



## Transcript of Proceedings

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Date: 10 December, 2003

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

WHITE J

No 10558 of 2003

STATE OF QUEENSLAND

Applicant

and

RODNEY WILLIAM KUPFER

Respondent

BRISBANE

..DATE 05/12/2003

JUDGMENT

**WARNING:** The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HER HONOUR: This is an application under Section 28 of the Criminal Proceeds Confiscation Act, 2002, for a restraining order and orders under s.38.

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Areas of controversy on this application are whether particular property - that is, a sum of money, namely \$52,620 - is the property of the respondent and whether - or the nature of the reasonable suspicious entertained by the applying officer would satisfy the Court under Section 31.

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There is also an argument relating to the public interest in Section 31(ii) in two ways: 1. That the property has been retained by the police unlawfully; and that the use of this legislation is against the public interest hanging as it does upon a crime of stealing which is not within, broadly speaking, the objects of the Act even though it is within Schedule 2.

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Section 28 of the Act permits the State to apply to this Court for an order restraining any person from dealing with property stated in the Order.

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The application is required to be supported by an affidavit of an authorised commission officer, which is the case here. The application may relate to all or any of certain categories of property set out.

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The State relies upon the property described in Section 28, subsection (iii), sub-subsection (a) of the Act; that is,

"property of a person suspected of having engaged in one or more serious crime-related activities"; and sub-section: "all of that person's property".

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The application seeks an order to restrain all of the respondent's property but specifically identifies the cash which was seized by the police.

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The evidence in support of the application is contained in the affidavit of Mr Duell, a financial investigator with the Crime and Misconduct Commission. He has been cross-examined on this application in relation to a number of matters.

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The respondent was charged on the 13th of February 2003 with burglary using violence whilst armed and in company, deprivation of liberty and stealing.

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Mr Duell deposes that he suspects that the respondent has engaged in a serious crime-related activity or activities and he has that suspicion he deposes:

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"Having regard to the contents of an application prepared by Plain-Clothes Senior Constable Brad Walton of the Nambour Criminal Investigation Branch, Queensland Police Service.",

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and that application which Senior Constable Walton prepared was for a order under the Police Powers and Responsibilities Act in relation to goods which had been seized on a search of

what was formerly the respondent's residence. He was at the time in custody.

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The document to which Mr Duell was referring is a document headed, "Facts Sheet". It related to the respondent and gave as his address a lot on a property via Yandina. He was said to be a resident at that address with his de facto wife, Charelle Nanette Kirkpatrick.

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He is also described as the Sergeant-of-Arms of the Rebels OMCG for the North-Coast Chapter. Mr Duell, in his cross-examination, said that there was no suggestion of drug dealing in the charges relating to this matter. Such a statement then about him being involved in a motor-cycle gang might be thought to be somewhat irrelevant.

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The facts state that on the 12th of February 2003 at 8.30 p.m. the respondent and other men committed a home invasion on a property located at Woombye owned by a Mr Rickards-Hanson. The respondent was armed with a hammer. The others were armed with a semi-automatic handgun and a shotgun.

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The home occupier escaped and went to a neighbouring house for help. That person's de facto and a visitor were detained by the respondent and the other men who were with him while they loaded the contents of his house onto their two utilities causing damage to both the house and the property.

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The police arrived at the house and located three of the four men, including the respondent. Their vehicles were searched and they were arrested. The respondent refused to be interviewed.

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I understand from statements from Mr Wilkin who appears on behalf of the respondent that the respondent was taken into custody on that evening, after being charged, and is still in custody - and relevantly was in custody when the search warrant was executed at the property at which he lived with his de facto wife on the 29th of April this year.

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The Facts Sheet states:

"A search of the dwelling located \$52,650 in \$50 and \$100 notes. The money was concealed in the bottom of a built-in wardrobe in the main bedroom. Two secret panels were unscrewed and, when lifted up, disclosed the money.

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An identical compartment was located in the bottom of the built-in wardrobe in the bedroom of the respondent's four year old son. This compartment concealed a loaded semi-automatic handgun, a six shot magnum revolver and an Australian Customs Service Marine Patrol Unit uniform."

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The Statement of Facts relates that the respondent's de facto wife told the police that she had no knowledge of the money. The respondent declined to be interviewed or to give an

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explanation about the money. It then states that an order to  
restrain the property:

"was issued by the Nambour Magistrates Court".

The question of the property is raised in this way by Mr  
Wilkin. The provision in the Act says:

"That it must relate to the property of a person  
suspected of having engaged in the relevant activity."

His submission is that the respondent, having been in custody  
for some months when the police executed the search warrant at  
his residence, could not be linked in any serious way with the  
money that was found.

He further points to the fact that Mr Duell deposes that he  
believes the cash to be owned by the respondent rather than  
assert that it is property of the respondent.

The expression "believed to be owned" seems to me to be an  
argument of no substance. It may be a manner of speech but it  
seems to me to be sufficient to satisfy the requirements of  
Section 28(iii), particularly that if it is borne in mind that  
there are provisions in the legislation for an interested  
person in respect of any property to make a claim for that  
property in Sections 49 and 65.

The fact that it was found in the way in which it was in the main bedroom of the residence occupied by the respondent with his de facto wife; that she has stated that she knows nothing of it and that he has declined to be interviewed about it seems to me sufficient to satisfy the civil standard of proof in this Act; that it is the property of the respondent.

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Moving then to the Section 31 argument about reasonable suspicion. It provides:

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"The Supreme Court must make a restraining order in relation to property if, after considering the application and the relevant affidavit, it is satisfied there are reasonable grounds for the suspicion on which the application is based."

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The submission by Mr Wilkin is that the fact sheet is unsworn and contains at least one error of fact and that, as Mr Duell said in his evidence, he relies upon the Statements of Fact in Senior Constable Walton's Facts Sheet as being true.

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The incorrect fact is that the order to retain the property - that is, the money found - was issued by the Nambour Magistrates Court. That might be a somewhat contentious proposition. The order Form 25 under the Police Powers and Responsibilities Act which is attached to Mr Duell's affidavit show a stamp - "Justice of the Peace Magistrates Court".

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The identification of the authorising officer is not filled in but it clearly must be a Magistrate or a Justice of the Peace Magistrates Court and Mr Duell concedes that it is a Justice of the Peace and not a Magistrate's signature.

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The degree of satisfaction is not dependant upon the material in the supporting Facts Sheet being sworn. One might look for internal consistency and the sense of whether or not it is a likely account; whether it is based upon conjecture and surmise and things of that kind. None of that is present here.

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This is a case where the police arrested the respondent in company with others on the site of a home invasion and found stolen property in the vehicles that were being used to convey that property away from the place invaded. I would have thought that that was sufficient to found the reasonable suspicion.

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The fact that there maybe some doubt about whether it was strictly an order of the Magistrates Court or a Justice of the Peace sitting at the Magistrates Court, or working in the Magistrates Court, would not, in my view, be determinative of whether there were reasonable grounds for the suspicion on which the application was based.

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The other issue relates to the public interest. There are two bases upon which the Court can decline to make an order under Section 31(ii), that is:

"(a) If the Court is satisfied in the particular circumstances it is not in the public interest to make the order; or

(b) If the State fails to give undertakings."

It is not said that (b) is here relevant.

Mr Wilkin points to Section 426 of the Police Powers and Responsibilities Act for his argument that it was an unlawful retention of property by the police and it would not be in the public interest for the Court to countenance such an action by making an order about the property that was seized.

Section 426(ii) provides that:

"Within 30 days after a police officer seizes the thing, the police officer must apply to a Justice of the Peace (Magistrates Court) or a Magistrate (the 'issuer') for an order under Section 427 in relation to the thing."

The application under 427 requires "the issuer" to consider the application and then make an order that it might be kept in the possession of a police officer until certain things eventuate.

Mr Wilkin's submission is that "the issuer" must be a Magistrate and not a Justice of the Peace because the description of "the issuer" is found in Section 426(ii) after

the word "Magistrate" and is not twice occurring after the word "Justice of the Peace (Magistrates Court)" and then again after "Magistrate". It is clear that Section 427 relates to "the issuer" referred to in 426.

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In my view, as a plain matter of statutory construction, "the issuer" relates both to Justice of the Peace (Magistrates Court) and to a Magistrate, and accordingly it is not apparent, at least on that argument, that it was an unlawful seizure of property.

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The final argument about the public interest is that in this case the charges relate to the stealing which alone is a Schedule 2 offence. Those are:

"Any offences punishable by imprisonment for five years or more and involving any of the following:",

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and there are set out in (a) through to (p) a number of crimes which include stealing.

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Mr Wilkin's submission is that it is inappropriate to attach what can only be described as the draconian powers contained in this part of the Criminal Proceeds Confiscation Act to something which does not have an element, for example, of drug-dealing or money laundering or child pornography, such as are elaborated to restrain the whole of the property of a person who has been charged with a criminal offence of the kind which is described in Schedule 2.

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In other words there must be an element of proportionality.  
The legislation empowers an order if the applicant reasonably  
suspects that the respondent has engaged in a serious crime-  
related activity. Those conditions have been satisfied. I  
conclude that proportionality is not the public interest which  
is envisaged in Section 31(ii)(a).

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Accordingly, there seem to me to be no points that have been  
raised by Mr Wilkin which would defeat the issue of the orders  
which are sought by the State on this application.

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HER HONOUR: Order as per draft.

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