SUPREME COURT OF QUEENSLAND

CITATION:	*R v Riscuta* [2017] QSC 47
PARTIES:	**R** **v** **RISCUTA, Doru** (applicant)
FILE NO/S:	Indictment No 492 of 2012
DIVISION:	Trial Division
PROCEEDING:	Application pursuant to s 590AA of the *Criminal Code* 1899 (Qld)
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	31 March 2017
DELIVERED AT:	Brisbane
HEARING DATE:	7 September 2016; 11 October 2016; supplementary written submissions on behalf of the applicant received 26 October 2016; supplementary written submissions on behalf of the respondent received 7 November 2016
JUDGE:	Burns J
ORDER:	**Application dismissed**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – WARRANTS, ARRESTS, SEARCH, SEIZURE AND INCIDENTAL POWERS – WARRANTS – LISTENING DEVICE WARRANTS – ISSUE AND VALIDITY – where a telecommunications service warrant was issued pursuant to the provisions of the *Telecommunications (Intercept and Access) Act* 1979 (Cth) – where the warrant authorised the interception of communications to and from a mobile phone belonging to another person – where a number of telephone conversations in which the applicant was a participant were intercepted pursuant to the warrant – where the applicant was subsequently charged on indictment with trafficking in dangerous drugs – where the Crown wished to rely on the conversations recorded pursuant to the warrant at the applicant's trial – where the applicant applied pursuant to s 590AA of the *Criminal Code* 1899 (Qld) to have the recorded conversations excluded on the basis that the warrant was invalid and/or unfairly obtained – whether there was a defect on the face of the warrant because the date until which the warrant was to remain in force predated its date of issue –

where the warrant was not sealed with the stamp of the issuing court – whether the public interest monitor was afforded a proper opportunity to consider whether to question the police officer who applied for the issue of the warrant and/or make submissions to the court before the warrant was issued – whether the warrant was invalid – whether the warrant was unfairly obtained – whether the conversations recorded pursuant to the warrant are admissible at the applicant's trial

COMMUNICATIONS LAW – SURVEILLANCE AND INTERCEPTION OF COMMUNICATIONS – WARRANTS AND AUTHORISATIONS – OTHER MATTERS – where a telecommunications service warrant was issued pursuant to the provisions of the *Telecommunications (Intercept and Access) Act* 1979 (Cth) – where the warrant authorised the interception of communications to and from a mobile phone belonging to another person – where a number of telephone conversations in which the applicant was a participant were intercepted pursuant to the warrant – where the applicant was subsequently charged on indictment with trafficking in dangerous drugs – where the Crown wished to rely on the conversations recorded pursuant to the warrant at the applicant's trial – where the applicant applied pursuant to s 590AA of the *Criminal Code* 1899 (Qld) to have the recorded conversations excluded on the basis that the warrant was invalid and/or unfairly obtained – whether there was a defect on the face of the warrant because the date until which the warrant was to remain in force predated its date of issue – where the warrant was not sealed with the stamp of the issuing court – whether the public interest monitor was afforded a proper opportunity to consider whether to question the police officer who applied for the issue of the warrant and/or make submissions to the court before the warrant was issued – whether the warrant was invalid – whether the warrant was unfairly obtained – whether the conversations recorded pursuant to the warrant are admissible at the applicant's trial

Criminal Code 1899 (Qld), s 573, s 590AA
Federal Magistrates Court Rules 2001 (Cth), r 2.09
Police Powers and Responsibilities Act 2000 (Qld), s 740, s 740(1)
Telecommunications (Intercept and Access) Act 1979 (Cth), s 7, s 34, s 39, s 39(2)(c), s 40, s 41, s 42, s 42(3), s 45, s 45(2), s 45(3), s 46, s 46(1), s 46(1)(d), s 46(2)(g), s 46(3), s 47, s 49(1), s 49(3), s 49(3)(a), s 63, s 65, s 75, s 105
Telecommunications (Interception and Access) Regulations 1987 (Cth), reg 3

Bunning v Cross (1978) 141 CLR 54; [1978] HCA 22, cited

Coco v R (1994) 179 CLR 427; [1994] HCA 15, cited
Commissioner of Police v Barbaro (2001) 51 NSWLR 419; [2001] NSWCA 57, cited
Dunesky v Elder (1994) 54 FCR 540, cited
Geldert v Western Australia (2012) 226 A Crim R 260; [2012] WASCA 226, cited
George v Rockett (1990) 170 CLR 104; [1990] HCA 26, cited
Grollo v Palmer (1995) 184 CLR 348; [1995] HCA 26, cited
Inland Revenue Commissioners v Rossminster Ltd [1980] AC 952, cited
McCleary v Director of Public Prosecutions (1998) 20 WAR 288, cited
Murphy v R (1989) 167 CLR 94; [1989] HCA 28, cited
Ousley v R (1997) 192 CLR 69; [1997] HCA 49, cited
Parker v Churchill (1985) 9 FCR 316, cited
Propend Finance Pty Ltd v Commissioner of Australian Federal Police (1994) 72 A Crim R 278, cited
R v Christensen (2005) 156 A Crim R 397; [2005] QSC 279, cited
Regina v Toro-Martinez [2000] NSWCCA 216, cited
R v Versac (2013) 227 A Crim R 569; [2013] QSC 46, cited

COUNSEL: S Di Carlo for the applicant
S Rankine for the respondent

SOLICITORS: Grasso Searles Romano for the applicant
Office of the Director of Public Prosecutions for the respondent

[1] The applicant, Doru Riscuta, is awaiting trial on an indictment alleging one count of unlawful trafficking in cocaine between 1 November 2008 and 20 March 2010 at the Gold Coast and elsewhere in the State of Queensland. He has made application in advance of his trial pursuant to s 590AA of the *Criminal Code* 1899 (Qld) for a ruling with respect to certain evidence that is proposed to be led in the Crown case.[1] The evidence in question consists of a number of telephone conversations that were recorded pursuant to a telecommunications service warrant issued by a Federal Magistrate on 4 December 2009. The applicant maintains that this evidence should be excluded from the jury's consideration.

[2] In support of the contention that the warrant suffers from such invalidity that the evidence gathered pursuant to it should be excluded, the applicant relies on the following features:

- *First*, there was a defect on the face of the warrant because the date until which the warrant was specified to remain in force (17 January 2009) predated its date of issue (4 December 2009);

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[1] By the application, a direction was also sought for the Crown to supply particulars of one of the trafficking counts pursuant to s 573 of the *Criminal Code* 1899 (Qld), but that part of the application was not pursued: T. 1-15 to T. 1-16.

- *Second*, it was argued that the warrant had been unfairly obtained because the public interest monitor was not afforded a proper opportunity to consider whether to question the applicant police officer and/or make submissions to the Federal Magistrate before the warrant was issued; and

- *Third*, the warrant was not sealed with the stamp of the issuing court.

[3] The application to this court was heard, and is determined, on an agreed bundle of material.[2] It consists of a copy of the application and supporting affidavit[3] for the warrant under challenge, a copy of the warrant itself, a copy of an email exchange in September 2016 between a legal officer employed by the Crown and a solicitor for the applicant, particulars supplied by the Crown in relation to the count of trafficking, a summary of the Crown allegations in relation to that count, a list of the telephone intercepts which the Crown proposes to lead at trial together with a transcript for each of those intercepts and two statements from the principal investigating officer, Detective Senior Sergeant Andrews.[4]

[4] The material contained in the agreed bundle establishes that an operation targeting a number of persons suspected of trafficking in dangerous drugs was commenced by the State Crime Operations Command of the Queensland Police Service in the middle of 2009. Various investigative techniques were employed including telephone intercepts. During the course of the operation, the applicant and a person by the name of Baffi were identified as suspects. Electronic and physical surveillance of the applicant as well as others was revealing of a number of communications and meetings between the two men. These, the Crown alleges, were in furtherance of a joint criminal enterprise to peddle cocaine on the Gold Coast and other places within Queensland. In particular, it is alleged that the applicant supplied cocaine to Baffi for this purpose.

[5] The warrant in question authorised the interception of communications to and from a mobile telephone in Baffi's name.[5] Of the conversations detailed in the list of telephone intercepts,[6] a total of 20 were recorded pursuant to this warrant with the balance recorded pursuant to warrants issued with respect to telephone services in the names of other persons. The first of the 20 recorded conversations occurred on 7 December 2009 with the last occurring on 16 January 2010 and, although heavily laden with coded phrases, they are said by the Crown to "provide critical evidence of the nature of the relationship between … Baffi [and the applicant] and the conduct engaged in by" them.[7] Most of these conversations were between the applicant and Baffi but two were between Baffi and a person by the name of Dron.

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2 Exhibit 1.

3 Sworn by Detective Inspector Slater on 4 December 2009. One of the exhibits to this affidavit (Exhibit A) was a copy of an affidavit sworn by Detective Acting Inspector Jason Gough of the State Drug Investigation Unit on 12 November 2009 in support of an application for a telecommunications service warrant with respect to a mobile telephone in the name of another person (Anderson). He was targeted in the same operation. A copy of the warrant issued in that instance as well as a copy of the affidavit sworn by DAI Gough were received in evidence at the hearing as a separate exhibit: Exhibit 2.

4 Dated 25 November 2011 and 20 May 2013.

5 When issued, the warrant was given an identifying number – Q09059/00.

6 Included in Exhibit 1.

7 Outline of submissions for the Crown, par 8.

[6] The recorded conversations are not the only evidence available to the Crown to support the existence of the alleged joint criminal enterprise. Nevertheless, they were submitted to be at "the centre of the Crown case and [to] form the basis of the evidence of joint criminal enterprise, and relevant evidence of [the] business being conducted between [the applicant] and Baffi".[8] After reviewing the transcripts of the intercepted conversations and the summary of the Crown case in the agreed bundle, I accept these submissions.

[7] The warrant was issued pursuant to the provisions of Part 2-5 of the *Telecommunications (Interception and Access) Act* 1979 (Cth). The scheme of that statute is such that the interception of telecommunications is prohibited unless authorised under its provisions.[9] By s 34 TIAA, an eligible authority of a State may be declared to be an agency for the purposes of the TIAA. The Queensland Police Service was, and is, the subject of the declaration under that provision and, as such, had standing to apply for the issue of a warrant to intercept a telecommunications service at the time the subject application was made.[10] Applications for a warrant are made on an agency's behalf by, in the case of a police force of a State, an officer of that police force: s 39(2)(c) TIAA. Save for urgent cases, applications must be in writing,[11] specify the name of the agency and the name of the person making the application on the agency's behalf[12] and be accompanied by a supporting affidavit.[13] The supporting affidavit must set out the facts and other grounds on which the application is based and, relevantly, specify "the period for which it is requested that the warrant be in force" and "state why it is considered necessary for the warrant to be in force for that period": s 42(3) TIAA.

[8] The TIAA makes special provision for public interest monitors in the case of the two States where that statutory role exists – Victoria and Queensland. In Queensland, the public interest monitor is a person appointed pursuant to s 740 of the *Police Powers and Responsibilities Act* 2000 (Qld) to monitor applications for, and the use of, surveillance device warrants, retrieval warrants and covert search warrants as well as applications for approvals for the use of surveillance devices under emergency authorisations.[14] By s 45 TIAA, the public interest monitor may make submissions to the judicial officer hearing an application for the issue of a warrant[15] and question the person making the application for the warrant.[16]

[9] Section 46 TIAA governs the issue of telecommunications service warrants. It sets out a number of preconditions about which the judicial officer to whom an application is made must be satisfied before issuing a warrant[17] and various matters to which the

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8 Outline of submissions for the Crown, par 6.

9 See s 7 and s 63 of the *Telecommunications (Interception and Access) Act* 1979 (Cth). A person who contravenes either of these provisions is guilty of an offence: s 105.

10 *Telecommunications (Interception and Access) Act* 1979 (Cth), s 39.

11 Ibid s 40.

12 Ibid s 41.

13 Ibid s 42.

14 *Police Powers and Responsibilities Act* 2000 (Qld), s 740(1).

15 *Telecommunications (Interception and Access) Act* 1979 (Cth), s 45(2).

16 Ibid s 45(3).

17 Ibid s 46(1).

judicial officer must have regard.[18] Among the preconditions about which the judicial officer must be satisfied is that the information likely to be obtained by intercepting communications under the warrant would be likely to assist in connection with the investigation by the agency of a serious offence or offences in which the "particular person" who is the subject of the warrant is involved or "another person is involved with whom the particular person is likely to communicate using the service".[19] Included in the list of matters about which the judicial officer must have regard are any submissions made by the public interest monitor.[20] Furthermore, a warrant must not be issued unless the judicial officer is satisfied that the agency has exhausted all other practicable methods of identifying the telecommunications services used, or likely to be used, by the person suspected of being involved in the offence or offences under investigation, or that the interception of communications made to or from a telecommunications service used or likely to be used by that person would not otherwise be possible.[21] Lastly, a telecommunications service warrant does not authorise the interception of communications passing over a telecommunications system that a carrier operates unless the issue of the warrant has been notified to an authorised representative of the carrier and the interception takes place as a result of action taken by an employee of the carrier.[22]

[10] When issued, a telecommunications service warrant is required to be in the prescribed form[23] and signed by the judicial officer who issues it.[24] The warrant may specify conditions or restrictions relating to interceptions under the warrant but it must specify, as the time during which it is to be in force, a period of "up to 45 days".[25]

[11] The issue of a warrant may be described as a judicial act but not in the sense of an adjudication to determine the rights of parties; the power to issue a warrant must be exercised judicially but that means only that the power must be exercised without "bias and fairly weighing the competing considerations of privacy and private property on the one hand and law enforcement on the other".[26] That said, there must be strict adherence to the statutory requirements for the issue of a warrant before such an intrusion on the privacy of the subject will be authorised.[27]

[12] In this case the application for the warrant was made by Detective Inspector Mark Slater of the State Crime Operations Command. In his affidavit filed in support of the application, DI Slater set out the facts on which the application was based and, along the

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18 Ibid s 46(2).

19 *Telecommunications (Interception and Access) Act* 1979 (Cth), s 46(1)(d).

20 Ibid s 46(2)(g).

21 Ibid s 46(3).

22 Ibid s 47.

23 Ibid s 49(1). The form is prescribed by reg 3 of the *Telecommunications (Interception and Access) Regulations* 1987 (Cth); Schedule 3, Form 1.

24 *Telecommunications (Interception and Access) Act* 1979 (Cth), s 49(1).

25 Ibid s 49(3)(a). This temporal limitation on the life of the warrant applied because, in this case, the warrant was sought on the basis that it was likely to assist in connection with the investigation by the Queensland Police Service of a serious offence or offences by Baffi or by another person with whom Baffi was likely to communicate using his mobile telephone service: s 46(1)(d).

26 *Grollo v Palmer* (1995) 184 CLR 348 at 359-360 per Brennan CJ, Deane, Dawson and Toohey JJ. And see *Coco v R* (1994) 179 CLR 427 at 444 per Mason CJ, Brennan, Gaudron and McHugh JJ.

27 *George v Rockett* (1990) 170 CLR 104 at 110-111; *Ousley v R* (1997) 192 CLR 69 at 106-107; *R v Christensen* (2005) 156 A Crim R 397 at [12].

way, sought to address the prescribed preconditions and matters discussed above at [9]. It is clear from what DI Slater deposed that the warrant was sought on the basis that it was likely to assist in connection with the investigation by the Queensland Police Service of serious offences by Baffi as well as other persons with whom Baffi was likely to communicate using his mobile telephone service.[28] Relevantly to this application, DI Slater requested that (if issued) the warrant remain in force for a period of 45 days.[29]

[13] The warrant was of course issued and, when issued, it was in the prescribed form. By its terms, the Federal Magistrate was satisfied about the existence of the prescribed preconditions and matters.[30] Indeed, it was not suggested on the hearing of this application that the material laid before the Magistrate was insufficient to satisfy him about any of those preconditions or matters.[31] The warrant otherwise authorised the interception of communications to and from Baffi's mobile telephone, and the period for which it was specified to be in force was expressed as follows:

> "(1) Under section 54 of the Act, this warrant comes into force when it is issued.
>
> (2) This warrant is in force until 17 January 2009."[32]

[14] I turn then to the *first* feature relied on by the applicant to challenge the evidence obtained under the warrant. As to that, it was common ground that the warrant was defective on its face because the date until which it was specified to remain in force (17 January 2009) predated its date of issue (4 December 2009). The applicant argued that the warrant therefore failed to specify the period during which it would be in force as required by s 49(3) TIAA. This was submitted to be a "major defect because even if the reference to January 2009 is severed, there is no specified time for the warrant to remain in force … or the warrant was never in force at all".[33] In that regard, it is to be observed that the TIAA does not authorise the issue of a retrospective warrant or, indeed, one that remains in force for more than 45 days where, as here, the warrant was sought to assist in connection with the investigation of serious offences in which Baffi and other persons who were likely to communicate with Baffi using the mobile telephone in question were involved.[34]

[15] Both parties referred to the decision of the New South Wales Court of Appeal in *Commissioner of Police v Barbaro*.[35] It was a factually similar case. A warrant was issued on 15 December 1997 by a judge under the *Listening Devices Act* 1984 (NSW). It authorised the use of a listening device from the date of issue until "4 January 1997". Handley JA (with whom Priestley and Meagher JJA agreed) upheld the validity of the

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28 And, as such, s 46(1)(d) and s 49(3)(a) of the *Telecommunications (Interception and Access) Act* 1979 (Cth) applied.

29 Exhibit 1; Affidavit of DI Slater sworn 4 December 2009 at par 58 and par 60.

30 Exhibit 1; par 1(2) of the warrant.

31 Had such a submission been made, however, it would have faced the obstacle discussed by Mason CJ and Toohey J in *Murphy v R* (1989) 167 CLR 94 at 106 to the effect that the "validity of the warrant is not open to collateral attack merely on the ground that the material laid before the [issuing] authority was insufficient to satisfy" the authority about the existence of prescribed matters.

32 Exhibit 1.

33 Applicant's submissions (entitled "Pre-Trial Hearing"), par 16.

34 *Telecommunications (Interception and Access) Act* 1979 (Cth), s 46(1)(d) and s 49(3)(a).

35 (2001) 51 NSWLR 419.

warrant. His Honour reasoned that warrants under that statute do not have to be produced to persons whose premises are about to be entered and searched; rather, they are directed to police officers who will act on them in secret. As such, his Honour said, there is "not the same necessity for such a warrant to be clear on its face" and that, on its true construction, the warrant was intended to operate until "4 January 1998".[36] Because "no one who was required to act on, and comply with, the warrant could possibly have been misled", it was valid.[37]

[16] The applicant sought to distinguish *Barbaro* on a number of grounds, the most persuasive of which was that the case was decided under a different statute.[38] However, and for precisely the same reason, it is unnecessary to decide whether the same approach should be taken in this case to answer the question whether the warrant meets the requirements of the TIAA. That is because, unlike the statute under consideration in *Barbaro*, the TIAA makes specific provision for the admission of evidence obtained pursuant to a warrant affected by an irregularity provided (relevantly) it is not substantial *and* the court is satisfied that, in all the circumstances, the irregularity should be disregarded.[39] By that provision:

> "**75 Giving information in evidence where defect in connection with warrant**
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> (1) Where a communication has been intercepted in contravention of subsection 7(1) but purportedly under a warrant (other than a warrant under section 11A, 11B or 11C), a person may give information obtained by the interception in evidence in an exempt proceeding, being a proceeding in a court or before a tribunal, body, authority or person, if the court, tribunal, body, authority or person, as the case may be, is satisfied that:
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> (a) but for an irregularity, the interception would not have constituted a contravention of subsection 7(1); and
>
> (b) in all the circumstances, the irregularity should be disregarded.
>
> (2) A reference in subsection (1) to an irregularity is a reference to a defect or irregularity (other than a substantial defect or irregularity):
>
> (a) in, or in connection with the issue of, a document purporting to be a warrant; or
>
> (b) in connection with the execution of a warrant, or the purported execution of a document purporting to be a warrant."

[17] It is clear from the terms of s 75(2) that an "irregularity" for the purposes of this provision may comprise a "defect … in … a document purporting to be a warrant".

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36 *Commissioner of Police v Barbaro* (2001) 51 NSWLR 419 at 422.

37 Ibid. And see *Wright v Queensland Police Service* [2002] 2 Qd R 667, where Holmes J held that the omission on a warrant issued under the *Police Powers and Responsibilities Act* 2000 (Qld) of the name of the issuer and the date and time of issue could not amount to invalidating defects because it was "difficult to see how [those] details … could affect the ability of those against whom the warrant was executed to ascertain the scope of the authority conferred by it or the jurisdiction by which it was issued": at [30]. Later, her Honour observed, "The question of whether a warrant meets the requirements of the Act must, in my view, be answered objectively by reference to its contents": at [32].

38 Applicant's submissions (entitled "Pre-Trial Hearing"), pars 18-23.

39 *Telecommunications (Interception and Access) Act* 1979 (Cth), s 75.

Also, the following observations made by McLure P (Martin CJ and Mazza JA agreeing) in *Geldert v Western Australia*[40] are instructive:

> "In its natural and ordinary meaning, 'irregularity' means a failure to comply, whether by act or omission, with statutorily prescribed rules and requirements. Section 75 does not in terms distinguish between procedural and substantive irregularity. Contrast *Corporations Act* 2001 (Cth), s 1322. Under s 75 (and s 144) the dividing line is the extent of the irregularity rather than its nature. A substantial irregularity is outside the scope of s 75.
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> The expression 'in connection with' is of wide import and capable of describing a spectrum of relationships ranging from the direct and immediate to tenuous and remote: *Re Calder; Ex Parte Lee* (2007) 34 WAR 289 at [35]-[38]. The expression is helpfully explained by Macfarlane J in the Canadian case of *Re Nanaimo Community Hotel Ltd v British Columbia* [1944] 4 DLR 638 at 639:
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> > One of the very generally accepted meanings of 'connection' is 'relation between things one of which is bound up with or involved in another'; or again 'having to do with'. The words include matters occurring prior to as well as subsequent to or consequent upon so long as they are related to the principal thing. The phrase 'having to do with' perhaps gives as good a suggestion of the meaning as could be had.
>
> An irregularity (as defined) 'in connection with' either the issue or the execution of a warrant is intended to capture all requirements under the Act, non-compliance with which results in intercepted information obtained under a warrant, or a purported warrant, contravening s 7(1) of the Act."[41]

[18] Although it was submitted for the applicant that the error as to the end date for the operational force of the warrant was a "major defect"[42] and "at the very least reckless",[43] I cannot agree. In truth, it was nothing more than a typographical error and, not only that, it was a familiar one. As Spigelman CJ once said:

> "This is the kind of typographical error that often occurs at the end of one calendar or the commencement of a new calendar year. The intent is plain and the error is obvious".[44]

[19] To my mind, the error was a defect in the warrant, but it was not a substantial one. Not only was the error obvious, the inclusion in the relevant paragraph of the warrant of the word "until" showed that the warrant was intended to have a prospective operation and, for this reason, it is plain that "17 January 2009" was intended to mean, and did mean, "17 January 2010". I am satisfied that, but for this irregularity, the interceptions pursuant to the warrant would not have contravened s 7(1) TIAA because each of the prescribed preconditions and matters referred to at [9] above were established by the

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40 (2012) 226 A Crim R 260.

41 *Geldert v Western Australia* (2012) 226 A Crim R 260 at [63]-[65]. And see *McCleary v Director of Public Prosecutions (Cth)* (1998) 20 WAR 288 at 322-325 per Ipp J (Malcolm CJ and Franklyn J agreeing).

42 Applicant's submissions (entitled "Pre-Trial Hearing"), par 16.

43 Ibid par 30.

44 *Regina v Toro-Martinez* [2000] NSWCCA 216 at [35], which observations were made in relation to an error in a certificate under s 15M of the *Crimes Act* 1914 (Cth) that was expressed to cover the period from "13 December 1996 until 11 January 1996".

material before the Federal Magistrate. Put another way, but for the error, there was nothing about the application, the material before the Magistrate or the other terms of the warrant that was in any way remarkable. Furthermore, the warrant must have been understood by those responsible for intercepting the relevant communications to be a warrant authorising interceptions from the date of issue (4 December 2009) to 17 January 2010 because the last intercept in time occurred on 16 January 2010. I am therefore satisfied that, in all of the circumstances, the irregularity constituted by this error should be disregarded and, subject only to a consideration of the two other features on which the applicant relies, the evidence recorded pursuant to the warrant will be admissible at the applicant's trial.

[20] For completeness, mention should be made of the arguments advanced to the court by both parties regarding the considerations that guide the exercise of the court's discretion to accept or reject evidence tainted by illegality or unfairness, that is to say, those discussed in *Bunning v Cross*.[45] Because, by the provisions of the TIAA, the evidence in question is admissible, no occasion arises for the exercise of that discretion. However, if it did, I would exercise my discretion in favour of admitting the evidence. That is principally because it cannot be said that the error in question was substantial or that it was deliberate or made in reckless disregard for the law; it was a typographical error that arose through oversight. Additionally, the cogency of the evidence obtained pursuant to the warrant was not affected by the error, the evidence is important to the proceeding and the offences charged on the indictment are most serious.

[21] The *second* feature on which the applicant relied had its focus on the process by which the warrant was issued. As the argument developed, it was contended that the public interest monitor was not provided with an adequate opportunity to be heard because he was "not provided enough time to come to a decision one way or the other about whether to exercise [his] rights to make submissions or question the police applicant".[46] In support of that contention, it was submitted that the public interest monitor did not receive the material on which the application for the warrant was made until 2.10 pm on the day of the hearing, that the hearing commenced five minutes later (2.15 pm) and that the warrant was issued five minutes after that (2.20 pm).[47] The point was made that the supporting affidavit was substantial and that its exhibits included a copy of another substantial affidavit.[48]

[22] The difficulty with these submissions is that, although it cannot be gainsaid that the warrant was issued at 2.20 pm on 4 December 2009 and that a delivery receipt with respect to the application and supporting affidavit was signed by the public interest monitor ten minutes earlier,[49] there is no evidence as to when a copy of the application and supporting affidavit was actually provided to the public interest monitor or, for that matter, to the Federal Magistrate. The applicant's argument assumes that the first occasion on which the public interest monitor saw a copy of the material was five minutes prior to the commencement of the hearing. That is an unsafe assumption. To

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45 (1978) 141 CLR 54 at 74 per Stephen and Aickin JJ. And see *R v Versac* (2013) 227 A Crim R 569 at [6] per Applegarth J.

46 Additional Submissions on paragraphs 24 and 40 of the Amended Submissions for the Applicant, par 9.

47 Ibid.

48 See footnote 3 above.

49 Exhibit 1; Email exchange dated 16 September 2016.

provide but one example, the public interest monitor may well have received a scanned copy of the application and supporting affidavit by email at an earlier point in time but was not served with a duplicate original copy of that material until he arrived in court. Indeed, such a scenario would not be uncommon in the context of applications to issue warrants. The other problem with these submissions is that, if the public interest monitor had insufficient time to properly consider the application or supporting material, doubtless he would have asked for an adjournment but, clearly, one was not sought.

[23] The role of the public interest monitor is an important one. Just as the courts have been traditionally regarded as "the guardians of the citizens' right to privacy"[50] and are regularly entrusted by legislation with the oversight of powers such as the power conferred by s 46 TIAA, the public interest monitor provides another layer of protection for private citizens who, unknown to those citizens, are sought to be made the subject of a surveillance warrant. In cases such as this where there is an application for the issue of a warrant, the public interest monitor is obliged to critically evaluate the material advanced in support of an application in order to determine whether to question the applicant police officer and/or make submissions on the hearing of the application. This will never be a perfunctory exercise; the public interest monitor must give real attention to the question whether the evidence and information offered by the party applying for the warrant is sufficient to satisfy the decision-maker of the existence of all applicable statutory preconditions and that the material is otherwise such as to justify such an intrusion into the privacy of the citizen in question.[51] There is no reason to think that the public interest monitor failed to discharge these obligations in this case, and there is certainly no evidence to that effect.

[24] The *third* feature relied on by the applicant can be dealt with briefly. Unlike the warrant issued during the course of the same operation with respect to a different person (Anderson),[52] the stamp of the Federal Magistrates Court of Australia was not impressed on the warrant issued with respect to Baffi's mobile telephone. It was originally submitted that the failure to do so was in breach of that court's rules,[53] but that submission was ultimately not pressed, it being conceded that the rules of court did not apply to the issue of a warrant.[54] Counsel for the applicant was right to make that concession. There is, in any event, no requirement under the TIAA for warrants to be stamped by the issuing court.

[25] For these reasons, none of the features relied on by the applicant support the exclusion of the challenged evidence.

[26] The application must accordingly be dismissed.

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50 *Inland Revenue Commissioners v Rossminster Ltd* [1980] AC 952 at 997 per Lord Wilberforce.

51 For similar observations regarding the duty of the magistrate justices to whom such an application is made, see *Parker v Churchill* (1985) 9 FCR 316 at 322; *Dunesky v Elder* (1994) 54 FCR 540 at 552 and *Propend Finance Pty Ltd v Commissioner of Australian Federal Police* (1994) 72 A Crim R 278 at 281.

52 Exhibit 2.

53 *Federal Magistrates Court Rules* 2001 (Cth), r 2.09.

54 Additional Submissions on paragraphs 24 and 40 of the Amended Submissions for the Applicant, par 13.