# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Stamatov* [2016] QSC 280 |
| PARTIES: | **R**<br>(respondent)<br><br>**v**<br><br>**STAMATOV, Alexander**<br>(defendant/applicant) |
| FILE NO/S: | SC Indictment No 5 of 2016 |
| DIVISION: | Trial Division |
| PROCEEDING: | Pre-Trial Application |
| ORIGINATING COURT: | Supreme Court Rockhampton |
| DELIVERED ON: | 1 December 2016 |
| DELIVERED AT: | Rockhampton |
| HEARING DATE: | 24 November 2016 |
| JUDGE: | McMeekin J |
| ORDER: | **The ruling of the Court is that:**<br><br>**1. The defendant's application for an order that parts of a record of interview conducted on 20 May 2015 be ruled inadmissible is refused.** |
| CATCHWORDS: | CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – PREJUDICIAL EVIDENCE – where the defendant applies for a ruling that parts of a record of interview are inadmissible – where there are references in the record of interview to the exercise of a search warrant – where there are references to text messages sent to the defendant sourcing various dangerous drugs – where the defendant submits the prosecution's case is that the defendant was trafficking in steroids – where the defendant submits the references to acts preparatory to supply of dangerous drugs other than steroids are prejudicial and not relevant – whether the evidence is inadmissible<br><br>*Criminal Code* 1899 (Qld), s 590AA<br>*Drugs Misuse Act* 1986 (Qld), s 5, s 129(1)<br><br>*Martin v Osborne* (1936) 55 CLR 367, considered<br>*Pollitt v The Queen* (1992) 174 CLR 558, cited<br>*R v Harper* [2015] QCA 273, cited |

*R v Kelly* [2005] QCA 103, cited
*R v Nguyen* [1999] 1 VR 457, considered
*R v Nguyen; R v Le* [2007] QCA 162, cited
*R v Duong* [2015] QCA 170, cited

COUNSEL: P Davis QC with J Jones for the applicant
J Phillips for the respondent

SOLICITORS: Potts Lawyers for the applicant
Director of Public Prosecutions (Qld) for the respondent

[1] **McMeekin J:** Alexander Stamatov is charged with trafficking in dangerous drugs contrary to s 5 of the *Drugs Misuse Act* 1986 (Qld). He applies pursuant to s 590AA of the *Criminal Code* 1899 (Qld) for a preliminary ruling on the admissibility of certain parts of a record of interview conducted between himself and two detectives on 20 May 2015.

[2] The parties have supplied a schedule (Ex 3) which refers to the disputed passages by Item number and then summarises the competing arguments. For convenience I shall use the Item numbers to refer to the disputed passages.

**Item 3**

[3] The objection relates to two things. One is the officer's reference to "drug related" items and matters. The Crown concedes the point. The second relates to the officer introducing the topic to be discussed – text messages on a mobile phone that the officers had seized in a search – in these terms: "We attended [an address] where you were present …in the search warrant that I …executed… in relation to that items were seized… a mobile phone."

[4] The objection is to the reference to the search warrant. The complaint is lack of relevance. The submission made at the hearing was:

> "…the fact that there was a search warrant adds nothing. There's no challenge to the legality of the search and all that the existence of the search warrant or evidence of the existence of the search warrant demonstrates is that there's been some exercise of executive power to issue it which, of course, raises the notion that some person exercising executive power has thought it necessary to do so. That adds nothing to the jury's deliberations or considerations of the case."

[5] Senior counsel for the applicant expressly disclaimed that the objection was one of the prejudicial effect of the evidence. Despite that, the submission was made that:

> "So the fact that someone exercises executive powers has determined to issue the search warrant does nothing more than raise that someone thought that the Crown at least had a – the police at least had a reason, some reason, to do that. And so it is just irrelevant."

[6] The prosecution response is that the reception of such introductory evidence is customarily led, innocuous and puts the item seized and the conversation about it into context. It was submitted that the jury should not be left with the impression that the mobile phone "simply magicked itself" into the police officer's hands.

[7] It is true, as senior counsel for the applicant effectively submitted, that the evidence is indicative that the police had information and someone in authority thought the information sufficiently cogent to issue the warrant. Nonetheless no case is cited in which a Court has ruled such evidence inadmissible.

[8] The admissibility of evidence that the police had acted "on information received" was considered by the Court of Appeal in Victoria in *R v Nguyen*[1]. There no objection was taken to the evidence that the police had been at a certain place acting "upon information received". The objection was to supplying the content of that information – that the information concerned a drug deal or delivery in the vicinity.

[9] Phillips CJ said:

> "My experience over the last forty years is that, in Victorian Magistrates' Courts at any rate, police officers often introduce their evidence by the phrase, "on information received". Objection is not taken and the fairness of proceedings is not diminished. Apart from this matter, I do not myself recall another instance of a like phrase being given in evidence in a jury trial. Its possible introduction into such proceedings ought to be scrutinised with great care and plain justification sought on a case by case basis."[2]

[10] The majority (Batts and Kenny JJA) did not agree with that sentiment. However the Court was unanimous in holding that content could not be given to such information. Kenny JA (with whom Batt JA agreed) said:

> "It is customary for police officers in this State to say in evidence that they attended at a place "upon information received". A statement like this has some limited relevance, as showing that the officer had a reason conformable to his office for being there and was in attendance in his capacity as a police officer. The statement is not objectionable as hearsay, because it is not said that any assertion contained in the information provided was true. **Accordingly, the evidence led from [the police officers] was, to my mind, unobjectionable and counsel for the applicant did not contend otherwise.** [Other officers] gave evidence beyond that which was customary: they testified as to the content of the information which had been received by them and, in this case, that evidence was either irrelevant or, if relevant, its form made it objectionable as hearsay."[3] (my emphasis)

[11] There is no attempt here to give content to the background information on which the warrant was based.

[12] I do not accept that a reference to a search warrant, albeit similar, is in precisely the same category of evidence as that in *Nguyen*. I agree with the prosecutor's submission that such evidence is led as a matter of course and so far as I am aware has been led throughout the near 40 years that I have been in practise or on the bench.[4] That of course does not supply an answer when objection is taken but tends to suggest that the evidence is admissible and certainly suggests that there is no unfairness.

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[1] [1999] 1 VR 457.
[2] Ibid at 458 [3].
[3] Ibid at 463 [21].
[4] By way of example in *R v Harper* [2015] QCA 273 the summary of the evidence on appeal suggests that the jury were told of searches made pursuant to nine separate search warrants.

[13] A deal of evidence in a criminal trial is not directly relevant to any fact in issue. The addresses of the witnesses are often irrelevant, their occupations, and many other details. The receipt of such evidence is justified as reflecting the practices from ancient times. It usually provides some context for the account that the jury are to hear. That is relevant here. Sometimes such matters are relevant not as facts in issue but as facts relevant to facts in issue. Brennan J said in *Pollitt v The Queen:*[5]

> "The first condition of admissibility of evidence is relevance: apart from questions relating to the credit of a witness, a fact which evidence is tendered to prove (a 'fact to be proved') must be a fact in issue or a fact relevant to a fact in issue. Where a fact to be proved is a fact in issue, admissibility of evidence tendered to prove it depends solely on the manner in which that evidence tends to establish the fact to be proved. Where a fact to be proved is a fact relevant to a fact in issue, admissibility depends first on the manner in which that evidence tends to establish the fact to be proved and, secondly, on the relevance of the fact to be proved to a fact in issue."

[14] The significant point here is that the messages that are said to be incriminatory are the applicant's messages – whether sent or received. So a fact relevant to that issue is that the phone under discussion is the applicant's mobile phone. It is relevant to know that it has been seized by the police acting in their official capacity and from the applicant's custody. That is so because the messages on it, if they are incriminatory, can be assumed then to be the unaltered messages sent and received by the applicant. It is not to the point to say that the applicant made no such protest in the interview. He is yet to reveal his defence in its entirety – he is under no obligation to do so. Evidence of this type meets in advance possible lines of defence. If anything the fact that the seizure was done pursuant to a search warrant rather than other alternatives about which the jury might speculate may be beneficial to the accused. In any case it is the fact.

[15] In my view the evidence is admissible.

**Items 13, 25, 26, 28, 29**

[16] Each of the contested passages contains references to illegal drugs or what may be illegal drugs, in one form or another. The references include an apparent associate of the applicant sourcing from him "MD caps" (described by the applicant in the interview as being like "ecstasy"); "caps", "roundies", "pills", and "gram on ice", and asking the defendant for prices for a "ball", "half ball", "ounce and half ounce". Item 26 refers to the applicant seeking to obtain a "glass pipe".

[17] Putting that last text to one side, the applicant concedes that if he was charged with trafficking in the drugs mentioned in the messages the evidence would be admissible but the prosecution case, he submits, is that he was trafficking in steroids, not other illegal drugs. It is submitted that this evidence at the most merely goes to acts prepatory to supplying drugs other than steroids, not trafficking in them. It is said that the disputed passages in the interview amount simply to bad character evidence.

[18] The Crown contends that the evidence is admissible. The Crown submit that the charge is not that the applicant trafficked in any one particular drug or type of drugs

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[5] (1992) 174 CLR 558 at 571.

but that he trafficked in "dangerous drugs". Reliance was placed on s 129 of the *Drugs Misuse Act* 1986 (Qld):

> **Evidentiary provisions**
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> (1) In respect of a charge against a person of having committed an
>
> offence defined in part 2—
>
> > (a) it is not necessary to particularise the dangerous drug in respect of which the offence is alleged to have been committed; and
> >
> > (b) that person shall be liable to be convicted as charged notwithstanding that the identity of the dangerous drug to which the charge relates is not proved to the satisfaction of the court that hears the charge if the court is satisfied that the thing to which the charge relates was at the material time a dangerous drug; …

[19] The offence of trafficking is an offence defined in Part 2 of the Act.

[20] In my view the applicant's objection is misconceived. It involves the rather startling proposition that proof that a person received enquiries on their mobile phone indicative of an ability to source and price dangerous drugs is not relevant to a charge of trafficking in dangerous drugs. It may well be that the prosecution case is strongest in its allegation that the applicant trafficked in steroids, but the prosecution case is not confined as the applicant's submission assumes.

[21] To take a more prosaic example. Assume that there is evidence that a vendor has made a number of sales of some object, say pineapples. Proof that the vendor had available on his shelves other items for sale typically sold by a green grocer would establish that the vendor was such a grocer not just a pineapple salesman. That no evidence was available that any of the items on the shelves had sold does not detract from that conclusion. So here. The text messages go to show that the applicant had available for sale drugs that were dangerous drugs. That it cannot be proved what the outcome was of the matters under discussion does not detract from the proof that that was his business, and that his business was not simply the sale of one type of dangerous drug.

[22] Each of the messages goes to prove an act that is a step in the process of selling dangerous drugs – an act prepatory to it. The prosecution do not have proof from the text messages as to the outcome of the transactions, if that is what they are, under discussion but that does not make them inadmissible as a step in the proof. Indeed the very repetitiveness of involvement provides some proof that what was involved is a business: *Martin v Osborne*[6]; *R v Kelly.*[7] In *Kelly* McPherson JA referred to *Martin v Osborne* in these terms:

> "In doing so, [the jury] were entitled to act on the principle that the repetition of acts and occurrences is, as Dixon J said in *Martin v Osborne* (1936) 55 CLR 367, 376:
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> > "… often the very thing which makes it probable that they are accompanied by some further fact. The frequency with which a set of circumstances recurs or the regularity with which a course of

[6] (1936) 55 CLR 367 at 376.
[7] [2005] QCA 103 at 3 [7].

> conduct is pursued may exclude, as unreasonable, any other explanation or hypothesis than the truth of the fact to be proved.""[8]

[23] Not only is the evidence relevant to the question of the conducting of a business but as well provides proof that the applicant was involved with numerous dangerous drugs and is clearly admissible to meet a defence case that the applicant believed that he was involved with placebos only, a defence that has been flagged at earlier mentions of the proceedings. Whether that is to be the defence or not the prosecution must negative all possible defences.

[24] Section 129(1)(a) means that proof of the identity of the drugs the subject of the charge is not necessary. All that is required is that there be proof that the drugs are dangerous drugs as defined of some form: see *R v Duong*[9]. If the prosecution case was by its particulars restricted to steroids there may be some basis for the complaint (see *R v Nguyen; R v Le*[10]) but it is not so restricted.

[25] There is no doubt here that the words used in the text messages provide proof of potential transactions related to dangerous drugs and not to innocuous substances – whether completed by a supply or not. In my view that is sufficient to make the texts admissible.

[26] The message relating to the glass pipe is in a different category. It suggests some association with dangerous drugs but for use, not supply to others. Despite that I think it admissible. It is the common experience of the Courts that many traffickers use the drugs in which they traffic – an excuse often given on sentence is that the trafficking was engaged in to support the drug taking habit. While motive need not be proved evidence suggestive of a reason to traffic in drugs cannot be inadmissible.

[27] In my view the disputed evidence is admissible.

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[8] Ibid.
[9] [2015] QCA 170 at 8 [27].
[10] [2007] QCA 162 at 6 [22].