THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

DOWD J

THURSDAY: 3 OCTOBER 2002

70214/01 REGINA v CLIFFORD CORTEZ

70215/01 REGINA v CE

70023/02 REGINA v ME

70088/01 REGINA v JOHN IKA

70213/02 REGINA v LT

JUDGMENT: Admissibility of evidence against LT and ME.

1 HIS HONOUR: Application has been made on behalf the accused LT and the accused ME, both of whom were aged 17 at the time of arrest and at the time of interview. Although there are dissimilar circumstances, both involve sufficiently similar issues that it is convenient that I deal with both in the same judgment.

2 The records of interview here arise out of the same melee and violence concerning the death of David Phuong from which the charge of murder and the charge of affray arise. It is noted that both accused have pleaded guilty to affray. The case against ME and LT are both based upon common purpose, it being an ingredient of the crime of murder.

3 The argument before the court involved the application of Pt 10A of the *Crimes Act* 1900 ("the Act"), and the *Crimes (Detention after Arrest) Regulation* 1998 ("Detention After Arrest Regulation") being the regulation

made under the Act, and the effect of the *Children (Criminal Proceedings) Act* 1987 ("Children CP Act"). Section 13 of the Children CP Act is in the following terms:

> *Section 13 - Admissibility of certain statements etc*
>
> (1) Any statement, confession, admission or information made or given to a member of the police force by a child who is a party to criminal proceedings shall not be admitted in evidence in those proceedings unless:
>
> (a) there was present at the place where, and throughout the period of time during which, it was made or given:
>
> (i) a person responsible for the child,
>
> (ii) an adult (other than a member of the police force) who was present with the consent of the person responsible for the child,
>
> (iii) in the case of a child who is of or above the age of 16 years—an adult (other than a member of the police force) who was present with the consent of the child, or
>
> (iv) a barrister or solicitor of the child's own choosing, or
>
> (b) the person acting judicially in those proceedings:
>
> (i) is satisfied that there was proper and sufficient reason for the absence of such an adult from the place where, or throughout the period of time during which, the statement, confession, admission or information was made or given, and
>
> (ii) considers that, in the particular circumstances of the case, the statement, confession, admission or information should be admitted in evidence in those proceedings.
>
> (2) In this section:
>
> (a) a reference to a person acting judicially includes a reference to a person making a determination as to the admissibility of evidence in committal proceedings, and
>
> (b) a reference to criminal proceedings is a reference to any criminal proceedings in which a person is alleged to have committed an offence while a child or which arise out of any other criminal proceedings in which a person is alleged to have committed an offence while a child.

> (3) Nothing in this section limits or affects the admissibility in evidence in any criminal proceedings against a child of any statement or information that the child is required to make or give by virtue of the provisions of any Act or law.

Section 13, therefore, applies to the interviews of ME and LT.

4 In each of the cases of ME and LT there were a number of records of interview which were taken by way of ERISP in police stations where copies of audio tapes were provided. On each occasion the accused was told that he was not under arrest and that he was free to leave and that none of the interviews exceeded a four hour period, although the cumulative period taken was over a period of many hours and many hundreds of questions.

5 As I have indicated in the previous judgment, the suggestion made to each of them that they were not under arrest and that they were free to leave has a degree of artificiality about it. Since they were being interviewed about the crime of murder, they had been cautioned and given documents as to legal rights, in particular, a summary document under Pt10A of the Act. If at any stage an admission were made, then of course the power to arrest, which remains and is not affected by Pt 10A of the Act, could have been invoked.

6 Each of the young people must have been conscious of the fact that they had been interviewed that they may not have answered the questions fully and, although free to leave, that they were easily located and were likely to be subjected to further questions.

Admissibility of Material against ME

7 In the case of ME, the application is that the evidence should be excluded under s 90 of the *Evidence Act* 1995 (“the Evidence Act”) as being unfair and that there had been failure to comply with the provisions of Pt 10A of the Act, thus enlivening s138 of the Evidence Act.

8 ME had no criminal record and, on 18 November 2000, had participated in an ERISP and video walk-around with Det Sgt Fitzgerald and Det Lockyer. He was put into the police custody system, although told he was not formally held under Pt 10A of the Act. He was subjected over a period of time to strong pressure, asserted by his counsel, Ms Flannery, to be badgering by Det Sgt Fitzgerald, ME being told, "Police, we're investigating the death of a male person."

9 It was clear from the interview that ME had difficulty understanding important matters. It is put on behalf of ME that, prior to the interview of 15 December 2000, which occurred at the request of Det Sgt Fitzgerald, that there was evidence that Det Sgt Fitzgerald knew that ME had participated in the fight and had assaulted a number of people during that fight. The purpose of the interview of 15 December 2000 was clearly to establish that ME had contemplated there was a possibility someone would suffer grievous bodily harm.

10 Counsel for ME says he was not told that he was suspected of murder. I do not think this fact of itself is such as to exclude evidence. It is not police practice, nor is it necessarily a matter of commonsense, that a person who is being investigated should be told precisely of the offence which is the subject of the investigation. Provided there is a cautioning and the general area of questioning is known, I do not think that simple fact of not being told the precise offence is such as to enliven the exclusionary provisions of the Evidence Act.

11 It is clear, however, that Detective Sergeant Fitzgerald was aware on 15 December 2000 that ME was vulnerable and, as he had the advantage of the contents of a listening device to ME and another participant in the events, and that ME was concerned about the fact of his lying to the police.

12 In accordance with s 13 of the Children CP Act, an acceptable person, namely a retired head master, Mr Don Harwin, was provided. Mr Harwin was not told of the seriousness of the investigation and it is difficult for me to see how he

could possibly have advised ME without knowing the risk that ME was under. He demonstrated in my view a lamentable lack of understanding of the significance of the interview and did not seem to appreciate the full extent of the proper role of an acceptable person. In this respect I think that, to comply with the regime imposed by Pt 10A of the Act and the regulations thereunder, a far better course of training by the police as to the obligations of acceptable person ought to occur. Although, as in the case of *H (a child) v R* (1996) 85 ACrimR 481, there was criticism of the age and appropriateness of the person. A total stranger to a 17 year old young person, who is a retired head master, is not the sort of image that immediately leaps up as someone to whom that young person could relate, and particularly where the support person is such that he is not given time to relate, as he was not here, to the young person, and where he did not seem to understand as a person *in loco parentis* that he might intervene to warn someone who may be making the most damning of admissions.

13 The compliance of the police service with the intention of the legislature in this respect is in my view extremely important. You do not need to know a lot about the law to know when a person is about to make damning admissions. You do not need to know a lot about the law to know that people have a right to remain silent, but nevertheless, young people do not necessarily know those entitlements as, indeed, do a lot of adults and the intention is to arm the young person with some protection.

14 It became obvious during the course of the interview that ME was a suspect in a murder investigation from the type of questions being asked, but it is put by Ms Flannery quite fairly that the “acceptable person” did not advise ME of his rights and remind him of his right to silence.

15 The question about which the Court was addressed and which needs to be satisfied is the application of Pt 10A of the Act regarding detention after arrest for the purpose of investigation. Pt 10A of the Act is designed to provide for a period of time that a person may be detained by police to enable the investigation of that person's involvement in an offence; to authorise the

questioning of a person who is under arrest for a period, despite any requirement of law to bring the person before a Justice, Magistrate or Court without delay; and to provide certain rights to the person arrested.

16 The question of being under arrest, which is a Common Law concept is expanded by s355(2) of the act:

> (2) A reference in this Part to a person who is under arrest or a person who is arrested includes a reference to a person who is in the company of a police officer for the purpose of participating in an investigative procedure, if:
>
> (a) the police officer believes that there is sufficient evidence to establish that the person has committed an offence that is or is to be the subject of the investigation, or
>
> (b) the police officer would arrest the person if the person attempted to leave, or
>
> (c) the police officer has given the person reasonable grounds for believing that the person would not be allowed to leave if the person wished to do so.

This provision of the Act is, with respect, awkwardly framed in that it deems a person to be under arrest if, firstly, there is a belief on the part of the police officer as to sufficient evidence to establish that the person has committed an offence which is the subject of the investigation.

17 The next provision is something which is entirely within the mind of the police officer as to whether he would arrest a person if the person attempted to leave, or the third category which relates to the person concerned, that the person was given reasonable grounds for believing the person would not be allowed to leave if he wished to do so.

18 In this case, as in the case for LT, the accused was told clearly he was free to leave at any time and that he was not under arrest. That, of course, is not the end of the matter. There is no suggestion that the police officer gave reasonable grounds to ME that he would not be allowed to leave and there is no evidence that the police officer would arrest ME if ME attempted to leave.

Although, as I have indicated, the making of certain admissions might well have changed that circumstance.

19 The question which the Court has to examine is the belief referred to in s 355(2)(a). Det Sgt Fitzgerald, an experienced police officer with at the time 16, now 18 years service, says that he had not formed a belief that there was sufficient evidence to establish that ME had committed an offence. A moment's reflection will show that, on the evidence available, ME had clearly committed the offence of assault and, at the relevant interview of 15 December 2000, that he had committed the offence of affray.

20 I quite accept that Det Sgt Fitzgerald wanted to obtain legal advice and, in a complex matter such as this would, as a matter of prudence and caution, obtain legal advice as to whether certain offences are made out. However, he had, in respect of two other persons involved, issued an alert to immigration authorities as to the notification of persons attempting to leave the country. There is no power on the part of Immigration to detain people as such and it would require the issue of a warrant or the provision of advice entitling an arrest to be made. It is in my view absurd to suggest that Det Sgt Fitzgerald would not have applied his mind to the question of whether assault or affray had occurred since, even if he failed to satisfy himself at that stage that he had grounds for bringing a charge of murder, it would be difficult not to have in mind that a warrant or an arrest might have to occur on the basis of the evidence that he then had.

21 The question in relation to the application of s355(2)(a) of the act is whether the police officer must hold a belief as to there being sufficient evidence to establish the commission of an offence.

22 In terms of the whole structure of this provision, be it for an adult or in this case for a child, that a policeman can prevent the application of the provision by simply refusing to apply his or her mind to the question of whether there was sufficient evidence, is somewhat like Scarlet in “Gone With The Wind”: "I'll think about that tomorrow."

23 This structure is particularly designed to prevent abuse of powers of arrest. Pt 10A is a very difficult and cumbersome procedure and the ancestry of subsection 355(2) is various and the terms have been used in the Evidence Act and in other provisions. I cannot accept that the word "believes" is limited to the mind of the police officer concerned.

24 In some of the evidence before me a junior officer said that she had formed the view that there was evidence of affray but quite correctly she was not the officer in charge and did not herself have authority to charge. I consider this provision covers 'belief' on the part of the police officer but must include imputed belief where the facts are so clear as to make it obvious that a police officer, presented with certain evidence, must form a belief, if that evidence is sufficiently cogent. In this case I believe the evidence was such, particularly at the time of the interviews in December, that there was sufficient evidence to establish that the person has committed an offence, namely of affray, and clearly that of assault or one of the more serious grades of assault.

25 Leaving aside offences such as interfering with the course of justice, matters relating to making statements to police, and making incorrect statements to police where an investigation is under way, the intention of the legislature is clearly to protect persons under arrest and with the subsequent amendments dealing with vulnerable persons, to protect people who were vulnerable. It is not, in my view, possible for the law to be circumvented by mental gymnastics on the part of a police officer. It seems to me, therefore, that there has been a deemed arrest of ME; and that the provisions of Pt 10A of the Act apply and the regulations made thereunder. There has not, in my view been a breach of the four hour maximum period of time, and hence there was no requirement that application be made to a Magistrate or Justice for an extension of the period of interview.

26 ME was entitled to leave and on each occasion left with an audio tape of electronic record of interview. However, there have in fact been breaches of the provisions set out to protect children. Section 356M of Pt 10A of the Act

provides that the custody manager caution and give a summary of the part of the Act to the detained person. The custody manager must inform the person as to the right to communicate with friends or relatives and make certain communications. I set out section 356M to show, fully, the obligations of the custody manager:

> *Section 356M – Custody manager to caution, and give summary of Part to, detained person*
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> (1) As soon as practicable after a person who is detained under this Part comes into custody at a police station or other place of detention, the custody manager for the person must orally and in writing:
>
> (a) caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence, and
>
> (b) give the person a summary of the provisions of this Part that is to include reference to the fact that the maximum investigation period may be extended beyond 4 hours by application made to an authorised justice and that the person, or the person's legal representative, may make representations to the authorised justice about the application.
>
> (2) The giving of a caution under subsection (1) (a) does not affect a requirement of any law that a person answer questions put by, or do things required by, a police officer.
>
> (3) After being given the information referred to in subsection (1) orally and in writing, the person is to be requested to sign an acknowledgment that the information has been so given.

27 Under the Detention After Arrest Regulation made pursuant to Pt 10A of the Act, a number of provisions are made and in particular I set out:

> *PART 4 -*
>
> *GENERAL PROVISIONS FOR VULNERABLE PERSONS*
>
> *Regulation 20 -*
>
> *Custody manager to assist vulnerable person*
>
> The custody manager must, as far as is practicable, assist a vulnerable person in exercising the person's rights under

Part 10A of the Act, including any right to make a telephone call to a legal practitioner, support person or other person

Regulation 21 – Support person may be present

(1) A vulnerable person is entitled to have a support person present during any investigative procedure in which the person is to participate.

(2) However, a person who is a vulnerable person solely as a result of being a person of non-English speaking background is entitled to have a support person present only if an interpreter would (in the absence of section 356S (3) of the Act) be required to be arranged for the person under section 356S (1) of the Act but is not required to be arranged because of section 356S (3) of the Act.

(3) Before any such investigative procedure starts, the custody manager mustinform the vulnerable person that he or she is entitled to the presence of a support person during any such investigative procedure.

(4) If the detained person wishes to have a support person present, the custody manager must, as soon as practicable:

(a) give the detained person reasonable facilities to enable the person to arrange for a support person to be present, and

(b) allow the person to do so in circumstances in which, so far as is practicable, the communication will not be overheard.

(5) The custody manager must defer for a reasonable period any such investigative procedure until a support person is present unless the vulnerable person has expressly waived his or her right to have a support person present.

(6) An investigative procedure is not required to be deferred under subclause (4) for more than 2 hours to allow a support person to arrive at the place of detention.

(7) A requirement imposed on a custody manager under this clause need not be complied with if the custody manager believes on reasonable grounds that doing so is likely to result in:

(a) an accomplice of the detained person avoiding arrest, or

(b) the concealment, fabrication, destruction or loss of evidence or the intimidation of a witness, or

(c) hindering the recovery of any person or property concerned in the offence under investigation, or

(d) bodily injury being caused to any other person.

(8) Further, in the case of a requirement under this clause that relates to the deferral of an investigative procedure, the requirement need not be complied with if the custody manager believes on reasonable grounds that the investigation is so urgent, having regard to the safety of other persons, that the investigative procedure should not be deferred.

Regulation 22 –

Rights to support person and to consult with other persons

(1) A vulnerable person is entitled to a support person under clause 21 or to consult with a friend, relative, guardian or independent person under section 356N (4) of the Act, but not both.

(2) However, a friend, relative, guardian or independent person who attends the place of detention under section 356N (1) (a) (ii) of the Act at the request of the vulnerable person is not prevented by this clause from acting as a support person if the vulnerable person requests it.

(3) A particular support person may be excluded from an investigative procedure if he or she unreasonably interferes with it. If this occurs, the detained person concerned is entitled to have another support person present.

Regulation 23 –

Child cannot waive right to support person

A vulnerable person who is a child cannot waive his or her right to have a support person present.

Regulation 25 –

Additional information to be included in detention warrant application

If an application for a detention warrant is made in respect of a vulnerable person, the application for the warrant must include reference to the fact that the person is believed to be a vulnerable person, the nature of the person's vulnerability, the identity and relationship of any support person who is present, and any particular precautions that have been taken in respect of the vulnerable person.

Regulation 26 –

Support persons and legal practitioners at interviews

(1) The custody manager is to inform a support person that a support person is not restricted to acting merely as an observer at an interview and may, among other things:

(a) assist and support the person being interviewed, and

(b) observe whether or not the interview is being conducted properly and fairly, and

(c) identify communication problems with the person being interviewed.

(2) The custody manager is to give a copy of the summary of the provisions of Part 10A referred to in section 356M of the Act to:

(a) the support person, and

(b) any interpreter for the vulnerable person who attends in person at the place of detention.

(3) If a support person or a person's legal representative is present during an interview involving a vulnerable person, the support person or legal representative is to be given an opportunity to read and sign the interview record.

(4) Any refusal by the support person or legal practitioner to sign an interview record when given the opportunity to do so must itself be recorded.

PART 5

SPECIAL PROVISIONS FOR VULNERABLE PERSONS

Regulation 29 – Cautioning

(1) If a detained person who is a vulnerable person is cautioned, the custody manager or other person applying the caution must take appropriate steps to ensure that the person understands the caution.

(2) If a detained person who is a vulnerable person is cautioned in the absence of a support person, the caution must be repeated in the presence of a support person, if one attends

28 Section 13 of the Children CP Act has been has been subject to interpretation by Hidden J in *H (a child) v R* (1996) 85 A Crim R 481 where his Honour observed at 486:

> The primary aim of such a provision is to protect children from the disadvantaged position inherent in their age, quite apart from any impropriety on the part of the police. That protective

> purpose can be met only by an adult who is free, not only to protest against perceived unfairness, but also to advise the child of his or her rights. As the occasion requires, this advice might be a reminder of the right to silence, or an admonition against further participation in the interview in the absence of legal advice.

29 Section 13, Pt 10A of the Act and the Detention after Arrest Regulations have been the subject of a determination by Wood CJ at Common Law in *R v Phung & Huynh* (2001) NSWSC 115 (unreported, revised 15 May 2002). In that matter His Honour said at paragraph 36:

> The role of the support person is to act as a check upon possible unfair or oppressive behaviour; to assist a child, particularly one who is timid, inarticulate, immature, or inexperienced in matters of law enforcement, who appears to be out of his or her depth, or in need of advice; and also to provide the comfort that accompanies knowledge that there is an independent person present during the interview. That role cannot be satisfactorily fulfilled if the support person is himself or herself immature, inexperienced, unfamiliar with the English language, or otherwise unsuitable for the task expected, that is, to intervene if any situation of apparent unfairness or oppression arises, and to give appropriate advice if it appears the child needs assistance in understanding his or her rights.

30 It is submitted by Ms Flannery, and it is clear on the evidence of Donald Harwin, that the very short space of time they were allowed together beforehand, and Mr Harwin's lack of appreciation of the full extent of his role, meant that neither had ME properly been advised, nor indeed could Mr Harwin have properly advised ME as to the seriousness of his position. There is no point in having an acceptable person present when a young person is likely to be subjected to questioning which may lead to a very serious criminal charge, in particular murder, unless the acceptable person understands the nature of the risk. There was no possibility that Mr Harwin could protect ME from perceived unfairness or advising him of rights.

31 As pointed out by Ms Flannery, when on 3 January 2001 the seriousness of his position was made clear to ME, he sought legal advice and refused to

answer any more questions. It would be hard to imagine a more telling example of the effect of understanding the nature of the risk.

32 The High Court in the majority judgment in R v Swaffield; Pavic v The Queen (1998) 192 CLR 159; (1998) 72 ALJR 339; ("Swaffield and Pavic"), the majority of the court (Toohey, Gaudron and Gummow JJ) held at paragraph 52:

> The purpose of the discretion to exclude evidence for unfairness is to protect the rights and privileges of an accused person;

And at 54:

> Unfairness then relates to the right of an accused to a fair trial… It may be, for instance, that no confession might have been made at all, had the police investigation been properly conducted.

33 In my view, therefore, looking at s90 of the Evidence Act (1995), the circumstances of the taking of the ERISP were such as to make it unfair to admit the ERISP against the accused. Even if Pt 10A of the Act did not in fact apply, the circumstances of the taking of the record of interview were in breach of the substance of the substantive effect of the Children CP Act. It is clear that ME was not afforded the protection the legislature intended.

34 As I have indicated, I consider that Pt 10A of the Act applied and as Det Sgt Fitzgerald's evidence shows, he had sufficient evidence at the time to charge ME with assault and affray. Although he says he had not come to that conclusion by 15 December 2000, it seems to me that knowledge must be imputed to him by the circumstance available to him. Justice Wood CJ at CL, in *Phung & Huynh* (2001) NSWSC 115, held at paragraph 39:

> The provisions need to be faithfully implemented and not merely given lip service or imperfectly observed. The consequences of any failure to give proper regard to them is to risk the exclusion of any ERISP, or the product of an investigative procedure, which is undertaken in circumstances where there has not been proper compliance with the law.

Regarding children he also held, at paragraph 34:

> It may be accepted that the purpose of the legislative regime, that now applies to the interview of children, and particularly those in custody following arrest, is to protect them from any disadvantage inherent in their age, as well as to protect them from any form of police impropriety. As to the former, what is required is compliance with the procedure laid down so as to prevent the young or vulnerable accused from being overawed by the occasion of being interviewed, at a police station, by detectives who are likely to be considerably older and more experienced than they are.

35 It should also be noted that the obligation to young people includes the obligation to make it known to them that there is a legal hotline available, provided by the Legal Aid Commission; financial provision has been made to enable this to occur at no cost to the young person.

36 The evidence before me that the hotline service was available at the time. The regulations require that the custody manager assist the young person. The police practice of handing someone a phone book and obliging them to find a criminal lawyer, even if it had occurred, underlines the absurdity of people seeking lawyers without proper opportunities of inquiring of lawyers that are skilled in criminal matters.

37 In paragraph 37 of *Phung v Huynh* (2001) NSWSC 115, Wood CJ at CL held that:

> In particular Regulation 20 [set out above] requires the custody manager to assist a vulnerable person in exercising that person's rights, and Regulation 26 [set out above] requires the custody manager to explain to a support person that his or her role is not confined to acting merely as an observer, but also extends to doing the other things specified.

And at paragraph 38:

> It is important that police officers appreciate that the regime now established is designed to secure ethical and fair investigations, as well as the protection of individual rights, of some significance, which attach in particular to children. Those rights, obviously, are of great importance when a child is facing a charge as serious as murder or armed robbery.

38 Young people aged 17 rarely have a solicitor and rarely have a contact number for one available. It is as absurd as suggesting they might contact their architect or their dietary advisor. The whole intention of the hotline is that young people would know that it is free, that is it is available, and would be able to obtain advice there and then. Failure to make it available is a clear breach of the Act and regulations but, more importantly, in breach of the requirement of fairness to the young person.

39 In my view, therefore, in addition to being inadmissible by virtue of section 90 of the *Evidence Act* 1995, the evidence at issue, tendered against ME is in breach of section 138 of the *Evidence Act* 1995, as the evidence was improperly obtained. Important though the evidence is, it does not outweigh the undesirability of admitting evidence that has been obtained in the way in which this evidence was obtained. Accordingly, I decline to admit the evidence of the ERISP of 15 December 2000 against ME.

Admissibility of Material against LT

40 Although LT was the subject of a number of records of interview, the only record of interview sought to be tendered against him is that of 19 December 2000. That does not mean, however, that one can ignore the effect of the other records of interview because the young person has to be conscious of what he has already said and, in fact, may be conscious that he has already misled the police by deliberate misstatement or omission and does not necessarily appreciate the niceties of the criminal justice system.

41 It is all very well that, at the end of an interview, the person is free to go with his tape to a lawyer. Young people, as I have in above indicated, do not always have lawyers available and do not always have the financial wherewithal in the absence of knowledge of a free Legal Aid service. The young person's consciousness of what occurred in one interview may be imperfectly remembered from an earlier interview and may well create serious difficulties for the young person in a later interview.

42 The Crown submits in respect of LT that, in fact, at no stage was he under arrest and he was aware that he was free to leave. The crown, indeed, puts that on 16 November 2000, it was LT himself who came to the police station at his own volition, that his rights were explained, he was told of his right to obtain a solicitor and that he had various support persons available to him. LT had expressed himself to be happy with that support person.

43 It is put on behalf of LT by his counsel, Mr Gordon, that he was, in fact, arrested by virtue of the provisions of s 355(2)(a) of the Act, in that Det Sgt Fitzgerald believed or ought to have believed there was sufficient evidence that LT had committed an offence of assault or affray.

44 I do not consider that "entering into custody" in terms of the inappropriate use of the custody system, constitutes an arrest “as such”. Nevertheless, the fact that the young person was given a piece of paper setting out legal rights and, although he was told he was not in custody, the substance of the fact would make it difficult for him to believe he was not under the control of the police.

45 The very entry in the custody system and the issue of a custody number and references to the custody management documents and the use of the words "release from custody" must have some effect on the mind of the young person.

46 As I have indicated in the case of ME, I consider that LT was, by virtue of s355, deemed to be under arrest and thus the provisions of Pt 10A of the Act and the regulations made thereunder apply. I do not consider, in respect of each of the acceptable persons, that sufficient time was allowed between LT and the acceptable person; that the acceptable persons understood their duties to explain and protect the interests of LT; and, in particular, Ms Tesoriero, who had various roles in relation to victims and persons interviewed prior to her use as an acceptable person, that she understood what her obligation was in relation to LT. There was not sufficient information provided to the acceptable persons in each case to be able to carry out the

substance and clear intent of the legislature as articulated in the references in *H (a child) v R* (1996) 85 ACrimR 481 and *Phung & Huynh* (2001) NSWSC 115, as outlined above.

47 LT was not told of his right to obtain free legal advice, which was clearly available, and it was obviously within the mandate of the custody officer to make that service available to him. The very fact that Ms Tesoriero thought of the interview that she observed that LT was being interviewed as a witness underlines the absurdity and unfairness of the position in which she was placed and the difficulty under which LT suffered of not having someone available to protect his interests. It seems to me the regime of support persons needs to have proper training and a protocol in relation to the duties support persons owe to the people they are there to assist.

48 I quite accept the desirability of a young person, or indeed not so young person, being brought into a police station, being entered into a record system that records when they go in, their condition, and what happens to them. What happened here was an abuse of the Pt 10A provisions of the Act for a good reason, rather than an intention to abuse those provisions. It does not seem difficult for an alternative system to be developed so that people who are not arrested as such, or deemed arrested, can nevertheless be part of the police station records. It is clear that there was inadequate training of the custody officers and police at the time as to the way the system was designed to work.

49 It is submitted that the questioning of a child as to whether someone is, in fact, acceptable or not is hardly an exercise of his own free choice, particularly as knowledge of a free Legal Aid service being available for all of the relevant time might have caused that person to obtain the legal advice to which he was clearly entitled.

50 Applying the decisions of *Phung & Huynh* (2001) NSWSC 115 and *H (a child) v R* (1996) 85 ACrimR 481, and on the reasons already given, I do not consider the clear legislative intention, of making provision of proper advice

available to the young person in respect of each of the interviews, to have been carried out.

51 If I can now turn to the submissions that have been made. I do not consider that s84 of the Evidence Act applies as I do not consider that, notwithstanding the very strong questioning of LT, that there is a basis for refusing admission under s 84. Nor is there support for the assertion that the evidence should be rejected under s 85 of the Evidence Act.

52 I do, however, consider, particularly as the audio tape is an audio transcript of an ERISP interview where the video recording was not viewable, that matters such as expressions and demonstrations, which are clearly recorded on the Video ERISP, would allow a proper understanding of an audio tape. The audio tape is for the purposes of record and transcription but can only support an video electronic record of interview and as such is likely to cause unfairness in the recording of it without the benefits that observation of a video ERISP provides.

53 I consider, therefore, that although there are difficulties in establishing the circumstances on which the admissions were made, I do not think that s 85 has been breached. However, I consider that in terms of s 90 of the *Evidence Act* 1995, it would be unfair to admit the evidence in the record of interview and, therefore, I consider that the audio record of interview ought not to be admitted.

54 As I have also indicated, I consider that failure to comply with the *Children (Criminal Procedure) Act* 1987 and the *Crimes (Detention after Arrest) Regulation* 1998 made under Pt 10A of the *Crimes Act* 1900 that the evidence obtained was improperly obtained as being in breach of an Australian law and, therefore, notwithstanding the significance and probative value, is such that the desirability of admitting the evidence does not outweigh the undesirability of the evidence that has been obtained in this way as the clear intention of the legislature to protect young people has been frustrated by the procedures adopted by the police.

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