (a) an offence against a law of the Commonwealth...; or a State offence that has a federal aspect."
7. As a result of these findings, it is unnecessary for me to engage in the lengthy submissions concerning whether a matter of procedural unfairness concerning the Crown's altered position on this preliminary issue.

8. The answer to the question posed as to whether the accused was a person in the company of an investigating official for the purpose of being questioned about a Commonwealth offence is "yes".

Question 2: Does any one or more of the criteria set out in s 23B(2)(c) CA apply?

1. As to s 23B(2)(c) CA the accused submitted that (i) and (iii) had application.

Q 2(a): Did the official believe that there was sufficient evidence to establish that the person has committed the offence?

1. As to s 23B(2)(c)(i) CA, I accept the evidence of DSC Witts that he held a genuine belief, and still believes, that at the time of the search he had not located "sufficient evidence" to "establish" that the accused had committed a (or the) Commonwealth offence/s they contemplated as they had not at that point located any evidence of the content of CAM on any of the data devices they were able to obtain access to. I accept the officer's evidence that he did not believe that the intelligence constituted "evidence" let alone "sufficient evidence" in the absence of any established information that took it beyond a suspicion or that the evidence contained in the intelligence was "sufficient" and could be "established", by which I infer, that the evidence was in some prima facie admissible form.
2. I note the language of the COPS material and the State Intelligence made reference to "suspicions" and that material there contained was for "intelligence purposes only" to be used in order to assist in obtaining a search warrant. The COPS material specifically contemplates what to do if no CAM was located during the search. I note that once access was obtained to the accused's mobile device during the search, SC Cooper was unsure that the images he accessed met the criteria of CAM. I accept that was the reason the accused was not arrested during the course of the search warrant.
3. I note counsel for the accused made reference to the judgment of Adamson J in R v FE (at [100]) which appears at first blush to suggest an interpretation of a different but similarly worded provision under LEPR, to incorporate both a subjective and objective test as to whether an officer had formed the belief that the evidence was sufficient to establish that the accused had committed a particular offence. The accused relies upon that interpretation from her Honour's additional remark (at [100]) that "if he had not formed the belief but ought to have formed the belief". I do not see respectfully, that her Honour was going so far as to find that the provision ought to incorporate the objective test in the way suggested. Her comments must be seen in context. In the absence of any reference to a reasonable basis for or reasonable grounds for the "belief as to the sufficiency of evidence to establish...the offence" (noting those precise words appear in the same provision at (c)(iii), the interpretation of the provision urged upon me by the accused is rejected.
4. On this basis I am not satisfied that the officer genuinely believed at any stage of the search that he had sufficient evidence to establish that the accused had committed the offence. He did not believe that because he had not located CAM at that time.

5. To be clear, and to respond to suggestions put to the officers during cross-examination, I do not find therefore that the officer deliberately failed to arrest the accused and convey him to the closest available police station to avoid him accessing his Part 9 rights under LEPR or Division 3 of Part 1C of the Act.

6. The answer to the question posed in the sub-heading above is therefore "no".

Q 2(b): Did the official give the person reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so?

1. I am satisfied that DSC Witts gave the accused reasonable grounds for believing that he would not be allowed to leave had he wished to do so. I note the following as to the context, all of which the official was aware of at the time of the commencement of the search: namely, that the accused was 19 years of age, Aboriginal and intellectually impaired; the accused was at home alone with his 17 year old younger sister; the premises had been opened on the morning by the Specially Trained Resource Team as described above.

2. As to the search itself:

1. Following the STR team had left 10 officers attended the premises, several of whom remained at the door at various points throughout the procedure, reasonably creating the impression that they were guarding or monitoring the entry and exits from the premises;

2. That from the commencement of the recording, the accused and his sister were positioned seated in the lounge area, heads bowed;

3. That the search warrant procedures and associated caution were being directed at both the accused and his sister;

4. That the accused was given a caution as to his right of silence, but not told whether he was under arrest or, in clearer language, whether he was free to leave the premises or not;

5. The accused was told that there was an independent officer, Inspector Agnew, present to see that the search was carried out in a fair and appropriate manner, but that the time to speak to him was at the completion of the search;

6. Suggestive that his freedom of movement was constrained, the official advised the accused and his sister: "to stay here, if you need anything, just ask. We are happy to facilitate anything you need";

7. The physical environment suggested the accused was constrained to remain seated in the lounge or where the officers otherwise directed him to go (later into one of the bedrooms);

8. The questioning of the accused as to the access to his devices took place when the offender was in the immediate company of officers, at the least 2 officers being Eid and Ward, Constable Eid in evidence conceding that he was not sure of the custodial status of the accused at that time. He considered he would have had to ask the case officer if he was free to leave;
9. The official DCS did not tell the accused that he was not under arrest, nor that he was free to leave if he wished to. The only suggestion that he may have been able to leave arose from the official telling the accused's father that the accused was "not under arrest at this point in time". There was no evidence that this information was communicated or conveyed to the accused who was not participating in that part of the conversation. There was no explanation as to what these words might have meant had that information been provided to the accused noting that shortly after the official had conveyed this information to KP, KP advised him of his cognitive dysfunction.
1. The answer to the question contained in the above sub-heading is therefore "yes".
2. In these circumstances, I am satisfied that the accused was therefore a "protected person" under s 23B of the Act.

Findings as other forms of unlawful/ improper conduct

1. I am satisfied that the conduct of police at the scene of the search that resulted in the provision of access to the PIN code to the accused's mobile device was in all the circumstances, when taken together, unlawful and/or improper based upon my following findings:
 1. The search took place in circumstances where the police intelligence clearly identified the accused as both Aboriginal and intellectually impaired: based upon my findings above DSC Witts apparently failed to share this information with the other officers;
 2. As the accused was a protected person under the Act, s 23H was engaged, noting the same definitions of "investigating official", "investigating a Commonwealth offence" and "believes on reasonable ground that a person...who is a protected person" who he intends to "question", all of which I have considered above. Accordingly, DSC Witts ought to have carried out the tasks set out in s 23H(1)(a) – (b) and (2)(c), which in short, concerned obligations to caution, inform, defer and/or not question. The officer did not inform the accused as to the notification of an Aboriginal assistance organisation, nor did he so notify them. Whilst the officer had contacted the accused's father early in the search, the questioning had commenced prior to his arrival and the caution had taken place in his absence, as had the initial (spare) explanation as to the operation of s 3LA. The accused had not been advised of his right to choose his interview friend or his ability to waive his right to that friend. Even if his father had been that interview friend, a significant proportion of the questioning as to access to the phone, took place with officers Eid and Cooper, in the absence of the accused's father.

3. DSC Witts whilst cautioning the accused did not inform the accused as to the meaning of the caution as described in s 23F CA in accordance with the definition of "inform" as set out in s 23B(1) CA.
4. DSC Witts failed to explain the information as to caution, custodial status and the working of s 3LA CA down into simple language in accordance with the NSW Police Handbook to ensure that the accused, with a known intellectual impairment, understood that he did not have to answer police questions nor do anything as requested and that the caution extended to answering questions or doing things that provided access to his telephone (namely providing his PIN code or his face for facial recognition);
5. DSC Witts did not inform the accused (or his sister) that they were not under arrest, which meant that they could leave if they wanted: rather the impression was created that they were not free to move;
6. Whilst there was nothing generally improper in adopting a policy of requesting access when executing a search of this type, following caution, DSC Witts' request for "assistance" to access the phone in this case, failed to explain that the accused was not obliged to provide access to his device in a way that was clear and failed to ensure, by checking, that the accused understood what he said in accordance with the guidelines contained in the NSW Police Force Handbook (exhibit 23);
7. DSC Witts' request for "assistance" was not accompanied by an additional caution and failed to explain in an intelligible manner that there was no legal requirement to do so;
8. DSC Witts' request for "assistance" failed to take into account that the accused was an intellectually impaired individual and may be susceptible to acquiescing to the requests of authority figures (see NSW Police Force Handbook);
9. DSC Witts' request for "assistance" to provide passwords which he represented would "speed up the process", without advising that the "process" to otherwise obtain access to the PIN code would require an application and order made by a magistrate pursuant to s 3LA, misrepresented the operation of that provision and suggested access was inevitable.
1. Accordingly, whilst the accused initially, prior to the arrival of his father at the premises, provided the police with the (wrong) PIN code, I am satisfied in all the circumstances the police acted both unlawfully and improperly prior to this point.
2. Following the arrival of the accused's father, I note the following:
 1. The case officer whilst advising the accused was not under arrest, failed to explain to the accused's father in plain English that this meant that the accused was free to leave, particularly in circumstances where the environment suggested he was not;
 2. The case officer failed to advise the accused's father that the accused was a protected suspect and entitled to the rights set out in s 23H CA and potentially LEPR;

3. DSC Witts' request for "assistance" from KP to have his son provide the passwords to his devices failed to accurately describe that in the absence of consent the process would require an application and order made by a magistrate pursuant to s 3LA CA;
4. That the use of the words by DSC Witts that he wished to "streamline this process as quick as possible" and later the statement that obtaining a s 3LA order to obtain passwords "... the opportunity to be able to do that, is obviously going to delay it as much as possible, but what we want to do, is obviously, facilitate it as quick as possible. The numbers that we are looking for..." was misleading in the sense that it suggested, or at least created the impression, that obtaining access to the device/s was inevitable and that refusing to do so would just mean that they were without their phones for longer.
5. That in so doing, the case officer, with the assistance of the accused's father (who had been misled as to the operation of the provision effectively acted in concert to coerce the accused to provide the access sought.
6. In the absence of accurate information KP was enlisted to assist with the access to devices rather than provide any of the protective measures that a support person might be asked to fulfil.
7. That DSC Witts did not correct KP after he had spoken to him about the s 3LA CA order, when he told his son to provide the PIN code "because they will get them unlocked anyways".
8. That thereafter SC Cooper and Eid acted together, in the absence of the accused's father, to have the accused provide orally the PIN code without further caution or reference to s 3LA or clarification that the explanation as to the provision or his right of silence was understood. These failures were in addition to the failure to adopt the protective measures relevant to being a protected suspect.
9. That the officers SC Cooper and Eid acted together to have the accused unlock the device including by face identification by holding the device in front of his face, without caution, or asking his permission to do so;
10. That the officers SC Cooper and Eid, acting together, filmed the accused as he attempted to put PIN codes into his phone, by having him physically input the code into the device in front of him whilst another officer (Ward) stood behind him filming him doing so without his apparent knowledge, or consent.
1. I find that the relevant officers prioritised their goal of attaining immediate access to the accused's devices over their obligations to comply with their duties to a citizen whose freedom was constrained (by context rather than a statement of arrest) and who was, in an obvious sense, vulnerable.

2. A matter that circumstantially supports my finding is the observation that early in the search the officer asked for SP's phone details which she refused to provide. When their father KP arrived at the scene DSC attempted to conscript him to assist in providing access to her phone in addition to the accused's device. He did not advise KP that his daughter had previously denied access to police, rather he asked for his assistance "obviously being your daughter. I was hoping to be able to speak without, if we can streamline this process as quick as possible". In other words, the officer had not respected the refusal by a child to "do something" even though he had just cautioned the accused in her presence that they did not have to say or "do" anything if they did not wish to.
3. Accordingly, I find on the above combination of reasons, that the evidence contained on the seized mobile device was obtained both improperly and in some respects in contravention of an Australian law. To the extent that it has been suggested the accused provided the PIN code to his phone voluntarily, I find that the consent was vitiated by the conduct of the police.

The second limb: the exercise of discretion under 138 EA

1. The accused having satisfied me that the relevant evidence was improperly or illegally obtained it is for the Crown to satisfy me that the desirability of admitting the evidence outweighs the undesirability of admitting it, given the way in which it was obtained:
 1. Section 138(3)(a) the probative value of the evidence: The evidence is important and highly probative to the Crown case in respect of all five counts: without this evidence it is apparent that the Crown case will likely fail. In the usual case evidence of high probative value would tend towards the desirability of admitting the evidence: *R v Camilleri* (2007) 68 NSWLR 720
 2. Section 138(3)(b) the importance of the evidence in the proceeding: In *DPP v Langford* [2012] NSWSC 310 at [31], Fullerton J referred to important evidence as "essential to proof of the prosecution case". The evidence in question is essential to prove all counts on the indictment. In the absence of evidence contained from the iPhone device, I am led to believe there is no other evidence.
 3. Section 138(3)(c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding. In *R v Dalley* (2002) 132 A Crim R 169; [2002] NSWCCA 284, Spigelman CJ (Blanch AJ agreeing) referred to s138(3)(c) and said at [3]: "In the case of criminal proceedings, in my opinion, the public interest in admitting evidence varies directly with the gravity of the offence. The more serious the offence, the more likely it is that the public interest requires the admission of the evidence." The offences charged against the accused are serious and carry maximum penalties each of 15 years imprisonment. They involve three forms of offending within the s 474 CC category of offending: namely, making available and possessing CAM but also using a carriage service to procure a person who held himself out to be a 14 year old boy (I am not aware of any evidence that has independently established that the person was an actual 14 year old boy,

which is perhaps more relevant to the sentence than the seriousness of the offence itself). The case law concerning possession or transmission of CAM is appropriately replete with statements as to community abhorrence for such conduct for reasons that I am well versed in. I note also that it is of real concern to the community that offences of this nature are becoming more prevalent. As to the seriousness of the criminality charged against the offender, it is noted that the quantity of the images (245 images and 387 video files) was not extensive (at least relative to many such offences before the court) and the age of the asserted child in the procure offence (being 14 years) in a range of 0 to 16 is towards the higher end of the range. Noting the accused's own age (19) and his level of intellectual functioning it is likely that the objective criminality of the offence would be assessed as towards the lower end of the available range.

4. s 138(3)(d) the gravity of the impropriety or contravention: The gravity of the various improprieties as set out above are, when taken together, not insignificant: the provisions in respect of Aboriginality (particularly when coupled with vulnerability deriving from intellectual impairment) are based in statute for a reason. I note Justice Spender in *Pressler v Hozberger* (1989) 44 A Criminal R 261 at 272 said as follows:

Where the legislature has defined the circumstances in which a person's liberties might be infringed or their rights curtailed, it should not readily be concluded that conduct outside the defined authorisation should be tolerated or excused. Judges ought not, by a wink or a nod, weaken the protection which the law gives to the rights and liberties or citizens.

1. As stated above, I find that the relevant officers prioritised their goal of gaining immediate access to the accused's devices over their obligations. I have set out the bases for the impropriety/unlawful conduct in detail above. I find that the conduct fell into a category of impropriety higher than a mere cutting of corners. Even if the DCS was not aware of the operation of the provision concerning a protected suspect, he was no doubt aware that he was asking for access to a device that provided the essential evidence central to the investigation which could implicate the accused in all the forms of conduct for which he was later charged. As Mr Pettit for the accused put it during the hearing: once access was granted to the accused's phone, it was "game over" for the accused. Looked at as a whole the search was carried out with little concern for the statutory rights of the accused.
2. Section 138(3)(e) whether the impropriety or contravention was deliberate or reckless: In *DPP v Marjancevic* (2011) 33 VR 440; [2011] VSCA 355 at [68], the Court referred to misconduct being deliberate if it is knowingly improper or unlawful. I am satisfied on balance that the explanation as to the s 3LA CA provision given to both the accused and his father was an intentional decision to create the false impression that the police would obtain access to the device sooner or later and thereby suggest that the most expedient thing to do was to provide access willingly. If this was not an intentional misstatement designed to coerce, it indicated a high degree of recklessness as to the accuracy of the statement. As to the remainder of the conduct, there appeared to be next to no consideration (at the highest) or knowledge (at its lowest) of the rights of an Aboriginal man in custody or particularly a

man with limited intellectual capacity. There was a high degree of failure to abide by the legislation that the officer said he was aware of.

3. s 138(3)(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: I note the parties' submissions as to the possibility that the improprieties may have breached the rights of a person under international Covenants or rights, notably Article 26: I do not find this factor established or determinative. The provision at least as concerns Article 26 appears to be concerned with discrimination based upon race, colour and other matters. This has not been established on the evidence.
4. Section 138(3)(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: there is no evidence of this.
5. Section 138(3)(h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law: In *Australian Securities and Investment Commission (ASIC) v Sigalla (No 2)* [2010] NSWSC 792 at [128], White J found that a number of credit card statements were obtained pursuant to an invalid notice to produce. ASIC submitted that the fact that a form-compliant notice could have been issued (for the purposes of this case a s 3LA order), militated towards admission of the evidence. The defendant argued that the fact the evidence could have been obtained lawfully, was reason to exclude the evidence. White J said the "factor is equivocal" but went on to say, "the fact that a notice could readily have been given that was within power is a factor for excluding the evidence when no real effort was made to comply with the regulation as to the form the notice was to take". As was recognised at [20] of *Kadir*, the significance of this factor to the balancing of the competing interests will vary depending on the circumstances.
6. A significant factor in this application is that there would have been very little difficulty, other than a short delay, for the police to have obtained the necessary evidence without resorting to impropriety or contravention of any law: namely, by providing the accused as a protected suspect with the protections set out in S 23H including access to a legal representative and advice and potentially obtaining consent to access the phone in that context. The alternative open to the police in the circumstances the accused refused access, following caution or the receipt of advice, was simply to apply to the magistrate for access by way of a section 3LA CA order. Such an order could have been lawfully sought and potentially granted on the magistrate's satisfaction as to the reasonable grounds for suspecting that evidential material was held in, or accessible from, a data storage device and that the specified person is reasonably suspected of having committed the offence stated in the relevant warrant.
1. Of real concern is my observation that these kinds of offences are becoming more prevalent in our society with widespread use of the internet and access to what is known as the "dark web". In those circumstances searches of this kind are likely to be undertaken on an

increasingly frequent basis in the process of investigating and prosecuting one of our society's most troubling and abhorrent crimes. It is very likely that access to electronic data storage devices will be sought and that s 3LA CA orders will need to be explained. All the more important that law enforcement agencies who undertake this important work go about their duties properly and lawfully. In respect of the potential to obtain an order under s 3LA CA, the position must be accurately represented. Clearly, training police in this important area is crucial. A civil society provides for the protection of the rights for those that are considered potentially vulnerable, even in circumstances where those persons have committed heinous crimes. Those protections must, in appropriate cases, be upheld.

2. I find in accordance with s 138(1) EA that, on balance, despite the obvious public interest in bringing perpetrators of crimes of this sort of crime to justice, the Crown have not satisfied their onus that the desirability of admitting the evidence outweighs the undesirability of admitting the evidence in all the circumstances of this case.
3. Accordingly, I make the following orders, moderated to the extent of the evidence adduced on the hearing:
 1. That all items found consequent to the search of the accused's mobile device found consequent to the Section 3E Crimes Act 1914 search of [address], on 8 June 2022 be excluded from evidence pursuant to s 138 EA.

Amendments

04 December 2024 - Corrected formatting in coversheet

04 December 2024 - Corrected spelling

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Decision last updated: 04 December 2024

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