SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hardstaff* [2016] QSC 299
PARTIES:	**THE QUEEN** **v** **KELLY-MAREE JOYCE DENISE HARDSTAFF** (applicant)
FILE NO/S:	Indictment No 1053 of 2016
DIVISION:	Trial Division
PROCEEDING:	590AA pre-trial hearing
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	15 December 2016
DELIVERED AT:	Brisbane
HEARING DATE:	19 September 2016, 8 November 2016
JUDGE:	Ann Lyons J
ORDER:	**1. The application to exclude the telephone communications on phones utilising the numbers 0411 192 786, 0481 780 723, 0414 729 277 and 0423 246 916 (the Lawler phones) is refused.** **2. The telephone communications on the phone utilising the number 0413 906 022 (Webb's phone), which relate to communications with mobile phone numbers 0487 564 448 and 0407 121 214, sent on 30 April 2016 and 1 May 2016, are excluded.** **3. The application to exclude the telephone communications on Webb's phone which relate to communications with mobile phone number 0431 624 331 is refused.** **4. Any references to variation of bail are to be removed from the text messages sent from the phone utilising 0431 624 331 to Webb's phone.** **5. The application to exclude the telephone communications on phones utilising the number 0411 990 163, which relate to communications with mobile phone numbers 0421 953 031, 0421 481 587 and 0481 252 467 (phones that relate to the evidence of Ten-Bohmer) is refused.** **6. The words "in jail" are to be removed from the text message sent from 0481 252 467 to 0411 990 163.** **7. The application to sever Counts 1 and 2 from**

Counts 3-5 on the Indictment is refused.

CATCHWORDS: CRIMINAL LAW – EVIDENCE – HEARSAY – PARTICULAR MATTERS – TELEPHONE CALLS – where the applicant applies under s 590AA(2)(e) of the *Criminal Code* to exclude telephone communications on the basis they contain third party communications – where the respondent submits there is reasonable evidence of pre-concert between the applicant and the co-conspirators of the type of offence alleged – whether the evidence is admissible against the applicant

CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – PREJUDICIAL EVIDENCE – where the applicant applies under s 590AA(2)(e) of the *Criminal Code* to exclude telephone communications on the basis of their prejudicial content – where the respondent submits that the prejudice can be overcome by the removal of certain words – whether the evidence is admissible

CRIMINAL LAW – EVIDENCE – PROPENSITY, TENDENCY AND CO-INCIDENCE – ADMISSIBILITY AND RELEVANCY – PROPENSITY EVIDENCE – EVIDENCE OF UNCHARGED ACTS – where the applicant is charged with various offences under the *Drugs Misuse Act* 1986 (Qld) – where there were two separate periods of offending – whether evidence of one period of offending is admissible as evidence of the other

CRIMINAL LAW – EVIDENCE – PROPENSITY, TENDENCY AND CO-INCIDENCE – JOINDER OF PERSONS OR COUNTS – where the applicant is charged with various offences under the *Drugs Misuse Act* 1986 (Qld) – where there were two separate periods of offending – where the applicant applies under s 590AA(2)(b) of the *Criminal Code* to sever the counts on the basis they were incorrectly joined – whether the counts are properly joined pursuant to s 567 of the *Criminal Code*

CRIMINAL LAW – EVIDENCE – PROPENSITY, TENDENCY AND CO-INCIDENCE – JOINDER OF PERSONS OR COUNTS – where the applicant is charged with various offences under the *Drugs Misuse Act* 1986 (Qld) – where there were two separate periods of offending – where the applicant applies under s 590AA(2)(b) of the *Criminal Code* for two separate trials on the basis of prejudice – whether separate trials should be ordered pursuant to s 597A of the *Criminal Code*

Criminal Code (Qld), s 567(2), s 590AA
Drugs Misuse Act 1986 (Qld)

Ahern v R [1988] HCA 39
Harriman v R [1989] HCA 50
Pfennig v The Queen (1995) 182 CLR 461
Phillips v R (2006) 225 CLR 303
R v Cogley [1999] VSCA 123
R v Cranston [1988] 1 Qd R 159
R v Mason [2014] QDC 51
R v WRC [2002] NSWCCA 210
Sutton v R [1984] HCA 5; (1984) 152 CLR 528
Tripodi v R [1961] HCA 22

COUNSEL: S Bain for the applicant
C N Marco for the respondent

SOLICITORS: AW Bale & Son for the applicant
Office of the Director of Public Prosecutions for the respondent

[1] The applicant Kelly-Maree Joyce Denise Hardstaff (AKA Kelly-Maree Joyce Denise Ward) is charged on a five count indictment with various offences under the *Drugs Misuse Act* 1986 (Qld), including two counts of trafficking in dangerous drugs (Counts 1 and 3); two counts of supplying dangerous drugs (Counts 2 and 5); and one count of possessing a mobile phone for use in connection with trafficking (Count 4).

[2] The first trafficking charge is alleged to have occurred between 5 May 2015 and 8 July 2015 and the second trafficking charge is alleged to have occurred six months later in the period between 1 January 2016 and 4 May 2016. The evidence against the applicant is based largely on telephone intercept evidence and stored data which was downloaded from a number of seized mobile telephones.

THIS APPLICATION

[3] Pursuant to s 590AA(2)(e) of the *Criminal Code* (Qld), the applicant seeks the following Rulings:

1. That the telephones seized by police, or alternatively certain text messages, be excluded from evidence at trial on the basis that they contain third party communications (hearsay) and/or should be excluded on the basis of their prejudicial content.

   The mobile phone numbers that are the subject of the application are described as follows for the purposes of the application:

   Lawler phones
   - 0411 192 786
   - 0481 780 723
   - 0414 729 277

Webb phone

- 0413 906 022

Unrecovered phone said to be utilised by applicant

- 0431 624 331

Phones that relate to Ten-Bohmer's evidence

- 0421 953 031
- 0421 481 587
- 0481 252 467

2. That Counts 1 and 2 be heard separately from Counts 3 to 5 on the indictment on the grounds that they are not properly joinable and and/or it would be unjust to hear the counts together. In this regard the applicant seeks a declaration that Counts 1 and 2 are not properly joinable with Counts 3, 4 and 5. Alternatively, the applicant seeks an order for a separate trial in respect of Counts 3, 4 and 5.

Background

[4] In relation to the first period of alleged trafficking in the 45 day period between May and June 2015, police had a telecommunications intercept warrant in relation to the mobile phone used by Renae Heinze. The intercepted messages revealed that Heinze was supplying methylamphetamine to Kelly-Maree Hardstaff and that on occasion, Hardstaff supplied quantities of methylamphetamine to Heinze. Hardstaff was then on-selling the methylamphetamine to others.

[5] There are 94 telephone conversations and 41 text messages between Hardstaff and Heinze in the relevant period. Coded words would be used whereby a reference to "hours of work" referred to the number of ounces of methylamphetamine either sought or supplied, and terms such as "a game", "HB" and "q" to refer to lesser quantities. Money was referred to as "bugsy" and "paper". The conversations also refer to supplying people and being owed money, as well as working from a shed.

[6] The allegations in relation to the trafficking in this first period are also based on the searches that were conducted on 17 June 2015 and 7 July 2015. On the first occasion, Hardstaff was found in possession of $8,650.00 and on the second occasion, she was found in possession of $3,750.00 and a number of mobile phones.

[7] An analysis of those phones revealed that on 6 July 2015 she supplied a person with methylamphetamine, which is Count 2 on the indictment. In the relevant period neither Hardstaff nor her husband had any income or salary apart from Child Support payments.

[8] The Crown also relies on the evidence of the witness Cristle Ten-Bohmer to substantiate the first period of trafficking. Hardstaff had met Ten-Bohmer while they were both in custody in late 2015 and it is Ten-Bohmer's evidence that whilst they were in custody, Hardstaff had admitted to her that she had been supplying "ice". Ms Hardstaff had been returned to custody on 10 July 2015 after being charged with the offences on 7 July 2015, which were in breach of the court ordered parole she had been subject to since 3 December 2012. Hardstaff served the remainder of the three year sentence imposed on 3 December 2012 and was released again on 2 December 2015.

[9] The second period of trafficking is alleged to have commenced on 1 January 2016. On 7 January 2016 police searched a hotel room at Margate. A mobile phone with two Sim cards was located as well as $1,350.00 and 24.900 grams of pure methylamphetamine. A person by the name of Tiarna Lawler was in occupation of the room. On the same day a motel room was searched at Scarborough and Hardstaff's husband Dylan Ward was present during the search. Police located a quantity of crystalline substance and $2,964.00 in a safe. Hotel records indicated that Lawler and Hardstaff were also staying in the room.

[10] On 25 February 2016 the police intercepted Hardstaff and Lawler in a red Mazda (605-TTK) at Portside, Hamilton. They searched the vehicle and located three mobile phones, a total of $4,500.00 hidden on Hardstaff, as well as a quantity of crystalline substance.

[11] Mobile telephones seized utilised telephone numbers 0481 780 723, 0411 192 786, and 0402 990 090.

[12] Stored communications warrants were obtained and a Cellebrite download of the phones was conducted. There is some evidence which points to the fact that Hardstaff utilised mobile phone number 0411 192 786 up until 21 February 2016 when Lawler started using that number to communicate with Hardstaff. From 21 February 2016 there are indications that Hardstaff started using mobile phone 0481 780 723. Hardstaff admits to owning mobile phone 0402 990 090 and the stored communications on that number commenced on 14 February 2016.

[13] On 25 March 2016, Hardstaff and Ward were located at a shed at Clontarf which had been hired by them earlier in March. Video surveillance in April 2016 also showed them attending the shed on multiple occasions. On two days a red Hyundai hatch (576-EIU) attended the shed and when intercepted the occupant was found in possession of 11.81 grams of methylamphetamine. The witness Ten-Bohmer confirmed that Hardstaff used the shed as a location from which to dispense drugs.

[14] On 14 April 2016, police executed a search warrant at Ten-Bohmer's residence. She was found in possession of 15.451 grams of pure methylamphetamine, $2,538.00 and two mobile phones. A download of the mobile phones indicated a number of communications between Ten-Bohmer and Hardstaff in relation to the supply of methylamphetamine. Ten-Bohmer told police the methylamphetamine found in her possession had been supplied by Hardstaff and advised police that she had been regularly purchasing commercial quantities of methylamphetamine from Hardstaff since January 2016. Ten-Bohmer also said that Lawler worked for Hardstaff.

[15] On 4 May 2016 a search warrant was executed at the shed at Clontarf but no items of interest were found. On the same day a search warrant was executed at Brighton where Hardstaff lived with Ward and Rebecca Webb. During the search police found in Webb's possession 82 pills containing methylone, $5,000.00, a quantity of a crystalline substance and a mobile telephone which utilised the number 0413 906 022.

[16] Hardstaff was found in possession of a mobile phone which used the number 0402 990 090. Communication warrants were obtained which indicated that there was one communication on Hardstaff's phone that related to a drug transaction. Messages on Webb's phone between her and Hardstaff indicate that pills were supplied to Webb by Hardstaff for the purpose of on-selling by Webb, on Hardstaff's behalf.

Grounds that the telephone communications be excluded

[17] The applicant argues that third party phone calls to which an accused is not a participant are *prima facie* hearsay and inadmissible against an accused. Furthermore the applicant submits that, for the Crown rely on hearsay evidence, it must be established that there is independent, reasonable evidence of pre-concert between the applicant and the co-conspirators of the type of offence alleged before the hearsay can be admitted against her. The relevant test was discussed in the High Court decision of *Ahern v R*[1] as follows:

> "[4] An appropriate starting point from which to consider the use which might be made of the acts and declarations of one co-conspirator against another is the rule of thumb referred to in *Tripodi v. The Queen* [1961] HCA 22; (1961) 104 CLR 1, at p 7. There it was said to be an "empirical but practical and convenient test" that acts and declarations done or made outside the presence of an accused are not admissible against him. Practical and convenient though that test might be, it can be no more than a rule of thumb, because it is clear that it has a limited application. It represents an attempt to state in practical terms the effect of the hearsay rule although, of course, acts (other than certain acts of communication) cannot of themselves constitute hearsay and, strictly speaking, lie outside the rule. However, acts may contain an implied assertion on the part of the actor which makes it appropriate to treat evidence of those acts for some purposes as the equivalent of hearsay. A conspirator may, in the absence of another person alleged to be a co-conspirator, say or do something carrying with it the implication that the other person is involved. The statement or the act may be admissible in evidence to prove the fact of a conspiracy and, by way of admission, the participation of the maker of the statement or the actor in that conspiracy. But evidence of neither the statement nor the act should, except in the circumstances which we shall elaborate presently, be admitted against the other person to prove his participation because it would for this purpose be hearsay or the equivalent of hearsay.
>
> …
>
> "[17] Where an accused is charged with conspiracy, evidence in the form of acts done or words uttered outside his presence by a person alleged to be a co-conspirator will only be admissible to prove the participation of the accused in the conspiracy where it is established that there was a combination of the type alleged, that the acts were done or the words uttered by a participant in furtherance of its common purpose and there is reasonable evidence, apart from the acts or words, that the accused was also a participant. The words "reasonable evidence" have provided a standard which has been applied without difficulty in this country for some years, at least in cases where preconcert has been the basis upon which evidence has been led in cases other than conspiracy, and there is no reason to suppose that if it has provided an appropriate test in those cases, it will not do so where conspiracy is

---

1 [1988] HCA 39.

> charged. If there is any difference between "reasonable evidence" and "a prima facie case", which in this context we very much doubt, then the words "reasonable evidence" are to be preferred providing, as they do, a test of admissibility for which no more precise expression is needed. The aim in limiting the use which might be made of a co-conspirator's acts or declarations is to exclude such evidence when its admission might operate unfairly against an accused. For this purpose, the element of discretion implicit in the term "reasonable evidence" is desirable."

[18] Counsel for the applicant contends that in short, the Crown must be able to point to "reasonable evidence" of pre-concert and corroboration. The third party telephone intercepts themselves cannot be used as the evidence of the conspiracy or to establish the pre-concert:[2]

> "[9] The implied authority on the part of one conspirator to act or speak on behalf of another will only arise if the latter is part of the combination. Evidence of the acts or declarations of the former may, however, be led to prove that very fact. That is where the dilemma lies in cases of conspiracy because, to assume the participation of the latter in order to admit the evidence on the basis of implied authority is to assume the very fact which is sought to be proved by that evidence. If there were no prerequisite to the admission of such evidence **"hearsay would lift itself by its own bootstraps to the level of competent evidence":** *Glasser v. United States* [1942] USSC 36; (1942) 315 US 60, at p 75. In that case, Glasser, who was charged with conspiracy to defraud the United States, had red hair. Evidence was led of a declaration by an alleged co-conspirator in the absence of Glasser that "he would have to see 'Red,' or send the money over to the 'red-head,' etc., in connection with 'fixing' cases" (at p.73). In accordance with accepted principle, such evidence was held to be admissible "only if there is proof aliunde that he is connected with the conspiracy" (at p.74). That, of course, still leaves two questions. The first is the degree or standard of proof of the evidence from another source which is required. The second is whether it is for the trial judge or the jury to decide whether proof of the required standard exists."

Exclusion of evidence from the "Lawler Phones"

[19] The applicant argues that it was Tiarna Lawler who utilised the three numbers 0411 192 786; 0481 780 723; 0414 729 277 and notes that none of these phones are registered to the applicant or were seized from the applicant. It is argued therefore that the Crown cannot establish by direct evidence that the applicant was ever in actual possession of the phones, or that the applicant actually sent the messages. In a recorded interview with police at the watch house Lawler in fact admitted to owning the phones.

[20] It is also argued that the evidence of Ten-Bohmer is the only direct evidence that the applicant used certain phones, none of which are the same as the "Lawler" phones. These telephone numbers are not referred to in Ten-Bohmer's statement. Any

---

[2] *Ahern v R* [1988] HCA 39.

purported self-identification by the applicant is vague. The applicant states that terms such as "kel", "Kelly" and "LLR" are proffered as self-identification but there is no voice identification or other corroborating evidence to link those names to the applicant.

[21] The applicant submits therefore that the telephone communications in relation to the "Lawler" numbers be excluded; or in the alternative that all communications in relation to 0411 192 786 after 21 February 2016 be excluded and all communications in relation to 0481 780 723 after 25 February 2016 be excluded.

Mobile phone number 0411 192 786

[22] In relation to the information obtained from mobile phone 0411 192 786, it would seem that this is the phone which was found in the centre console of the red Mazda intercepted at Hamilton on 25 February 2016. Both Lawler and Hardstaff were in the vehicle at the time and Lawler told police that the phone was hers. A check revealed that it was registered to her from 30 January 2016.

[23] The Crown accepts that the phone was utilised by Lawler from 21 February 2016 but that prior to that date it was used by Hardstaff. The Crown relies on a number of messages located on the stored communications of the phone to argue that Hardstaff was the user of the phone prior to 21 February 2016. These are messages whereby the user of the phone identifies herself as "kel" or "Kelly", makes reference to using a red Mazda or enquires as to the whereabouts of Dylan Ward, who is known to be Hardstaff's husband.

[24] Having considered the content of the messages sent by that mobile phone, as outlined in Exhibit 3 and the respondent's submissions[3] which relate to the period from 14 February to 19 February 2016, I conclude that a jury could reasonably draw the inference that the references to "k", "kel" or "Kelly" are references to the Christian name of Ms Hardstaff. Accordingly I consider that there is ample evidence from which a jury could conclude that prior to 21 February 2016, Hardstaff was the user of that mobile telephone number and not Tiarna Lawler. Similarly, it would seem to me that the message sent from that phone on 20 February 2016 to a third person with a reference to "Tiarna" gives rise to the inference that Tiarna was not the user of the mobile phone on that occasion. Furthermore when all of the messages in that period are considered as a whole there is nothing to indicate that the phone was being shared with a second user during that period.

[25] Whilst I note that the applicant seeks to exclude messages stored on the phone 0411 192 786 after 21 February 2016 on the basis that Lawler was then using the phone, it would seem clear that there are a number of communications between 21 February 2016 and 25 February 2016 between the mobile phone number 0411 192 786 and Hardstaff's mobile phone number 0402 990 090. In this regard I note that Hardstaff accepts that the latter phone number is hers and she is subscribed to that number. I consider that the relevant text messages between the two mobile phones are such that it would be open for a jury to conclude that the communications as outlined relate to Hardstaff's drug trafficking business and they are evidence against her. I can see no basis to exclude those messages as she is a party to the communications.

---

[3] Respondent's Submissions dated 21 September 2016, at [3].

Mobile phone number 0481 780 723

[26] In relation to the information obtained from mobile phone 0481 780 723, which is a black Apple iPhone found in the red Mazda intercepted at Hamilton on 25 February 2016. Lawler told police that the phone was hers but it would seem that it was registered to a person named Terry Dallas from 21 February 2016. The Crown alleges that the phone was in fact utilised by Hardstaff and that this is revealed by the contents of the messages.

[27] In this regard the Crown relies on a text message sent on 21 February 2016 to 44 contacts, stating that it was a new number as the user "had to ditch the other one". It was from a sender described as "k". An analysis of the mobile phone 0402 990 090, which is owned and admitted by Hardstaff to be hers, reveals that 38 of the 44 contacts to whom the message was sent were common to both phones.

[28] Furthermore, in a number of messages sent from that phone between 22 February and 24 February 2016, the user identifies as "kel", as using a red Mazda, or to "Dylan" or "Tiarna" being Dylan Ward and Tiarna Lawler respectively. I note in particular that the message received by that phone on 22 February 2016 refers to the recipient of the message being "kell". In addition the messages on that phone refer to an address where Hardstaff lived, albeit with two others.

[29] I consider therefore that an available inference is that the phone was being used by Hardstaff.

Mobile phone numbers 0414 729 277and 0423 246 916

[30] In relation to the information obtained from mobile phone 0414 729 277, which is a dual Sim mobile phone that utilised the telephone numbers 0414 729 277 and 0423 246 916. It was located during a search of a room at the Waltzing Matilda Hotel at Margate on 7 January 2016. Lawler was in occupation of the room. A subscriber check on the phone indicated that it was registered to a person named Marcus Daly from 14 February 2008. It is clear however that messages stored on the mobile phone from 2 January 2016, using the number 0414 729 277, indicate that the messages were sent by "kel". One of the messages was sent by "kel" to 28 contacts. An analysis of Hardstaff's phone reveals that six of the 28 contacts were common to her phone. I consider that these messages raise an inference that the phone number 0414 729 277 was used by Ms Hardstaff.

[31] Messages sent from the phone using the other number, 0423 246 916, indicate that the messages were sent by "k" or "Kelly" and refer to "Tiarna". Furthermore there are messages sent using that number between 4 January 2016 and 5 January 2016 which refer to "Kelly", "kel" or "k". I consider that these messages also raise the inference that Hardstaff was the sender and that the same owner used both numbers.

[32] An available inference is that Hardstaff was the user of the phone which utilised both those numbers.

[33] I am therefore satisfied there is no basis to exclude the information obtained from the three mobile phone numbers, 0411 192 78, 0481 780 723, 0414 729 277 and 0423 246 916, as sought by the applicant pursuant to this application.

[34] The application to exclude the telephone communications in relation to the Lawler telephone numbers is therefore refused.

Exclusion of evidence from the "Webb Phone"

[35] The Webb phone number is 0413 906 022. This phone was found on 4 May 2016 when a search warrant was executed at a Brighton address where Hardstaff, her husband Dylan Ward and Rebecca Webb resided. A Samsung mobile phone was located in Webb's possession. The stored communication revealed a number of text messages which had been deleted, including communications with a mobile phone number alleged to have been used by Hardstaff. This mobile phone number is 0431 624 331; however this phone has not been recovered and is not registered to the applicant.

[36] The Crown seeks to rely on text messages from the Webb phone to implicate the applicant in relation to the supply count, the subject of Count 5 on the indictment, where it is alleged that Hardstaff supplied Webb an ecstasy analogue on 30 April 2016.

[37] The Crown seeks to rely on the self-identification within those messages to allege that it was Hardstaff who was messaging Webb with respect to a bail variation. The Crown alleges Hardstaff sought a bail variation to the address in the message.

[38] Counsel for the applicant argues that any correspondence with respect to criminal litigation (including requests for bail variations) between the Crown and the applicant or the applicant's solicitors is "without prejudice". The Crown would necessarily have to lead evidence in relation to a communication by the applicant's solicitors seeking that variation.

[39] Furthermore it is submitted that the prejudicial nature of allowing a jury to speculate on what the applicant may have been on bail for outweighs the probative value of that evidence. Counsel for the applicant therefore seeks the exclusion of the entire text message on the "Webb" phone from 0431 624 331 that refers to the applicant making an application to vary her bail on the basis that it is privileged or prejudicial.

[40] In my view a consideration of the text messages between the two numbers on the afternoon of 28 April 2016 makes it plain that the available inference is that it was Hardstaff who was indeed the user of the phone. This is particularly so when one considers the messages sent at 16.28.04 and following where the sender gives an email address which would appear to the applicant's email, and gives instructions to Webb as to the content of the letter as follows:

28/04/2016	16:27:28	28/04/2016	16:27:35	61413906022	61431624331	ok i can scan it and email it coz i got a scanner wats ur email babe.
28/04/2016	16:27:38	28/04/2016	16:27:48	61431624331	61413906022	And a letter from u saying that I rent a room u… Cause they are denying me to put my bail address there because it comes up as a convenience store
28/04/2016	16:27:44	28/04/2016	16:27:49	61431624331	61413906022	Thank u
28/04/2016	16:28:04	28/04/2016	16:28:08	61431624331	61413906022	kellyward25099@gmail.com

28/04/2016	16:29:32	28/04/2016	16:29:41	61413906022	61431624331	fuck im no good with letters how should i write it?
28/04/2016	16:32:58	28/04/2016	16:33:02	61431624331	61413906022	Write this in your letter…/n/nl Rebecca Webb of 144 lascelles stree Brighton rent a house which is partly connected to a convenience store. I rent a room
28/04/2016	16:32:59	28/04/2016	16:33:02	61431624331	61413906022	Bb
28/04/2016	16:32:59	28/04/2016	16:33:02	61431624331	61413906022	to Kelly-maree Hardstaff/ward and she pays rent fortnightly…/nlf you have any other queries please feel free to contact me on……/n/nRebecca We

[41] In terms of the prejudicial nature of the specific text message which refers to bail, I consider that the text message can be edited to take out any reference to a variation of bail as submitted by the Crown. In my view the remaining message would not give rise to speculation as confirmation of an address is often required for a variety of purposes and is a normal incident of modern living.

[42] In relation to the stored communications on Webb's mobile phone which relate to the missing mobile phone 0431 624 331, the Crown alleges that the stored messages on Webb's mobile phone from 0431 624 331 are from Hardstaff. Those stored messages are the basis for Count 5 which is a charge that Hardstaff supplied Webb with a quantity of tablets for the purpose of Webb on-supplying those tablets on Hardstaff's behalf.

[43] I accept that the messages which are relied on are instructions being given from the user of 0431 624 331. Those messages come less than two days after the messages from that phone, in which Hardstaff clearly identifies herself as the user of the phone, are sent. I also note that the messages are of a similar style.

[44] It would seem to me therefore that the stored communications on Webb's mobile phone which relate to messages to and from the telephone number 0431 624 331 could give rise to an inference that they relate to Hardstaff's drug trafficking business and to Webb's involvement in it. It is clear from those text messages that the available inference is that it is Hardstaff who is directing Webb in relation to sales and deliveries. I consider therefore that the information supports an inference that Ms Hardstaff was the user of the phone on those five occasions and indeed sent those messages. That evidence should not therefore be excluded.

[45] I also consider that the stored communications on Webb's mobile phone, which relate to text messages to and from 0431 624 331 on 2 May 2016, are such that an available inference is that they relate to drug messages given the consistent references to "hb" and the references to "350" and "400", which are common terms used to refer to the quantities in which drugs are sold.

[46] There are then a series of messages located on the stored communications of Webb's mobile phone which are to and from two mobile phone numbers which do not appear to be connected to Hardstaff. They are numbers 0487 564 448 and 0407 121 214. Those text messages clearly relate to the offer of drugs for sale.

[47] The Crown argues that Webb's messages to third parties advertising their sale are admissible against Hardstaff on the *Tripodi*[4] principle. That principle indicates that evidence in the form of acts done or words uttered outside Hardstaff's presence, which in this case are the stored text messages in Webb's phone, will be admissible to prove Hardstaff's participation in the conspiracy where it is established that there was "a combination of the type alleged, that the acts were done or the words uttered by a participant in furtherance of its common purpose and there is reasonable evidence, apart from the acts or words, that the accused was also a participant."[5]

[48] In my view, the five text messages should be excluded despite the Crown's argument that there is sufficient evidence of a pre-concert between Webb and Hardstaff in relation to the tablets to show that it is Hardstaff directing Webb as to their sale. I do not consider that there is anything in those messages that specifically links Webb to Hardstaff in relation to those sales by way of a particular sales method. There is no particular distinguishing feature in those texts which necessarily creates a link to Hardstaff. Neither is there evidence before me that Hardstaff was Webb's only source of drugs. Neither is there any indication that it was in fact Hardstaff who was the one directing Webb in relation to the sales rather than somebody else.

[49] The five stored messages on Webb's phone, which relate to mobile phone numbers 0487 564 448 and 0407 121 214 and sent on 30 April 2016 and 1 May 2016, should therefore be excluded.

The evidence of Cristle Ten-Bohmer

[50] On 14 April 2016, police conducted a search of Christel Ten-Bohmer's residence at Lisburn Street, East Brisbane, and found two mobile phones that utilised the number 0411 990 163.

[51] A Cellebrite download of both mobile telephones revealed a number of drug related text messages to and from mobile phone numbers 0421 953 031, 0421 481 587 and 0481 252 467.

[52] Ten-Bohmer provided a witness statement stating that those three numbers were utilised by Hardstaff. It is contended on behalf of the applicant that in the absence of Ten-Bohmer giving evidence against the applicant at trial, there is little to connect these numbers to her. Ten-Bohmer is yet to be sentenced. The applicant submits that any communication with any of the three mobile phone numbers which were in contact with Ms Ten-Bohmer's mobile phone number should be excluded unless Ms Ten-Bohmer gives evidence.

The mobile phone number 0421 953 031

[53] The Crown argues that even without the sworn evidence of Ten-Bohmer, the text messages which were located on the Cellebrite download of the mobile telephone using 0411 990 163 to or from 0421 953 031, where the user identifies as "K" and refers "to being with her kids", to "being at the sheds" and "providing the address of the sheds at Robson Street, Clontarf", supports a conclusion that Hardstaff is the user of the mobile phone number.

---

4 *Tripodi v R* [1961] HCA 22.
5 *Ahern v R* [1988] HCA 39.

[54] Having considered the messages either to or from Ms Ten-Bohmer's phone number to the phone number 0421 953 031 and in particular noting the references to a shed at Clontarf and the sign off of "k", I consider that there is evidence from which a jury could conclude that Ms Hardstaff was the user of the mobile phone number.

The mobile phone number 0421 481 587

[55] In relation to the messages on Ms Ten-Bohmer's mobile phone either to or from mobile phone number 0421 481 587 it is clear that the user texts the following message to Ms Ten-Bohmer on 12 April 2016: "New number sorry other one been off fucked the phone…K". The messages on the following 2 days contain references to "Dylan" and "the shed".[6]

[56] Accordingly I consider that there is evidence from which a jury could conclude that the user of that mobile phone was Ms Hardstaff.

The mobile phone number 0481 252 467

[57] The messages on Ms Ten-Bohmer's mobile phone either to or from mobile phone number 0481 252 467 contain texts from "k" or "kkk" inquiring whether "everyone got the new number". They also contain texts to Ms Ten-Bohmner where the user asks "Tell me something only u would know about us in jail…so I know its u" and Ms Ten-Bohmer replies by referring to "our fight over loosing [sic] the key or u helping me wit ma show cause???" I consider therefore that there is also evidence in those texts from which a jury could conclude that Ms Hardstaff was the user of that mobile phone.

[58] Counsel for the applicant also seeks the exclusion of any reference to the applicant or others being incarcerated in the watch house or otherwise detained, on the basis of the prejudicial nature of the evidence. In relation to a reference in the text message to the time that Hardstaff and Ten-Bohmer were both in prison, I consider that the text message could be edited to delete the words "in jail". I do not consider that it is necessary to delete the reference to "show cause" as such a procedure is used in a wide variety of situations.

[59] Accordingly I can see no basis to exclude the evidence of those text messages to or from the 3 mobile phone numbers 0421 953 031, 0421 481 587 and 0481 252 467. I note however that the words "in jail" should be removed from the relevant text message.

Are Counts 1 to 5 properly joined on the indictment?

[60] Section 567(1) of the Code provides that except as otherwise expressly provided "an indictment must charge 1 offence only and not 2 or more offences". Section 567(2) of the Code then expressly provides "Charges for more than 1 indictable offence may be joined in the same indictment against the same person if those charges are founded on the same facts or are, or form part of, a series of offences of the same or similar character or a series of offences committed in the prosecution of a single purpose."

[61] Counsel for the applicant seeks a declaration that Counts 1 and 2 are not properly joinable with Counts 3, 4 and 5 and on this basis, seeks an order that there be separate trials – one trial in relation to the first period of alleged trafficking (Counts 1 and 2) and

---

[6] See Respondent's Submissions dated 21 September 2016, p 11.

another trial in relation to the second period of alleged trafficking (Counts 3-5). The essence of the applicant's argument is that the charges are not, on the Schedules of Fact provided by the Crown, founded on the same facts.

[62] For a charge to be founded on the same facts *R v Cranston*[7] held they must have a 'common factual origin'. There is no doubt that Counts 1 and 2 are not founded on the same facts as Counts 3-5 in the way dictated by s 567 of the Code, given that Counts 1 and 2 occurred in an 8 week period from early May 2015 to early July 2015 and the other counts occurred over a 12 week period from early January 2016 to early May 2016.

[63] Presumably the basis for joinder is that the offences are of the same or similar character, given that Counts 1 and 3 both charge trafficking offences. The applicant argues that the five counts on the indictment are not part of a series of offences of the same or similar character. In this regard I note that Macrossan J in *Cranston* outlined the history regarding the joinder of charges at common law and noted that there must be some "justification" for the joinder of charges in the first place under the rules which regulate it. Reference was also made in *Cranston* to the High Court decision of *de Jesus v The Queen*[8] where Dawson J held that the offences of rape in that case, which involved different victims and occurred on different occasions, were of the same or similar character because of their inherent legal character or elements and they "constituted a series because there was a sufficient nexus or correlation constituted by the factual similarity in the circumstances of their commission".[9] I note however that Brennan J in *de Jesus* considered that he could not see where there was a connection between the two offences such that it made them a single series or part of it. Clearly then views can differ as to what constitutes a nexus or a series.

[64] The Schedule of Facts which has been tendered in relation to Counts 1 and 2 indicates that in the first period the police operation into trafficking was targeting a woman called Renae Heinze and that Hardstaff was not initially under suspicion. There are however a significant number of telephone conversations (94) and text messages (41) between Hardstaff and Heinze in the relevant period. Many of those communications use coded language. A significant amount of money was also found in Hardstaff's possession when the searches that were conducted on 17 June 2015 and 7 July 2015. On the first occasion, it was $8,650.00 and on the second it was $3,750.00. That evidence by itself could simply indicate that the applicant had a serious drug addiction and was simply purchasing in large quantities to support her own habit.

[65] There is however other evidence which points to trafficking and supply in this first period. There is reference in the conversations to Hardstaff supplying people and being owed money, as well as reference to working from a shed. It is clear from those conversations that an available inference is that Hardstaff was buying from Heinze in large quantities and indeed more than 15 ounces of methylamphetamine is shown to have been purchased over a two month period. The evidence also indicates that Hardstaff owned a number of mobile phones. There is also evidence that on 6 July 2015 Hardstaff supplied a person with methylamphetamine (Count 2). In the relevant period

---

7 [1988] 1Qd R 159.
8 (1986) 61 ALJR 1.
9 *R v Cranston* [1988] 1Qd R 159 at 164.

neither Hardstaff nor her husband had any income or salary apart from Child Support payments.

[66] The Crown also relies on the evidence of the witness Cristle Ten-Bohmer that Hardstaff had admitted to her whilst they were both in custody that she had been supplying "ice".

[67] That is the extent of the evidence against the applicant in relation to Counts 1 and 2. I have already outlined above in paragraphs [19] to [59] the extensive telephone evidence of trafficking in mehthylamphetamine in the second period.

[68] Should all those counts be joined on the same indictment?

[69] The answer to this question necessarily depends on whether the requirements for joinder as provided for by s 567 of the Code have been satisfied. Do the offences in Counts 1 and 2 on the one hand and Counts 3, 4 and 5 on the other form part of a series of offences committed in the prosecution of a single purpose? Is there a sufficient nexus between the offences to show that they are offences of a similar character?

[70] In *R v Cogley*[10] it was held that in order for a number of offences to be a series of offences of a similar character, there needs to be some nexus between the offences i.e. elements of similarity which, in all the circumstances of the case, enables the offences to be described as a series. The Crown submits that both periods of trafficking involved the use of an industrial shed, coded messages and were committed in the prosecution of a single purpose, namely the carrying on of a business of distributing methylamphetamine for profit. The Crown argues that the business only ceased operating for the six months Hardstaff was in custody and then recommenced.

[71] There is no doubt that the two sets of offences are separated in time by about six months during the period the applicant was in custody and I accept that there is no particular feature which indicates that there is a major identifier which is common between the two sets of the offences. I cannot see an underlying unity or a system, pattern or signature which is inherently unique to the applicant. Indeed some of the similarities referred to by the respondent would be present in almost all drug offences, particularly the language and terms used as well as the use of mobile phones and text messages.

[72] It is clear however that it is not necessary to show a "striking similarity" or the need for an "underlying unity".[11] There is no doubt that all five counts on the indictment involve the movement of large quantities of drugs for profit. It would seem to me however that ultimately, the offences are of a sufficiently similar character in that they all involve the supply or attempted supply of drugs in exchange for money as part of the same business.

[73] An objective analysis of the text messages indicates that there is evidence of a continuation of the same business from the first trafficking period into the second trafficking period. In this regard the evidence is that a text message was sent by "Kel" to 28 contacts on 2 January 2016, shortly after Hardstaff's release from custody. Six of those contacts were common to Hardstaff's previous phone and indeed the message was sent to what must be an established customer base, given the content of the message:

---

[10] [1999] VSCA 123 at [24].

[11] *Sutton v R* [1984] HCA 5; (1984) 152 CLR 528 per Brennan J.

> "New number. Please do not say names in text and I do not like voice calls when you are chasing stuff for drop off etc….please keep this number strictly to yourself. LLR kel xo"

[74] It would seem to me that the text in those terms amounts to a resumption of the supply of the same or similar product to the same people using the usual methods. In my view the text message essentially says "I am back, here is my new number, use this number but be discreet, the product will be dropped off." The implication is that the method for ordering would also be the same i.e. the product could be ordered for drop off via a text message. Furthermore the message was clearly sent to an established customer base of persons who had used the service before. It is also to be inferred that the product which was to be dropped off was not part of a legitimate business given the warnings about the use of names. It would seem to me that message indicates Hardstaff is re-engaging in her business and she is using a similar business model. I consider that on the basis of the principles identified in *Sutton v R*[12] that there is indeed a connection between the crimes. As Brennan J stated:

> "The equivalent provision in the Indictments Act was considered in *Ludlow v. Metropolitan Police Commissioner* (1971) AC 29, at p 39 where Lord Pearson pointed out that both the law and the facts 'should be taken into account in deciding whether offences are similar or dissimilar in character', and I respectfully agree. If the offences are similar in character, they may constitute a series. 'Series' does not import a clear criterion for determining what charges may be joined in the same information. Perhaps little more can be said about its meaning than Dixon J. said in *Packett v. The King* [1937] HCA 53; (1937) 58 CLR 190, at p 207, namely, that 'it connotes some connection between the crimes'.
>
> The facts to be taken into account in ascertaining whether the charges joined in the information satisfy the conditions stated in sub-s. (1) are the facts alleged by the Crown. They are the facts on which the indictment is framed and the only facts available to a trial judge upon which he can rule whether the joinder of charges is authorized by sub-s. (1). If the joinder of charges in an information is challenged, the judge will refer to the depositions taken on the committal proceedings and proofs of other evidence which the Crown proposes to tender at the trial in order to determine whether there is such a connection between the offences charged that they may rightly be regarded as a series. It is immaterial that those facts are disputed by the defence."

[75] On that basis I consider that the two trafficking offences are of a sufficiently similar character and could appropriately be joined on the indictment.

Is the evidence of the trafficking in Counts 1 and 3 cross admissible?

[76] The Crown submits that the cross admissibility of the evidence from each period of alleged trafficking supports joinder under s 567. The Crown also submits that the evidence pertaining to each of the alleged trafficking periods is cross admissible on application of the test in *Pfennig v The Queen,*[13] that is, that there is no reasonable view of it other than as supporting an inference of guilt of Ms Hardstaff.

---

12 [1984] HCA 5; (1984) 152 CLR 528 at 540-541.
13 (1995) 182 CLR 461.

[77] The applicant however submits that the evidence pertaining to each period of offending is not cross admissible on application of the *Pfennig* test. The applicant points out that the two periods of alleged trafficking are separated in time by approximately six months and argues that there is no 'unusual feature or stamp' to the offending that would allow the evidence to be connected through the requisite sufficient nexus.

[78] The applicant argues that allowing the cross admissibility of the evidence would be prejudicial because it asks the jury to engage in impermissible propensity reasoning. It was clearly established in *Pfennig* that 'mere' propensity evidence which merely shows that an accused person has a bad disposition has no other relevance and should not be received into evidence. Such evidence is generally to be excluded not because it is not relevant, but rather because it is likely to be prejudicial to an accused.

[79] The Crown submits that the test in *Pfennig* is not restricted to considering whether the evidence is similar in fact or has an 'unusual feature or stamp' and indeed the Crown makes clear that it does not assert in this case that the evidence is so. It is the Crown's submission that while similar facts or an 'unusual stamp' are bases upon which a strong degree of probative force may be shown, the test in *Pfennig* is simply that there is no reasonable view of the evidence other than as supporting an inference of guilt.

[80] Propensity evidence can therefore be admissible in some circumstances to establish the guilt of an accused as the High Court made clear in *Phillips v R:*[14]

> "'The "admission of similar fact evidence ... is exceptional and requires a strong degree of probative force". It must have "a really material bearing on the issues to be decided". It is only admissible where its probative force "clearly transcends its merely prejudicial effect". "[I]ts probative value must be sufficiently high; it is not enough that the evidence merely has some probative value of the requisite kind."'

[81] The Crown in this case therefore draws the following commonalities between the two periods of alleged offending to demonstrate that strong degree of probative force, namely the use of a leased industrial shed from which to dispense the drugs; the similarity of drug related terminology used in communications; the consistency of Hardstaff's self-identification in communications; and the use of multiple telephone numbers. Counsel's arguments include the use of similar language and the consistent use of the name "kel" or "k". The Crown asserts that the two periods of alleged offending were only interrupted by Hardstaff's return to custody in late 2015 and that immediately on her release she sent text messages to her customer base, which indicated an intention to resume business as usual.

[82] The test in *Pfennig* was considered by the High Court in *Phillips* as follows:

> "What is said in *Pfennig v The Queen* about the task of a judge deciding the admissibility of similar fact evidence, and for that purpose comparing the probative effect of the evidence with its prejudicial effect, must be understood in the light of two further considerations. First, due weight must be given to the necessity to view the similar fact evidence in the context of the prosecution case. Secondly, it must be recognised that, as a test of admissibility of evidence, the test is to be applied by the judge on certain

[14] (2006) 225 CLR 303 at [54].

> assumptions. Thus it must be assumed that the similar fact evidence would be accepted as true and that the prosecution case (as revealed in evidence already given at trial or in the depositions of witnesses later to be called) may be accepted by the jury. *Pfennig v The Queen* does not require the judge to conclude that the similar fact evidence, standing alone, would demonstrate the guilt of the accused of the offence or offences with which he or she is charged. But it does require the judge to *exclude* the evidence if, viewed in the context and way just described, there is a reasonable view of the similar fact evidence which is consistent with innocence" (footnotes omitted).

[83] Accordingly the test I must apply when considering the issue of cross admissibility is the same test a jury must apply, which is whether there is a reasonable view of the evidence which is consistent with innocence. To this I note a number of assumptions I must bear in mind when applying this test. First, that the similar fact evidence is true,[15] second that the prosecution case is accepted by the jury[16] and third, that to be admissible, the propensity evidence when added to the other evidence would eliminate any reasonable doubt that would otherwise arise.[17]

[84] I have already outlined above the evidence of the trafficking in Count 1 and 3. The evidence of trafficking in Count 1 is not as great as the evidence of trafficking in Count 3. There is no doubt however that there is evidence to support an inference that Hardstaff was engaged in a course of conduct during the first period which would support charges of trafficking and supply. The text messages, the codes used, the fact that Ms Hardstaff received no other income other than Child Support payments during the relevant time, the quantities of drugs obtained in a two month period and the amounts of money found when intercepted all support such a conclusion. It is highly unlikely that given the quantities of drugs purchased and the sums of money involved that the drugs were solely for Hardstaff's personal use. It would seem to me that there is no reasonable explanation for the purchase of that quantity of methylamphetamine other than for the purpose of trafficking in the drug for profit.

[85] If I assume that the evidence of the text messages and the searches in relation to Count 1 are accepted by the jury but they are not satisfied beyond reasonable doubt that that it establishes Hardstaff's involvement in trafficking in methylamphetamine, the issue is whether the evidence in relation to the second period of trafficking would remove that doubt.

[86] There is no doubt that there is ample evidence to support the charges on Counts 3-5 given the content of the text messages which I have referred to in paragraphs [19] to [59]. Whilst the evidence in relation to Counts 3-5 is stronger than the evidence to support Counts 1 and 2 it is in fact clearly similar to the nature of the activities in the first period - there are just more examples of the same type of conduct. It clearly involves the sale of methylamphetamine by Hardstaff, the use of similarly coded language and the use of the shed at Clontarf.

---

15 *Phillips v R* (2006) 225 CLR 303.
16 Ibid.
17 *R v WRC* [2002] NSWCCA 210 at [29].

[87] It would seem to me that any doubt that a jury might have in relation to the first period of trafficking would be removed by the evidence of the trafficking in this second period. In this regard I note Dawson J's view in *Harriman v R*:[18]

> "Propensity evidence is, of course, circumstantial evidence in that the only proof which it can offer is proof by inference. But it is circumstantial evidence of a dangerous kind because of the prejudice which it engenders. That is why the occasions upon which it is admissible are strictly limited. As with all circumstantial evidence in criminal cases, it should not be used to draw an inference adverse to an accused unless it is the only reasonable inference in the circumstances. But more than that, the evidence ought not be admitted at all if the trial judge is of the opinion that there is a rational view of it which is inconsistent with the guilt of the accused: see *Hoch* (24). If he is of that opinion, the evidence will not possess the requisite high degree of probative force."

[88] It would seem to me that when all of the evidence is considered as a whole, there is no reasonable explanation for it other than that Hardstaff was engaged in drug trafficking in both periods. On that basis the evidence of the second period of trafficking is admissible in respect of the charge of trafficking in the first period.

[89] Even if I am satisfied that all Counts are properly joined, there remains the question of whether I should exercise my discretion pursuant to s 597A of the Code to sever Counts 1 and 2 from Counts 3, 4 and 5 on the Indictment, because of prejudice to the applicant.

Should there be severance of Counts 1 and 2 from Counts 3 to 5 on the Indictment due to prejudice?

[90] As previously noted Macrossan J in *R v Cranston* [19] considered the issue of prejudice and held that where there was a significant level of prejudice, then there should be a liberal exercise of the discretion to sever contained in s 597A of the Code. In *Sutton* Brennan J indicated that there should be severance if evidence on one count is not admissible on the other. In this case however as the evidence is cross admissible, those considerations do not apply and indeed given that factor there would seem to be no utility in the severance.

[91] There should be orders in the following terms:

ORDERS

1. **The application to exclude the telephone communications on phones utilising the numbers 0411 192 786, 0481 780 723, 0414 729 277 and 0423 246 916 (the Lawler phones) is refused.**

2. **The telephone communications on the phone utilising the number 0413 906 022 (Webb's phone), which relate to communications with mobile phone numbers 0487 564 448 and 0407 121 214, sent on 30 April 2016 and 1 May 2016, are excluded.**

---

[18] [1989] HCA 50.
[19] [1988] 1 Qd R 159.

3. **The application to exclude the telephone communications on Webb's phone which relate to communications with mobile phone number 0431 624 331 is refused.**

4. **Any references to variation of bail are to be removed from the text messages sent from the phone utilising 0431 624 331 to Webb's phone.**

5. **The application to exclude the telephone communications on phones utilising the number 0411 990 163, which relate to communications with mobile phone numbers 0421 953 031, 0421 481 587 and 0481 252 467 (phones that relate to the evidence of Ten-Bohmer) is refused.**

6. **The words "in jail" are to be removed from the text message sent from 0481 252 467 to 0411 990 163.**