SUPREME COURT OF QUEENSLAND

CITATION:	*R v Cahill* [2017] QSC 275
PARTIES:	**R** **v** **CAHILL, Colin Mark** (applicant)
FILE NO/S:	Indictment No 47 of 2016
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Toowoomba
DELIVERED ON:	24 November 2016
DELIVERED AT:	Brisbane
HEARING DATE:	27 October 2016
JUDGE:	Peter Lyons J
ORDER:	**Application dismissed.**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – EVIDENCE UNFAIR TO ADMIT OR IMPROPERLY OBTAINED – where the applicant's car was searched by police – where illegal drugs and other items were located – where police have a power under s 31 of the *Police Powers and Responsibilities Act* 2000 (Qld) (*PPRA*) to search vehicles without a warrant if they have a reasonable suspicion that prescribed circumstances exist – where the police officer did not expressly detain the vehicle and its occupants – where the search was accordingly unlawful unless the occupants of the vehicle consented – whether the police officer obtained the consent of the occupants of the vehicle before commencing the search CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – EVIDENCE UNFAIR TO ADMIT OR IMPROPERLY OBTAINED – where the applicant's car was searched by police – where illegal drugs and other items were located – where applicant was subsequently arrested and searched – where a mobile phone was seized and searched - where police have a power under s 365 of the PPRA to arrest without a warrant – where police have a power under s 443 of the PPRA to search a person in custody – whether, assuming the search of the vehicle was unlawful, the arrest and seizure of

the mobile phone was unlawful so that a discretion arose to exclude the evidence

Police Powers and Responsibilities Act 2000 (Qld), s 31, s 365, s 442, s 443, s 618, s 619, sch 6
Criminal Code (Qld), s 679

Bunning v Cross (1978) 141 CLR 54
Cleland v The Queen (1982) 151 CLR 1
George v Rockett (1990) 170 CLR 104
MacPherson v The Queen (1981) 147 CLR 512
R v Bossley [2012] QSC 292
R v Keen [2015] QSC 7
R v Nguyen (2015) 248 A Crim R 398
The Queen v Ireland (1970) 126 CLR 321
Wendo v The Queen (1963) 109 CLR 559

COUNSEL: A J Kimmins for the applicant
S Petrie for the respondent

SOLICITORS: Anderson Fredericks Turner for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] Late on the evening of 3 April 2015, police stopped a motor vehicle in which the applicant was travelling, and conducted a search. A small quantity of methylamphetamine was found in the applicant's wallet, and some drug-related paraphernalia was found in the car. The applicant was arrested, and his mobile phone was seized and searched. As a result the applicant was charged with unlawfully trafficking in drugs.

[2] The applicant has applied for an order excluding the evidence of the searches and their results.

Further facts

[3] On the evening of 3 April 2015, Constable Heptinstall was driving a police vehicle on North Street, Toowoomba, carrying out patrol duties. She was accompanied by Senior Constable Turner. She saw a silver-coloured sedan, and then activated the lights on the police vehicle, for the purpose of conducting a random breath test. The silver sedan pulled into the car park of Wilsonton State High School.

[4] Constable Heptinstall left the police vehicle and approached the silver sedan. There were two occupants of the sedan. It was driven by Mr Merrett, with the applicant being a passenger in the vehicle. The vehicle was owned by Mr Merrett's partner.

[5] As she approached the silver sedan, Constable Heptinstall activated her body-worn camera. After a time, the camera ceased recording. Subsequently, Constable Heptinstall reactivated the camera.

[6] Senior Constable Turner obtained Mr Merrett's licence, and gave it to Constable Heptinstall. She returned to the police vehicle for the purpose of carrying out a licence check. It was at about this time that the camera stopped recording.

[7] Constable Heptinstall gave evidence of observations she made up to this point of Mr Merrett and the applicant, and that she formed what she described as a reasonable suspicion that the vehicle might contain drugs. After conveying the results of the licence check to Senior Constable Turner, Constable Heptinstall gave evidence that she asked both the applicant and Mr Merrett if they would consent to a voluntary search of the vehicle, to which they agreed.

[8] The vehicle was searched, resulting in the location of the items previously mentioned in the vehicle. At some point, the camera again commenced to record events. Constable Heptinstall advised the applicant of his rights and questioned him in relation to the items found in the vehicle. She then arrested the applicant. By that time, Senior Constable Dolley had arrived, and he assisted Constable Heptinstall with both the search of the vehicle, and a "pat down" search of the applicant after his arrest. A mobile phone was found on the applicant in the course of the latter search.

[9] The applicant was taken to the Toowoomba Watch House. Constable Heptinstall gave evidence that she formed a reasonable suspicion that the applicant might be using his mobile phone to sell drugs. She seized the mobile phone from him, and observed several messages indicating the phone was being used for the purpose of selling drugs. She then arranged to have the messages on the phone downloaded. The written submissions for the respondent stated, without objection, that later analysis of the contents of the phone revealed hundreds of messages relating to the supply of drugs, from 2 October 2014 to 3 April 2015.

[10] Constable Heptinstall provided a statement relating to these events which was dated 17 March 2016. As a result of contact from a police prosecutor, she provided an addendum statement dated 18 July 2016. On 26 October 2016 notes were prepared in the course of a conference before the hearing of the application, which Constable Heptinstall initialled and adopted as accurate.

Contentions

[11] For the applicant, it was submitted that, since the vehicle and its occupants had not been detained, s 31 of the *Police Powers and Responsibilities Act* 2000 (Qld) (*PPRA*) was not engaged. The search of the vehicle was accordingly unlawful. Constable Heptinstall could not have had a reasonable suspicion that the applicant was in possession of drugs or evidence of the commission of a relevant offence, until she knew of the applicant's prior drug-related offences, or until the search commenced. The search accordingly was unlawful. That gave rise to a discretion to exclude the evidence obtained as a result of the search. The discretion arose both at common law, and under s 130 of the *Evidence Act* 1977 (Qld). The principles relevant to the exercise of the discretion were identified in *R v Ireland*[1] and *Bunning v Cross*[2]. It was submitted that the relevant factors favoured exclusion of the evidence. Since the arrest of the applicant was consequent on

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1 (1970) 126 CLR 321.
2 (1978) 141 CLR 54.

the unlawful search, the arrest was itself unlawful; as was the seizure and analysis of the contents of the mobile phone.

[12] It was submitted that the onus rested on the respondent to establish that the evidence was admissible, and accordingly, to establish that the searches were lawful.

[13] For the respondent it was submitted that, since consent had been given to the search of the vehicle, it was lawful. The applicant had been lawfully arrested, and it followed that the seizure of the mobile phone and its subsequent analysis was lawful. The onus fell on the applicant to establish any alleged unlawfulness, consistent with *Wendo v The Queen*[3], *Cleland v The Queen*[4] and *MacPherson v The Queen*[5]; though it was acknowledged that, so far as lawfulness turned on the state of mind of Constable Heptinstall, an evidentiary onus fell on the respondent to lead evidence of it, consistent with *R v Nguyen*[6]. While *R v Keen*[7] proceeded on the basis that the onus rested on the respondent in a case like this, the judgment in that case did not in fact consider the question of the onus of proof.

Nature of application and onus

[14] The fact that evidence has been obtained unlawfully (or, for that matter, unfairly) does not, of itself, render the evidence inadmissible[8]. It is for that reason that the rejection of such evidence is a matter of discretion, and not a rule of law. It follows that the rule that conditions relating to the admissibility of evidence must be established by the party tendering the evidence[9] does not apply.

[15] Since the exclusion of evidence unlawfully obtained is a matter of discretion, it would seem consistent with general principle that the onus of persuading the Court that the evidence should be excluded (including the onus of proving facts relied upon in support of that conclusion) would fall on the party seeking the exercise of the discretion. That that is the position seems to me to have been authoritatively established[10].

[16] The applicant relied upon *R v Keen* for the proposition that the onus fell on the respondent to establish that evidence obtained unlawfully should be admitted. It might be observed that that was the position adopted by both parties in *Keen*, and it was accepted without analysis. In my respectful opinion, the position accepted in *Keen* does not reflect the true nature of the application, nor is it consistent with the authorities to which I have referred.

[17] Accordingly, in my view the onus fell on the applicant to establish that the evidence of the searches should be excluded on discretionary grounds, including the onus to establish the factual basis relied upon by the applicant. It seems that the standard of proof is the balance of probabilities[11].

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3 (1963) 109 CLR 559.
4 (1982) 151 CLR 1.
5 (1981) 147 CLR 512.
6 (2015) 248 A Crim R 398, 404.
7 [2015] QSC 7.
8 See *The Queen v Ireland* (1970) 126 CLR 321, 334.
9 See *Cross* at [11075] nn 1 and 2; see nn 5-8.
10 See *R v Lee* (1950) 82 CLR 133, 152-153; *Wendo v The Queen* (1963) 109 CLR 559, 565; *MacPherson v The Queen* (1981) 147 CLR 512, 519-520.
11 *Cleland* at pp 16, 19; see also *Cross* at [11075] nn 12 and 13.

Consent

[18] Constable Heptinstall's evidence that the applicant and Mr Merrett consented to a search of the vehicle appeared in her second statement. The notes which she adopted are to a somewhat similar effect. Constable Heptinstall was cross-examined about the variations in her statements. She acknowledged that the obtaining of consent to conduct the search was very important. She knew that it would be unlawful to carry out the search without consent, except in accordance with the PPRA. She accepted that she had not detained the vehicle or its occupants. She acknowledged that it was very important to obtain consent to carry out the search, if she had not detained the vehicle or its occupants. She explained her failure to record obtaining consent to carry out the search as a consequence of her inexperience. She had a specific recollection of Mr Merrett and the applicant standing beside her, and asking each of them whether they consented to a search of the vehicle and a pat down search. Mr Merrett responded first. She acknowledged that it would have been easy to obtain a warrant to carry out the search. She said that the pat down search of the applicant would not have occurred, if he had not been arrested. In her re-examination, she confirmed her recollection of asking for consent, and gave evidence that Mr Merrett responded, "Yeah, yeah, yeah, go for it, go for it". The applicant then said, "Yep, fine".

[19] Mr Merrett gave evidence that he was asked by the female police officer after the vehicle stopped, whether a search would lead to finding firearms or drugs, to which he replied, "No". No other question was directed to him about searching the vehicle. He also said that he did not remember any question being directed to the applicant about a search of the vehicle.

[20] In cross-examination, Mr Merrett said that he had been first asked to provide his recollection of these events about two days previously. He said that the search was roughly conducted, and at the time of the search the police officers were not at all friendly. He said that the body search was "a bit confronting", and it was carried out by the female police officer. He was not asked to consent to that search. After he was referred to the recording made by Constable Heptinstall, he agreed that there was some friendliness on the part of the police officers. When asked whether he was nervous at the time of these events, he volunteered that the applicant had borrowed some money from him which had not been repaid, and that he was not here as the applicant's "best friend". He said that he was nervous about the way the car was being treated. He said that he did not consent to the search of the vehicle.

[21] It was orally submitted for the applicant that the explanation given by Constable Heptinstall about the failure to refer to consent did not stand with her evidence that she recognised the importance of consent to the search. If she recognised the significance of that consent, it was odd that she had not attempted to produce a written record of the conversation in which the consent was given, on the night of these events. It was submitted that, in truth, at that time she was not conscious of the need for consent.

[22] It was orally submitted that the evidence of Mr Merrett should be accepted. He was not well disposed to the applicant. His evidence was definite and direct. The reference to obtaining consent to a pat down search only appeared in the written notes of 26 October 2016. Reference was also made to the absence of corroboration for the evidence of Constable Heptinstall on this question; and to the variations in the evidence of Constable Heptinstall about obtaining consent. It was submitted that she had added to

her version of the events, in an attempt to cover the inadequacies of what she stated on the night in question. Her evidence was in fact manufactured.

[23] For the respondent, it was orally submitted that Constable Heptinstall was a very honest witness. The inadequacies in her statements were explained by her lack of experience. However she had a clear recollection of asking for consent to the search. Mr Merrett was only asked very recently to recollect the events of 3 April 2015.

[24] In my view, there is force in the submissions made on behalf of the applicant about the evidence of Constable Heptinstall in relation to obtaining consent for the searches. However, her evidence was that she would ask people in the position of the applicant and Mr Merrett if they consented to a search, once she had formed a suspicion that drugs were in the vehicle, because a similar issue had been raised in the past. She is recorded as saying, after the search of the vehicle and before she questioned the applicant, that she always reads cautions and rights to a person she is about to question, and, "It's something that I do alright". Immediately after, she informed the applicant of his right to silence and of other rights. It seems to me that that evidence supports the likelihood of the Constable having a practice in relation to seeking consent for the conduct of a search.

[25] As was recognised in the oral submissions for the applicant, the nature of the evidence of Constable Heptinstall on this topic is such that the evidence could not be regarded as simply mistaken, at least on the question of obtaining consent to search the vehicle. I observed nothing in the course of her evidence which led me to think that she was dishonest; rather, the contrary. She appeared to have a clear and definite recollection of speaking both to the applicant and Mr Merrett in relation to consent, before the car was searched. She presented as an inexperienced police officer consistent with her explanation for the production of the addendum statement, and what is recorded in the notes of 26 October 2016. A consideration of the evidence of Constable Heptinstall would not lead me to reject her evidence that she sought consent from the applicant and Mr Merrett, before the car was searched.

[26] The presentation of Mr Merrett in the witness box was a little unusual. His evidence as to the questions which he said the police asked him, seemed to me to be somewhat assertive, in a manner that was a little surprising, considering that he had only been asked to recollect these events shortly before the hearing of the application. It seemed to me that the reliability of his evidence was affected by the period of time which had elapsed before he was asked to recollect the events of 3 April 2015. His description of the manner in which the search was conducted and the behaviour of the police towards him was at odds with the, admittedly limited, recording of those events. There is some degree of improbability in his description of the body search, and his statement that it was conducted without his consent, particularly when a number of police officers were by then present; though I do not give a great deal of weight to this consideration.

[27] In the end, I have concluded that the evidence of Constable Heptinstall, that she asked the applicant and Mr Merrett for their consent to search the car, should be accepted. I have greater reservations about her evidence about consent to the pat down search of the applicant and Mr Merrett. That is because that evidence appeared for the first time in the notes of 26 October 2016; and it is a little easier to infer that the fact that consent for the search of the car was sought had led Constable Heptinstall mistakenly to think that

consent for the pat down searches was also sought. Nevertheless, in the end I am prepared to accept that evidence also.

[28] In *R v Bossley*[12] Dalton J expressed the view that a search which does not have statutory authorisation, but for which the person searched has provided consent, is not unlawful. This view finds strong support in *Bunning*[13], and in my view, it is correct.

[29] It follows that the search of the vehicle was lawful.

The arrest and the seizure of the mobile phone

[30] Although my conclusion that the search of the vehicle was lawful makes it unnecessary, it seems to me appropriate to consider the submissions made in relation to this question. I propose to do so on the assumption that the search of the vehicle was unlawful.

[31] The applicant submitted that in those circumstances, the arrest was unlawful, because a lawful arrest could not follow from an unlawful search. The same was true of the seizure and subsequent analysis of the applicant's mobile phone. That would lead to the exclusion of the evidence obtained from the mobile phone on discretionary grounds. These submissions were contested by the respondent.

[32] The power to arrest a person without a warrant is found in s 365 of the PPRA, which includes the following:

> "**365 Arrest without warrant**
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> (1) It is lawful for a police officer, without warrant, to arrest an adult the police officer reasonably suspects has committed or is committing an offence if it is reasonably necessary for 1 or more of the following reasons—
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> (a) to prevent the continuation or repetition of an offence or the commission of another offence;
>
> (b) to make inquiries to establish the person's identity;
>
> (c) to ensure the person's appearance before a court;
>
> (d) to obtain or preserve evidence relating to the offence;
>
> (e) to prevent the harassment of, or interference with, a person who may be required to give evidence relating to the offence;
>
> (f) to prevent the fabrication of evidence;
>
> (g) to preserve the safety or welfare of any person, including the person arrested;
>
> (h) to prevent a person fleeing from a police officer or the location of an offence;
>
> (i) because the offence is an offence against section 790 or

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[12] [2012] QSC 292 at [17].
[13] See pp 63-64; 67 and 82.

(j) because the offence is an offence against the *Domestic and Family Violence Protection Act 2012*, section 177, 178 or 179;

(k) because of the nature and seriousness of the offence;

(l) because the offence is—

(i) an offence against the *Corrective Services Act 2006*, section 135(4); or

(ii) an offence to which the *Corrective Services Act 2006*, section 136 applies.

(2) Also, it is lawful for a police officer, without warrant, to arrest a person the police officer reasonably suspects has committed or is committing an indictable offence, for questioning the person about the offence, or investigating the offence, under chapter 15."

[33] Consequential provisions appear in Chapter 16, the relevant provisions applying if a person has been lawfully arrested[14]. They include the following:

"**443 Police officer may search person in custody**

(1) A police officer may search and re-search a person to whom this chapter applies.

(2) A police officer may seize from the person anything found during the search that the police officer reasonably suspects may provide evidence of the commission of an offence."

[34] Section 443(2) is to be understood by reference to ss 618 and 619 of the PPRA, as follows:

"**618 Power to examine seized things**

To remove doubt, it is declared that a power to seize a thing under this Act includes and always has included—

(a) power to examine the thing; and

(b) power to arrange for someone else to examine the thing.

619 Extent of power to examine seized things

Without limiting section 618, power to examine a thing seized under this Act includes, and always has included, a power to do something that is reasonably necessary for, or as part of, a scientific or other investigative procedure involving the thing, even though doing the thing may damage the thing or destroy it.

Examples—

- performing an analysis involving the thing

[14] See s 442(a) of the PPRA.

- making an appraisal of the thing
- inspecting the thing
- perusing the thing
- scanning the thing
- sifting the thing"

[35] It will be apparent from these provisions that a critical matter in the process of obtaining evidence in this case by way of analysis of the mobile phone is the lawful arrest of the applicant. Although s 365(1) and (2) each identify purposes for which an arrest might be made, no issue has been taken about there being an appropriate purpose for the arrest.

[36] The foundation for the exercise of the power to arrest, therefore, is the reasonable suspicion by Constable Heptinstall that the applicant had committed an offence, at the time of the arrest. At that time, as a result of the search of the car, she had found in the applicant's wallet a small clip seal bag containing what she said (without objection) was "methamphetamine", and a set of digital scales in his luggage. She also gave evidence that a short time earlier she had noticed behaviour on the applicant's part, which she obviously regarded as suspicious.

[37] The applicant's written submissions appear to have accepted that there was a basis for a reasonable suspicion that the applicant was in possession of drugs as a result of the search of the vehicle[15].

[38] The applicant's submissions appeared to contend that somehow the unlawfulness of the search of the vehicle infected and invalidated the arrest. However the submissions did not explain how this might be so. Under s 365, as I have mentioned, the foundation for the exercise of the power to arrest someone is that the police officer "reasonably suspects" that that person has committed an offence. There are two aspects to be considered. One is the actual state of mind of the police officer; and the other is its reasonableness. The lawfulness of the search is irrelevant to the police officer's state of mind. The reasonableness aspect has been explained in a context containing slightly different language (s 679 of the *Criminal Code*) as a reference to the existence of reasonable grounds for the suspicion[16], reflecting the language of the relevant statutory provision. However the definition of "reasonably suspects" in Schedule 6 of the PPRA imports similar language. It seems to me, therefore, that the unlawfulness of the search which provided the information on which the suspicion is based does not affect the question whether there were reasonable grounds for the suspicion; and accordingly whether the arrest was within power. There may well be cases where the unlawfulness of the search reflects some improper purpose, relevant perhaps to the lawfulness of the arrest; but there is no suggestion of this in the present case.

[39] Moreover, I find it difficult to conclude that the mere fact that a suspicion based on evidence which was obtained unlawfully would not provide a proper basis for an arrest. As I have indicated, evidence obtained unlawfully is admissible at a criminal trial, unless excluded on discretionary grounds. If that be so, then it would seem strange that a police officer cannot rely on such evidence when arresting a person.

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[15] See para 30.

[16] See *George v Rockett* (1990) 170 CLR 104, 111-112.

[40] Accordingly, were it necessary to do so, I would have found that the (assumed) unlawfulness of the search did not mean that the consequent arrest of the applicant was unlawful; and accordingly that the exercise of the powers resulting in the analysis of the contents of the mobile phone was also lawful. No recognisable basis for excluding the evidence in such circumstances was identified on behalf of the applicant. Accordingly, I would have refused the application in those circumstances, at least in relation to the contents of the mobile phone.

Conclusion

[41] The application should be dismissed.