IN THE COUNTY COURT OF VICTORIA

Revised
Not Restricted

AT MELBOURNE
CRIMINAL DIVISION

Case No. CR-09-00450

DIRECTOR OF PUBLIC PROSECUTIONS

v

KW

JUDGE:	HIS HONOUR JUDGE MULLALY
WHERE HELD:	Melbourne
DATE OF HEARING:	6-10 September 2010
DATE OF RULING:	2 May 2011
CASE MAY BE CITED AS:	DPP v W
MEDIUM NEUTRAL CITATION:	[2011] VCC

REASONS FOR RULING

Catchwords:

APPEARANCES:	Counsel	Solicitors
For the Crown	Mr C Young	
For the Accused	Ms A Richards QC Ms A Kapitaniak	
For the Victoria Opportunity & Human Rights Commission	Ms K Walker	
For the Attorney-General	Ms C Geiringer	

HIS HONOUR:

The Applications

1 By Presentment No X01676473, the prosecution alleges that KW at Elsternwick on 16 February 2008 by threats or intimidation attempted to procure DTY to take part in an act of sexual penetration with KW. The substantive offence is established by s.57(1) of the *Crimes Act* 1958.

2 Mr W, has pleaded not guilty to this offence.

3 Prior to the empanelment of a jury in his trial, an application has been made to exclude from the evidence a tape recording of a telephone conversation between the accused and the complainant, DTY made on 21 February 2008 . The complainant participated in the recorded telephone call when she was at the Caulfield Police station.

4 The application has three limbs. **First,** that the discretion established by s.138 *Evidence Act* 2008 ought be exercised in favour of the accused. The discretion in s.138 is enlivened if it is established that the evidence was obtained by, or as a consequence of, an impropriety or a contravention of an Australian law. In broad terms, it was argued on behalf of the accused that there were the following specific contraventions of an Australian law by the informant.

(a) Section 6 of the *Surveillance Devices Act* 1999 was contravened;

(b) Section 38 of the *Charter of Human Rights and Responsibilities Act* 2006 was contravened.

5 It is also argued that there were breaches of s 11 and 30 of the *Surveillance Devices Act* 1999, though these were not pressed in the same way that the other breaches set out above were.

6 It was also argued that the conduct of the informant in effect amounted to a breach or interference with the human rights articulated in s 13 and s 24 of the *Charter of Human Rights and Responsibilities Act 2006,* to the extent or degree that the evidence was obtained as a consequence an impropriety.

7 The alleged contraventions of the particular pieces of legislation are said to be linked and all arise from the key fact in dispute in this application being the taping of a telephone call between the accused and the complainant on 21 February 2008.

8 As noted in the absence of a finding that the specific laws were contravened, the accused nonetheless argued that the approach of the informant in obtaining the evidence amounted to an impropriety.

9 The **second** basis of the argument to exclude the evidence was that the discretion established by s.90 *Evidence Act* 2008 ought to be exercised in favour of the accused.

10 The **third** basis put forward by the accused was that the discretion pursuant to s.135 or discretion (as it is commonly termed) established by s.137 ought to be exercised in a way that resulted in the evidence being excluded.

11 The prosecution maintained that the evidence was admissible.

The Interveners

12 As a consequence of the accused raising arguments as to the impact of the *Charter of Human Rights and Responsibilities Act 2006*, the Victorian Equal Opportunity & Human Rights Commission and the Attorney-General sought to intervene. I will not dwell on the legal formalities involved in those entities being permitted to intervene in matters such as this save to say that their intervention was authorised and orthodox. I will deal with the submissions of the interveners in the course of these reasons.

The facts in issue in the case

13 In determining the admissibility of any piece of evidence it is first necessary to be satisfied that the evidence is relevant. There is no issue that the evidence is relevant.

14 The next step in dealing with a question of admissibility is to consider what are the facts in issue in the case and what is the purpose of the impugned evidence[1].

15 The central fact in issue in this case is whether on 16 February 2008 the accused said words which amounted to an attempt to procure sex from the complainant by threats or intimidation. The prosecution says that the later taped telephone conversation of 21 February 2008 is evidence making it more likely he did commit the crime alleged on 16 February 2008. It is confirmatory evidence, though as was pointed out in the course of submissions, the recorded conversation could be seen as a separate commission of the crime as well. That said, the prosecution seek to maintain the single count on the presentment and rely on the taped telephone conversation as evidence probative of the commission of the crime alleged.

16 In essence the purposes of the evidence were the following interconnected matters: the recorded conversation;

(a) contains admissions against interest;

(b) provides support for the complainants version of the earlier conversation on 16 February;

(c) allows the jury to more readily reject the accused version set out in his ROI and

(d) revealed or established that the accused lied in his ROI as to when

[1] HML v The Queen 235 CLR 234, [2008] HCA 16

he last spoke to the complainant and as a material lie it diminishes his credit[2].

17 The defence is that the complainant has misconstrued the conversation of 16 February 2008 and embellished upon it. The accused does not take issue that he wanted to talk to the complainant and give back to her a disk which had on it embarrassing photographs but that is all he wished to do. When he did meet her on 16 February 2008 he says he did not seek sex with her or threaten to reveal the photographs if she refused.

The broad factual matrix

18 In order to resolve the application, it is necessary expand upon brief outline of the facts set out above.

19 The complainant and the accused were in a relationship, that ended in 2006. During the course of the relationship the complainant consented to the accused taking photographs of her. There were some photographs of her naked. The accused man kept these photographs on his computer. After the relationship between the accused and the complainant came to an end, the complainant married another man.

20 On 16 February 2008, and obviously well after the relationship ended, the accused contacted the complainant by telephone. He asked to meet with her. The complainant had other things to do during the course of the day, but at 3 pm on the afternoon of 16 February 2008 she sent a text message to the accused saying she would meet him at McDonald's on the corner of Glenhuntly Road and Nepean Highway. The accused texted back, saying "I'm coming now."

21 According to the statement made by the complainant when the accused met her at the McDonald's, he said to her, amongst other things, that he missed

[2] T232-3

her and that he wanted her to leave her husband and recommence a relationship with him. She made it plain that she would not do this. The accused then produced an envelope with a disk, saying words to the effect that these were the explicit photographs that had been taken during their relationship, and that if the complainant did not agree to having sex with him twice a month he would distribute the photographs to her friends and neighbours. He said, in effect, that the complainant was to call him with her answer.

22 The complainant took the envelope with her when the two parted. The next day she confirmed that the disk had on it explicit photographs. She went to her local police station at Narre Warren. The police officer took a statement from her, which she signed at 8.35 in the evening.

23 It seems that because the conversation between the complainant and the accused took place at the McDonald's in Elsternwick, the matter was transferred to the Caulfield CIU. The police officer who took on the investigation, Detective Russell, received the statement and other relevant information from the Narre Warren Police Station on 19 February 2008. He contacted the complainant that same day, and arranged for her to attend at the Caulfield CIU office on 21 February 2008.

The recorded telephone conversation

24 Detective Russell gave evidence on a *voir dire* held pursuant to s.189 of the *Evidence Act*. I will deal with the evidence he gave in more detail shortly. For present purposes it is sufficient to understand that when the complainant attended at the Caulfield Police Station on 21 February 2008, Detective Russell raised with her the prospect of taping a telephone call with the accused. The complainant agreed with this proposal. She was instructed on how to use the machine provided to her by Detective Russell.

25 The complainant, having got the machine, then wrote some notes in Mandarin

to help her with the conversation with the accused man. These notes were later given to Detective Russell and translated, and both the originals and the translations are part of the depositions.

26 The complainant then rang the accused on his mobile phone. The conversation between the complainant and the accused was conducted in Mandarin. It was recorded using the device provided to the complainant by Detective Russell. At the end of the conversation, the device and the micro tape were returned to Detective Russell. He arranged for the recording to be translated, and a transcript of the translation is part of the depositions. The conversation went for approximately eleven minutes. The transcript of the translation of the recorded telephone call is appended to these reasons. It is set out at pp.95 through to 102 of the depositions.

27 The topic of the recorded conversation was what the accused had said to the complainant at the McDonald's store on 16 February 2008 and the implications of what was said. The complainant maintained her resistance to the suggestion of the accused that she have sex with him twice a month. The accused, so the Crown argues, maintained his position that if the complainant did not agree to have sex with him twice a month he would distribute the photographs to friends, neighbours and family.

28 As noted, the complete transcript of the recorded telephone call is appended to these reasons. However, in order to understand the issues to be determined it is necessary to refer to some parts of the transcript of the recorded telephone call.

29 The conversation almost immediately reveals by implication that there was a proposal put by the accused which is connected with the disk and that the complainant does not agree at all with what is proposed. She said, "*Now I want to very seriously ask you, whether or not you plan to burn all the photos and discs?"*

30 The accused responded by indicating his state of mind and his perception of the position that he was in. He said, "*Do you think I want to be like this? I don't wish to be like this. I was angered by you, I was forced by you"*

31 The fact that the parties were talking about what was expected of the complainant becomes clear shortly thereafter as does the accused making it plain that if she does not agree there are consequences involving exposing her to her friends and family. The complainant says " *Because I definitely don't agree to do this. I would not agree".* The accused responded directly to this, "*You will not agree, right? Then let's expose it all. Since your family already know about this".* The accused expanded upon this by indicating "*China would know too, since you are forcing me like this"*. The complainant repeated that she was not forcing the accused.

32 The fact that the accused was talking about the complainant having sex with him is revealed shortly thereafter when the complainant asks what he wanted her to do. The accused responded by indicating he want it *"Just like what it used to be".* The complainant responded, "*How like it used to be, tell me. You told me last time …"* The accused in response to this provided some further detail and indicated the sexual nature of what he wanted her to do. The accused said, "*Can you use a hand to do it …"* The complainant queried, *"Use the hand to do what … use the hand to do what?"* The accused responded, "*I need you, need you in this aspect".* The complainant asked, "*What aspect? Please specify*". The accused responded, "*The sex aspect".* The complainant repeated, "*What aspect?"* The accused said, *"Sex".* The accused went on, "*Actually I (sic) can use either the hand or the mouth if your … your vagina is not good. I have a problem now."*

33 The conversation proceeded on and the complainant indicated that first of all the photos had to be destroyed as they were personal things. The accused responded, "*Yes, it would be very simple for me if I want to destroy them",* to which the complainant responded, "*You're saying if I am willing to see you*

each month, along each month and make love to you, then you would destroy them, right?" The accused responded indicating the precise terms were not sex every month but, "*Once every two weeks".*

34 These are short extracts from a much longer conversation. As a conversation, which in turn uses as a reference the earlier McDonalds store conversation, naturally there are aspects of it that require conclusions and inferences to be drawn as to what is meant. In other words the taped conversation does not put the allegation as a policeman might in an interview with a suspect. But nonetheless, as can be seen from the brief extracts set out above what is seen is evidence of very high probative value revealing that what the accused proposed in the conversation on 16 February was that the complainant had to agree to sex with him twice a month and if she did not the photographs on the disk would be exposed to friends and family.

35 Once the recorded conversation concluded the complainant gave a short summary of the content of it to Detective Russell. Detective Russell having got the device from the complainant then confirmed that an audible recording had been made. He then made an entry into a property book at the Caulfield CIU noting in effect that the audio tape was part of the investigation and available to be produced later as an exhibit. He also took possession of the notes that the complainant had written prior to the recording. Detective Russell had the complainant sign the notepaper and date it. It too was kept as an exhibit.

36 It would appear from the evidence of the translator, Kamla Cheng, that she attended at the Caulfield Police Station on 25 February 2008 where she spent time translating and transcribing onto her own computer the recording of the telephone conversation. Later on 10 March 2008 she returned to the police station at Caulfield and continued translation and transcription concluding the job that day. A year later or thereabouts, on 19 February 2009, she clarified aspects of the translation and transcription. She provided statements to this effect, which are contained in the depositions.

The accused's record of interview

37 On 22 February 2008 Detective Russell, along with other police, attended at the accused's premises at 5/33-35 Edgar Road, Glen Iris. Ultimately the accused attended at the Caulfield Police Station that afternoon where was arrested and interviewed. The prosecution seeks to lead the interview not only because it contains the accused's denials and explanations but also because it contains a lie. The alleged lie is very much connected to the fact that the accused participated in the taped telephone conversation.

38 In the interview, the Accused admitted he had met with the complainant on the previous Saturday having first called her to arrange a meeting. He admitted he had bought to the meeting a disk containing naked photographs of the complainant. He said the photographs were on his computer but he deleted them the very day the police came to his premises. He said he did that because the complainant had asked him to do so when they had met on the Saturday. He was asked why he wanted to give the disk to the complainant rather than just throw it out. He responded *Why? No, no do that because I asked her to – asked to her we can m-, maybe we can have a chance now to getting bet -, better, our relationship*"

39 When the allegations were put to him he denied he had said that if the complainant did not agree to have sex with him twice a month he would distribute the photographs to friends and family. He said that his words had " *a different meaning"*

40 The prosecution say that in his interview the accused lied about the taped telephone call saying that the last time he spoke to the complainant was at the McDonalds. When he was told of the taped telephone call made the day before he was arrested and asked if he remembered that call, he said ' *Okay, lets say yes I remember".* He then confirmed that the topic of the telephone call was the complainant wanting him *"to delete this photo"*

41 The other evidence in the case includes that the accused computer was examined and it revealed that the photographs on the disk were once on the computer and had been deleted on though it seems that was done in the early hours of 21 February 2008, whereas the arrest was on 22 February 2008[3] .

Evidence on the voir dire

42 Once the prosecution were put on notice by those representing the accused of the challenge to the admissibility of the taped telephone, the prosecution had Detective Russell swear an affidavit as to what he did in respect of the telephone call and why he did it. Also the prosecution arranged for a Detective Senior Sergeant Ridley to swear an affidavit setting out his experience in respect of telephone calls made by a complainant to an accused, together with opinions and some general propositions about how and why Victoria Police use the technique that was adopted by Detective Russell in this case.

43 During the voir dire, the affidavit of Detective Senior Sergeant Ridley of 5 May 2010 became Exhibit A. Appended to that affidavit was an internal police document headed "Pre-text Conversations", that became Exhibit B. Also tendered through Detective Senior Sergeant Ridley were extracts from the Victoria Police Manual (Exhibit C) and extracts from the Chief Commissioner's instructions (Exhibit D).

44 In his affidavit Detective Ridley indicated that he knew of, had utilised or had supervised or had given advice on the use of pre-text telephone conversations in investigations of sexual offences[4]. In his opinion, neither the Victoria Police Manual or the Chief Commissioner's instructions contained any policy with respect to the use of pre-text conversations[5]. His evidence established that the internal police document, which was appended to his affidavit, was one

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3 Depositions p50 statement of Detective Stephen Russell, Notice of additional witness, Statement of Cameron Brown

4 Affidavit of Robert Stewart Ridley Exhibit A paragraphs 3-4

5 ibid, para 6 Transcript p8

prepared by the members of the Sexual Crimes Squad and had been used and updated over a period of 15 years[6]. He gave evidence that, in his experience pre-text conversations were utilised most commonly in the investigation of "historical sexual crimes where the crime involves an ongoing relationship between a suspect and the alleged victim and typically had occurred many years before[7]". In his oral evidence he indicated that although in drug and conspiracy cases there may be instances where the crime itself is committed by the words that are expressed by a suspect which had been recorded, that such situations were not common in the investigation of sexual offences. In fact, he said that he "couldn't recall a case like that"[8].

45 He made it plain that no statistics were kept on the use of recording conversations described to be pre-text conversations[9].

46 The affidavit of Detective Russell sworn on 5 May 2010 was Exhibit E and the statements he made as part of compiling the brief became Exhibits F and G. Detective Russell indicated that in the course of his time in the police force he had used the pre-text conversation as an investigative tool in approximately 12 investigations that had been predominantly for sexual-related offences[10]. He indicated that having received the report from the Narre Warren Police Station on 19 February 2008 he conducted enquiries of the LEAP database in respect of both the accused and the complainant and noted nothing was recorded against either person that could assist the investigation. He then spoke to the complainant by phone and she confirmed the contents of the statement that she had made to the police at Narre Warren.

47 In his evidence Detective Russell indicated that he had made an assessment of the statement and decided to try and gather more evidence to corroborate

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6 ibid
7 Para 18 and Transcript p23
8 Transcript 24
9 Para 20 and see also discussion at Transcript pp17-8
10 Affidavit of Stephen James Russell Exhibit E paragraph 2

the allegation[11]. His enquiries with McDonalds regarding CCTV footage were to no avail as there was no operating camera in the area where the alleged meeting took place[12].

48 His affidavit then continued

> 10. "I then considered whether to arrest and interview the accused, but considered that I could not do so because there was no corroborating evidence. I was also concerned that there was insufficient evidence to successfully prosecute if I arrested the accused and he made a 'no comment' interview".
>
> 11. "I then considered several investigative options including have the complainant meet with the accused again while the complainant wore a listening device. I decided against this after considering the safety of Anna".
>
> 12."I ultimately used an avenue of enquiry commonly referred to as a pretext."
>
> 13.I used this investigative option to corroborate the reported offence as well as to obtain any evidence or admissions from the accused.
>
> 14."I consider this to be the most appropriate option due to having no intelligence holdings on the Victoria Police LEAP database on the accused. I also considered that I could not conduct any form of long-term investigation into the accused and the incident after assessing the factors involved being the time frames allegedly told to Anna by the accused in the conversation and the seriousness of the offence."
>
> 15 "The long-term investigative options are considered I could not conduct included telephone interception of the accused, mobile/optical/audio surveillance of the accused, an undercover operation involving the use of covert operative and a controlled meeting of the accused and Anna that could be recorded and surveilled."

49 Having gone through his options and come to the conclusion that a pre-text telephone conversation was the best option, he then arranged to meet the complainant and did so for the first time on 21 February 2008. He said that when the complainant came to the police station he "told Anna about the need to gather more evidence to support the allegation and that she could assist by

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11 Paragraphs 3-7

12 Paragraph 9

telephoning the accused and engaging him in conversation about the meeting they had at Elsternwick McDonald's and trying to talk about what had been spoken about between them[13]". He said Anna told him that she was willing to assist the investigation[14]. He then advised her on how to use of the recording device.

50 He said the device was a Sony brand M-950 model and that a microcassette or tape to record was provided to Anna and she was shown how to stop and start the device and advised how to place the ear piece in the ear that she was going to hold to the telephone[15].

51 I interposed that during the course of his evidence, Detective Russell said that in order to get the device from the police Technical Support Unit, he had to complete a form which then had to be authorised by his superior officers and then sent by fax to the Technical Support Unit. The application document was tendered as Exhibit H. It is notable that the document is dated 19 February 2008. The applicant for the device is given as "Detective Russell". The type of offence described was "blackmail". As to "the target (offender details)" part of the form, Detective Russell wrote brief details identifying the accused. The request on the form is set out in brief terms as "provision of Nagra to conduct pretext". The document as signed by Detective Senior Sergeant Tim Wettenhal on 19 February 2008. It would appear that the authorising officer was Inspector Margaret Lewis. What is made plain in the application document is that on the day that Detective Russell received details of the complaint and spoke to Anna by telephone, he had made a decision to be equipped to record a telephone conversation between the complainant and the accused, providing the complainant agreed to participate once she attended at the police station some two days later on 21 February 2008. As will become plain he did not at the same time or later make any plans or

13 Paragraph 17
14 Paragraph 18
15 Paragraph 19

arrangements to secure a warrant to record the conversation

52 Detective Russell's affidavit and his evidence makes plain that it was he who showed the complainant how to use the recording device and it was he who inserted new batteries and unsealed a new cassette tape and inserted that into the device[16]. His evidence was that he did not tell the complainant what to say or how to conduct the conversation and that when she made the telephone call there was no one present in a closed room at any point. He waited outside out of hearing range[17].

53 Although in his affidavit he said he did not tell Anna what to say or how to conduct the conversation, there is no issue that Detective Russell was keen for the complainant to engage the accused in a conversation about the meeting that they had had at the McDonalds store and in particular to have him talk about or repeat what had been said at that time[18]. In his evidence Detective Russell indicated that although he was familiar with the Victoria Police Manual and the Chief Commissioner's instructions, it was really only that they existed and the format of these documents and that in fact he was not familiar with the particular extracts that were contained in Exhibits C and D. He was familiar with the pre-text telephone instruction which he indicated was contained on a intranet within the Victoria Police. He indicated that he had prior to conducting this particular pre-text telephone conversation referred again to that document or printed it and read it again to ensure that he had familiarised himself with the latest version of it[19].

54 Detective Russell was firmly of the view that the provisions of the surveillance devices requiring warrants to record conversations did not apply to taping of conversations between a complainant and the accused if the complainant consented to the conversation being recorded and pushed the record button

16 Paragraphs 19-20, Transcript 39-40
17 Paragraphs 21, Transcript 39
18 Paragraph 17, Transcript 40
19 Transcript 28, 31-32

on the device herself. His view was that if the complainant pushed the button to record the conversation then it was she who was using the listening device or surveillance device. He was of the view that providing that he as a third party did not listen to or monitor the conversation, then the conversation could be recorded without there being a requirement for a warrant. He considered that all that was required of him was to ensure that he did not overhear or listen to the conversation or monitor it in any way. This would be achieved if he left the complainant alone in a room and remained outside of range of hearing the conversation, which is something that he did in this case[20].

55 If it has not been made plain already this too was the view held by Detective Senior Sergeant Ridley[21].

56 In his evidence Detective Russell indicated that this case was different to a dated or historic sexual complaint in that it had a sense of urgency about it. There was in his mind a deadline approaching of the weekend which was one or two days away. He indicated as far as he knew from the complainant the accused's request was for her to call him. He indicated that because the accused had left with the complainant that she should call him, it was "probably advantageous that that was a position that then we could work from, and if he did, if she did call him again and engage him in discussions then, he might be more open to talking about it"[22].

57 Detective Russell was asked about the obtaining of a warrant pursuant to the *Surveillance Devices Act*. He said in answer to questions from counsel for the accused that he knew "that generally the law around recording private conversations that if you are a party to it you can do that (get a warrant)"[23] but as indicated Detective Russell was firm in his evidence that as he was not a party to the conversation there was no requirement for a warrant. He was

20 Transcript 29, 34, 39, 43.
21 Transcript 10, 11-12, 21, 23
22 Transcript 37-8
23 Transcript 39

asked if there was any impediment to getting a warrant in terms of the timeframes. He answered, "If you're asking was it easier for me to go down this course than to get a warrant, no"[24]. He was then asked if an application for a warrant was an equally convenient and reasonable approach. He responded, "It could've been, and if - if the victim had said, 'No, I don't want to be involved' then we would've had to take a step back and look at how else we could approach it, but it was that time frame that we were dealing with. It may have forced our hand and we may have had to go and simply arrest him[25].

What precisely is the evidence that is sought to be excluded

58 The question of what evidence is sought to be excluded is usually straightforward. It is not so straightforward in this case. The complainant and the accused spoke to each other in Mandarin in the recorded telephone call. The tape recording will never be played to the jury. It is proposed by the Prosecution that the translated transcript be read to the jury by the translator.

59 At the outset of the application it was made clear that the accused sought to have excluded the evidence of a witness reading the transcript of the recorded call. If the application was successful it was not said that that the complainant was thereby prevented from giving evidence of what was said from her memory.[26] And it follows that likewise the complainant could give evidence of the fact of the call being made by her to the accused on 21 February 2008. Also anything said in the call that was referred to in the accused's record of interview was not part of the challenge. This it seems permitted the prosecution to maintain its argument that the accused lied about the fact of the call and if the jury find it was a lie use that to assess the credibility of the accused's denial's and his version of events.

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24 Transcript 43
25 ibid
26 Transcript 56-9, 186

60 The question of what was sought to be excluded was further refined during the pre trial argument. In particular the prosecution indicated that should I find that the complainant was an agent of the state as that concept was explained in *Swaffield v The Queen and Pavic v The Queen*[27], then the prosecution would not seek to lead evidence of the content of the telephone call from the memory of the complainant. Otherwise, notwithstanding any ruling excluding the transcript of the tape, the prosecution intended to lead the evidence of the content of the recorded telephone conversation from the memory of the complainant.

61 Further it was pointed out in argument that if the transcript is ruled inadmissible and the complainant gives evidence from her memory it may be that an attack on the reliability of her memory or on her credibility as to the content of the conversation would see the prosecution endeavour to rehabilitate her as a witness by seeking to have her consider the transcript and refresh her memory from it or otherwise utilise the transcript to overcome the attack on her credit.

62 These matter go to the overall consequences for the trial of the application made to exclude the transcript of the recorded conversation.

63 As was said by senior counsel for the accused in the course of exchanges on this topic:

> *"It may be that should Your Honour rule this recording is inadmissible, that it becomes of little utility or practical input at the end of the day"*[28]

What is the alleged contravention of Australian law

[27] 192 CLR 159, [1998] HCA 1
[28] T108. 16

Surveillance devices Act 1999

64 The principle contention of the accused was that the conduct of the informant breached s6(1) Surveillance Devices Act ("SDA").

65 Section 6 of the SDA reads as follows:

6. ***Regulation of installation, use and maintenance of listening devices***

(1) Subject to subsection (2), a person must not knowingly install, use or maintain a listening device to overhear, record, monitor or listen to a private conversation to which the person is not a party, without the express or implied consent of each party to the conversation.
Penalty: In the case of a natural person, level 7 imprisonment (2 years maximum) or a level 7 fine (240 penalty units maximum) or both; In the case of a body corporate, 1200 penalty units.

(2) Subsection (1) does not apply to-
(a) the installation, use or maintenance of a listening device in accordance with a warrant, emergency authorisation, corresponding warrant or corresponding emergency authorisation; or
(b) the installation, use or maintenance of a listening device in accordance with a law of the Commonwealth; or
(c) the use of a listening device by a law enforcement officer to monitor or record a private conversation to which he or she is not a party if-
(i) at least one party to the conversation consents to the monitoring or recording; and
(ii) the law enforcement officer is acting in the course of his or her duty; and
(iii) the law enforcement officer reasonably believes that it is necessary to monitor or record the conversation for the protection of any person's safety.

66 The elements of the offence created by s 6(1) appear to be the following: A person must not

1. knowingly

2. install, use or maintain a listening device

3. to overhear, record, monitor or listen to a private conversation

4. without the consent express or implied by each party to the conversation.

67 The accused argues that it was on any reasonable analysis the informant who "installed used or maintained" the listening device to record the private conversation of the complainant and the accused without the accused consent. By recording the conversation without first obtaining a warrant from the Supreme Court in accordance with the relevant sections of the SDA, the informant breached s 6(1) and thereby illegally obtained the evidence.

68 While the accused counsel always maintained that the informant had breached the SDA by his conduct in amounting to installation and perhaps by reason of installing new batteries, maintenance of the listening device, the real focus of the allegation of a breach was that the informant used the listening device to record the conversation. In my view the true gravamen of the application turned on whether the informant did in fact breach s6(1) of the SDA by being the one who knowingly <u>used</u> the listening device to record the private conversation.

69 The prosecution maintains that it was the complainant that operated and thereby "used" the listening device and consequentially no warrant was required. This was a party to the conversation who used the listening device and as such s6(1) allowed for the recording and therefore the informant had not by his conduct breached the provision.

70 As the issue in dispute is clear enough, I can quickly deal with aspects of the SDA that are not in issue. It is not in dispute that the conversation between the complainant and the accused on 21 February 2008 was a "private

conversation" as that term in defined in the SDA.[29]

71 Although no direct evidence was called by the accused, it is not in dispute that while the complainant expressly consented to the recording of the conversation, the accused as the other party to the conversation did not consent either expressly or by implication.

72 The Sony M950 tape recorder was a listening device as defined in the SDA.

73 Detective Russell was at the relevant time a law enforcement officer as that term is defined. Detective Russell did not reasonably believe or hold any belief that any persons, in particular the complainant's safety was in issue.[30]

74 The installation, use or maintenance of the listening device was not in accordance with a warrant or an emergency authorisation[31]. No warrant was applied for by Detective Russell or anyone else.

75 What then falls to be resolved is the proper interpretation of the statute and most particularly the terms "install, use or maintain", in particular the term "use", and then consideration of the evidence of the conduct of the informant in obtaining the impugned evidence.

76 However before moving directly to the question of statutory interpretation it is necessary to understand where the onus lies and the standard of proof required in making any finding as to a contravention of an Australian law or impropriety.

Section 138 Evidence Act 2008

77 As noted above, the accused contends that the transcript of the recorded telephone conversation should not be admitted in the exercise of the

[29] Section 3 SDA sets out the definitions. T81 reveals the agreement.
[30] T 82
[31] s6(2)(a)

discretion that arises pursuant to s.138 of the *Evidence Act 2008* . Section 138 is as follows:

> "138. Exclusion of improperly or illegally obtained evidence
>
> (1) Evidence that was obtained–
>
> (a) improperly or in contravention of an Australian law; or
>
> (b) in consequence of an impropriety or of a contravention of an Australian law–
>
> is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.
>
> (2) Without limiting subsection (1), evidence of an admission that was made during or in consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been obtained improperly if the person conducting the questioning–
>
> (a) did, or omitted to do, an act in the course of the questioning even though he or she knew or ought reasonably to have known that the act or omission was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning; or
>
> (b) made a false statement in the course of the questioning even though he or she knew or ought reasonably to have known that the statement was false and that making the false statement was likely to cause the person who was being questioned to make an admission.
>
> (3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account–
>
> (a) the probative value of the evidence; and
>
> (b) the importance of the evidence in the proceeding; and
>
> (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and
>
> (d) the gravity of the impropriety or contravention; and
>
> (e) whether the impropriety or contravention was deliberate or reckless; and
>
> (f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and
>
> (g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and
>
> (h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law."

78 There are two steps involved in the exercise of the discretion pursuant to

s.138: the first step involves a finding that the evidence was obtained improperly or in contravention of an Australian law, or in consequence of an impropriety or contravention of an Australian law. If the trial judge concludes that the evidence was obtained in contravention of an Australian law, or as a consequence of an impropriety or contravention of an Australian law, what then falls to be considered is whether it is shown that the desirability of admitting the evidence outweighs the undesirability of admitting the evidence. If the desirability of admitting the evidence does not outweigh the undesirability of admitting the evidence, then the evidence is not to be admitted.

79 The onus of establishing that the evidence was obtained as a consequence of an impropriety or a breach of Australian law rests on the accused man. If that onus is satisfied, then the onus switches to the prosecution to show that the desirability of admitting the evidence outweighs the undesirability of admitting the evidence. In this way the codification of the rule in *Bunning v Cross*[32] has altered so that the prosecution now has the onus in respect of discretionary matters[33].

80 It is also necessary to keep in mind the standard of proof required to be discharged in this application first by the accused and then potentially by the prosecution. One must turn to s.142 of the *Evidence Act 2008*. That section reads:

> "142. Admissibility of evidence – standard of proof
>
> (1) Except as otherwise provided by this Act, in any proceeding the court is to find that the facts necessary for deciding–
>
> (a) a question whether evidence should be admitted or not admitted, whether in the exercise of a discretion or not; or
>
> (b) any other question arising under this Act–
>
> have been proved if it is satisfied that they have been proved on the balance
>
> of probabilities.

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32 (1978) 141 CLR 54.

33 Parker v Comptroller General of Customs [2009] HCA 7 per French CJ [28]

(2) In determining whether it is so satisfied, the matters that the court must take into account include–

(a) the importance of the evidence in the proceeding; and

(b) the gravity of the matters alleged in relation to the question."

81 The well known principles set out in *Briginshaw v Briginshaw*[34] are applicable when an accused calls in aid s138 to have evidence excluded. Section 142 (2)(b) would lead to that conclusion and that is how the section has operated in jurisdictions that have operated under the Uniform Evidence Act.[35] In other words, clear or cogent or strict proof may be necessary where a serious matter is contended such as police officers acting improperly or in contravention of an Australian law. A finding of impropriety or contravention of Australian law should not by lightly made[36].

82 Counsel for the The Human Rights and Equal Opportunities Commission ("VEOHRC") raised arguments as to how s138 of the *Evidence Act 2008* ought be interpreted as a consequence of the broad application and consequences of s 32 of the *Charter of Human Rights and Responsibilities Act 2006* ('the Charter"). I will defer consideration of the arguments until a later point.

83 ***Interpretation of section 6 of the SDA***

84 The interpretation of section 6(1) calls for the application of well understood principles of statutory interpretation. Counsel for the accused argued that this was sufficient to expose that the impugned evidence was obtained in breach of s 6(1). However, statutory interpretation in this state must now take account of the *Charter of Human Rights and Responsibilities Act 2006* ('the Charter"). The accused was joined by the counsel for VEOHRC, in contending that the proper interpretation of s6(1), when consideration is given to the principles set out in the Charter, makes it abundantly clear that the informant

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34 (1938) 60 CLR 336.

35 State of NSW v Hathaway [2010] NSWCA 184, [259], [273]; Palmer v Dorman [2005] NSWCA 361 [46]-[47]; R(Cth) v Petroulis (No 8) [2007] NSWSC 82 [15]-[18]

36 *Neat Holdings Pty Limited v Karajan Holdings Pty Limited [1992] HCA 66 [2],* [1992] (per Mason CJ, Brennan, Deane and Gaudron JJ).

breached s6(1).

Ordinary Principles of Statutory Interpretation

85 One of the fundamentals of statutory interpretation is to consider the whole of the statute, and the mischief that the statute and the particular section intend to remedy. A broad approach to the statutory context is required. A word in a statute may appear to be straightforward but a literal interpretation of a word may well not thereby convey the legislative intent[37].

86 With this in mind it seems to me necessary to consider the broad purpose of the SDA in respect to conversations and recordings of the kind in issue in this case. The SDA is legislation that, in a general sense, recognises the right to have private conversations without others who are not parties to the conversation using devices to eavesdrop and record what is being said. While there is no unalienable right to privacy nonetheless the general object and purpose of the SDA is to regulate the installation and use of devices that enable eavesdropping and recording. It enables law enforcement officers to use surveillance devices to fight crime but does so in a way that allows for independent authorisation and oversight of the use of such devices. It creates offences for anyone, including law enforcement officers, who utilise surveillance devices to listen to and record conversations unless the proper procedures are followed. This is a very broad overview of the legislation very briefly expressed.

87 In this case the relevant surveillance device was the Sony tape recorder. In the course of these reasons I will refer to this piece of equipment as the listening device or the device rather than the surveillance device.

88 As noted above the key phrase in s6(1) is “install, use or maintain”. Each of these words is defined in the SDA. The definitions are not exclusive or

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[37] CIC Insurance v Bankstown Football Club Limited (1985) CLR 384 at [45] per Brennan CJ, Toohey Dawson and GummowJJ

exhaustive as to what may constitute the forbidden conduct. The definitions are as follows:

> *"install includes attach;….*
>
> *maintain, in relation to a surveillance device, includes-*
>
> > *(a) adjust, relocate, repair or service the device; and*
> >
> > *(b) replace a faulty device. …*
>
> *use of a surveillance device includes use of the device to record a conversation or other activity"*

89 Although it is usually unhelpful to get bogged down in labels, it seems to me that the often used terms "participant surveillance" and "third party surveillance" are useful in determining this case. Participant surveillance is when a participant to a conversation records it without the knowledge or consent of the other participant. Third party surveillance is where the person recording the conversation is not a party to it but a third party, usually a law enforcement officer. Third party surveillance is often without the knowledge or consent of either party, thought this is not always the case.

90 In Victoria pursuant to s6 (1) SDA participant surveillance does not require a warrant. Third party surveillance does require a warrant. When one of the parties works with a third party, then greater uncertainty arises as to whether a warrant is required. Different approaches have been taken by the courts and legislators in different jurisdictions throughout the world.

91 Counsel for the accused says that it was the Informant, as opposed to the complainant, who installed, used or maintained the listening device and that he did so is obvious enough from a common sense analysis of each step in the process. The accused argued that it was artificial to consider that the complainant by pushing the record button on the tape recorder thereby alone

used the listening device. It was submitted that by adopting such a limited and restricted view of the concept of “install, use and maintain’, in particular “use”, the purposes and objects of the whole SDA would be defeated. The critical balance between the right to privacy and the gathering of evidence in a criminal investigation would be lost by such an artificial interpretation as to what prompted the need for a warrant and in what circumstances a warrant was not required.

92 The accused argued that on any analysis it was the informant who did all the relevant acts so that the conversation was recorded and its contents made available to be used against the accused. It was submitted that this plainly established that the evidence was obtained by or as a consequence of a breach of an Australian law. Further argument was put as to how then the discretion pursuant to s138 should be exercised in the accused favour. I will defer consideration of this matter until I have set out the other contentions on s6 SDA including the arguments from all parties as to the operation of the Charter.

93 In this case the accused and the VEOHRC contended that by taking the proper approach which promotes the protection of privacy I should see that this case was in fact surveillance of a kind that required a warrant in order to be lawful. It was not lawful participant surveillance but in truth a third party surveillance by the police albeit with the co-operation of the complainant as a party to the conversation.

94 The prosecution says this was participant surveillance and consequently no warrant was required. The absence of a warrant did not and does not render the recording unlawful. It was the complainant as a participant or party to the conversation who recorded the conversation. The complainant used the device. The prosecutor contended that what the argument for the accused did was blend the concepts of participant and third party surveillance. The prosecutor argued that SDA itself carefully balanced the surveillance that had

to be authorised by the courts and regulated and what surveillance could occur without the need for a warrant. In essence the prosecution argued that every participant in a conversation must be wary that it may be recorded by means other than mere memory. It did not matter that the recording device was provided by the informant, what was determinative was who used the device and this was the person who pushed the button on the device so that the device thereby recorded the conversation. In this case that person was the complainant and as she was a participant in the conversation no warrant was required. The recording was not in breach of the SDA.

95 Of course this is not the first time that s 6(1) SDA or its legislative predecessors, *s4 Listening Devices Act 1969, ("LDA")* has been the subject of dispute. However one important limitation is each was decided before the Charter became part of our laws. It is necessary now to consider those decisions.

Previous Decisions

96 The first decision referred to by the prosecutor was a ruling by Cummins J in the trial of *R v Story*[38]. In that case a recording device was hidden in a house with the resident's consent and operated by her when incriminating conversations were taking place. There was no warrant. The application in that case was to stay the proceedings as an abuse of proceedings. The issue of the recording of conversations without a warrant was one of the basis for the stay application. The learned trial judge ruled that the resident had used the device not the police officer who provided the equipment and secured the product for the purposes of police intelligence. There was no argument put that on the principles of agency the police used the device. There was a finding that other parts of the Act forbidding publication of the conversation were breached but in the exercise of discretion the evidence obtained would not be excluded and thus the defence argument that an abuse of process was

[38] Unreported Supreme Court of Victoria Cummins J 9 December 1994.

occurring was not thereby assisted. This aspect of the matter was the prominent one in the ruling. As to the issue of 'use", the ruling was is based on the simple proposition that the person pushing the button is the one who used the device.

97 *R v Bandulla*[39] is the next case. Here the Court of Appeal dealt with a wide range of incomprehensible and comprehensible arguments put by an unrepresented applicant who was for the most part unrepresented at trial. As far as the challenge to recorded evidence went it seems that a witness, Camelleri, was supplied the equipment to record conversations with the accused. There was no warrant until right before the end of the investigation. It was said that a warrant was not thought to be necessary because the recording was not prohibited by s.4 of the LDA. In dealing with this aspect of the case Justice Brooking, with whom Winneke P and O'Bryan AJA agreed, said

> "Section 4(1)(a) was inapplicable since the conversations were recorded by Camilleri, who was a party to them…"

98 Brooking J went on to say in effect that he, like the trial judge, would not have excluded the evidence in the exercise of discretion had any illegality been detected. He added that he could see no reason why the witnesses would not have been able to give oral evidence of the conversations from memory in any event[40]

99 The next case is *R v Juric.*[41] That case involved recordings of the accused while he was in prison on remand for murder. One set of recordings were when the accused was walking around the prison grounds with another prisoner, Foley, who had secreted on him a listening device. Of note was that a warrant was sought and secured for the recording of the conversation

[39] [2001] VSCA 202.
[40] [14]-[15]
[41] (2004) 4 VR 411.

notwithstanding that Foley was to activate the device and no one else could at the time of the recording have heard the conversation. The inclusion of this evidence was said to give rise to a miscarriage because, contrary to the trial judge's ruling, Foley was indeed a state agent and had elicited inculpatory information from the accused. The sole issue was the *Swaffield and Pavic* point. This along with other grounds raised on the appeal meant there had to be a re-trial. The Court of Appeal in providing guidance to the next trial judge briefly dealt with a second recording of a conversation with the accused. This recording was of a telephone conversation between a co-accused, Evans, and the accused, while the accused was in prison. There was no warrant obtained authorising the recording. Evans was working with the police when he recorded the conversation. He ultimately gave evidence for the prosecution on the trial of Juric.

100 A ground asserting that the admission into evidence of the recorded Evans conversation lead to a miscarriage was argued but, as set out above, the Court of Appeal decided the matter on other grounds. The Court indicated that the next trial judge may well find the evidence admissible, but the Court found it "unnecessary for us to reach any final conclusion in relation to this ground"[42]. The argument in relation to this ground appears to have concentrated on an alleged illegality arising from a breach of s 4 LDA. The breach asserted being that as the police were not a party to the conversation but would "overhear" it and use it in the legal proceedings then a warrant was required[43]. The Court referred to the exceptions in s 4(1) (b) and s 4(2) which concern the publication of the substance of the recordings. In this regard the Court made reference to the Attorney General's second reading speech after saying "In so far as there is any ambiguity in the section" The part of the second reading speech referred to touched on the exceptions set out in s 4(1) (b) and s 4(2). The court made further reference to that part of *R v Bandulla*

[42] ibid [71]
[43] ibid [70]

that is discussed above.[44]

101 The final case is *R v Van Doorn*.[45] In that case in recorded telephone conversations the accused made incriminating statements to the complainants commenting on past illegal sexual activity and arranging a time and place for another episode. At his trial an application was made to have the evidence excluded, both the tapes and the substance of the conversations, on the basis that the complainants were state agents and that the discretion discussed in *Swaffield and Pavic* should operate in favour of exclusion. This same argument was put on appeal. Winneke P, with the agreement of Eames and Vincent JJA, rejected the applicant's contention finding there was no basis for rejecting the evidence. Though the point argued was whether the complainant's were state agents, Winneke P said as to the lawfulness of the technique employed by the police:

> *The calls were part of a legitimate investigative technique employed by the police in seeking to determine whether serious indictable offences had been committed. The use of such "pretext conversations" between alleged victims and suspected offenders are, and have long been, a common investigative tool used by police in investigating alleged sexual offences committed against young people. These conversations were recorded before the applicant was taken into custody or questioned by police. There is, and was, no suggestion that they were recorded unlawfully;(here the footnote reference was to R v Juric) nor were they recorded in circumstances in which it could be said that the applicant's "rights to silence" were circumvented. The trial judge was entitled to conclude that this was simply one more occasion where K.B. and J.S. were engaging in a conversation with the applicant to "set up" an arrangement where they could obtain from him money and/or cigarettes in exchange for sexual favours. It was the girls' claim that there had been many similar previous exchanges. This was not a case where the applicant was in police custody and/or had made it clear to authorities that he was exercising or proposing to exercise his right to silence. There was no infringement here of the rights conferred by s.454A Crimes Act 1958 (Vic.). The events were simply a necessary part of the police investigations to establish whether the stories being told by the girls could be confirmed. The making of such calls, and the recording of them, in those circumstances was neither unfair, nor unlawful*[46].

[44] ibid [67]-[72]
[45] [2004] VSCA 65
[46] ibid [20]

102 It is plain that a key issue argued in these cases was either that in effect the complainant or witness was a state agent and elicited inculpatory information in sense discussed in the *Swaffield and Pavic* or that the publication of the substance of the conversation gave rise to an illegality. It seems in no case was the issue fully argued as to whether the police by engaging the co-operation of the complainant to push the button to record the private conversation meant that in all the circumstances the police were themselves "using" the listening device to record the conversation.

103 Whatever the position, the decisions cannot be put to one side, far from it. Each decision gives guidance as to the interpretative question before me. It is not a matter that the decisions can be confidently distinguished. However the usually straightforward other side of the coin, that the decisions, if not distinguishable, are therefore binding on a County Court trial judge has to be assess in light of the impact of the Charter on statutory interpretation in this state. That impact extends to the status of the authorities that have dealt with a particular statutory provision prior to the Charter.

104 What needs now to be examined is the effect of the Charter on the issues before me.

The impact of the Charter on statutory interpretation

105 Counsel for the accused adopted the arguments of Counsel for the VEOHRC in respect of the Charter.

106 The VEOHRC submitted that on any analysis of the facts various rights set out in the Charter were in issue. What this lead to was a submission that was not seriously in dispute, that the Charter was engaged and thus had to be considered in the determination of this application. The rights that were imperilled were those set out in s 13 (a) of the Charter, the right not to have privacy unlawfully or arbitrarily interfered with, and the right set out in s 24 (1), the right to silence as encompassed as part of the right to a fair trial. Those

sections relevantly read as follows:

> ***13 Privacy and reputation***
>
> *A person has the right—*
>
> *(a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and…*
>
> ***24 Fair hearing***
>
> *(1) A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.*

107 It was argued that once rights articulated in the Charter are imperilled and thus the Charter is engaged, then the process of interpreting a statute is that which is required by s32 of the Charter

108 Section 32 (1) of the Charter reads

> 32. ***Interpretation***
>
> *(1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.*

109 Further it was argued that the approach to interpretation is that which was outline by the Court of Appeal in *Moncilovic.*[47] In brief terms that approach is as follows:

> *(a) The meaning of the statutory provision in question must be ascertained by applying s 32 of the Charter at the outset of the interpretive exercise in conjunction with other relevant principles of statutory interpretation.*
>
> *(b) Compliance with the s 32 (1) obligations means exploring all 'possible" interpretations of the provision in question and adopting the interpretation that least infringes Charter rights. What is possible is*

[47] [2010] VSCA 50

determined by the existing framework of interpretive rules, including of course the presumption against interference with rights.

(c) The presumption against interference with fundamental rights must now be understood to extend to the protection and promotion of the human rights set out in the Charter.

(d) whether it is "possible" to give a statutory provision a meaning compatible with human rights does not depend on the presence of ambiguity in the language of the provision being interpreted.

(e) Justification under s 7(2) of the Charter becomes relevant only if the provision, so interpreted, breaches a right protected by the Charter[48]*.*

110 Therefore it is necessary to consider the possible interpretations of the s 6(1) and adopt the interpretation which least infringes the Charter rights involved in this case. Indeed I should consider that my interpretation should promote and protect the human rights involved in this case.

111 The possible interpretations are that notwithstanding that the informant suggested the recording and did so motivated by a desire to get admissions and corroboration so as to assist in the prosecution of the accused, and the informant provided everything necessary and sufficient for the recording and then harvested the product to use in the trial against the accused, it nonetheless was the complainant who used the device because after due instructions it was she who pushed the record button.

112 The other possible interpretation is that all the conduct of the informant when examined reveals this was third party surveillance which involved the co-operation of the complainant in the process of obtaining the recording but she was a conduit and no more.

113 It was argued that the right not to have privacy illegally or arbitrarily interfered

[48] Ibid at [35], [103]-[110]

with is promoted by the latter interpretation which recognised the reality of the police involvement and the role of the complainant as part of the means to record the conversation. The fact that the informant remained outside the door because he erroneously believed the statute prevented him from hearing the conversation reveals the artificiality of the interpretation of the SDA adopted by the Victoria Police and adhered to in this case by the informant. In other words the police strictly adhere to a process, albeit a simple one, of sitting away from the conversation because of an institutionalised belief that the SDA requires them to do that and if they do not sit outside the evidence obtained will potentially or likely be seen as illegally obtained.

114 In truth the statute does not prevent any police officer from being present when the conversation is happening and listening to what they can hear. What is forbidden is that the police cannot use the listening device itself to overhear the conversation. The point to be appreciated is that by engaging in this strict process of sitting outside the room, the true artificiality of what is occurring is all the more exposed.

115 The key point to keep in mind is the fundamental rights at stake. They should not be compromised or put in peril by those acting for the state adhering to a procedure which makes overly fine distinctions as to what circumstances require a warrant and independent supervision and those that do not. The importance of protecting the rights at stake is clearly one of the key purposes of the SDA itself. In that purpose our legislature is at one with international jurisprudence on the importance of protecting human rights while allowing proper processes – such as warrants - for gathering evidence to prosecute crime. The Charter is a further explicit legislative statement of the importance of human rights. In particular the scope of s 32 of the Charter is a practical methodology for the promotion and protection of human rights.

116 It was argued by counsel for the VEOHRC that decisions of superior courts interpreting s 6 (1) or its predecessors prior to the Charter did not have the

same status as they otherwise would have had.

117 This last point is important. The prosecution argued that the word "use" in s 6(1) is a simple concept. It means the person who used the device to record the conversation by pushing the record button and that was the complainant. The word "use" could not be expanded to include the informant in this case. This is how the authorities have interpreted this provision and this term in previous cases and I would be bound to follow those decisions and in any event I should follow those decisions.

118 As to the role of the Charter, the prosecutor made the point that s 6(1) created an offence and accordingly I had to be cautious lest I expanded the scope of a criminal offence by resorting to the Charter and human rights[49]. In any event, the proper approach was only to diverge from binding authority if the decisions could be seen as plainly wrong. The decisions in question were not plainly wrong and the Charter did not make them so. It was not for trial judge to interpret the statute contrary to the authorities.

119 The prosecutor argued that counsel for the accused and the VEOHRC had introduced a concept of the complainant being an agent for the informant in the use of the listening device and this confused the issues of state agency which went to the issue of the right to silence and the unfairness discretion as discussed in *Swaffield and Pavic.* His argument was that there was no place for criminal complicity or innocent agency between the informant and the complainant. Rather the simple way through this was that the complainant was the person that used the listening device and as such the informant could not and did not breach s 6(1)

120 However before going immediately to consider what, if any, alternative interpretations of the term "use" are possible, it is necessary to consider the previous decisions referred to above in light of the Charter.

[49] Coco v The Queen (1994) 179 CLR 427

121 Counsel for the VEOHRC argued that a consequence of the Charter was that in certain circumstances I am able to operate as if not strictly bound by the previous decisions. Indeed to come to any other view would cause fundamental error in my approach. The proper approach was to allow s 32 of the Charter to have its intended effect. That meant I may be driven to interpret a statutory provision in a way different to earlier decisions in order that the intent of s32 and the Charter generally was not defeated. That included that I may interpret the relevant statutory provision in this case in a way differently to earlier and hitherto binding decisions. It should be considered, so the argument went, akin to interpreting a statute after amending legislation and thus I would not necessarily be bound by previous authority where the interpretation was prior to the statute being amended. Counsel argued that this far reaching proposition was not just logical consequence of the Charter becoming part of the laws of this State but it was supported by the Court of Appeal in *Momcilovic*[50] and by the approach of Nettle JA in *RJE v Secretary to the Department of Justice .*[51]

122 Counsel for the VEOHRC argued that the decisions made prior to the Charter would obviously be of very significant importance and I would only move from the interpretation of the superior courts in those decisions if I found it necessary in order to give proper effect to the Charter. The argument went that the particular facts of a case may well mean that to follow strictly previous decisions would defeat a Charter compatible interpretation of the statute and this was indeed one of those cases.

123 The prosecution argued, that only if the previous decisions were plainly wrong could I contemplate moving away from them. In this case, the decisions referred to were not plainly wrong. They were in fact in very large part informed by the age old principles of privacy, fairness and human rights now articulated explicitly in the Charter and I should follow them.

[50] [2010] VSCA 50
[51] [2008] VSCA 265 [105]-[106]

124 In my view there is merit in the submissions put by counsel for the VEOHRC The whole of s32 of the Charter leads to that conclusion. The effect of the Charter is considerable. The process established by s32(1) as interpreted by Momcilovic establishes at least a dichotomy. It means that if there is a possible interpretation that is compatible with human rights and one that is not or is less compatible, then as far as is possible consistent with the purpose of the statute, the human rights compatible interpretation must be adopted. This means that if the possible interpretation that is not compatible or not as compatible with human rights, is the interpretation that the Courts in the past have adopted then it cannot be that the previous decisions have the same determinative and binding authority as once may have been the case. Likewise s32(2) makes it plain that the jurisprudence to be considered is broad and necessarily broader than the strict hierarchy of precedent.

125 Of course as a trial judge I must move with the utmost caution, but I consider there are aspects of this case that show if I take the approach urged by counsel for the VEOHRC , I would not turning the principle of precedent on its head and nor would I thereby be requiring of law enforcement officers anything other than what is broadly routine for them when they are seeking to record conversations and use them as part of the evidence against an accused, that is seek and obtain a warrant from a court.

126 The question becomes is the interpretation of s6(1) urged by the prosecution based on the previous decisions the only possible interpretation or the one that most advances the human rights here engaged. Is any other interpretation possible which is more compliant with the Charter and is consistent with the overall purpose of the SDA without ignoring the the earlier decisions and what was argued and determined by the courts in those cases.

127 That requires me to return to the facts of this case. In my view a helpful way to consider the facts so as to elicit the possible interpretations of the words of s6(1) is by reference to the following topics and questions:

- What did the informant plan and what did he do to get ready for the recording before speaking to the complainant and obtaining her consent to participate in the recording of the conversation?

- What did the informant say to the complainant as to what he wanted her to do and why he wanted her to do it?

- What things were done by the complainant in order for the recording to occur?

- What did the informant do after the conversation was successfully recorded with the product of the recording?

128 These questions can be answered by reference to the evidence set out above. What can be distilled from that evidence is that this was conduct engaged in by the police that resembled common place third party surveillance by the police. It has the appearance of third party surveillance in all respects save for the fact that at the point in time when the words of the impugned conversation were spoken by the accused and the complainant the informant deliberately chose to be outside rather than inside the room where the complainant was.

129 The informant did everything necessary in advance to enable the recording to occur. He sought the complainant's consent and did so in a context where she was reassured that everything would be done by the informant to ensure that the recording could occur and that she would not have to do anything off her own bat, as it were, to record the conversation save for pushing a button. The complainant was given a script to read before the conversation commenced indentifying that the conversation was to be recorded and the reasons for recording the conversation. As discussed already the informant adopted the standard police procedure of sitting outside the room in the mistaken belief that the legislation required that. Once the conversation was over everything thereafter was as it would be with third party surveillance- the informant took

the tape, checked that voices had been recorded, received a summary of it from the complainant, had the tape transcribed and translated. In the meantime the accused was arrested and the subsequent record of interview was conducted with the informant armed with details from the summary of the conversation. The fact that the conversation was recorded was immediately used to expose that the accused lied in the interview and that lie is now relied on as part of the evidence inculpating the accused is also relevant in determining this issue. The product of the use of the recording device has always been with the police as a powerful part of the investigation and then as an important part of the prosecution of the accused.

130 The argument of the prosecution is that the term use is restricted to who pushed the button on the device. This interpretation seems to limit the term use to the concept of "operate" the listening device. I consider that this is not the only possible interpretation and it is not the proper one in the sense that it is not consistent with the purposes of the SDA itself or that it promotes or protects the relevant human rights.

131 Lest it be thought that I consider that the onus at this point is on the prosecution I should expressly say that in my view the alternative interpretation put in favour of the accused is one that is consistent with the objects of the SDA and is one that does promote and protect the relevant human rights.

132 It seems to me that another possible interpretation is to see the term use in the broader context of what was done by whom to secure a permanent and complete record of the impugned conversation. The informant wanted the conversation recorded to advance the investigation and any potential prosecution and to achieve that he need to use a listening device in order that the conversation was recorded and thereby preserved so that mere memory was not all he had to rely on. In advance he arranged for that device to be made available by adhering with a strict authorisation procedure within the

police force hierarchy. He ensured the complainant could operate the device. She was the conduit for the recording of the conversation. Having successfully used the device to obtain a record of the conversation the informant did everything necessary to ensure that the investigation and prosecution was advanced as consequence of him using a listening device to obtain the permanent record of the conversation.

133 It seems to me that to discover the proper interpretation of the term use, it is necessary to keep in mind the immediate context of the word in s 6 (1), it is the "use of a listening device " to "record" a private conversation. In other words it is to utilise the machine to record what was being said. It is not merely to operate the machine for that moment by pushing a button but to utilise a machine which has the capacity to record a conversation for that purpose. Such an interpretation fits more comfortably with the definition of the word use in s3 of the SDA:

> *use of a surveillance device includes use of the device to record a conversation or other activity"*

134 An interpretation such as that prevailing in the police force at the time that a warrant was not required to record conversations like that between the complainant and the accused on 21 February 2008 because although everything required to be done to record the conversation was done by the informant but, in the end, it was the complainant who was left to pushed the record button on the machine is such a very fine point that, in my view, in the era of the Charter, it is no longer sustainable or valid. The fact that the complainant push the record button but no more does not mean that she and she alone used the device.

135 There can be no issue that by his conduct of the informant was "knowingly" using the listening device to record the private conversation. This does not suggest that the informant knew he was breaching the SDA, far from it, he

believed he was complying with the SDA in every particular. The element of knowingly goes to whether his actions were deliberate as opposed to accidental. It is not about ignorance or knowledge of the law

136 Also the other elements of the offence as set out above as to lack of consent from the accused and that the conversation was a private conversation are conceded

137 Accordingly by the combination of ordinary statutory interpretation and in particular interpretation through the prism of the Charter I find on the balance of probabilities that informant was in breach of s6(1) of the SDA.

138 I come to this finding having kept in mind it is for the accused to discharge the onus. That said there was no dispute in essence about the facts it was all about the proper interpretation. Notwithstanding that I have kept well in mind that it is a serious step to find that a police officer breached an Australian law and of course I have not made that finding lightly, on the contrary.

139 Before moving from the SDA to consider other alleged breaches of Australian law, I can deal briefly with he contention by counsel for the accused that the informant breached s 11 of the SDA and that there was a breach of s 30N of the SDA as well.

Section 11 Surveillance Devices Act

140 The allegation made was that the complainant and or the informant breached s 11 of the SDA by knowingly communicating or publishing a record or report of a private conversation without the consent of both parties. The relevant parts of s11 read:

> **11 Prohibition on communication or publication of private conversations or activities**
>
> (1) Subject to subsection (2), a person must not knowingly communicate or publish a record or report of a private conversation or private activity that has been made as a direct or indirect result of the

use of a listening device, an optical surveillance device or a tracking device.

Penalty: In the case of a natural person, level 7 imprisonment (2 years maximum) or a level 7 fine (240 penalty units maximum) or both;

In the case of a body corporate, 1200 penalty units.

(2) Subsection (1) does not apply—

…

(b) to a communication or publication that is no more than is reasonably necessary—

(i) in the public interest; or

(ii) for the protection of the lawful interests of the person making it; or

(c) to a communication or publication in the course of legal proceedings or disciplinary proceedings; or

141 This aspect of the argument can be dealt with briefly. Whatever communication or publication occurred was justified by reason of those matters set out in s 11(2)(b) and (c). I am not satisfied at all let alone on the balance of probabilities to the degree necessary that there was a breach of s 11 of the SDA.

Section 30N Surveillance Devices Act

142 The argument based on s30N of the SDA can also be dealt with briefly. In Part 5 of the SDA the legislature established a requirement for a regime to record instance were surveillance devices were used by law enforcement officers. This record keeping regime allowed for monitoring within the law enforcement agency and importantly external monitoring, inspections and supervision up to reports being tabled in Parliament by the relevant Minister. These are expressions of the striking of a balance between privacy and crime prevention and detection that are inherent in the whole Act.

143 Counsel for the accused argued that no records were kept of the use of the listening device in this case or indeed it seems in other cases where this pretext call procedure has been used. That argument seems to misconstrue s

30N. What strictly is required by the section is not records of the use of a device by a law enforcement officer but details of the use by the law enforcement officer of the information obtained by the use of the device. Here the ultimate use of the information obtained from the use of the device is or will be in the prosecution of the accused in, to use the words of s24 of the Charter itself, a competent, independent and impartial court as part of a fair and public hearing. Further it could be said that the process of securing this particular listening device through the approvals and authorisations obtained by the informant established a record of the use of the listening device.

144 In any event giving the argument raised by counsel for the accused the widest possible scope, while there may be an absence of formal or centralised record keeping when listening devices are used for pretext calls, it is hard to see that the impugned evidence in this case has been obtained as a consequence of that breach or any impropriety. In other words, whatever failings there maybe within the systems of Victoria Police, they do not enliven the provisions of s138 of the Evidence Act in this particular case. Section 30N provides no basis for excluding the transcript of the taped recorded conversation of 21 February 2008.

145 That said it is important that I keep in mind the policy or purpose behind the establishment of various requirements and responsibilities which arise if a device is used by a law enforcement officer or agency. It is part of the background for consideration of another limb of the accused's attack on the admissibility of the evidence – the alleged breach of s38 of the Charter and it is to that I know turn.

Section 38 of the Charter

146 Counsel for the accused and for the VEOHRC submitted that the conduct of the informant in respect of this matter and generally Victoria Police in relation to pretext telephone was such that s38(1) of the Charter was breached.

Section 38(1) of the Charter reads:

> ***38 Conduct of public authorities***
>
> *(1) Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.*

147 Victoria Police is a public authority as defined in the Charter.

148 Although there is no penalty prescribed for a breach of s38 it was argued that conduct that breached s38(1) of the Charter would be sufficient to trigger the consideration of s138 of the *Evidence Act 2008.* Counsel for the Attorney-General ultimately supported this proposition and of course it is logical that a breach of the Charter is a breach of an Australian law.

149 The allegation made is that the conduct of the informant meant that the Victoria Police either acted in a way that was incompatible with the human rights established by s 13 and or s 24 of the Charter or failed to give proper consideration to those human rights of the accused. The relevant parts of s 13 and s 24 read as follows:

> ***13 Privacy and reputation***
>
> *A person has the right—*
>
> *(a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and…*

> ***24 Fair hearing***
>
> *(1) A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing*.

150 The human right not to have privacy unlawfully or arbitrarily interfered with is put in issue by the covert recording of the private conversation involving the

accused. A great deal of thoughtful argument, based on prodigious research, was mounted by counsel for the VEOHRC and the prosecution on the jurisprudence of the right not to have privacy unlawfully or in particular, arbitrarily interfered with. However, it seemed to me in the end a simple proposition was established: that is a finding that s 6(1)of the SDA was breached meant that the informant and his employer, Victoria Police, had "acted in a way that is incompatible with the human right" of privacy as set out in s13 of the Charter and, in making the decisions that were made to record the conversation without a warrant there was a failure "to give proper consideration to a relevant human right". In other words there was a breach of s 38 of the Charter. I do not make this finding lightly. There was consideration by the informant based on the broad and collective experience of Victoria Police as to how the recording should occur so as to ensure that no illegality arose which could potentially imperil the admissibility of the evidence secured by the recording of the conversation. The point is there was not proper consideration of the right the accused had not to have his privacy unlawfully or arbitrarily interfered with. As the great weight of international jurisprudence makes plain the proper consideration of the right not to have privacy unlawfully or arbitrarily interfered with is by having the process independently authorised by the granting of a warrant by a court. This was not done and the unlawfulness in the sense of a breach of s 6(1) of the SDA occurred.

151 In addition the thinking of the informant and collectively the thinking or policy of Victoria Police was that no warrant was required. In all the circumstances as explained in these reasons already, this was not the correct interpretation of the SDA, it was artificial to operate on the basis that as the complainant pushed the record button on the device she "used" the device. It reveals that there was a failure to give "proper consideration to the relevant right of privacy. Proper consideration would have been that a warrant was required before the accused's privacy could be interfered with in the way proposed.

152 It should be clear that I have not come to this conclusion on the basis that the breach of s 6(1) of the SDA meant necessarily there was a breach of s 38 of the Charter. However the finding is one that in all the circumstances does arise because the warrantless recording of the conversation was in breach of s 6(1) of the SDA.

153 The breach of s 38 of the Charter by reason of unlawfulness or failure to give proper consideration to the right of the accused as articulated in s 24 of the Charter is more problematic. It is not in issue that the human right to have a fair hearing in a criminal trial incorporates the right to silence, or more specifically the right of an accused not to have his right to silence imperilled by unlawful conduct on the part of the investigators or their agents or by impropriety in the investigation. This matter involves careful analysis of whether the complainant was in fact an agent of the state during the course of the challenged conversation. That is a larger topic that opens up the discretion involved in s 90 of the *Evidence Act 2008,* and independently of a breach of s38 of the Charter, it may be an impropriety that directly engages the public policy considerations implicit in s138 of the *Evidence Act 2008.* These matter are interlinked but it is preferable to turn to the issue of whether the complainant was an agent of the state and deal with whether there was a the breach of s38, by unlawfulness or insufficient thought to the Accused right to silence as part of that.

State Agency and the Right to Silence

154 What this aspect of the argument came to was that because of the way the complainant was used by the informant to engage the accused in speaking about the earlier conversation at the McDonalds store and in doing so making admissions against interest, I should exercise the discretion contained in s 90 of the *Evidence Act 2008* and exclude the evidence. In addition I should find that what occurred meant that the evidence has been secured at too high a price. The accused's right to silence was overcome in a fashion that was

unlawful or at the least the evidence was a product of impropriety. These matters mean that the discretion in s138 of the Evidence Act 2008 should see the evidence excluded.

155 The implications of a finding in favour of the accused by these routes are broader than what has been discussed thus far. The prosecutor fairly conceded that if I determine these matters in the accused's favour then not only would the transcript of the taped conversation be excluded but the complainant would not be entitled to give evidence from her memory nor could evidence of the fact of the second conversation be given. This latter point would eliminate from the prosecutor's armoury the alleged lie told by the accused in the record of interview.

156 The question to be determined is whether the complainant was a state agent and if so did she engage in eliciting information in the impugned conversation. The place to start in an analysis of this issue is the Hight Court decision in *Swaffield v The Queen and Pavic v The Queen.*[52] In those two cases and in others that have applied the principles, the accused is engaged by a third party who is working at the behest of the police. There are other cases where the accused is engaged by the complainant who is working with the police having initiated the investigation by making the compliant to the police. That is the scenario in this case. In the course of argument I directed the parties to a number of authorities that dealt with the application of the *Swaffield* principles to pretext telephone calls. The most helpful of those decisions is that of NSWCCA in *R v Pavitt.*[53] The joint judgement of McColl JA and Latham J conveniently sets out a number of propositions that flow from an analysis of the leading Australian and Canadian authorities on the topic. These are contained in [70]-[71] which reads as follows:

> *70 In our view, without being exhaustive, the following propositions relevant to the present case can be extracted from the authorities to which we have referred concerning the admissibility of covertly recorded conversations*

[52] 192 CLR 159, [1998] HCA 1
[53] 169 A Crim R. 452; [2007] NSWCCA 88

(a) The underlying consideration in the admissibility of covertly recorded conversations is to look at the accused's freedom to choose to speak to the police and the extent to which that freedom has been impugned: Swaffield (at [91]) per Toohey, Gaudron and Gummow JJ; (at [155]) per Kirby J.

(b) If that freedom is impugned, the court has a discretion to reject the evidence, the exercise of which will turn on all the circumstances which may point to unfairness to the accused if the confession is admitted: Swaffield (at [91]); a conclusion that some or all of the Broyles factors were present did not lead to the admissions being excluded in either Pavic or Carter's cases;

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

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

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

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

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

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

(h) Admissions will have been elicited if the relevant parts of the conversation were the functional equivalent of an interrogation and if the state agent exploited any special characteristics of the relationship

to extract the statement; evidence of the instructions given to the state agent for the conduct of the conversation may also be important: Broyles.

(i) The fact that the conversation was covertly recorded is not, of itself, unfair or improper, at least where the recording was lawful[54]*.*

157 The key questions for determination in this case are those set out in sub paragraph (e) above. Was the complainant acting as agent of the state and secondly did she conduct the conversation in a way that meant it was in effect an interrogation eliciting evidence.

Agent of the State

158 Although much can and has been said about how this question is best tackled, it seems to me the test articulated by Iacobucci J in his judgement in the Canadian case of *R v Broyles*, where he said:

> "30 In determining whether or not the informer is a state agent, it is appropriate to focus on the effect of the relationship between the informer and the authorities on the particular exchange or contact with the accused. A relationship between the informer and the state is relevant for the purposes of s 7 only if it affects the circumstances surrounding the making of the impugned statement. A relationship between the informer and the authorities which develops after the statement is made, or which in no way affects the exchange between the informer and the accused, will not make the informer a state agent for the purposes of the exchange in question. Only if the relationship between the informer and the state is such that the exchange between the informer and the accused is materially different from what it would have been had there been no such relationship should the informer be considered a state agent for the purposes of the exchange**. I would accordingly adopt the following simple test: would the exchange between the accused and the informer have taken place, in the form and manner in which it did take place, but for the intervention of the state or its agents?**[55]

159 While there was very helpful submissions by both counsel for the accused and the prosecutor on this issue I do not intend to recite what each party

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54 Pavitt 169 A. Crim. R. 452 at 487. The citations of the cases referred in addition to Swaffield are R v Carter (2000) 1 VR 175; R v Broyles [1991] 3SCR 595; R v Herbert [1990] 2 SCR 151

55 Broyles [30] cited in Pavitt at [47] but with different emphasis. The bold emphasis here is mine to bring focus to "the simple test".

contended. The resolution of this question is in my view straightforward and driven by the unusual facts of this case.

160 Its starts by keeping in mind the nature of the alleged crime. It is alleged by the complainant that in the conversation at the McDonald store the accused left the complainant to consider the proposition that she agree to sex with him every fortnight and if she did not so agree he would distribute the explicit photographs of her that he had retained. The proposition inherently called for a response. To use the vernacular the accused left the ball in the complainant's court. Accordingly it was expected by the accused that she would contact him again with her answer. In my view taking the Crown case at its highest, the can be no question that the accused was expecting the complainant to telephone him to discuss the topic further. It was the next step in a process he had set in the McDonalds store conversation. In my view the recorded telephone call made a few days later from the police station was the sort of call if not precisely the call that the accused was expecting. It was what he demanded.

161 The only aspect of the fact of the call, its form and the manner of the conversation that was not as the accused had requested or expected was that it was recorded. Though it is of note that the accused expressed his suspicions that the call was being taped but he continued on nonetheless. When I say that the call is of the kind the accused expected I mean that he expected the complainant to call and that the topic would be her response to what was raised at the earlier conversation and that the complainant would give him an answer to his demand. I do not mean he expected the complainant to refuse.

162 What follows is that there is nothing about the form or the manner in which the call took place that would have been materially different if the police were not involved. In my view the question posed by Iacobucci J in *Broyles* " **would the exchange between the accused and the informer have taken place, in the**

form and manner in which it did take place, but for the intervention of the state or its agents?" must be answered in this case "yes it would have and unquestionably so."

163 Accordingly I have come to the view that the complainant was not an agent of the state when she engaged in the recorded exchange with the accused.

Elicitation

164 The issue of whether the complainant elicited inculpatory information or admissions from the accused in breach of his right to silence, is also best expressed by Iacobucci J

> *"37 In my view, it is difficult to give a short and precise meaning of elicitation but rather one should look to a series of factors to decide the issue. These factors test the relationship between the state agent and the accused so as to answer this question: considering all the circumstances of the exchange between the accused and the state agent, is there a causal link between the conduct of the state agent and the making of the statement by the accused? For convenience, I arrange these factors into two groups. This list of factors is not exhaustive, nor will the answer to any one question necessarily be dispositive.*
>
> *38 The first set of factors concerns the nature of the exchange between the accused and the state agent. Did the state agent actively seek out information such that the exchange could be characterized as akin to an interrogation, or did he or she conduct his or her part of the conversation as someone in the role the accused believed the informer to be playing would ordinarily have done? The focus should not be on the form of the conversation, but rather on whether the relevant parts of the conversation were the functional equivalent of an interrogation.*
>
> *39 The second set of factors concerns the nature of the relationship between the state agent and the accused. Did the state agent exploit any special characteristics of the relationship to extract the statement? Was there a relationship of trust between the state agent and the accused? Was the accused obligated or vulnerable to the state agent? Did the state agent manipulate the accused to bring about a mental state in which the accused was more likely to talk?*
>
> *40 In considering whether the statement in question was elicited, evidence of the instructions given to the state agent for the conduct of the conversation may be important."*[56]

[56] Cited in Pavitt at [49]

165 Applying the first set of factors to the facts of this case, the question to resolve is whether the recorded conversation was a functional equivalent of an interrogation. While it is the case that the complainant asked the accused questions - in order for her to precisely understand what he was demanding-, looked at as whole the conversation is not the equivalent of an interrogation. What must be kept in mind is not the form of the conversation involving as it does questions but whether the complainant sought information as would be expected as part of a conversation albeit a most unusual one. It seems to me that the fact there was a conversation and the nature of it lead the accused to repeat or clarify what had been said at the earlier McDonalds store conversation. This is different from a situation where a complainant is asking why an accused committed an alleged crime in the past or a third party asking questions to get the an accused to describe what they did thus revealing culpability. The factual scenario here is different and thus so too the conversation and the questions asked by the complainant of the accused.

166 Notwithstanding that, there are many times in the conversation where the complainant moves it to discuss what the complainant would like the relationship to be – ordinary, platonic friendship – and what she meant when she said in the past that they could remain friends – having meals together, yum cha etc. She speaks of the accused needing help and psychological treatment. She speaks of her happiness with her husband and how she doesn't want anything to cause harm to that. [57] These are some examples and there are others where the complainant does indeed press the accused to tell her what he wants her to do, in effect repeat his earlier made demand. However in my view this is a conversation that was not a functional or subtle equivalent of an interrogation.

167 I have taken into account the informant's purpose in setting up the conversation. I have come to the conclusion I have also mindful of the

[57] See in particular the transcript of the conversation at Depositions p96-7

answers given later by the complainant in cross-examination at the committal[58]. Taking into account those parts of the committal which counsel for the accused gave emphasis to and reading them in context of the whole of the cross-examination at the committal, I remain firmly of the view that this conversation was not an interrogation of a kind that would establish that the complainant was a state agent informant

168 Moving to the second broad set of factors identified in *Broyles* and adopted in *Pavitt,* that of whether the complainant exploited the relationship between her and the accused to extract from him the words he spoke. It is clear to me from a careful reading of the conversation and by taking into account what each party says of the relationship in the statements and the record of interview that there was no exploitation of the accused. There was no other evidence called on the voir dire to establish or elaborate on this contention that the accused was vulnerable and his vulnerability was manipulated.

169 On any reasonable analysis the accused was not obligated to speak as he did or participate in the conversation at all. He was not vulnerable to the complainant, on the contrary he endeavours to exploit the complainants vulnerability. That is at the heart of the demand or threat he is making, he has photographs and she is vulnerable to him exploiting that fact. There is no manipulation by the complainant, rather she is endeavouring to discover whether the accused is serious and why he would act in this way. The accused is not tricked and no lies or falsehoods are told to him in order to prompt him to speak against his interest[59]. The recording of the conversation without the accused knowledge[60] does not amount to trickery or

[58] Depositions pp39-40

[59] Contrast this with what has been held to be a legitimate police investigatory tool in *Tofilau v The Queen; Marks v The Queen; Hill v The Queen; Clarke v the Queen [2007] HCA 39 (30 August 2007)*

[60] Though he was suspicious.

unlawfulness.[61]

170 On no account is this conversation one where the complainant elicits information in a form or manner that compromises the accused's right to silence.

171 There are no other aspects of the circumstances of the accused with respect to the complainant or the police such as a previous refusal to speak to the police that would render the admission of the evidence unfair or mean that a conviction based on this evidence would be gained at too high a price.

172 On the contrary this was responsible and intelligent police work in taking the opportunity to record a conversation that the accused expected would happen. It was a conversation that the accused would have known would involve discussing and potentially confirming the content of the earlier McDonald's conversation. It was a conversation were the accused had every opportunity to point out that the complainant had entirely misconstrued the McDonalds conversation and that he was not making any threats or demands. Likewise it was a conversation that the accused could well have expected would have been reported to the police if not recorded and the recording provided to the police. The accused's suspicions that it was being recorded are testimony of that.

173 This is not a conversation were the complainant was a state agent or elicited information so as to compromise or defeat the accused's right to silence. The circumstances of obtaining the evidence and any admissions by the accused contained in the evidence were not such as create an unfairness to the accused.

The State Agent aspect of the Application for exclusion based on section 90 of

[61] Em v The Queen [2007] HCA 46

the Evidence Act 2008

174 Section 90 of the Evidence Act 2008 reads as follows:

> *90. Discretion to exclude admissions*
>
> *In a criminal proceeding, the court may refuse to admit evidence of an admission, or refuse to admit the evidence to prove a particular fact, if-*
>
> *(a) the evidence is adduced by the prosecution; and*
>
> *(b) having regard to the circumstances in which the admission was made, it would be unfair to an accused to use the evidence.*

175 The consequence of the above findings is that I will not exercise my discretion pursuant to s 90 of the *Evidence Act 2008* to exclude the evidence.

The State Agent aspect of the Application for exclusion based on section 138 of the Evidence Act 2008

176 In the end the application to exclude the substance of the conversation included that by reason of the conduct of the informant in using the complainant as a state agent to elicit information contrary to the accused right to silence, the evidence was obtained by or as a consequence of this impropriety. Thus it was submitted that the discretion pursuant to s138 of the *Evidence Act 2008* should be exercised in favour of the accused.

177 Again, based on the findings set out above, it follows that the accused has not satisfied the onus that the evidence was obtained by or as a consequence of an impropriety. Accordingly there is basis to consider the discretionary balance contained in s 138 of the *Evidence Act 2008*.

The right to silence aspect of the allegation that s38 of the Charter was

breached

178 What also follows from this aspect of my ruling is that I do not consider that the informant or Victoria Police breached s 38 of the Charter by acting in a way or in making the decision to involve the complainant in recording the private conversation or by failing to give proper consideration to the accused's right to silence as contained within the right to a fair trial articulated in s24 of the Charter. Accordingly the first stage in the s138 process is not satisfied and there is no basis to consider the discretionary balance contained in s 138 of the *Evidence Act 2008*.

The exercise of the s 138 discretion following the finding that s6(1) of the SDA was breached

179 The only remaining basis for exclusion of the transcript of the recorded conversation is the exercise of the discretion pursuant to s 138 of the *Evidence Act 2008* consequent on my finding that there was a breach of s 6(1) of the SDA and the connected breach of s38 of the Charter insofar as that relates to the s13 right to privacy. Thereafter there remains consideration of ss 135 and 137 of the *Evidence Act 2008,* though those matters can be dealt with briefly.

180 I have dealt briefly with s 138 of the *Evidence Act 2008* in setting the parameters of what is required of each party at each stage in the process of considering exclusion of unlawfully or improperly obtained evidence. There is one further argument that was mounted as to how s 138 of the *Evidence Act 2008* ought be interpreted given the over arching role of s32 of the Charter and also in particular s 7 of the Charter.

Sections 38 and 7 of the Charter and whether any limits should be applied to

the discretion established by Section 138 of the Evidence Act 2008.

181 This argument requires analysis of ss 7, 38 and 39 of the Charter. They are as follow:

> *7 Human rights-what they are and when they may be limited*
>
> *(1) This Part sets out the human rights that Parliament specifically seeks to protect and promote.*
>
> *(2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including-*
>
> *(a) the nature of the right; and*
>
> *(b) the importance of the purpose of the limitation; and*
>
> *(c) the nature and extent of the limitation; and*
>
> *(d) the relationship between the limitation and its purpose; and*
>
> *(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.*
>
> *(3) Nothing in this Charter gives a person, entity or public authority a right to limit (to a greater extent than is provided for in this Charter) or destroy the human rights of any person.*
>
> …
>
> *38. Conduct of public authorities*
>
> *(1) Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.*
> *...*
>
> *39. Legal proceedings*
>
> *(1) If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.*
>
> *(2) This section does not affect any right that a person has, otherwise than because of this Charter, to seek any relief or remedy in respect of an act or decision of a public authority, including a right-*

…

(b) to seek a declaration of unlawfulness and associated relief including an injunction, a stay of proceedings or exclusion of evidence.

182 Counsel for the VEOHRC submitted that the effect of s32 of the Charter was that s138 of the *Evidence Act 2008* had to be interpreted in a way that was Charter compliant. The argument went that one possible interpretation that promoted and protected human rights was to see the s138 discretion as confined so that in effect it operated like s 7 of the Charter when the breach of an Australian law or an impropriety involved limiting human rights. In other words on finding that there was a contravention of an Australian law or an impropriety and a human right was limited then I would determine the desirability and undesirability question by considering if the breach or the impropriety would be justified in a free and democratic society and by reference to the matters setout in s7 (2) (a) – (e) of the Charter. If the breach or impropriety would not be justified in a free and democratic society then it followed that the desirability of the admission of the evidence would be outweighed by the undesirability.

183 Counsel for the Attorney General and the prosecutor argued against this proposition. As a baseline point the Counsel for the Attorney General submitted that s 138 was compatible with the Charter. The balancing task included a requirement to take into account human rights by reference to s 138(3) (f). Accordingly s138 did promote and protect relevant human rights. Therefore there was no need to consider any other possible interpretation of s138 such as that suggested by Counsel for the VEOHRC.

184 Counsel for the Attorney General argued that the approach of the VEOHRC merged the concepts of a limit on human rights and the operation of s7 of the Charter as establishing the sole guide to relief for any limitation on human rights or breach of law involving a human right. Counsel for the Attorney General argued this approach was flawed on a number of basis.

185 First it ignored the operation of s 39 of the Charter. It was s39 of the Charter

that provided the route for a remedy or relief once a breach or a limitation on a human right was established or alleged. Relevantly for this case is that the remedy for the accused for a limitation on his right to privacy or the breach of s38 of the Charter was set out in s 39(2) (b) of the Charter – to seek exclusion of the evidence. The provisions within the Charter itself envisioned that a breach of the Charter or limitations on a persons human rights could be a basis for seeking the exclusion of evidence. The process that would govern the exclusion of evidence would be in this case the provisions of s138 of the *Evidence Act 2008.* The argument went that when dealing with breaches of the Charter or limitations to human rights s 138 would operate as it does with any contravention of an Australian law or impropriety. It would not be confined in a way that lead to automatic exclusion unless the test in s7 of the Charter could be satisfied.

186 Counsel for the Attorney General submitted that the preponderance of international jurisprudence operated this way in circumstances such as these. To put it simply, perhaps too simply, the international cases establish that a breach of a human right or Charter right did not automatically lead to exclusion of evidence obtained. It was a weighty factor but not determinative.

187 There are aspects of this part of the proceedings that are complex. However the approach put forward in the submissions of Counsel for the Attorney General have much merit. In my view there is nothing in the standard interpretation of s138 that tends to establish that such an approach is incompatible with Charter rights. Certainly there is nothing that requires that s138 be interpreted as Charter compliant only if it operates to automatically exclude evidence if it cannot be established that the s 7 test of demonstrably justified in a free and democratic society is satisfied.

188 The breach of s38 of the Charter in respect of the accused right to privacy by Victoria police through the acts of the informant and generally leads the accused to seek the relief of exclusion of the evidence of the transcript of the

recorded conversation. Whether that relief is granted depends on the exercise of the balancing discretion in s138 of the *Evidence Act 2008*. In simple terms the discretion I have is at large and will be exercised in accordance with the words of the section and how the courts have interpreted those words to date. The involvement of the fundamental human rights not to have privacy unlawfully or arbitrarily interfered with means that consideration must be given to what is acceptable and not acceptable in our free and democratic society, but the discretion remains a wide one.

Section 138 of the Evidence Act 2008

189 Having found to the requisite standard that there was a breach of s 6(1) of the SDA and the connected breach of s38 of the Charter insofar as that relates to the s13 right to privacy, what follows is whether the evidence should be excluded.

190 The question to be resolved is whether the prosecution have established that desirability of admitting the evidence outweighs the undesirability of admitting the evidence such that presumption that it is inadmissible is set to one side. The factors that must be considered include those setout in s138 (3) (a) –(h). I will deal with each of those matters in turn, though some if not all are interconnected.

191 Section 138 (3) (a): The probative value of the transcript of the recorded conversation is very significant. What is at the heart of the prosecution case is that the substance of what was said in the recorded conversation confirms the allegations surrounding the McDonalds conversation. Therefore to have an accurate, permanent, translated and essentially incontrovertible record of the conversation adds very substantially to the probative value of the impugned evidence.

192 The probative value is all the more significant because the defence to the charge is in the main that the conversation at the McDonalds has been

misconstrued. The transcript of the recorded conversation casts an inculpatory light on the defence. Further given that the case is essentially one word against another as to what words were spoken at the McDonalds store and what they meant, for the jury to hear in translated form how the second conversation went, the exchanges between both parties reveals the very significant probative value of the evidence. In that sense the transcript of the tape has aspects of being objective rather than the complainant being required to give post event recollections and interpretations of what was said and what was meant.

193 Finally the probative value of the tape is that it exposes the alleged lie of the accused in his record of interview. Although caution will have to be taken about the lie, in particular to ensure the onus remains on the prosecution, nonetheless the lie is lead to diminish the credit of the accused in a case where the credit of the parties will be to the fore. This aspect adds to the probative value of the transcript of the conversation.

194 The probative value of the evidence is also tied up in those matters covered below in respect of s138 (3) (b) and (c)

195 Section 138 (3) (b): The evidence is of great importance in this proceeding.

196 Throughout these reasons I have mentioned that if the translation of the conversation is not admissible and not thereby read to the jury, the complainant may well be able to give evidence of what was said from her memory. However what cannot be overlooked is that as the credit of the complainant will be necessarily intensely scrutinised in this trial. In a criminal trial there is often a merging of the concepts of the reliability and credibility of a witness. Routinely the defence will take the forensic path of showing that lack of reliability is because of a lack credibility or it should cause the jury to consider the witness has little or no credibility. The importance of a translated tape must be seen as removing the risk that a sketchy memory or unreliable

recall is seen as part of or a product of the complainant's lack of credit.

197 Perhaps of greater moment in assessing the importance of the transcript is that by reason of the regrettable but it seems enduring delays in the criminal justice system 3 years have now past and this now past since the alleged offending and this will no doubt have the inevitable effect on memory. On any analysis the evidence in the form of the transcript of the tape is very important to this proceeding.

198 Section 138 (3) (c): the nature of the relevant offence is a matter of some importance and that is because the alleged offence is one that can be committed by spoken words. In this case it is alleged that the words spoken by the accused at the McDonalds store amount to the offence. Accordingly, an accurate, taped and transcribed account of the words spoken by the accused days later when repeating, explaining, or elaborating on what was said at on the earlier occasion exposes how in this case, more than in most others, a reliable taped and transcribed is of value to the jury in determining the issues.

199 Section 138 (3) (d) and (e) relate to what the informant did in securing the evidence in particular the seriousness of the breach of s6(1) of the SDA and s38 of the Charter and whether what the informant did was done to deliberately contravene the SDA or undermine the accused rights or whether he was reckless as to those matters.

200 As can be easily deduced from all the evidence given on this application and from the depositions, the informant diligently tried to adhere to what he believed and was told was the lawful way of recording a conversation of this kind. He followed a course of conduct that in fact could be said to have had curial approval via the Victorian Supreme Court decisions referred to in these reasons. He relied on his own and the combined experience of other investigators who drafted the pretext call document tendered in this the application. Indeed he rechecked the document to be sure he was following

the latest version. All the experience, his and that of others within Victoria Police was that no warrant was required for the recording of a conversation of this kind. He did not deliberately avoid curial approval or independent supervision of what he was embarking on because he knew or believed that what he was doing was in breach of the law or improper. He was not reckless about these matters either. Rather he did not apply for a warrant because he firmly believed he did not need one. In his mind he could well have made the application and he would have done so confident of obtaining a warrant. I do not overlook that there were some time pressures and that the damage would have been done had the accused published the photographs before the complainant telephoned him and the conversation recorded under warrant. There are emergency authorisation powers available to deal with such contingencies.

201 The informant did all that was required of him to get approval to obtain the Sony device from the technical unit within the police. His purpose for getting the device was explicitly and truthfully expressed to his superiors. Nothing was hidden or fudged.

202 What needs t be well understood is that Detective Russell's conduct could not be seen as anything other than diligent and professional. He tread a path set by others and in the belief that to deviate from it would be the wrong thing and would put at risk any evidence he obtained. The true position is that those that set the path misunderstood the provisions of the SDA and most particularly did not revisit the procedures subsequent to the Charter becoming part of our laws.

203 The gravity of the contravention must be seen in light of the fact that the what it may lead to is the inadmissibility of the transcript in circumstances where complainant could give evidence of what was said from her memory. She will do that in respect of the McDonalds conversation, which in general terms is what the prosecution must be proved beyond reasonable doubt.

204 In one sense the ease by which all the problems could have been avoided by obtaining a warrant could be seen as telling against the admission of the evidence. There are instances where decisions refusing to admit evidence have implicit in them a deterrent message to others who may be tempted to take short cuts when dealing with the rights of an accused. This is not one of those cases. There is no need to make an example in this unusual case. As I said, in the course of argument, perhaps repetitively, this is an unusual example of the use of the pretext telephone call procedure because the crime itself is committed by the words spoken.

205 Although it does not loom large in resolving this case, what in my view should have happened was securing a warrant or emergency authorisation pursuant to the SDA. This is the routine in New South Wales and it does not seem to have hampered the use of the investigatory tool in that state. It is hard to imagine how it could do so in this state. These matters relate not just to s138 (d) and (e) but also to s 138(3) (h).

206 Section 138(3) (f): As noted above the various s138 factors considered thus are interlinked. Accordingly, in considering each of them I have kept well in mind that the contravention that I have found to have occurred went to fundamental rights of the accused. I turn now to consider those rights explicitly.

207 I must not forget the importance of the individual rights of the accused and ensure as far as possible that his rights are protected and promoted. I weigh in the balance the importance of those rights for the whole community especially in the face of the State's capacity, and growing capacity, to monitor and record a person's private words and activities. I was taken to many local and international authorities that eloquently stated the importance of the human rights at stake here. There is no need for me to try to imitate them. I appreciate and will place into the balance that the right not to have privacy unlawfully interfered with is a bedrock principle in any democratic society

operating by the rule of law.

Does the desirability of admitting the evidence outweigh the undesirability?

208 The question as to whether the prosecution has satisfied me that the admissibility of the transcript of the recorded conversation involves an orthodox balancing task. In my view given all the circumstances, the prosecution has satisfied me that the desirability of admitting the evidence outweighs the undesirability of admitting the evidence.

209 In my view this does not give curial approval to breaches of the SDA or to warrantless recordings of private conversations by the police. Rather it balances all the particular facts and circumstances of this case. It recognises the unusual nature of the offence to be tried and in particular the role of the spoken word in the elements of the offence together with the high probative value of the evidence. I have considered all the circumstances that lead the informant to obtain the evidence in the way he did. I have considered the heavy weight of the human rights involved and the importance of the state adhering strictly to transparent independent and balanced procedures before interfering with privacy and using the product against someone in a criminal trial. In this case the undesirability of admitting the evidence is not easily dismissed but the weight of it in this instance and the presumption that unlawfully obtained evidence is not to be admitted is set aside by the eight of all the factors that establish the desirability of admitting the evidence.

Section 135 and 137 of the Evidence Act 2008

210 Counsel for the accused contended, but faintly, that the evidence in the form of the transcript and any evidence from the memory of the complainant should be excluded by operation of s135 or s137. It is hard to understand why resort was made to s135, when the test the accused has to satisfy is more onerous.

211 In any event there is nothing in the contentions directed at either s 135 or 137. The evidence is of high probative value. Its only prejudice to the accused is it makes his conviction more likely. There was no unfair prejudice identified and with proper directions in truth no risk of unfair prejudice exists[62]. The jury are capable of giving the evidence proper, rational consideration and there is no risk it will be misused or given undue weight. The jury will be warned that they have to be satisfied beyond reasonable doubt that the accused said the words that establish the elements of the offence at the McDonalds store. They will be warned not to substitute the words they may hear in the reading of the transcript of the recorded conversation with the words alleged to have been spoken at the McDonalds store. The words in the transcript are part of the evidence going to the probabilities that the accused did say the alleged words at the McDonalds store. Such a direction would satisfactorily eliminate or sufficiently diminish any risks of misuse of the transcript of the recorded conversation.

[62] Shamouil [2006] NSWCCA 112.