SUPREME COURT OF QUEENSLAND

CITATION:	*R v KL* [2017] QSC 144
PARTIES:	**THE QUEEN** v **KL** (applicant)
FILE NO/S:	Indictment No 721 of 2016
DIVISION:	Trial Division
PROCEEDING:	590AA pre-trial hearing
DELIVERED ON:	6 July 2017
DELIVERED AT:	Brisbane
HEARING DATE:	29 June 2017
JUDGE:	Jackson J
ORDER:	**The order of the court is that:** **1. The application is dismissed.**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – ILLEGALLY OBTAINED EVIDENCE – PARTICULAR CASES – where police performed an emergent search of a residential unit under s 160 of the *Police Powers and Responsibilities Act* 2000 (Qld) – where a substance containing a dangerous drug and a mobile telephone which are alleged to be the property of the applicant were seized during the search – where a post-search approval order was applied for under s 161 of the *Police Powers and Responsibilities Act* 2000 (Qld) five days after the search was performed – where the applicant submits that the application under s 161 of the *Police Powers and Responsibilities Act* 2000 (Qld) was not made as soon as reasonably practicable – where the applicant applies for an order under s 590AA of the *Criminal Code* (Qld) that all evidence seized during the search of a residential unit on 6 and 7 August 2017 is inadmissible at his trial – whether the application should be granted *Criminal Code* (Qld), 590AA *Police Powers and Responsibilities Act* 2000 (Qld), s 160, s 161 *Bunning v Cross* (1978) 141 CLR 54, applied

Cleland v The Queen (1982) 151 CLR 1, cited
MacPherson v The Queen (1981) 147 CLR 512, distinguished
R v Bartorillo [2006] QCA 283, cited
R v Cahill [2016] QSC 275, discussed
R v Lee (1950) 82 CLR 133, distinguished
R v Ireland (1970) 126 CLR 321, cited
R v Keen [2016] 2 Qd R 1, cited
R v Milos [2014] QCA 314, applied
R v Munck [2010] QSC 416, cited
R v P [2016] QSC 49, followed
Wendo v The Queen (1963) 109 CLR 559, distinguished

COUNSEL: M J McCarthy for the applicant
S Hedge for the Crown

SOLICITORS: Fisher Dore Lawyers for the applicant
Office of the Director of Public Prosecutions for the Crown

Jackson J

1. The applicant is awaiting trial on indictment in this court for offences that on dates between 21 May 2015 and 7 August 2015 he carried on the business of unlawfully trafficking in a dangerous drug and that on 7 August 2015 he unlawfully had possession of the dangerous drug methylamphetamine.

2. He applies for an order under s 590AA of the *Criminal Code* that all evidence seized during the search of a residential unit on 6 and 7 August 2017 is inadmissible at his trial.

Background facts

3. At about midnight on 6 August, police officers entered the unit for the original purpose of arresting someone other than the defendant under a warrant for arrest. They were given entry by managers of the building who unlocked the door.

4. Evidence was seized as the result of what is commonly known as an "emergent search" carried out under s 160 of the *Police Powers and Responsibilities Act* 2000 (Qld) ("PPRA").

5. That real evidence included a quantity of a substance that on analysis contained a quantity of the dangerous drug methylamphetamine in excess of 2.0 grams alleged to have been found in a jacket belonging to the defendant and a mobile telephone from which text messages have been recovered alleged to be the defendant's phone.

The questions raised by the application

6. At the trial of the applicant, the prosecution would tender evidence of the search, and the finding of the substance as relevant to prove possession of a dangerous drug in excess of 2.0 grams and the finding of the phone as evidence relevant to

prove trafficking in a dangerous drug. The evidence would be given by the police officers who carried out the search.

7. The applicant would object to the admission of the evidence of the substance or the phone as evidence that should be excluded as obtained by an unlawful search. The question of admission of the evidence would be resolved on a voir dire. The present application made under s 590AA is a summary process for resolving that question in advance of the trial, but the questions for decision are, in substance, those that would otherwise have arisen at the trial.

8. It may appear trite to say so, but the starting point is that at common law a police officer has limited authority to search a person or a person's property without their consent. The relevant powers are now the subject of statute, largely under the PPRA, where detailed provision is made as to the extent of and the conditions upon which a police officer has authority to conduct a search of a person or property in different situations. The underlying assumption is that a search not conducted in accordance with the statutory conditions is not authorised by the statute and that evidence obtained in those circumstances, unless otherwise authorised, is obtained by an unlawful or illegal search.[1]

9. A further assumption on which the provisions of the statute operate is that evidence obtained upon an unlawful search may be excluded, that is, ruled or held to be inadmissible in a criminal proceeding for an offence by way of trial on indictment.[2] That rule is a principle of the common law of Australia, and in this country it is founded in *R v Ireland*[3] and *Bunning v Cross*,[4] particularly *Bunning v Cross*. That case concerned the admissibility of evidence obtained under a statutory provision authorising a police officer to require a driver to give a breath specimen for a breathalyser test. A condition of the exercise of the power was that the police officer had a reasonable suspicion that the driver was under the influence of alcohol. It was held that the condition was not satisfied. A question arose as to the admissibility of the results of the test as evidence obtained by an unlawful requirement to provide the breath specimen.

10. In the present case, the questions are whether the search by police officers was unlawful and whether evidence obtained by an unlawful search is admissible or should be excluded. It is the principle applied in *Bunning v Cross* that determines the answer to the second question.

11. However, an additional question arose during submissions as to whether the applicant or the respondent bears the onus of proof on questions of fact relevant to deciding the questions whether the search was unlawful and, if so, whether the evidence should be excluded. The parties made a joint submission about the onus of proof but before considering that submission it is necessary to set out the relevant statutory provisions and the relevant facts and contentions.

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1 *Police Powers and Responsibilities Act* 2000 (Qld), ss 7 and 10; *R v Munck* [2010] QSC 416 [33]; *R v Koning* [2001] QSC 131; *Wright v Queensland Police Service* [2002] 2 Qd R 667, 677-678 [34]-[38].

2 *Police Powers and Responsibilities Act* 2000 (Qld), ss 7 and 10; *R v Munck* [2010] QSC 416 [34]; *R v O'Neill* [1996] 2 Qd R 326, 347; *Kuruma v The Queen* [1955] AC 197, 204.

3 (1970) 126 CLR 321, 335.

4 (1978) 141 CLR 54.

Sections 160 and 161

12. Section 160 of the PPRA provides, relevantly:

> "(1) This section applies if a police officer reasonably suspects—
>
> (a) a thing at or about a place, or in the possession of a person at or about a place is evidence of the commission of a part 2 offence; and
> (b) the evidence may be concealed or destroyed unless the place is immediately entered and searched.
>
> (2) …
> (3) A police officer may enter the place and exercise search warrant powers, other than power to do something that may cause structural damage to a building, at the place as if they were conferred under a search warrant."

13. However, exercise of the powers granted under s 160 is subject to the condition imposed under s 161 of the PPRA as follows:

> "(1) **As soon as reasonably practicable after exercising powers** under section 160, the police officer must apply to a magistrate in writing for an order approving the search (post-search approval order).
> (2) The application must be sworn and state the grounds on which it is sought.
> (3) The applicant need not appear at the consideration of the application, unless the magistrate otherwise requires.
> (4) The magistrate may refuse to consider the application until the police officer gives the magistrate all the information the magistrate requires about the application in the way the magistrate requires.
>
> Example—
> The magistrate may require additional information supporting the application to be given by statutory declaration." (emphasis added)

14. The applicant does not challenge the validity of the search because of non-compliance with s 160. A senior constable ("SCO") was the police officer who reasonably suspected that a thing at the unit, or in the possession of a person at the unit was evidence of the commission of relevant offences and that evidence may have been concealed or destroyed unless the unit was immediately entered and searched. Accordingly, under s 160, he was authorised to enter the unit and exercise search warrant powers as if they were conferred under a search warrant.

15. The applicant's challenge is that the condition under s 161(1) that SCO as the relevant police officer had to apply for a post-search approval order as soon as reasonably practicable after the search powers were exercised was not complied with.

Facts relating to the timing of the application

16. Following or during the search, the police in attendance arrested four people. They were transported to a police station. The evidence collected in the search was secured and processed. SCO was involved in the process until the end of his shift at 4 am on Friday 7 August or afterwards.

17. Later, presumably on the morning of Friday 7 August, those detained were charged with a range of offences. One was issued with a notice to appear. The others were taken to the Southport watch house and would have been taken by other police officers before a magistrate. They included the applicant.

18. SCO returned to work at 10 pm on Friday 7 August for his next rostered shift. That was in the Safe Night precincts on the Gold Coast at Surfers Paradise. He was on foot patrol duties. His shift finished at 6 am. His next shift was on Saturday night and Sunday morning between the same hours on the same duties. As he described it, Friday and Saturday nights were "all hands on deck", meaning that he was required to carry out those duties as opposed to attending to desk work such as preparing the sworn application he was required to make under s 161 of the PPRA.

19. On Sunday 8 August, SCO was rostered and worked from 6 pm to 2 am.

20. It will be recalled that an application under s 161 is required to be made to a magistrate. There were standing arrangements as to when a magistrate would be available at Southport, which was the nearest Magistrate's Court. They were that an application could be made on Monday to Friday at either 8:45 am or 1:45 pm.

21. The applicant did not contend that SCO ought to have made the application at 8:45 am or 1:45 pm on Friday 7 August. Accordingly, the first time when it might have been reasonably practicable to make the application was at 8:45 am on Monday, 10 August, or 1:45 pm on that day.

22. SCO made an affidavit that was filed and read by the prosecution on the hearing of the application. He was called as a witness on the application and gave evidence to the extent of his recollection. I have no hesitation in accepting it as forthrightly and reliably given. He was the only witness who gave oral evidence.

23. SCO was not sure whether he began preparation of the application on Sunday 9 August but may have done so. His shift that day was between 6pm and 2am the following morning.

24. He did recall working on the preparation of the application on Monday 10 August. His shift that day began at 4 pm and ended at midnight. The task of preparing the application took in excess of three hours and was the longest of its kind he has done. He did so using his notebook and information gathered from Queensland Police Service QPrime system records.

25. Although the PPRA does not require that the applicant be the person who appears to make the application unless the magistrate requires it, SCO said it had been impressed on him that he should appear to make such an application, so as to be able to answer any questions.

26. On Tuesday 11 August, SCO was rostered for a requalification day or course. Accordingly, he did not make the application on that day.

27. On Wednesday 12 August, SCO's shift began at 1 pm. He attended before the magistrate and made the application. The magistrate granted a post-search approval order. The applicant does not challenge the validity of the order.

28. The applicant submits that the facts disclose a failure to make the application required under s 161(1) as soon as reasonably practicable. He submits that it was practicable to make the application from 8:45 am on Monday 10 August and on each of the times a magistrate was available from then. In all, the applicant submits that SCO's application should have been made on at least four practicable opportunities before it was made on the afternoon of Wednesday 12 August. The applicant referred to a case from another context as to the meaning of "as soon as reasonably practicable",[5] but it does not need to be considered.

29. The respondent accepts that it was possible to have made the application on each of those opportunities when a magistrate was available but submits that even if it was practicable to have done so, nevertheless an application made within 5 days that include a weekend, as a general proposition, is made as soon as reasonably practicable.

30. Second, the respondent submits that the application in this case was brought as soon as reasonably practicable having regard to SCO's work roster and commitments. The applicant submits that SCO's work roster and commitments ought to have been reprioritised to bring the application as soon as reasonably practicable, rather than as soon as was reasonably convenient.

31. The respondent submits that it would not have been reasonable for SCO to have attended to the preparation of the application on either his Friday or Saturday night shifts when he rightly gave priority to the public safety considerations that attended being on foot or traffic patrol on those nights in Surfers Paradise. There is an unstated assumption that underlies that submission, namely that there was no reasonable alternative to SCO carrying out those duties on those nights. That assumption was not proved by the respondent, other than to the extent that SCO said it was "all hands on deck" on Friday and Saturday nights.

32. Even if SCO's other duties made it reasonable on Friday and Saturday nights for him not to prepare the application, other persons, including the five other officers who attended with SCO at the time of the search, might possibly have assisted with that task. It was not necessary, as a matter of law, for SCO to prepare the draft application personally, any more than a deponent must prepare the draft of his or her own affidavit. However, this possibility was not explored with SCO in evidence. Accordingly, I do not conclude as a matter of fact that the draft application reasonably could have been prepared by others in a period that was shorter than it took SCO to do.[6]

33. In my view, even if SCO's other duties precluded him from appearing on an application before Tuesday 11 August, the application was not made as soon as

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5 *Al-Kateb v Godwin* (2004) 219 CLR 562, 608 [121] and 638 [226]; compare *Wills v Whiteside*; *ex parte Wills* [1987] 2 Qd R 284, 288.

6 Compare *R v P* [2016] QSC 49, [58] and [59].

reasonably practicable when it was not made on that day. As previously stated, irrespective of SCO's view, the application was not one that required his personal appearance as a matter of law. Nor was it suggested that it would have been impossible or unreasonable to have postponed SCO's requalification day. It should not be ignored that Tuesday 11 August was already 4 days after the day of the search.

Consequences of the breach

34. The respondent submits and the applicant accepts that the proper construction of ss 160 and 161 of the PPRA is that a breach of the requirement that the application must be made as soon as reasonably practicable retrospectively makes unlawful the search that was otherwise lawfully made under s 160. I observe that the PPRA does not expressly provide for the consequence of a breach of that requirement but neither party contended for any other construction and *R v P*[7] is authority that supports it. I proceed on the basis that the proper construction is that the search is made unlawful retrospectively.

35. Next, both parties submit that whether evidence seized during the unlawful search should be excluded is to be decided by the application of the common law principles that apply in relation to the discretionary exclusion of evidence obtained under an unlawful search in accordance with *Bunning v Cross*. Again *R v P*[8] supports that proposition and I proceed on that basis in order to decide this case.

Onus of proof

36. The parties jointly submit that there is an evidentiary onus on the prosecution to prove the facts required to establish admissibility of the evidence obtained by the search but that otherwise the onus of proof of facts relevant to exclude the evidence is borne by the applicant. I do not accept that submission. It is necessary to explain why briefly but I will not do so at length because in the result the onus of proof does not affect the result of this application.

37. The first question is who bears the onus of proving compliance or non-compliance with s 161? At trial, the question would arise when SCO was called to give evidence of carrying out the search and seizing the substance and phone. The applicant would object to the evidence being received as obtained by an unlawful search because of non-compliance with s 161.

38. As the party alleging that the applicant was in possession of a dangerous drug and that the applicant carried on the business of trafficking in a dangerous drug, the onus of proof of those ultimate facts rests on the prosecution, requiring it to prove them by admissible evidence. In propounding that evidence, the prosecution bears the onus of proving its admissibility, in general. As the party who objects to its reception on the ground that it was obtained unlawfully the applicant would at the least bear an evidentiary onus of proof of the fact or facts that raise the question that the evidence was obtained unlawfully. That was done on this application by an affidavit of the applicant's solicitor showing that the post-search approval order was not obtained until Wednesday 12 August.

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7 [2016] QSC 49, [60].

8 [2016] QSC 49, [61]-[118].

39. If compliance with the conditions of ss 160 and 161 is required for the lawful exercise of the emergent search power,[9] it might be thought that proof of compliance with those conditions would lie on the party who relied on the valid exercise of the power for admission of the evidence.

40. However, it must be remembered that the power discussed in *Bunning v Cross* is a discretionary power to exclude evidence obtained by unlawful conduct that is otherwise admissible. The informing principle is that the court expects those whose office is to uphold and enforce the law to do so lawfully, at the risk that the court will exclude evidence unlawfully obtained. That principle is not particularly concerned with the defendant. It is not based on fairness to the particular defendant.[10] The purpose of the principle is to promote lawful conduct by the police and to dissociate the court and the administration of justice from unlawful conduct.[11]

41. The parties jointly submit that the applicant bears the onus of proof of all facts relevant to the exclusion of the evidence by analogy with the common law cases that deal with the onus of proof of facts relating to whether a confession is given voluntarily and the admissibility of a confession not made voluntarily.[12]

42. In my view, the analogy is not a strong one. First, there is a distinction between the discretion to exclude evidence under the *Bunning v Cross* principle and the principles under which an involuntary confession is inadmissible as of right and a voluntary confession may be excluded in any event on the ground of unfairness that is well recognised, as both the principal reasons in *Bunning v Cross* say[13] and *Cleland v The Queen*[14] show even more clearly. For cases dealing with the admissibility of involuntary confessions, Deane J said in *Cleland*:

> "If there be anything to suggest that the alleged confession may not have been voluntary, the onus lies on the prosecution to show, on the balance of probability, that it was…".[15]

43. Second, the operation of the common law is often based in common sense and the procedural and evidentiary rules it devises have regard to practical considerations. When a question as to the voluntariness of a confession arises, the questions are what was the occasion of and what caused or may have caused the defendant to make the confessional statement. The person best placed to give evidence of the defendant's state of mind is the defendant. As a matter of common sense, it might have been reasonable to require that a defendant prove that his or her action in making a confessional statement was not voluntary on the voir dire, but on that question the prosecution bears the onus of proof.

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9 *Vines v Djordjevitch* (1955) 91 CLR 512, 519-520.
10 (1978) 141 CLR 54, 74-75.
11 (1978) 141 CLR 54, 74-75.
12 *R v Lee* (1950) 82 CLR 133, 152-153; *Wendo v The Queen* (1963) 109 CLR 559, 572-573; *MacPherson v The Queen* (1981) 147 CLR 512, 519-520.
13 (1978) 141 CLR 54, 75.
14 (1982) 151 CLR 1, 5-9.
15 (1982) 151 CLR 1, 19.

44. Third, when the question is whether a police officer had a reasonable suspicion as to a state of affairs before exercising a power of search to obtain evidence that does not otherwise exist, the person best placed to give evidence that the reasonable suspicion was held is the police officer. Even more clearly, when a police officer is required to do something within a required time based on what is reasonably practicable as a condition of a power of search to obtain evidence that does not otherwise exist, the person best placed to give evidence as to whether it was done or done in time is the police officer. As a matter of law, what is the basis in principle to require that the defendant prove something that he or she did not witness, cannot know of their own knowledge, and, in effect, could require the defendant to call the police officer?[16]

45. Fourth, in at least one case the Court of Appeal has set aside an order based on inadequate findings made by the Judge below to resolve a conflict of evidence as to whether a search was made lawfully without deciding that the conflict of evidence should be resolved in favour of the prosecution because the defendant bears the onus of proof.[17]

46. In *R v Keen*,[18] in an application concerned with the use of evidence obtained by exercise of the power to search an occupied vehicle under s 31 of the PPRA, I accepted a joint submission that the prosecution bore the onus to prove the facts showing that the statutory conditions for a lawful search had been complied with.

47. In *R v Cahill*,[19] P Lyons J rejected that view. His Honour also found that a defendant who challenges the admissibility of evidence obtained by unlawful search on the ground that it should be excluded as a matter of discretion under the principle of *Bunning v Cross* bears the onus of proving the facts relevant to the exercise of the discretion. In reaching both conclusions, his Honour relied on the cases previously mentioned concerned with the admissibility of a confessional statement and whether a confession made voluntarily should be excluded from evidence on the ground of unfairness to the accused.

48. Although the parties in the present case appear to have accepted as a matter of law that the principles that apply to the facts relevant to proof of compliance with s 161 are the same as in proof of the facts relating whether to exclude a voluntary confession on the ground of unfairness, I do not accept that they are.

49. Further, if it is found that evidence was obtained by an unlawful search, I also do not accept that there is an onus on the defendant to prove all further facts relevant to decide the question whether, as a matter of discretion, that evidence should be excluded.

50. *Bunning v Cross*, and the cases which have considered it, discuss what, in law, are the relevant considerations for the court in making that discretionary decision whether to exclude evidence as a matter of public policy. None of them discusses questions of the onus of proof or applies the cases concerned

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16 Compare *R v Turner* (1816) 5 M & S 206, 211; 105 ER 1026, 1028 and *Blatch v Archer* (1774) 1 Cowp, 63, 65; 969, 970.

17 *R v Bartorillo* [2006] QCA 283, [14]-[25].

18 [2016] 2 Qd R 1, [18].

19 [2016] QSC 275.

with the discretionary exclusion of a confession on the ground of unfairness on a question of the onus of proof in exercising the different discretion on the principle of *Bunning v Cross*.

51. Some of the relevant considerations identified in *Bunning v Cross* are not matters that would be within the knowledge of the defendant or the defendant's capacity to prove. One example is sufficient for present purposes. A relevant consideration is whether the breach of the law by the police officer that made the search unlawful was deliberate or a mistake. What is the logic or principle that would require the defendant to prove that the breach was deliberate not a mistake? No court of high authority has yet decided that it is for the defendant to a criminal prosecution to prove all the facts relevant to the decision that evidence should be excluded as unlawfully obtained under the principle of *Bunning v Cross*.

52. However, it is neither necessary to decide these questions for the present case, nor is it desirable to discuss them further. It is not necessary because my findings and the disposition of this application do not depend on the differing views that might be taken of the relevant questions as to onus of proof.[20] It is not desirable because the final joint submission of the parties did not canvass them, notwithstanding that the applicant in oral submissions contended generally that the respondent bore the onus of proof.

Relevant considerations

53. In *R v Milos*[21] Morrison JA identified the following considerations relevant to the exercise of the *Bunning v Cross* discretion, inter alia:

> "(a) unfairness to the accused does not enter into the equation; evidence obtained by means of an unlawful search can be used as long as the search is conducted in a way that provides all proper safeguards against the evidence being improperly placed in the accused's possession;
> (b) whether the safeguards in place to protect the individual have been deliberately disregarded, or disregarded in a wholesale fashion;
> (c) whether the non-compliance with the statutory safeguards was isolated or merely accidental, involving no overt defiance of the will of the legislature, or calculated disregard of the common law;
> (d) whether the unlawfulness was other than the result of a mistaken belief on the part of the police officers, and not a question of deliberate disregard of the law. The real evil to be guarded against is a deliberate or reckless disregard of the law by those whose duty is to enforce it;
> (e) whether the unlawfulness of the conduct affects the cogency of the evidence so obtained; where the unlawfulness arises from mistake, and is neither deliberate nor reckless, cogency is one of the factors to which regard should be had; if other equally cogent evidence,

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20 I observe that the question of exclusion of evidence in the exercise of discretion was not reached on the facts in *R v Cahill* [2016] QSC 275, so the views of P Lyons J are purely obiter dictum.

21 [2014] QCA 314, [93].

untainted by any lawfulness, is available at the trial, the case for admission of evidence unlawfully obtained will be weaker;

(f) the ease with which the law might have been complied with in procuring the evidence in question; in this respect a deliberate cutting of corners would tend against the admissibility of the evidence;

(g) the nature of the offence charged; and

(h) the legislative intent in relation to the safeguards in place."[22]

Relevant considerations in this case

54. The respondent submits that there are a number of circumstances that support the conclusion that the evidence should not be excluded in the present case, including:

(a) breach of the requirement to make the application within the required time is less serious than would be an initially unlawful search, where a fundamental common law immunity of freedom from unlawful search is broken;

(b) failure to make the application within the required time did not injure or affect the subject of the search in any direct way as the application is one made ex parte and administratively;

(c) the breach in this case was not deliberate, because SCO believed he was making the application as soon as was reasonably practicable, while attending to the other responsibilities and duties of his employment and office;

(d) the offences are serious offences, each carrying a maximum penalty of 25 years imprisonment;[23]

(e) excluding the evidence of finding the alleged dangerous drug in the applicant's jacket and the finding of the applicant's phone from which the incriminating text messages were downloaded would result in an inability to prove the offences; and

(f) excluding the evidence would come at a significant social cost.[24]

55. The respondent submits that, in balancing the factors to be taken into account in exercising the discretion whether to exclude the evidence, these factors outweigh the countervailing factors of encouraging or requiring a police officer to act within power in carrying out a search to obtain evidence of the commission of a criminal offence by imposing the sanction of excluding evidence obtained by an unlawful search.

56. The applicant submits that the evidence should be excluded because:

(a) in any event, the evidence on the possession charge is not persuasive because of the possibility that someone else in the unit may have placed the methylamphetamine found into the applicant's jacket pocket; and

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22 See also *R v P* [2016] QSC 49, [63]-[64]; *R v Munck* [2010] QSC 416, [35]; *R v Day* [2008] QSC 358, [34].

23 See *R v Milos* [2014] QCA 314, [98].

24 *R v Williamson* [2009] QSC 434, [53]-[55].

(b) exclusion of that evidence and the evidence obtained from the applicant's phone of his alleged trafficking activity is required to deter police from similar conduct to the breach of s 161 of the PPRA alleged against SCO in the present case.

57. In my view, the respondent's submissions should be accepted in this case. There was no deliberate delay or deliberate breach of the requirement to make the application as soon as reasonably practicable. The extent of the delay was not great. The offences are serious. Without the evidence obtained by the search, neither offence can be proved. The other requirements for a lawful search were met. The circumstances of this case do not disclose a systemic error or policy failure by the police service in complying with the requirement that an application for a post-search approval order must be applied for as soon as practicable after the search.

58. For clarity, I add that it must not be assumed that delay in the making of a post-search approval order application because the police officer attends to other duties will generally not result in the exclusion of evidence seized during a search rendered unlawful by the delay. Each case must depend on its own facts.

59. The application must be dismissed.