R v Jesson [2009] NTSC 13

PARTIES:	THE QUEEN
	v
	JESSON, ANTHONY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	20728892
DELIVERED:	7 April 2009
HEARING DATES:	1–5, 8–9 September 2008
JUDGMENT OF:	MILDREN J

CATCHWORDS:

CRIMINAL LAW – s 26L Evidence Act application – whether search warrant valid – s 120B Police administration Act – whether evidence of admissions not recorded electronically are admissible – whether expert evidence of coded language concerning drug dealing admissible – voice identification evidence.

STATUTES:

Evidence Act 1995 (NSW)
Evidence Act 2007 (NT), s 26L
Misuse of Drugs Act 2008 (NT), s 2(a)(ii)
Police Administration Act 2005 (NT), s 117, s 118, s 118(4), s 118(5), s 118(8), s 120B, s 120B(1)(a), s 120B(1)(b), s 120B(1)(ba), s 120B(4), s 120B(6), s 120C, s 139, s 142(1), s 142(1)(a) , s 143, s 148B(2), s 161
Telecommunications (Interception and Access) Act 1979 (Cth), s 46A
Trespass Act, s 13(1A)

CITATIONS:
***Followed*:**
Bulejcik v The Queen (1995–1996) 185 CLR 375
R v Solomon (2005) 92 SASR 331
Ridgeway v The Queen (1995) 184 CLR 19

***Referred to*:**
Bunning v Cross (1977–1978) 141 CLR 54
Carr v Western Australia (2007) 176 A Crim R 555
Chow v The Queen (2007) 172 A Crim R 582
Hart v Commissioner of Australian Federal Police & Ors (2002) 124 FCR 384
Johns v Australian Securities Commission & Ors (1993) 178 CLR 408
Nguyen v The Queen (2007) 173 A Crim R 557
Project Blue Sky Inc & Ors v Australian Broadcasting Authority (1998) 194 CLR 355
R v Cant (2001) 138 NTR 1
R v Inland Revenue Commissioners; ex parte Rossminster Ltd [1980] AC 952
Stapleton v The Queen (1952) S6 CLR 358
The Queen v Swaffield; Pavic v The Queen (1997) 192 CLR 159

REPRESENTATION:

Counsel:

Crown:	E Armitage
Accused:	J Tippett QC

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Accused:	Maleys

Judgment category classification:	A
Number of pages:	44

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

R v Jesson [2009] NTSC 13
No. 20728892

BETWEEN:

THE QUEEN
Plaintiff

AND:

ANTHONY JESSON
Defendant

CORAM: MILDREN J

REASONS FOR RULING

(Delivered 7 April 2009)

[1] The accused is charged with taking part in the unlawful supply of a commercial quantity of cannabis plant material between 16 September and 27 October 2007. The amount of the dangerous drug concerned was an amount of 10,577 grams. The maximum penalty fixed by s 2(a)(ii) of the Misuse of Drugs Act 2008 (NT) for this offence is imprisonment for 14 years.

[2] This is an application under s 26L of the Evidence Act 2007 (NT) to determine the admissibility of certain evidence proposed to be lead at the trial. The evidence concerns:

1. The validity of two search warrants issued pursuant to s 120B of the Police Administration Act 2005 (NT) in relation to firstly, the search of premises, namely cabin 131, Hidden Valley Tourist Park and secondly, the search of a white Holden Commodore utility SA Registration number XCF–368, registered in the name of the co–accused John Shillito (Shillito). It is the submission of counsel for the accused, Mr Tippett QC, that in both cases no valid warrant was issued, that the searches were unlawful and that the Court in the exercise of its discretion should exclude any evidence discovered by the police as a result of those searches.

2. The Crown intends to lead evidence of a conversation between Detective Senior Constable (DSC) McKellar and the accused and his co–accused concerning the ownership of two mobile telephones located in cabin 131. The Crown concedes that the evidence is inadmissible pursuant to s 142(1) of the Police Administration Act, but seeks the Court to exercise its discretion to admit that evidence on the ground that it would not be contrary to the interests of justice to do so, vide s 143 of the Police Administration Act.

3. The Crown seeks to lead evidence from the officer in charge of the investigation, Detective Senior Constable (DSC) Crawley, concerning some telephone conversations said to have been between the accused's brother, Johne Jesson, and other persons, whom the Crown will invite the jury to infer were the accused and his co–accused. The Crown intends to

call evidence that the conversations included coded messages about the supply of cannabis. The Crown intends to call DSC Crawley as to the fact that certain words were consistent with being code for cannabis, quantities of money and other matters relevant to the possession and supply of cannabis.

The Crown Case

[3] Between 7 August and 30 October 2007 a warrant issued under s 46A of the Telecommunications (Interception and Access) Act 1979 (Cth) was issued to Northern Territory Police in respect of telecommunications services used or likely to be used by Johne Jesson. Five service numbers were intercepted, but only three produced calls of interest to the police. In relation to those three numbers, in excess of 2,000 calls were recorded. All of these calls were monitored by DSC Crawley, who became familiar with Johne Jesson's voice. The Crown intends to call DSC Crawley to identify Johne Jesson as the speaker on each of the calls in question.

[4] Between 8 and 15 August 2007, there were 20 calls of particular interest identified. DSC Crawley formed the opinion that, during this period, Johne Jesson was using coded language with unnamed persons to whom he was recorded as speaking consistent with him being involved in unlawful activity in relation to prohibited drugs, namely cannabis. As a consequence, on Wednesday 15 August 2007, Johne Jesson was stopped by police near Mataranka whilst travelling northbound on the Stuart Highway. There was an esky in the rear tray of the utility he was driving. Secreted in the walls of

the esky were 32 cryo–vac bags of cannabis weighing 8,748.8 grams. Johne Jesson admitted to being in possession of the cannabis thereby located.

[5] Between 17 September and 26 October 2007, a number of calls were made on one of the numbers allegedly used by Johne Jesson to a mobile telephone service 0415 924 556 (the 556 calls). It is the Crown case that each of the 556 calls was made between Johne Jesson and the accused.

[6] These calls were monitored by DSC Crawley who formed the opinion that the language used was similar to and sometimes the same as the code which she had previously heard used by Johne Jesson in the lead up to the arrest on 15 August 2007. She formed the opinion that the code was consistent with arrangements being made between Johne Jesson and the accused for the supply of an illegal drug and other activities related to illegal drug dealing.

[7] Subsequent monitoring of phone calls between 17 September and 26 October 2007 caused DSC Crawley to form the opinion that there was to be a meeting arranged for 25–26 October 2007, consistent with an arrangement being made for 24 pounds of cannabis to be delivered to the accused and Johne Jesson at that time.

[8] On 24 October 2007 a telephone booking was taken by the Hidden Valley Tourist Park in the name of Michael O'Connor. As part of that booking a vehicle detail for a Holden XCE–386 was provided and the 556 service number was also provided. The booking was for two nights for persons due to arrive on 25 October 2007 and depart on 27 October 2007.

[9] The Crown alleges that on 25 October 2007, Johne Jesson attended at the Hidden Valley Tourist Park where he obtained the key to cabin 131 and paid for one night's accommodation. The Crown alleges that Johne Jesson then went to and waited at cabin 131.

[10] The Crown alleges that Shillito is the registered owner of XCF–368. That vehicle was seen by police, who were conducting surveillance, travelling north along the Stuart Highway near the Township of Adelaide River at 1.40 pm on 25 October 2007. It was next sighted by police at 2.10 pm on the Stuart Highway near Coolalinga and at 2.35 pm it was observed turning into Hidden Valley Road and then into the Hidden Valley Tourist Park. The Crown alleges that the driver of the vehicle was the co–accused, Shillito.

[11] The Crown case is that Shillito, having walked into the reception area of the tourist park, telephoned Johne Jesson and arranged to collect the key from him at the Hidden Valley Hotel. The Crown alleges that Shillito then drove to the Hidden Valley Hotel, collected the key and then returned to the Hidden Valley Tourist Park where he parked XCF–368 between cabins 130 and 131. He removed items from the rear tray of the vehicle and entered cabin 131.

[12] Later that afternoon, Johne Jesson went to the Hidden Valley Tourist Park with a female companion. Johne Jesson and the female sat on the front deck of cabin 131 drinking beer with Shillito. Whilst there, Johne Jesson received a phone call from the accused, Anthony Jesson. Johne Jesson told Anthony

Jesson that he was sitting on the balcony with “old mate” (which the Crown alleges is a code reference to Shillito) and the “fishing trip is arranged for tomorrow” (which the Crown alleges is a coded reference to illegal drug activities).

[13] Shortly prior to this, during the afternoon of 25 October 2007, SC Payne was tasked to obtain a search warrant for cabin 131. He obtained approval from his superintendent to apply for the warrant. He completed a typed pro forma for a s 120B search warrant. This document was endorsed on the back by the superintendent to signify that he had approved an application being made by SC Payne to approach a Justice of the Peace to apply for a search warrant.

[14] At about shortly before 3.10 pm, SC Payne telephoned Mrs Kay Wright, a Justice of the Peace and applied for a search warrant in relation to cabin 131. Mrs Wright gave evidence that she was given information by SC Payne over the telephone which satisfied her that it was appropriate to approve the granting of a warrant. There is no dispute that SC Payne’s oral application was either on oath or affirmation and that the Justice of the Peace was satisfied that there were reasonable grounds sufficient to issue a warrant. SC Payne then wrote on his copy of the warrant the words “Approved by phone K Wright 15.10 hours 25/10/07”. Mrs Wright made notes at the time of the information she had been given by SC Payne and of the fact that she had issued a warrant and the time and other details, but she did not actually prepare or sign at that time a search warrant in relation to cabin 131.

[15] At 4.30 pm SC Payne moved into cabin 130 at the Hidden Valley Tourist Park, directly next to the vehicle. At 9.00 pm, Shillito caught a taxi from the front gate of the Hidden Valley Tourist Park.

[16] On 26 October 2007, the accused arrived at Darwin Airport on Jetstar flight JQ670 from Adelaide, arriving in Darwin at 1.55 am. There he caught a taxi to the Casino where he joined Shillito. Both men returned to the tourist park and entered cabin 131 at 3.40 am on Friday 26 October.

[17] At 4.25 am Senior Constable (SC) Payne, who was accompanied by a number of other police officers, purported to execute the search warrant in relation to cabin 131. During the course of the search, only one item was seized which later turned out to be of no interest. During the course of the search DSC McKellar was the nominated exhibits officer. He entered cabin 131 and sat at a small table located in the lounge area of the cabin. On the table there were two wallets and two mobile telephones, as well as a pile of loose change. Each wallet had a phone near it. The wallets were not together but were separated from each other on the table. Whilst the search was going on, DSC McKellar looked in each of the wallets. In one wallet he located a driver's licence in the name of Shillito. In the other wallet he located two driver's licences in the name of the accused, one licence for the Northern Territory and the other for South Australia. The drivers' licences had photographs of the licensees which corresponded with the occupants. The wallets were then returned to the place where he found them. DSC McKellar then activated the mobile telephones and searched the call registers. The

mobile telephone nearest the accused's wallet was a pink, silver and black Nokia. McKellar made some notes of some numbers that had been dialled and some numbers received from the call register and also made notes of some business cards found in the accused's wallet.

[18] The mobile telephones were then placed with the wallets where they were originally located.

[19] Subsequently, at 4.50 am, SC Payne made a second application for a telephone warrant from Mrs Wright. The same procedure was gone through between SC Payne and Mrs Wright. Mrs Wright authorised over the telephone a s 120B warrant for a search of the vehicle. The warrant was then executed and the vehicle searched. Located in hidden compartments inside the vehicle were a number of bags of cannabis, weighing in all 10,577 grams or 23.349 pounds. The cannabis was contained in 48 cryo–vac bags.

[20] At 6.00 am on 26 October 2007, Johne Jesson returned to the Hidden Valley Tourist Park and shortly thereafter all three men were arrested. There is no suggestion that any of the accused were cautioned at that time.

[21] After the arrests had taken place, DSC McKellar placed the wallets and mobile telephones and the change in separate bags intending that this property would accompany the persons arrested when they were taken to the watch house. Before placing the wallets and phones in a bag, DSC McKellar claimed that he walked to the door to cabin 131 and asked the accused and Shillito, individually, to confirm which property belonged to whom. No

caution had been administered at this stage by any police officer. DSC McKellar claims that Shillito indicated that the wallet which contained his driver's licence was his and that the black and silver Nokia mobile telephone belonged to him. He claims that he then was told by the accused that the wallet containing his licences belonged to him and that the pink, silver and black Nokia mobile telephone was his. These items were then put into separate bags and labelled for the purpose of accompanying the accused and Shillito to the watch house as prisoner's property.

[22] Subsequently, DSC Crawley made a decision that the phones were to be seized and conveyed a message to DSC McKellar through DSC Leafe to that effect. DSC McKellar then seized the phones and put them in two exhibit bags for that purpose. The phones were later sent to the forensic section of the Northern Territory Police for fingerprinting and to see if DNA could be located on them. These results were negative.

[23] No notes were made by DSC McKellar of the conversation he says that he had with either accused concerning the mobile telephones and there is no reference to this conversation in the statement which he made on 3 December 2007. It was not until 11 June 2008 that he made a further statement in which he made reference to the conversation with the accused concerning ownership of the pink, silver and black Nokia mobile telephone. The accused gave evidence on the voir dire that no such conversation occurred. At the time when the statement was made on 11 June 2008 by

DSC McKellar, he had no notes in order to refresh his memory of the conversation.

The Searches were Both Unlawful

[24] It was submitted by Mr Tippett QC on behalf of the accused, that both of the searches were unlawful. Essentially the argument of Mr Tippett QC is that there was never a warrant issued.

[25] Section 120B of the Police Administration Act is contained in Part VII Division 2A of the Act. The heading to the Division is "Special provisions about dangerous drugs".

[26] Section 120B provides as follows:

> "**120B Search warrants**
>
> (1) Where it is made to appear to a justice, by application on oath, that there are reasonable grounds for believing –
>
> (a) that there is at a place a dangerous drug, precursor or drug manufacturing equipment;
>
> (b) that a dangerous drug, precursor or drug manufacturing equipment may be concealed on a person or on or in property in the immediate control of a person; or
>
> (ba) that a dangerous drug, precursor or drug manufacturing equipment may, within the next following 72 hours –
>
> (i) be brought on or into a place; or
>
> (ii) be concealed on a person or on or in property in the immediate control of a person,

the justice may issue a warrant authorising a member of the Police Force named in the warrant, with such assistance as the member thinks necessary, to search –

(c) in a case referred to in paragraph (a) or (ba)(i) –

(i) the place;

(ii) any person found at the place; and

(iii) any person who enters the place while the search is in progress; and

(d) in a case referred to in paragraph (b) or (ba)(ii), or in respect of a person referred to in paragraph (c)(ii) or (iii) –

(i) the person;

(ii) the clothing worn by the person; or

(iii) the property in the immediate control of the person.

(2) A warrant issued under subsection (1)(a) or (ba)(i) authorises the member to whom it is issued to direct a person referred to in subsection (1)(c)(ii) or (iii) to remain at the place for as long as is reasonably required for the purposes of the search of the place and of the person.

(3) Section 112(1) of the Criminal Code applies to and in relation to a person directed under subsection (2) as if the person were in the lawful custody of the member while so directed.

(4) Under this section –

(a) an application for a warrant and a submission concerning an application may be made in whole or in part;

(b) information concerning an application may be furnished in whole or in part; and

(c) an oath may be administered,

by telephone, telex, radio or other similar means.

(5) A warrant issued under this section shall remain in force for such period as the justice issuing it specifies in the warrant.

(6) Where a warrant is issued as the result of an action taken under or in pursuance of subsection (4), the justice issuing it shall send it to the Commissioner within 7 days after it is issued.

(7) Where it is necessary for a member to satisfy a person that a warrant under this section was issued authorising the member to conduct a search and, for reasonable cause, the member cannot, at the time of the search, produce the warrant, the member may produce a copy of the warrant completed and endorsed in accordance with subsection (8) and the production of the copy shall be deemed to be a production of the warrant.

(8) For the purposes of subsection (7), a member shall –

(a) complete a form of warrant substantially in the terms of the warrant issued; and

(b) write on that form of warrant a statement that a warrant in those terms was issued giving –

(i) the name of the justice who issued the warrant; and

(ii) the date, time and place on and at which it was issued."

[27] It is to be noted that s 120B authorises a search warrant under s 120B(1)(a) if there is a dangerous drug in certain premises; under s 120B(1)(b) if a

dangerous drug may be concealed on a person or in property in the immediate control of a person; or under s 120B(1)(ba) if there is a dangerous drug which may within the next 72 hours be brought on or into a place or be concealed on a person or in property in the immediate control of a person.

[28] Under s 120B(4) an application for a warrant and a submission concerning an application for a warrant may be made by telephone.

[29] Section 120B is to be contrasted with s 118 which also provides for search warrants by telephone. One of the significant differences between a warrant under s 117 or s 118 as contrasted with s 120B is that a warrant may be issued in respect of a dangerous drug that may be brought onto premises or be concealed on the person of an individual within the next following 72 hours.

[30] There are a number of other differences in the drafting of the provisions of s 118 and s 120B. Under s 118 it is necessary for it to be shown that it is "impracticable for a member of the police force to make application in person". There is no similar requirement under s 120B(4). Secondly, s 118(4) requires the Justice who issues the warrant to complete and sign the warrant and inform the member by telephone of the terms of the warrant signed by him and record on the warrant his reasons for issuing it. There is no similar provision under s 120B. There is also a different procedure in relation to what must be done after the warrant has been executed or the

warrant expires. Under s 118(5) the member who has obtained the warrant must forward to the Justice who issued the warrant the form of warrant prepared by the member and the information and affidavit, if any, to be sworn in connection with the issue of the warrant. Under s 120B there is no such requirement, but the warrant is required to be sent to the Commissioner within seven days after it is issued pursuant to s 120B(6). There is a further difference in that s 118(8) specifically provides that where it is necessary for a court in any proceeding to be satisfied that an entry or seizure was authorised by warrant issued by a Justice and the warrant signed by the Justice is not produced in evidence, the Court shall assume unless the contrary is proved, that the evidence or seizure was not authorised by the warrant. There is no similar provision in relation to s 120B warrants. There are also provisions under s 118 that prevent a police officer from making a second application for a warrant if the first application has been refused. That provision does not apply in relation to s 120B warrants.

[31] It was submitted that in determining the processes required to be undertaken by police officers to obtain a valid search warrant under s 120B regard may be had to the provisions of s 117 and s 118. I agree in general terms with this submission that in construing s 120B the Court must have regard to the Act as a whole. As was said in *Project Blue Sky Inc & Ors v Australian Broadcasting Authority*[1]:

[1] (1998) 194 CLR 355 at 381–382 para 69–70 per McHugh, Gummow, Kirby and Hayne JJ

> "[69] The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole". In *Commissioner for Railways (NSW) v Agalianos*, Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed.
>
> [70] A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court "to determine which is the leading provision and which the subordinate provision, and which must give way to the other". Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme."

[32] However, I do not accept the submission that, where s 120B makes no specific provision, the requirements of s 118 are impliedly imported. In my opinion, s 120B is a special provision in a different sub–division of the Act and must be construed according to its terms: see also *R v Cant*[2]. The first question is whether the Justice issuing a warrant under s 120B is required to complete and sign the warrant at the time that the warrant is issued.

[2] (2001) 138 NTR 1 at 10–11 para [41]

[33] I think it is clear that there must be a written warrant completed and signed by the Justice. So much is clear from s 120B(7) and s 120B(8). In my opinion, where those provisions refer to the word "warrant" they refer to the written document issued by the Justice authorising the search. As was said in *R v Inland Revenue Commissioners; ex parte Rossminster Ltd*[3]:

> "There is no mystery about the word "warrant": it simply means a document issued by a person in authority under power conferred in that behalf authorising the doing of an act which would otherwise be illegal." [4]

[34] It is clear on the facts of this case that at the time of the execution of the supposed warrants there was no warrant in that sense in existence.

[35] I turn now to consider the effect of the deeming provision, s 120B(7). In my opinion, that provision does not deem a copy of the warrant completed and endorsed in accordance with s 120B(8) to be the warrant if there is no warrant in existence in the first place. The deeming provision only goes so far as to deem production of a copy to be production of the warrant; it does not deem the copy to be the warrant where there is no warrant in the first place.

[36] The evidence was that in each case at about 9.30 am on 26 October SC Payne attended at the home of Mrs Wright and asked her to endorse the copies of the warrant made by SC Payne, which she did. On the search warrant relating to cabin 131, Mrs Wright endorsed the warrant as follows:

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[3] [1980] AC 952 at 1000 per Lord Wilberforce

[4] This passage was cited with approval by the full Federal Court in *Hart v Commissioner of Australian Federal Police & Ors* (2002) 124 FCR 384 at 400 para [66]

> "Kay Wright JP 26/10/07 9.37 am warrant approved by phone 25/10/07 at 3.10 pm"

[37] In relation to the warrant concerning the search of the vehicle, Mrs Wright endorsed it "Kay Wright JP 25/10/07 warrant approved by phone at 4.50 am".

[38] The question then arises whether by endorsing the warrants in this way, this was a sufficient compliance with the section. Did this make the duplicate copy of the warrant the original warrant so that the original warrant and the copy of the warrant was the same document?

[39] I have no doubt that a document which is imperfect at the time of its creation can be perfected at a later time. However that does not apply here because there was never a warrant in existence at the relevant time. The best that can be said about the warrants is that the Justice by endorsing the copy of the warrants the following morning created a warrant at that time. This was, at best, the creation of the warrants after the warrants had already been executed. I think it is plain from the wording of s 120B that a warrant must be issued, ie signed by the Justice, prior to its execution.

[40] In *R v Cant*[5], Thomas J held that a supposed warrant issued in identical circumstances to that which occurred here required the Justice of the Peace to create a document which was the original warrant and required it to be in existence at the time that the warrant was executed. In arriving at her

[5] (2001) 138 NTR 1

conclusions, her Honour referred to *George v Rockett*[6]. I note that in that case the full bench of the High Court said[7]:

> "To insist on strict compliance with the statutory conditions governing the issue of search warrants is simply to give effect to the purpose of the legislation."

[41] Counsel for the respondent referred me to the observations in *Hart v Commissioner of Australian Federal Police & Ors*[8] where their Honours dealt with the construction of statutes authorising the search of premises and the seizures of things from them. In particular I was referred to this passage[9]:

> "… effect must be given to the importance attached by the legislature to the use of search warrants as an important and legitimate tool in the detection and prosecution of criminal offences. Where the language of the statute authorising their use offers choices between one construction requiring fine legal judgments in the issue and/or execution of warrants and another which is more likely to be consistent with operational realities then the latter construction is generally to be preferred. The need to recognise the operational realities in which warrants are executed was acknowledged by the learned primary Judge, who referred in that connection to *Dunesky v Commonwealth* (1996) 89 A Crim R 372, at 382–383, per Lockhart J. See also *Baker v Campbell* (1985) 153 CLR 52, at 83, per Mason J. The tension between the public and private interests involved in the issue and execution of search warrants was referred to by Lockhart J in *Crowley v Murphy* (1981) 52 FLR 123, at 141–142 (Northrop J agreeing at 132). His Honour cited the observation of Lord Cooper in *Lawrie v Muir* [1950] SLT 37, at 39–40:
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> > "From the standpoint of principle it seems to me that the law must strive to reconcile two highly important interests which are liable to come into conflict – (a) the interest of the citizen

[6] (1990) 170 CLR 104 at 110–111
[7] *George v Rockett* (1990) 170 CLR 104 at 111
[8] (2002) 124 FCR 384 at 399–401 [pars 64–68] per French, Sackville and RD Nicholson JJ
[9] *Hart v Commissioner of Australian Federal Police & Ors* (2002) 124 FCR 384 at 401 para 68

> to be protected from illegal or irregular invasions of his liberties by the authorities, and (b) the interests of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from Courts of law on any merely formal or technical ground. Neither of these objects can be insisted upon to the uttermost. The protection of the citizen is primarily protection for the innocent citizen against unwarranted, wrongful and perhaps high–handed interference, and the common sanction is an action of damages. The protection is not intended as a protection for the guilty citizen against the efforts of the public prosecutor to vindicate the law. On the other hand the interest of the State cannot be magnified to the point of causing all the safeguards for the protection of the citizen to vanish, and of offering a positive inducement to the authorities to proceed by irregular methods."

> See also *Trimboli v Onley (No 3)* (1981) 56 FLR 321, at 332–333, per Holland J. These remarks relate more to attacks upon the scope of warrants and action under them than to the construction of the statutes authorising the issue of such warrants. They nevertheless expose adequately the policy issues and legislative purposes which should inform construction. In particular, there is no requirement that the Court approach that task armed with a prima facie hostility to the invasion of privacy that is necessarily involved in the exercise of investigative powers. Privacy is but one of the interests to be taken into account in construing legislation authorising the exercise of such power."

[42] However, I would not regard the failure to issue a warrant at all as a mere quillity. In my opinion, it is fundamental that there must be a written warrant in existence at the time of its execution. In the result, I agree with her Honour's decision in *R v Cant*[10].

[43] In relation to the search of the vehicle, s 120C of the Police Administration Act provided at the time as follows:

[10] (2001) 138 NTR 1

"120C. Searching vehicles, &c.

A member of the Police Force may stop and search, and detain for the purposes of that search –

(a) an aircraft, ship, train or vehicle if the member has reasonable grounds to suspect that a dangerous drug, precursor or drug manufacturing equipment may be found on or in it;

(b) a person found on or in the aircraft, ship, train or vehicle; or

(c) a person in a public place if the member has reasonable grounds to suspect that the person has in his or her possession, or is in any way conveying, a dangerous drug, precursor or drug manufacturing equipment."

[44] No submissions were made originally in reliance upon s 120C that the search of the vehicle was valid notwithstanding the warrant may be invalid. I therefore invited counsel to provide written submissions.

[45] On the whole of the evidence there is no doubt that the police had reasonable grounds to suspect that the vehicle in question had dangerous drugs which may be found on or in it. A similar argument was raised in *Hart v Commissioner of Australian Federal Police & Ors*[11], where it was submitted that, when a power is exercised, a mistake as to the source of power works no invalidity. That proposition is undoubtedly correct[12]. In that case the full Federal Court rejected the argument because it held that one kind of act, seizure, could not be converted by retrospective reflection on

[11] (2002) 124 FCR 384 at 410 para 104
[12] See *Johns v Australian Securities Commission & Ors* (1993) 178 CLR 408 at 426 per Brennan J and cases cited.

the law into another kind of act, namely pre–seizure removal. However that is not the case here and in my opinion the police can rely upon s 120C as the source of power.

[46] It is to be noted that s 120C does not specifically refer to the need to have a warrant. By subsequent amendment to s 120C it is now clear that no warrant is required as the opening words of the section now provide:

> "A member of the police force may, without warrant, stop, detain and search the following…"

[47] It was submitted by Mr Tippett QC that the power of a police officer to search under s 120C is limited to a vehicle which is in motion and then stopped and does not apply to a vehicle which is already stopped. In my opinion the power should not be so constrained. It would not enhance the purpose of s 120C to require that a police officer, who reasonably suspects that a vehicle which was stationary, but which he believed on reasonable grounds contained a dangerous drug, to have to wait until the vehicle was put in motion in order to search it. All the more so with an aircraft, ship or train. In the case of an aircraft, it may be difficult for a police officer to mobilise a vehicle in order to stop an aircraft which is taxiing to an airstrip. Ms Armitage submitted that the word "stop" extended to empower a police officer to prevent a stationary vehicle from departing. I accept that submission. In my view the words "stop and search, and detain" apply whether the aircraft, ship, train or vehicle is in motion at the time or not.

[48] Mr Tippett QC submitted that, as the vehicle was stationary on private land, s 120C did not apply. I do not accept that submission. Section 120C is not, by its terms, limited to vehicles in a public place, but in any event, there is no evidence that SC Payne was a trespasser on private land at the place where the vehicle was parked. On the contrary, the police had the lawful use of cabin 130 and the vehicle on the evidence was parked between the two cabins. It may be inferred from this that the police had lawful authority to be on the land so far as the owner of the premises was concerned. There is no evidence that Shillito had exclusive use of the area where his car was parked.

[49] It was not suggested that SC Payne did not have reasonable grounds for believing that the vehicle contained cannabis when he applied for the s 120B search warrant in relation to the vehicle. On the whole of the evidence, as I have already said, I consider that the police did have such grounds and that the search of the vehicle was lawfully carried out.

[50] There is however no equivalent provision relating to the search of premises. As there was no warrant in force which enabled the police to search cabin 131, the first question is whether the search was unlawful. Counsel for the accused submitted that the search constituted a trespass. It was not suggested that the search exposed the police to prosecution for an offence against Northern Territory criminal law. Presumably this is because counsel for the accused acknowledged that the police would have a defence under s 13(1A) of the Trespass Act.

[51] So far as civil liability is concerned, s 161 of the Police Administration Act provides that in certain circumstances when an action is brought against a member of the police force for any act done by that member in accordance with the terms of a warrant issued by a Justice or Magistrate, such member shall not be responsible for any irregularity in the issue of such a warrant. However, the police could not rely upon s 161 in this case as there never was a warrant in the first place.

[52] Alternatively, it may be suggested that the police were protected by s 148B(2) of the Police Administration Act which provides that a police officer is not civilly liable for an act done or omitted to be done in good faith in the performance or purported performance of his or her duties as a member.

[53] Counsel for the accused, Mr Tippet QC, submitted that all s 148B(2) does is to provide statutory protection to the police for commission of a tort such as trespass; it does not go so far as to make it clear that the act was not tortious. In other words, in his submission, the act was still a tort; it was just that it was not amenable to a claim for damages if the member acted in good faith, etc.

[54] Counsel for the Crown did not seek to rely upon s 148B(2).

[55] In any event, it seems to me that s 148B(2) does not apply as that is a general provision and s 161 is a special provision relating to protection of

members of the police force purporting to carry out a search in accordance with the terms of a warrant.

[56] I therefore conclude that the search of cabin 131 was unlawful.

[57] Counsel for the accused submitted that I should, in the exercise of my discretion, reject any evidence obtained by the police as a result of the search of cabin 131 on public policy grounds. The relevant principles are discussed in a number of authorities including *Bunning v Cross*[13]*; Ridgeway v The Queen*[14]; *The Queen v Swaffield; Pavic v The Queen*[15].

[58] In *Bunning v Cross*[16], Stephen and Aitken JJ, with whom Barwick CJ agreed, identified some of the considerations relevant to the exercise of the discretion. The first of these considerations is whether the illegality was deliberate or reckless or arose only from a mistake.

[59] So far as SC Payne's evidence is concerned, I accept that he believed that he was executing a valid warrant. According to his evidence this was one of the first occasions on which he had applied for a telephone warrant under s 120B of the Police Administration Act and he followed the procedure which he was led to believe was required. He did not first read the provisions of the Act nor did he look up any police standing orders before applying for the warrant. He was unaware of the decision of Thomas J in *R v*

[13] (1977–1978) 141 CLR 54
[14] (1995) 184 CLR 19
[15] (1997) 192 CLR 159
[16] (1977–1978) 141 CLR 54 at 79–80

Cant[17]. He gave evidence that he was not aware of the correct procedure until shortly before the hearing in this matter.

[60] Evidence was also given by Superintendent Peter Gordon, who was the superintendent in charge of the Drugs and Organised Crime Unit in 2007, although he was actually on leave at the time when this warrant was sought. Superintendent Gordon was aware that sometimes telephone warrants were obtained under s 120B in circumstances where the Justice of the Peace did not fill out a warrant at the time. In these circumstances, the procedure which he personally sanctioned was that the officer who obtained the telephone warrant should ask the Justice to endorse the fact that the approval had been given on the copy of the warrant filled out by the officer, as happened in this case. I should add that in addition, he gave evidence that there was an internal police procedure in place which required a police officer to get approval from a superintendent before applying for a warrant. The purpose of this procedure was to ensure that the officer had adequate grounds for applying for the warrant before an application was made. That in fact happened in this case.

[61] According to Superintendent Gordon, the police provide to Justices of the Peace forms of warrants so that they may be filled out, but that there are times when a Justice may not have a warrant form to complete available to them. According to his evidence this could occur on about 20 per cent of the occasions that such warrants were sought.

[17] (2001) 138 NTR 1

[62] In *R v Cant*[18], Thomas J, when considering the criteria relevant to the application of her discretion in that case, said:

> "The fact that the Justice of the Peace and to a lesser extent the police officer who obtained the warrant had such a fundamental lack of understanding of the requirements of the Police Administration Act is of concern. I am not able to find that it is conduct either encouraged or tolerated by those in higher authority in the police force. For future reference I suggest that the reasons for ruling in this matter be drawn to the attention of the Commissioner of Police."

[63] That is a warning by a member of this Court that should have been taken very seriously. It is relevant to the exercise of discretion that warrants which are invalid have been tolerated by those in higher authority. This point was made in the joint judgment of Mason CJ, Deane and Dawson JJ in *Ridgeway v The Queen*[19] when their Honours said:

> "Thus, the weight to be given to the public interest in the conviction and punishment of those guilty of crime will vary according to the degree of criminality involved. The weight to the given to the principle considerations of public policy favouring the exclusion of the evidence – the public interest in maintaining the integrity of the Courts and ensuring the observance of the law and minimum standards of propriety by those entrusted with powers of law enforcement – will vary according to other factors of which the most important will ordinarily be the nature, the seriousness and the effect of the illegal or improper conduct engaged in by the law enforcement officers and whether such conduct is encouraged or tolerated by those in higher authority in the police force or, in the case of illegal conduct, by those responsible for the institution of criminal proceedings."

[64] On the basis of the evidence of Superintendent Gordon, I am compelled to the conclusion that he was well aware that it was the duty of the Justice to

[18] (2001) 138 NTR 1 at 10 para 40
[19] (1995) 184 CLR 19 at 38

complete a warrant at the time when the application was approved over the telephone and to subsequently forward it to the Police Commissioner. He was also well aware that this was not always being done and it appears that no training was given to police officers which specifically dealt with the problems which were identified in *R v Cant*[20], despite the fact that Thomas J considered the matter of sufficient importance to suggest that her judgment should be referred to the Commissioner. Mr Tippett QC submitted that in all of the circumstances this Court should not tolerate or be seen to tolerate a continuing and fundamental failure by the police to ensure that proper warrants were obtained.

[65] Ms Armitage submitted that the police officer applying for the telephone warrant does not have x–ray vision and cannot see whether the Justice is properly filling out the warrant. Mr Tippett QC submitted that the matter was easily remedied. The police officer seeking the warrant should ask the Justice if the Justice has a blank copy of the warrant available to be completed and if so should verify with the Justice the precise terms of the warrant and that the warrant has been signed. Ms Armitage in response submitted that the police had no such responsibility based on the doctrine of the separation of powers.

[66] In my opinion, the submission of Mr Tippett QC is correct. The matter is able to be easily verified by the police officer and in my opinion it is his duty to ensure, before executing a telephone warrant, that a proper warrant,

[20] (2001) 138 NTR 1

in the same terms as the copy warrant which he has written out, has been created and signed by the Justice. This he can only do by asking the Justice questions of the kind to which I have referred. It would be unlikely in the extreme that a Justice would lie about such matters. If the Justice did not have a form of warrant to complete, the police officer could then apply to another Justice and go through the same procedure again.

[67] So far as calling in aid the doctrine of separation of powers, the act of a Justice in granting a warrant is an administrative act and not a judicial one. There is certainly nothing improper, in my opinion, in seeking to ensure that the Justice has in fact complied with the Act. The ease with which the law might have been complied with in procuring the evidence in question is one of the relevant factors to be considered[21].

[68] Another factor of relevance is whether there is equally cogent evidence, untainted by any illegality available to the prosecution at the trial. If so the case for the admission of evidence illegally obtained will be weaker[22].

[69] So far as the search of cabin 131 is concerned, the only evidence of relevance is the two mobile telephones in question and what may be gleaned from them. By itself this represents a small part of the prosecution case. If the evidence is excluded no doubt the prosecution case will be weakened, but as I understand it there is other evidence available to the prosecution at

[21] See *Bunning v Cross* (1977–1978) 141 CLR 54 at 99
[22] See *Bunning v Cross* (1977–1978) 141 CLR 54

the trial, or other evidence could be obtained, upon which the prosecutor may rely.

[70] Another important factor is the nature of the offence charged[23]. The offence with which the accused is charged is no doubt a serious one, but not in the most serious category of offending, neither by reference to the maximum penalty available nor by reference to the facts and circumstances of the case itself. No doubt if there is a conviction, the accused is likely to spend some considerable time in prison.

[71] I should also refer to s 120B(6) which requires the Justice to send the warrant to the Commissioner within seven days after it is issued. I would not regard a failure by a Justice who had properly completed a warrant to "send it to the Commissioner" within the seven day period as invalidating the warrant. The purpose of that requirement is to ensure that the original warrant is able to be kept and stored at a proper place so that it may be produced if necessary. I do not consider that the purpose of that subsection was intended by the Legislature to have the effect that a breach of the provision should render a valid warrant invalid[24]. Whether or not the Justice complies with that subsection is entirely a matter over which the police have no control. Furthermore it would be a strange outcome if a perfectly valid warrant and a lawful search carried out in pursuance of the warrant were subsequently to be held to be invalid simply because the Justice issuing the

[23] See *Bunning v Cross* (1977–1978) 141 CLR 54 at 80
[24] See the discussion in *Project Blue Sky Inc & Ors v Australian Broadcasting Authority* (1998) 194 CLR 355 at 388–391 pars 91–93

warrant failed to send it to the Commissioner within seven days. There may also be good reasons why a warrant was not sent within the relevant time frame; the Justice may have died or mislaid the warrant or simply forgot to do it. I do not consider it would enhance the purposes of the legislation to interpret the subsection to have that consequence.

[72] In the end I have concluded that the balance of considerations must come down in favour of the exclusion of the evidence.

[73] *R v Cant*[25] was published on 25 May 2001. Her Honour specifically requested that her judgment be referred to the Commissioner no doubt intending that appropriate steps would be taken by the police to remedy the situation. Not only has this not occurred, but the same practices continue to be tolerated. It is a practice which must stop and which can be easily remedied.

[74] If I am wrong in my conclusion that the search of the vehicle was lawful, I would not exclude the evidence obtained from that search in the exercise of my discretion because without that evidence, the prosecution case would collapse and I consider that I have sufficiently exercised my discretion on public policy grounds by rejecting the evidence obtained as a result of the search of cabin 131.

[25] (2001) 138 NTR 1

The Admissibility of the Conversation between the Accused and Detective Senior Constable Chris McKellar

[75] Clearly the conversation is inadmissible under s 142(1)(a) of the Police Administration Act. That provision provides as follows:

> "**142. Electronic recording of confessions and admissions**
>
> (1) Subject to section 143, evidence of a confession or admission made to a member of the Police Force by a person suspected of having committed a relevant offence is not admissible as part of the prosecution case in proceedings for a relevant offence unless –
>
> (a) where the confession or admission was made before the commencement of questioning, the substance of the confession or admission was confirmed by the person and the confirmation was electronically recorded; or
>
> (b) where the confession or admission was made during questioning, the questioning and anything said by the person was electronically recorded,
>
> and the electronic recording is available to be tendered in evidence."

[76] It is common ground that the offence was a "relevant offence" as defined by s 139; that the admissions to be relied upon were made before the commencement of questioning; and that the substance of the admission was not confirmed by an electronic recording. The Crown conceded that the evidence was inadmissible unless the Court exercised its discretion to admit the evidence under s 143. That section is in the following terms:

> **"143. Certain evidence may be admitted**
>
> A court may admit evidence to which this Division applies even if the requirements of this Division have not been complied with, or there is insufficient evidence of compliance with those requirements, if, having regard to the nature of and the reasons for the non–compliance or insufficiency of evidence and any other relevant matters, the court is satisfied that, in the circumstances of the case, admission of the evidence would not be contrary to the interests of justice."

[77] It is clear that not only had the police failed to comply with s 142 of the Police Administration Act, but that no caution had been administered. Indeed the evidence is that after the police had cautioned the accused, he exercised his right of silence.

[78] The failure to administer a caution does not by itself mean that the evidence is inadmissible, but it enlivens a discretion to exclude the evidence[26]. I accept the evidence of DSC McKellar that at the time when he inquired about the mobile telephones he believed that the mobile telephones were not to be seized, but were merely to be taken to the police station as prisoner's property and that was the reason why he asked the accused and his co–accused, Shillito, to identify their mobile telephones.

[79] However, there are a number of considerations as to why I think it would not be in the interests of justice to admit this evidence notwithstanding the way in which DSC McKellar says that the admission came about and the purpose for which the admission was obtained. The first of these considerations is

[26] See *Stapleton v The Queen* (1952) 86 CLR 358 at 375–376; *Carr v Western Australia* (2007) 176 A Crim R 555, at 557–558; 556–557 (High Court)

that the accused denies that any such conversation took place. I accept that it is not part of my function to decide whether or not there was such a conversation as that is a jury question, but I consider it relevant to whether or not the accused can have a fair trial on the issue. The difficulty with the state of the evidence is that no notes were made of this conversation at the time; DSC McKellar's memory is such that he is unable to remember the precise conversation except in a general way and there is really no supporting evidence which tends to corroborate the police version.

[80] There is some evidence from DSC Leafe, who remained on the veranda with the accused and his co–accused during the search as the security officer, about this subject:

> "Q: Did you hear any conversation concerning the phones? ––– At one point, Detective McKellar, Chris McKellar, he asked Mr Shillito and Anthony Jesson to identify some property. I believe Shillito just went inside the doorway, I'm not – I can recall that Mr Anthony Jesson did, but Mr Shillito indicated some property on the table, which included – I recall seeing a wallet and I believe there was a phone there as well.
>
> Q: Alright, did you hear Mr Jesson say anything? ––– I don't recall anything Mr Jesson said.
>
> Q: Okay, do you recall whether he said anything, even if you can't recall the words? ––– I know he went inside, but whether he said anything I can't recall.
>
> Q: Where did he go when he went inside? ––– Well I was just in the doorway, and he moved over towards the table, which is just inside, where the exhibits officer was located.

Q: Did he move inside before or after Officer McKellar inquired about whose property was whose? ––– He moved inside after he inquired.

Q: Where was McKellar, Officer McKellar? ––– He was situated on a table, just inside the door to the cabin, on the interior, and as you walk in the door, to the left, a very short distance from the door.

Q: Where was the property that Mr Shillito was indicating was his? ––– On that table, well that's the direction I saw Mr Shillito indicate.

Q: Did you see what the property was that Mr Shillito was indicating was his? ––– Other than being aware that there was some, like a wallet and a phone, and that's the direction I saw Mr Shillito point, I assumed that's what he was referring to.

Q: Are you able to describe the wallet or the phone that you saw Mr Shillito point to? ––– I recall the wallet being dark, but other than that I can't recall."

[81] DSC Leafe said that he made no notes of the conversation and did not include any of this information in his statement.

[82] DSC Leafe's version of the conversation does not marry with the version given by DSC McKellar.

[83] In cross examination DSC McKellar changed his evidence somewhat. He originally said that he was unsure whether he was sitting at the table or whether he went to the doorway to the veranda when this alleged conversation occurred. Subsequently, he seemed to accept that he either went to the doorway to the veranda or went out onto the veranda when he

had this conversation and that he picked up the mobile telephones and took them with him.

[84] Secondly, DSC McKellar ought to have realised that it is likely that the phones would be seized. This investigation heavily depended in the first place upon telephone intercepts, a matter which he well knew; and he had searched the call registers of the phones looking for evidence. Whilst I accept it is often no part of the duty of an exhibits officer to seize exhibits, it ought to have crossed DSC McKellar's mind that the mobile telephones would be seized and taken into evidence.

[85] It seems to me that also the fact that no caution was given is relevant. Having regard to the fact that the accused subsequently exercised his right of silence, I think it is likely that had he been cautioned and had he realised that any admissions he made about the mobile telephone might be used in evidence against him, he would not have said anything about which mobile telephone was his.

[86] Finally, as I have excluded the evidence covering the seizure of the telephones under the s 120B warrant, any evidence about the conversations relating to the telephones would not make sense.

[87] For these reasons I have concluded that it would not be in the interests of justice to admit the conversations relating to the mobile telephone as against the accused.

Voice Identification

[88] As noted earlier, DSC Crawley monitored all of the intercepted calls between 7 August and 30 October 2007. During the entire investigation she listened to more than 2,000 calls. It is alleged that during this period she became very familiar with the sound, intonation and manner of speech of the voice making and receiving calls from the intercepted service numbers. It is submitted that the voice was distinctive.

[89] On 15 August 2007, Johne Jesson participated in an audio recorded s 140 Police Administration Act conversation and an electronically recorded interview which lasted for 52 minutes. DSC Crawley was present during the interview. She also had telephone conversations with a person who identified himself as Johne Jesson on 18, 19, 23 and 24 October 2007 and also spoke to him in person on 14 October 2007.

[90] The Crown proposes to lead evidence from DSC Crawley that, in her opinion, the voice which she heard on each of the recorded calls was that of Johne Jesson. Alternatively, the Crown proposes to tender into evidence recordings of Johne Jesson's voice obtained by police of a conversation which the Crown says Johne Jesson had with Shillito. The purpose of tendering into evidence these recordings would be to put before the jury sufficient recorded material for the jury to make their own comparisons between Johne Jesson's voice recorded on the s 140 tape and the electronic record of interview recordings and the recordings of the voice on the intercepted telephone calls.

[91] It is not intended by the prosecutor to lead evidence of voice identification from DSC Crawley as to the other persons to whom Johne Jesson was speaking on the intercepted phone calls.

[92] Counsel for the accused does not object to this evidence so long as there is no attempt to identify through this witness the identity of the other persons involved in the telephone intercepts.

[93] I consider that the evidence of DSC Crawley is admissible. So far as the telephone intercept calls are concerned which relate to the alleged offence which took place between 16 September and 27 October 2007, by this time DSC Crawley was very familiar with the voice, having listened to it on many occasions both prior to and during the relevant period, both through the telephone intercepts and by speaking to Johne Jesson over the telephone herself and by her having been present during a record of interview.

[94] In my opinion the evidence is admissible[27]. Clearly the evidence of DSC Crawley establishes a very strong basis for her to give evidence that, in her opinion, the voice on the relevant recordings, is that of Johne Jesson. It does not matter that additional evidence could be available to the jurors so that they can make up their own minds based on listening to the tapes. If all of the tapes were needed to be played, the number of hours of court time this would involve would become unmanageable. The purpose of expert evidence

[27] See *Bulejcik v The Queen* (1995–1996) 185 CLR 375; c.f *R v Solomon* (2005) 92 SASR 331.

is to avoid having to teach jurors a subject about which they have no knowledge and could only be informed about by leading extensive evidence.

Opinion Evidence as to the Code Used During Telephone Conversations

[95] The Crown also proposes to lead through DSC Crawley evidence that Johne Jesson and others involved in the telephone intercepts were using code to refer to an arrangement to bring into the Territory a large quantity of cannabis.

[96] DSC Crawley commenced employment with the Northern Territory Police in July 1997. In August 2004 she commenced duties in the Drug Enforcement section. Her duties have been solely dedicated to serious drug investigations since then.

[97] She has been involved in numerous drug investigations, both as an investigator and as the officer in charge of an investigation. A number of these investigations have resulted in seizures of dangerous drugs including cannabis, methyl amphetamine, heroine, ketamine, MDMA, cocaine, LSD and steroids. Her experience over the years has provided her with insight as to the argot and codes often used by persons involved in the sale and distribution of illicit substances.

[98] She has also completed a number of courses specifically relating to the field of drug investigation. In 2004 she completed surveillance training conducted with a number of Commonwealth agencies including the Australian Federal Police, the Australian Defence Force, the Australian Tax Office and the

Australian Customs Service. As a result of that training she gained background knowledge on the types of drugs used by drug offenders and their methods of operation. The latter included not only how people involved in the trade carry out anti–surveillance measures, but also include how they use codes in order to avoid detection.

[99] Since 2004 she has also been involved in the insertion and utilisation of undercover police operatives. She has been both an undercover operative and a handler of undercover operatives. As a result of this experience she is familiar with the argot used by drug dealers and drug users. As part of her training as an undercover operative, she was discouraged from using obvious terms that would have described dangerous drugs, as offenders are well aware that telephone calls could be intercepted by law enforcement agencies.

[100] In 2005, she attended the Ninth National Chemical Diversion Congress in Darwin where she obtained training as to the methods used and adopted by persons involved in the manufacture, transportation, distribution and sale of illicit substances. Additionally, she has completed a clandestine laboratory course with the Northern Territory Police Force in 2006 and has read a wide range of literature which specifically relates to dangerous drug use, production and distribution.

[101] As a result of her training and experience she has acquired the ability to quickly identify terminology used by persons involved with dangerous drugs

and is able to identify conversations where innuendo is used to describe illicit activities. Part of her experience has been gained when performing duties listening to conversations as the result of lawfully obtained listening devices and also from speaking with registered and unregistered informers.

[102] In addition, in the course of her daily duties, she has interaction with drug users, drug suppliers and drug informants.

[103] As a result of listening to the telephone intercepts involving Johne Jesson, she formed the opinion that he had been using coded language consistent with him referring to marijuana and the distribution of marijuana. Part of this opinion is based upon intelligence that she had received from a drug informant.

[104] It is proposed that she will refer to a number of these conversations which will be played to the jury and offer the opinion that certain words used by the speaker are consistent with a reference to marijuana, that other words are consistent with the quantity of marijuana being spoken about, that other words are consistent with being a reference to the arrangements for the distribution of drugs, that other words are consistent with references to money being sent through the post to pay for drugs and that other words are consistent with references to the amount of money involved.

[105] The telephone conversations to which she refers cover periods between 5 August and 15 August 2007 (which did not involve the accused or the co–accused, Shillito) and subsequent conversations which were made between

17 September and 25 October 2007 which the Crown alleges do involve both accused.

[106] As is apparent from her statement, the methodology involved in identifying code and ascribing a meaning which may be consistent with the distribution, sale, etc of drugs depends upon a number of identified factors. Firstly, the conversation or conversations in question do not usually make any sense according to the literal words used. There is, therefore, a strong inference that something else is being referred to other than the literal meaning. Secondly, some of the words used are consistent with quantities of drugs being discussed. For example reference to a six pack or a 12 pack is consistent with the speaker referring to six pounds or 12 pounds of cannabis, the drug cannabis being identified not only from informants but also from the quantities being discussed. Reference to an amount of money such as 26½ dollars is consistent with being a reference to a sum of $26,500. There are also a number of fishing references, some of which are consistent with a reference to cannabis and some of which are consistent with references to arrangements for the distribution of the cannabis. There are also references to videos being sent which in context are consistent with money being sent through the post.

[107] As a result of her understanding of the coded telephone calls made by Johne Jesson in the period between 8 and 15 August 2007, she formed the opinion that Johne Jesson intended to carry a large quantity of cannabis by vehicle along the Stuart Highway to Darwin on 15 August 2007. At 12.30 pm on

Wednesday 15 August 2007, Johne Jesson was stopped by police near Mataranka whilst travelling northbound on the Stuart Highway. There was an esky on the rear tray of the vehicle which he was driving. Secreted in the walls of the esky police located 32 cryo–vac bags of cannabis weighing 8,748.8 grams. This evidence will be relied upon as supporting evidence confirming that the words used by Johne Jesson in the intercepted telephone calls in August 2007 were consistent with references to cannabis and their methods of distribution, etc as understood by the witness.

[108] A similar but not identical code was used in the intercepted telephone calls between 17 September and 25 September 2007. Some of the coded words are different, but nevertheless the principles remain the same.

[109] Counsel for the Crown referred me to two decisions of the Court of Criminal Appeal of the Supreme Court of New South Wales, namely *Chow v The Queen*[28] and *Nguyen v The Queen*[29] in which the admissibility of similar evidence has been discussed. In those cases the admissibility of the evidence depended upon the provisions of the Evidence Act 1995 (NSW). The decision in *Chow v The Queen*[30] is not really helpful as the question of admissibility was not discussed. However in the case of *Nguyen v The Queen*[31], there was a detailed discussion of the relevant principles by James J (with whom Spigelman CJ and Hislop J agreed).

[28] (2007) 172 A Crim R 582
[29] (2007) 173 A Crim R 557
[30] (2007) 172 A Crim R 582
[31] (2007) 173 A Crim R 557

[110] There is no doubt that a police officer who has acquired relevant knowledge and experience is able to give evidence that persons involved in the sale and distribution of illegal drugs often use coded language in order to avoid detection. An officer with relevant experience is entitled also to give evidence that certain well known words are commonly used to refer to specific drugs.

[111] As a review of the authorities by James J reveals, in some cases the police officer may have sufficient background experience to even give an opinion that certain words have a particular meaning, but usually if the officer is able to explain the process of reasoning adopted, the officer will be limited to providing an opinion to the effect that a particular reference is consistent with being a reference to drugs or a reference to distribution of drugs or a reference to the quantity of certain drugs as the case may be.

[112] The statement prepared by DSC Crawley, which became exhibit P13 in these proceedings, I consider establishes that she does have the kind of relevant experience and specialised knowledge to enable her to give evidence of the kind which is proposed to be lead. I think it is significant in this case that the officer had the opportunity to test her assumptions about what the codes meant as a result of the August conversations and as a result of the subsequent interception of the drugs at Mataranka. This provided her with a strong basis for saying, in my opinion, that words used in the first group of conversations are consistent with references to cannabis, the distribution of cannabis, amounts of money, weights, etc.

[113] However, there are some references in the second group of conversations to words and expressions which do not appear in the first group of conversations. In the second group of conversations there are references to "bores" which DSC Crawley considers to be a substitution for "videos". Although the process of reasoning is not fully disclosed in her statement as to how she arrived at this conclusion, I think it is reasonable to infer from her statement that she arrived at the conclusion by reference to the context which included references to other words and expressions familiar to her as part of the argot being used.

[114] In a number of passages in exhibit P13, DSC Crawley states that she formed the opinion that, for example, certain words had a particular meaning. Counsel for the Crown does not seek to lead evidence in this form, but rather to lead evidence in the form that the words were consistent with having that meaning. In my opinion, DSC Crawley is qualified to give evidence as long it is limited in this way.

[115] I note that the prosecution intends to play the relevant tapes to the jury, the proposal being that by this means the jurors will be able to determine for themselves with the assistance of DSC Crawley's evidence whether the conversations have the meanings which the Crown submit that they have. No objection was taken to these tapes being played.

[116] Subject to the qualification abovementioned, the evidence of DSC Crawley in relation to the coded language used in the tapes will be admitted.