SUPREME COURT OF QUEENSLAND

CITATION:	*R v Ford* [2017] QSC 205
PARTIES:	**THE QUEEN** (respondent) **v** **BRANDON JOHN FORD** (applicant)
FILE NO/S:	67 of 2017
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	20 September 2017
DELIVERED AT:	Brisbane
HEARING DATE:	12 July 2017
JUDGE:	Flanagan J
ORDER:	**The Court rules that:** **(a) the electronic recording of the field interview conducted between Constable Kowalski and Senior Constable van den Berg and the applicant on 20 March 2016 commencing at a time unknown but after 1.25 am and finishing at 1.58 am be excluded from evidence at the applicant's trial;** **(b) the stored information on the applicant's Apple iPhone 5 seized on 20 March 2016 be excluded from evidence at the applicant's trial.**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – EVIDENCE UNFAIR TO ADMIT OR IMPROPERLY OBTAINED – application pursuant to s 590AA of the *Criminal Code* to exclude evidence of a witness at trial – where the applicant was charged in relation to drug-related offences – where the police questioned the applicant in Fortitude Valley, Brisbane – where the applicant's cousin was also present when the applicant was questioned by police – where the applicants cousin was subsequently excluded from questioning pursuant to s 441 of the *Police Powers and Responsibilities Act* 2000 (Qld) – where the applicant was not informed of his right to speak to another friend, relative, or lawyer and ask that person to be present during questioning –

whether the police complied with their obligations under the *Police Powers and Responsibilities Act* 2000 (Qld) – whether the applicant was informed of his right to select a support person to be present during questioning – whether the applicant was permitted to exercise his right to nominate a support person to be present during questioning – whether the applicant was notified of his right to speak to a friend, relative or lawyer, to ask that person to be present during questioning – whether the police officers breached s 418 and 419 of the *Police Powers and Responsibilities Act* 2000 (Qld) – whether the applicant was notified of his right to speak to another friend, relative or lawyer, to ask that person to be present during questioning after his cousin was excluded from questioning – whether the police officers breached s 426 of the *Police Powers and Responsibilities Act* 2000 (Qld)

Criminal Code 1899 (Qld), ss 205A and 590AA
Evidence Act 1977 (Qld), s 130
Police Powers and Responsibilities Act 2000 (Qld), ss 5, 154, 415, 418, 419, 420, 421, 422, 423, 424, 425, 426, 428, 429, 430, 431, 432, 434, 441
Police Powers and Responsibilities Regulation 2012 (Qld), ss 22, 23, 26

R v LR [2005] QCA 368, cited
R v Playford [2013] QCA 109, applied
R v Swaffield (1998) 192 CLR 159, cited
R v Bossley [2012] QSC 292
R v Nash [2014] QCA 139, cited

COUNSEL: C Martinovic for the applicant
C N Marco for the respondent

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

[1] The applicant is charged with 19 drug-related offences. Fifteen of these offences concern the supply of dangerous drugs; two involve possession of a dangerous drug, and another the possession of a mobile phone used in connection with trafficking in dangerous drugs. The most serious charge is count 6 on the indictment which alleges that between 26 May 2015 and 21 March 2016 at Brisbane the applicant carried on the business of unlawfully trafficking in a dangerous drug, namely 3, 4-methylenedioxymethamphetamine (MDMA).

[2] The applicant, pursuant to section 590AA of the *Criminal Code* 1899 (Qld), seeks a ruling that evidence electronically recorded on 20 March 2016 be excluded from his trial. The ground identified in the application is that:

> "The electronically recorded record of interview, of alleged confessional statements was not conducted in accordance with the Police Powers and

> Responsibilities Act 2000 ['the Act'] and its ancillary 2012 Regulations, in that I was not afforded my legal right to communicate with and have present a friend, relative or lawyer, during questioning."

[3] At the hearing of the application the applicant was given leave to add a further ground. This ground seeks the exclusion of stored information on the applicant's Apple iPhone 5 mobile telephone on the basis that the defendant was not warned as to his right to silence prior to him providing his PIN to police.

[4] In the applicant's supplementary outline the applicant also seeks leave to add another ground to have the recorded interview excluded, relying on section 423 of the Act which deals with the questioning of intoxicated persons.

[5] For the reasons which follow I rule that:

(a) the electronic recording of the field interview conducted between Constable Kowalski and Senior Constable van den Berg and the applicant on 20 March 2016 commencing at a time unknown but after 1.25 am and finishing at 1.58 am be excluded from evidence at the applicant's trial;

(b) the stored information on the applicant's Apple iPhone 5 mobile telephone seized on 20 March 2016 be excluded from evidence at the applicant's trial;

(c) in light of my ruling in relation to (a) above, it is unnecessary to determine the application for leave to add the intoxication ground.

The evidence

[6] At around 1.25 am on 20 March 2016 Constable Kowalski, in company with Senior Constable van den Berg and another officer, were conducting plain clothes foot patrols on Brunswick Street, Fortitude Valley near the intersection with McLachlan Street. She observed a group of three males and one female walking on the opposite side of the road. This group was followed into the carpark at Brunswick Central. Constable Kowalski spoke to two of the males. She recognised the applicant as the person to whom other officers had previously spoken on 24 January 2016. On that occasion the other officers had located 31 MDMA tablets and $1,015 in cash on the applicant.

[7] Constable Kowalski asked the applicant and the other male if they were in possession of any dangerous drugs. Both stated they were not and consented to police conducting a search of their pockets and wallets. The applicant produced an Australian passport from his rear pocket in the name of Brandon John Ford, a wallet and a black I-Phone 5. The passport revealed to Constable Kowalski that the applicant was 18 years of age.

[8] Inside the wallet she located $390 in Australian currency. Constable Kowalski then had a brief unrecorded conversation with the applicant in relation to the large amount of cash in his wallet. During this conversation the applicant appeared to become increasingly nervous and started fidgeting. It was at this stage that Constable Kowalski detained the applicant for a further search. She requested Senior Constable van den Berg to search the applicant. The applicant was taken to an alcove at the side of the carpark for privacy reasons. After Senior Constable van den Berg had informed the applicant that he was going to conduct a search that would involve a partial strip search

the applicant removed a clip seal bag from the front of his pants and handed it to Senior Constable van den Berg. This clip seal bag contained 14 blue tablets. Senior Constable van den Berg then escorted the applicant back to Constable Kowalski who activated her digital recorder. An interview was then conducted with the applicant, with both police officers asking questions.

[9] It is necessary to set out in full the exchanges which occurred at the commencement of the recorded interview:

> "CON KOWALSKI: Um yep okay.
>
> SCON VAN DEN BERG: Yeah ta. What's your pin code mate?
>
> FORD: 4-6-0-7-2-8.
>
> SCON VAN DEN BERG: 4-6-0-7-2-8?
>
> CON KOWALSKI: So Brandon what was your middle name again Brandon?
>
> FORD: John.
>
> CON KOWALSKI: John? And it's Ford isn't it?
>
> FORD: Yep.
>
> CON KOWALSKI: What's your date of birth?
>
> FORD: Twenty eighth of April nineteen ninety seven.
>
> CON KOWALSKI: Okay cool. Nineteen ninety seven. And what's your address at the moment?
>
> FORD: Um Sixty MacDonald Drive.
>
> CON KOWALSKI: Is it M-C or M-A--
>
> FORD: M-A-C.
>
> CON KOWALSKI: M-A-C.
>
> FORD: D-O-N-A-L-D Drive.
>
> CON KOWALSKI: Drive--
>
> FORD: Narangba--
>
> CON KOWALSKI: Narangba. And you live there with mum?
>
> FORD: Yep.
>
> CON KOWALSKI: And dad?
>
> FORD: And st--
>
> CON KOWALSKI: Step-dad?
>
> FORD: Oh no.
>
> CON KOWALSKI: Oh okay mum's partner, yep. Ah what's the mobile number on--

FORD: Not any more.

CON KOWALSKI: Hey?

FORD: Not any more.

CON KOWALSKI: Not anymore?

FORD: Yeah.

CON KOWALSKI: What do you mean?

FORD: Ah well I'm getting kicked out, they said if I didn't have a job [INDISTINCT].

CON KOWALSKI: Oh okay. Um what's your mobile number Brandon?

FORD: 0-4-0-2.

CON KOWALSKI: Yep.

FORD: 5-2-3.

CON KOWALSKI: Yep.

FORD: 1- [INDISTINCT].

CON KOWALSKI: 1-7-4? So you're looking for work at the moment? What's um, what's your pin code for your phone man?

FORD: [INDISTINCT].

SCON VAN DEN BERG: Ah what's your pin code again?

FORD: 4-6-0-7-2-8.

CON KOWALSKI: Um Brandon obviously man um, we just stopped you guys tonight um, your behaviour indicated to me pretty early that you looked like you were, you had some drugs on you man so, um eventually you, you pulled this little bag out um from, was it in your undies or just in your trousers?

FORD: It was in my undies.

CON KOWALSKI: Alright man. So obviously I'm gonna have to ask you some questions about that okay? So before I ask you any questions, I must tell you you've the right to remain silent--

FORD: Yep.

CON KOWALSKI: So this means you don't have to say anything, answer any questions or make a statement unless you wish to do so--

FORD: Yeah.

CON KOWALSKI: But if you do say something or make a statement, it may later be used as evidence okay?

FORD: Yep.

CON KOWALSKI: You understand that--

FORD: Yeah.

CON KOWALSKI: Warning Brandon?

FORD: So if questions come up that I don't feel like I like should answer at the moment, I'm free to say--

CON KOWALSKI: Absolutely.

FORD: Okay.

CON KOWALSKI: Yep, yep. But um as long as you understand, I'm not tryna trick you.

FORD: Yep.

CON KOWALSKI: But obviously I've gotta ask you questions--

FORD: Yeah.

CON KOWALSKI: Okay? Um you also have the right to telephone or speak to a friend or relative--

FORD: Mhm.

CON KOWALSKI: To tell them where you are and arrange or attempt to arrange for them to be present during questioning.

FORD: Yeah.

CON KOWALSKI: And you have the right to speak to a lawyer of your choice to arrange or attempt to arrange for the lawyer to be present during questioning.

FORD: Yeah.

CON KOWALSKI: Okay? So if you wanna telephone or speak to any of these people, then I'll delay my questioning for a reasonable period of time for that to happen.

FORD: Yep.

CON KOWALSKI: Okay? Is there anyone that you wanna telephone or speak to at this stage?

FORD: Mm [INDISTINCT] who would I call?

CON KOWALSKI: So I understand Ben's your cousin?

FORD: Yep.

CON KOWALSKI: Yeah are you happy for him to be here while you chat to me?

FORD: Um yeah, yeah, yep.

CON KOWALSKI: Yeah? 'Cause you, you can tell him to go and sit over there if you want--

FORD: Nah.

CON KOWALSKI: Or if you--

FORD: Yeah.

CON KOWALSKI: Yeah? So Ben can sort of act as your support person if you want, if wanna yeah--

FORD: Yeah.

CON KOWALSKI: If you wanna have him here that's, that's fine.

FORD: Yeah I guess.

CON KOWALSKI: Alright man. Um so how much have you had to drink tonight?

FORD: Um nothing.

CON KOWALSKI: No alcohol at all? Okay and how many pills have you had tonight?

FORD: Just [INDISTINCT].

CON KOWALSKI: Just one? And how long ago did you take it Brandon?

FORD: [INDISTINCT] ten thirty?

CON KOWALSKI: Then thirty okay and it's so it's now like half past one so it's about three hours ago?

FORD: Yep.

CON KOWALSKI: Okay do you feel like you're under the influence of that now?

FORD: Ah not really no.

CON KOWALSKI: Not really?

FORD: Yeah coming down.

CON KOWALSKI: Okay alright.

SCON VAN DEN BERG: Just in, sorry to interrupt [INDISTINCT]. Ben, what's your mobile number, or what's your last name?

HAYES: Sorry?

SCON VAN DEN BERG: What's your last name?

HAYES: Hayes.

SCON VAN DEN BERG: Hayes. He's gonna be involved as an interview, he can't be a support person.

CON KOWALSKI: Oh okay alright. Um Ben unfortunately man I'm gonna have to ask you to um just [INDISTINCT] somewhere else just 'cause of, some things in the phone that my partner's seen that may involve you okay? Um so just while I talk to Brandon [INDISTINCT]. Um so mate

> if you, probably down, might be a, a good spot just down the, if you wanna grab a seat down there
>
> HAYES: [INDISTINCT].
>
> CON KOWALSKI: Um that way you can still see us and--
>
> HAYES: [INDISTINCT].
>
> CON KOWALSKI: See just, just---
>
> SCON VAN DEN BERG: J-, just be far enough so you can't hear the conversation.
>
> CON KOWALSKI: Yeah where those, like there's a little sort of brick seat, you see where those guys are sitting there?
>
> HAYES: Yeah the [INDISTINCT].
>
> CON KOWALSKI: Yeah, yeah.
>
> HAYES: Yeah.
>
> CON KOWALSKI: That way you can still see us and see what's going on but you just can't hear us."[1]

[10] There are a number of matters arising from this extract of the transcript of the recorded interview. First, both officers each asked the applicant for his PIN prior to him being cautioned or informed of his rights. Secondly, it was Constable Kowalski who suggested the applicant's cousin, Ben Hayes, act as the applicant's "support person". Thirdly, within a very short time of the questioning continuing, Hayes was excluded from the interview.

[11] Both Constable Kowalski and Senior Constable van den Berg gave oral evidence. Constable Kowalski recalls activating her digital recorder in view of the applicant. Whilst the evidence does not precisely establish Ben Hayes' age, he was at the time somewhere between 18 and 21 years of age. The applicant was standing with his cousin when he was first approached by Constable Kowalski. She recalls that when asked whether the applicant wished to telephone anyone his question, "Who would I call?" was directed to his cousin rather than to Constable Kowalski. She knew that Ben Hayes was the applicant's cousin because the applicant had previously informed her of this fact. I have listened to the recording a number of times. The applicant either asked his cousin, "Who would I call?" or "Who do I call?"

[12] According to Constable Kowalski her initial enquiry to the applicant as to whether he was happy to have his cousin present was based on her concerns for the applicant's privacy. Her evidence was that the reason she suggested the applicant's cousin as his "support person" was because the applicant had not nominated anyone else:[2]

> "He seemed unsure so I just wanted to be clear whether or not he wanted Ben to be there, if he wanted Ben to be that person."

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[1] Transcript of Police Record of Interview between Constable Penny Kowalski and Senior Constable Damian A Van Den Berg and Brandon John Ford and Ben Hayes on 20 March 2016.

[2] T1-9, lines 9-11.

[13] In cross-examination Constable Kowalski was asked why, after the applicant's cousin was told to leave, she did not give the applicant a further opportunity to exercise his right to communicate with a friend, relative or lawyer:

> "The defendant hadn't actually asked for a support person. When I initially said about Ben being in the vicinity, it was more a privacy concern and it was only because the defendant had hesitated and not suggested anyone that I then said 'would you like Ben to be present', for it to be as a support person."[3]

[14] Constable Kowalski repeated this point a number of times in cross-examination:

> "It brings me back to the same point, that after I'd given him the opportunity to speak to someone, that he didn't nominate anybody and it was only at my suggestion of saying, 'Your cousin's here. Would you like your cousin to be your support person.'"[4]
>
> …
>
> It's after I ask him, 'Is there anyone that you want to telephone or speak to at this stage?' And then he pauses, turns to Ben, 'Who would I call?'. So I took that from the pause – after there – that there was no one that he wanted to speak to. He turned to Ben to ask who would I call?"[5]

[15] Having listened to the recording, there is only a two to three second interval between the applicant enquiring of his cousin, "Who would I call?" or "Who do I call?" and Constable Kowalski's suggestion that the applicant's cousin act as his support person. Such a short time interval does not, in my view, constitute any hesitancy let alone a failure on the part of the applicant to nominate a friend, relative or lawyer. The question posed by the applicant directed to his cousin supports a finding that the applicant was still considering whether and how he would exercise his right to communicate with a friend, relative or lawyer. There is nothing in the applicant's exchange with Constable Kowalski consistent with the applicant declining to exercise his right. Constable Kowalski accepted that the applicant had not declined the offer for him to contact a lawyer.[6] She also accepted that at no point in time did she offer the applicant the opportunity to attend the police station to be questioned.[7]

[16] Constable Kowalski could not recall if prior to the commencement of the recorded interview she had placed the applicant under arrest. She referred to her usual practice, that where a suspect is detained for search and drugs are found, the suspect would normally be undetained and then arrested. Constable Kowalski accepted that the recorded interview does not reveal if she followed her usual practice on this occasion.[8] Her official notebook does not contain any notation of an arrest and time of arrest.[9] She issued the applicant with a notice to appear at the conclusion of the interview.

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3 T1-10, lines 38-41.
4 T1-12, lines 13-16.
5 T1-13, lines 1-5.
6 T1-14, line 39.
7 T1-16, lines 45-47.
8 T1-27, lines 1-10.
9 T1-31, lines 6-10.

[17] As is evident from the passage of the recorded interview quoted above, both Senior Constable van den Berg and Constable Kowalski requested the applicant's PIN number to his mobile phone prior to him being informed of his right to silence and his right to telephone a friend, relative or lawyer. The PIN code was requested in circumstances where the applicant had already been detained, searched (and drugs had been found) and Constable Kowalski had activated her digital recorder. She accepted that asking the applicant for his PIN constituted a question that she knew may possibly incriminate him.[10]

[18] Senior Constable van den Berg, having obtained the applicant's PIN, commenced going through the stored information on the applicant's mobile phone while Constable Kowalski was conducting the interview. On examining the phone Senior Constable van den Berg came across messages concerning drug supply as between the applicant and a person called Ben. It was on this basis that Senior Constable van den Berg had the applicant's cousin excluded from the interview.[11]

[19] In an addendum statement dated 18 June 2017 Senior Constable van den Berg states that he formed the reasonable suspicion that the applicant's mobile phone contained evidence of drug supply which is a prescribed circumstance for searching a person as it is a seven year imprisonment offence.[12] He accepted in cross-examination that he did not have an order to actually demand the PIN code from the applicant.[13] Senior Constable van den Berg has been trained and is an authorised user of the Cellebrite (UFED) systems. These are the two systems used by the Queensland Police Service and both systems require the phone to be unlocked for police to be able to begin the extraction of the mobile device.[14] There is presently no technology being used by the Queensland Police Service that would allow access to the applicant's Apple iPhone 5 without a PIN or password being provided to police.[15] Senior Constable van den Berg did not agree in cross-examination with the proposition that the applicant should have been informed of his right to silence prior to being asked for his PIN.[16]

[20] It is evident from the transcript of the recorded interview that Senior Constable van den Berg questioned the applicant by reference to information stored on the mobile phone:

> "SCON VAN DEN BERG: So that's where you are at the moment on that one okay so in your phone, okay, it's unlocked, ah you've, you've unlock, given me the passcode. Um I've opened it up your Wikr account is signed in, okay? And in the Wikr account you've ah ticked a hundred and fifty, asked someone to tick a hundred and fifty pills. What can you tell me about that conversation?
>
> FORD: Um yeah this is where I don't want to give out any names.
>
> SCON VAN DEN BERG: No you don't have to give names, I'm just asking about the conversation.

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[10] T1-33, lines 19-46.
[11] T1-39, lines 9-14.
[12] Addendum Statement of Senior Constable van den Berg, [12].
[13] T1-44, lines 1-3.
[14] Addendum Statement of Senior Constable van den Berg, [14]-[16].
[15] Addendum Statement of Senior Constable van den Berg, [17].
[16] T1-44, lines 20-46.

FORD: Well yeah.

SCON VAN DEN BERG: So did you tick a hundred and fifty?

FORD: Yeah."

[21] Both Constable Kowalski and Senior Constable van den Berg accept that the applicant was not given any further opportunity to telephone or communicate with a friend, relative or lawyer after his cousin was excluded from the interview.[17]

[22] Senior Constable van den Berg does not recall Constable Kowalski informing the applicant that he was under arrest.[18] Neither officer cautioned the applicant in terms of section 22 of the *Police Powers and Responsibilities Regulation* 2012 (the Regulation).

The relevant provisions of the Act

[23] The purposes of the Act are set out in section 5. These include:

> "(c) to provide consistency in the nature and extent of powers and responsibilities of police officers;
>
> (d) to standardise the way the powers and responsibilities of police officers are to be exercised;
>
> (e) to ensure fairness to, and protect the rights of, persons against whom police officers exercise powers under this Act."

[24] Chapter 15 part 3 is entitled, "Safeguards ensuring rights of and fairness to persons questioned for indictable offences". The provisions of part 3 include those which deal with the right of a relevant person to communicate with a friend, relative or lawyer as well as the requirement for a person to be cautioned as to their right to remain silent. Part 3 therefore seeks to achieve, in particular, the purpose of the Act identified in section 5(e).

[25] By section 415(1), part 3 applies to a "relevant person" if the person is in the company of a police officer for the purposes of being questioned as a suspect about his or her involvement in the commission of an indictable offence. Part 3 does not however, apply to a person only if the police officer is exercising a power conferred under any Act or law to detain the person for a search or a power conferred under any Act to require the person to give information or answer questions: section 415(2)(a) and (b). As is evident from the extract of the transcript of the recorded interview, the applicant here was both informed of his rights and cautioned. This was in circumstances where the search of his person had been completed and police had taken possession of his mobile telephone and the 14 pills. At the time he was requested to provide his PIN, which was prior to him being cautioned, neither Constable Kowalski or Senior Constable van den Berg were exercising a power under any Act which required the applicant to give information or answer questions. Pursuant to section 154 of the Act a magistrate or a judge may, in issuing a search warrant, order a specified person to give a police officer access to information. Similarly under section 154A, a magistrate or a

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[17] T1-46, lines 40-47.
[18] T1-37, lines 14-15.

judge may make an order requiring a specified person to provide such access information in relation to a storage device, such as a mobile telephone, which has already been seized under the search warrant. A failure on the part of a person to provide such access information constitutes an offence under section 205A of the *Criminal Code*. Here the applicant's mobile telephone was not the subject of a search warrant, nor a search warrant which required him to provide access information.

[26] Part 3 division 2 deals with a relevant person's right to communicate with a friend, relative or lawyer prior to a police officer commencing questioning. Division 2 contains two sections which deal with this right. Sections 418 and 419 provide:

> "**418 Right to communicate with friend, relative or lawyer**
>
> (1) Before a police officer starts to question a relevant person for an indictable offence, the police officer must inform the person he or she may—
>
> (a) telephone or speak to a friend or relative to inform the person of his or her whereabouts and ask the person to be present during questioning; and
>
> (b) telephone or speak to a lawyer of the person's choice and arrange, or attempt to arrange, for the lawyer to be present during the questioning.
>
> (2) The police officer must delay the questioning for a reasonable time to allow the person to telephone or speak to a person mentioned in subsection (1).
>
> (3) If the person arranges for someone to be present, the police officer must delay the questioning for a reasonable time to allow the other person to arrive.
>
> (4) What is a reasonable time to delay questioning to allow a friend, relative or lawyer to arrive at the place of questioning will depend on the particular circumstances, including, for example—
>
> (a) how far the person has to travel to the place; and
>
> (b) when the person indicated he or she would arrive at the place.
>
> (5) What is a reasonable time to delay questioning to allow the relevant person to speak to a friend, relative or lawyer will depend on the particular circumstances, including, for example, the number and complexity of the matters under investigation.
>
> (6) Unless special circumstances exist, a delay of more than 2 hours may be unreasonable.
>
> **419 Speaking to and presence of friend, relative or lawyer**
>
> (1) If the relevant person asks to speak to a friend, relative or lawyer, the investigating police officer must—

(a) as soon as practicable, provide reasonable facilities to enable the person to speak to the other person; and

(b) if the other person is a lawyer and it is reasonably practicable—allow the relevant person to speak to the lawyer in circumstances in which the conversation can not be overheard.

(2) If the relevant person arranges for another person to be present during questioning, the investigating police officer must also allow the other person to be present and give advice to the relevant person during the questioning.

(3) If the police officer considers the other person is unreasonably interfering with the questioning, the police officer may exclude the person from being present during questioning.

(4) This section does not apply to a person who is an Aborigine, a Torres Strait Islander or a child.

Note—

For Aboriginal people and Torres Strait Islanders, see section 420 and for children, see section 421."

[27] Schedule 9, Section 23 of the Regulation provides further content to the requirement of a police officer to inform a relevant person of the right to communicate with a friend, relative or lawyer. Section 23 of the Regulation provides:

"**23 Right to communicate with friend, relative or lawyer**

(1) If a police officer is required to inform a relevant person of the matters mentioned in section 418(1)(a) or (b) of the Act, the police officer must inform the person in a way substantially complying with the following—

'You have the right to telephone or speak to a friend or relative to inform that person where you are and to ask him or her to be present during questioning.

You also have the right to telephone or speak to a lawyer of your choice to inform the lawyer where you are and to arrange or attempt to arrange for the lawyer to be present during questioning.

If you want to telephone or speak to any of these people, questioning will be delayed for a reasonable time for that purpose.

Is there anyone you wish to telephone or speak to?'.

(2) If the police officer reasonably suspects the relevant person does not understand the information, the police officer may ask the relevant person to explain the meaning of the information in the person's own words.

(3) If necessary, the police officer must further explain the information.

(4) If the relevant person wants to speak to a lawyer, the police officer must, without unreasonable delay, make available to the person—

(a) if the police officer has available a list of lawyers for the region and the person has not asked to speak to a particular lawyer—the list; or

(b) a telephone directory for the region.

(5) A police officer must not do or say anything with the intention of—

(a) dissuading the relevant person from obtaining legal advice; or

(b) persuading a relevant person to arrange for a particular lawyer to be present."

[28] There is an important distinction to be drawn between section 418(2) and 419(1). Section 419(1) deals with a situation where the relevant person has asked to speak to a friend, relative or lawyer. Section 418(2) is not predicated on such a request. It simply requires the police officer to delay the questioning for a reasonable time to allow the person to telephone or speak to a friend, relative or lawyer. It is significant that section 418 identifies the offer to communicate with a friend, relative or lawyer as a "right". It is apparent from sections 418 and 419 of the Act and section 23 of the Regulation that the right is one to be exercised by the relevant person. Section 418(2), by requiring that questioning be delayed for a reasonable time to allow the person to telephone or speak to a friend, relative or lawyer, shows that the right is one which requires some time at least to be considered and exercised. As observed by Keane JA (as his Honour then was) in *R v LR*:[19]

> "That was a decision for the appellant. It was the responsibility of the interviewing officer however, pursuant to s 249(1),[20] to ensure that the appellant understood that there was an important decision to be made and that that decision needed to be made decisively one way or the other."

[29] Part 3 division 3 contains special requirements for the questioning of Aboriginal people and Torres Strait Islanders, children and persons with impaired capacity as well as persons who are apparently under the influence of liquor or a drug. One of the special requirements is that a police officer must not commence questioning before allowing the particular person to speak to a support person. The term "support person" is defined in Schedule 6 to the Act. The suggestion made by Constable Kowalski to the applicant was that his cousin could "sort of act as your support person if you want". The term "support person" however, does not appear in part 3 of division 2, which contains the right to communicate with a "friend, relative or lawyer" in section 418.

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[19] [2005] QCA 368 at [48].

[20] The previous equivalent to s 418 of the Act.

[30] The applicant was questioned as a suspect about his involvement in the commission of an indictable offence. He was therefore "a relevant person" for the purposes of section 415, 418 and 419. Section 22 of Schedule 9 of the Regulation also applied. Section 22 applies if a police officer wants to question a person as a suspect. Sections 22(2) and (4) provide:

> "(2) If the police officer approaches the person when not at a police station or police establishment, the police officer must caution the person in a way substantially complying with the following—
>
> 'I am (name and rank) of (name of police station or police establishment).
>
> I wish to question you about (briefly describe offence).
>
> Are you prepared to come with me to (place of questioning)?
>
> Do you understand that you are not under arrest and you do not have to come with me?'.
>
> …
>
> (4) Before the police officer starts to question the person, the police officer must caution the person in a way substantially complying with the following—
>
> 'Do you understand you are not under arrest?
>
> Do you understand you are free to leave at any time unless you are arrested?'."

[31] Section 431(1) of the Act requires a police officer, before a relevant person is questioned, to caution the person in the way required under the *Responsibilities Code.* That requirement is contained in section 26 of the Regulation. There is no dispute that Constable Kowalski cautioned the applicant as required by section 431(1) of the Act and section 26 of the Regulation. The caution was however, given after the applicant had been asked by both Senior Constable van den Berg and Constable Kowalski for his PIN code.

[32] The Act contains a number of provisions which permit a police officer, under limited circumstances, to exclude a person from being present during questioning. Section 419(3) provides that a police officer may exclude "the other person" (that is the friend, relative or lawyer) if that person is unreasonably interfering with the questioning. Section 420(6) and 421(4) give a similar power to a police officer to exclude a support person who unreasonably interferes with the questioning of respectively an Aboriginal person, Torres Strait Islander or child.

[33] Part 3 division 4 both defines what constitutes "unreasonable interference" and sets out the procedure that must be followed both before and after a person is excluded. Section 424 defines what is "unreasonable interference" for divisions 2 and 3 by identifying what may be unreasonable interference and what is not unreasonable interference. For example, conduct that prevents or unreasonably obstructs proper questions being put to a relevant person may be unreasonable interference. It is not however, unreasonable interference to seek clarification of a question or to challenge the way in which a

question is put. Section 425 provides that if a police officer considers a friend, relative, lawyer or support person present during the questioning is unreasonably interfering with the questioning then prior to excluding the person the police officer must warn the person not to interfere with the questioning and give the person one further opportunity to stop unreasonably interfering with the questioning. The police officer must tell the person that he or she may be excluded from being present during the questioning if he or she continues to interfere unreasonably with the questioning. Section 426 details the procedure a police officer must take if a person is excluded from questioning:

> "**426 If police officer excludes person from questioning**
>
> (1) If a police officer excludes a person from being present during questioning, the police officer must—
>
> (a) if the excluded person was a friend, relative or lawyer—advise the relevant person that he or she may telephone or speak to another friend, relative or lawyer, to ask the person to be present during the questioning;
>
> and
>
> (b) if the relevant person arranges for another person to be present—delay the questioning for a reasonable time to allow the other person to be present during the questioning.
>
> (2) Also, the police officer must arrange for someone else to be present during the questioning if—
>
> (a) the police officer must not question the relevant person without a support person being present because of a requirement under this Act; and
>
> (b) the relevant person has not arranged for another person to be present during the questioning."

[34] Part 3 division 5 provides further circumstances in which a support person may be excluded. These circumstances include where the support person is unable to properly perform the role of a support person or where it would be in the interests of the relevant person to exclude the support person and arrange for another support person to be present during questioning. Section 428 states the circumstances in which a person may be unable to properly perform the role of a support person for a relevant person. These include such circumstances as a support person having ingested alcohol, a drug or a potentially harmful thing. It also includes a circumstance in section 428(3)(g) where the support person witnessed the commission of the offence for which the relevant person is being questioned. Section 429(2) requires a police officer to exclude a support person from being present during questioning if that person is unable to properly perform the role of support person. Section 430(b) provides that where a support person has been excluded from the questioning of either an Aboriginal person, Torres Strait Islander, child or person with impaired capacity, the questioning must be delayed for a reasonable time to allow another person to be present as a support person during questioning.

[35] I note that where police have a discretion or are required to exclude a person from questioning, in each instance the Act requires the relevant person either to be informed of his or her right to communicate with a friend, relative or lawyer or for the questioning to be delayed for a reasonable time to allow another support person to be present. Chapter 15 part 3 of the Act, when read with the purpose stated in section 5(e), evinces a legislative intention that the exercise by a person of their right to communicate with a friend, relative or lawyer or to have a support person present is not defeated or circumvented by a person being excluded from the questioning of the suspect.

[36] Another relevant provision is section 441 which falls within part 3 division 8 which is headed "General". Section 441 provides:

> "**441 When sections 418–422, 432 and 434 do not apply**
>
> (1) Sections 418 to 422, 432 and 434 do not apply if a police officer reasonably suspects that compliance with the sections is likely to result in—
>
> (a) an accomplice or accessory of the relevant person taking steps to avoid apprehension; or
>
> (b) an accomplice or accessory being present during questioning; or
>
> (c) evidence being concealed, fabricated or destroyed; or
>
> (d) a witness being intimidated.
>
> (2) Also, a police officer is not required to delay questioning if, having regard to the safety of other people, the police officer reasonably suspects questioning is so urgent that it should not be delayed.
>
> (3) This section applies only for so long as the police officer has the reasonable suspicion."

[37] Sections 432 and 434 which are referred to in section 441 relate to a police officer giving information to a friend, relative or lawyer as to the suspect's whereabouts and the right of a visiting foreign national to communicate with his or her embassy prior to being questioned by a police officer. Section 441 relieves a police officer of compliance with sections 418 to 422, 432 and 434 where the police holds a reasonable suspicion that compliance "is likely to result in" the specified matters. The term "is likely to result in" suggest a prospective assessment. Section 441, unlike sections 419(3), 420(6), 421(4), 424-430, is not concerned with the exclusion of a friend, relative, lawyer or support person from the questioning of the suspect. Rather, section 441 has a different application which seeks to strike a balance between the rights of a suspect on the one hand and the responsibility of a police officer to investigate offences and enforce the law.[21] Given that section 441 permits the abrogation of the rights of a suspect, the necessary balance is struck by a requirement that a police officer "reasonably suspects" those matters stated in section 441(1)(a)-(d). The balance is also struck by section 441(3) which limits the application of section 441 only for as long as

[21] See s 5(a) of the Act.

the police officer has the reasonable suspicion. In the present case the relevant reasonable suspicion that Senior Constable van den Berg had on examining the applicant's mobile phone was that an accomplice or an accessory would be present during questioning, namely the applicant's cousin. As soon as the applicant's cousin was excluded, the basis for Senior Constable van den Berg's reasonable suspicion no longer existed. The effect of section 441(3) is that once the applicant's cousin was excluded, the applicant's right to communicate with a friend, relative or lawyer contained in section 418(1) of the Act and section 23 of the Regulation was re-enlivened. In my view, this required Constable Kowalski to delay the questioning for a reasonable time to allow the applicant to exercise his right.[22]

[38] The respondent submits that the police officers did not need to comply with section 418 because the reasonable suspicion was not removed at any time prior to the conclusion of the field interview. I do not accept this submission. The reasonable suspicion, as expressed by Senior Constable van den Berg in the recording, was only in respect of Ben Hayes. Once he was removed, there was no basis for any continuing reasonable suspicion that a different relative (such as a parent) or friend or lawyer would also be an accomplice or accessory. This is particularly so in circumstances where it was Constable Kowalski's suggestion that caused Ben Hayes to act as the applicant's "support person".

[39] It is apparent that Ben Hayes was not excluded pursuant to s 419(3) for unreasonably interfering with the questioning. Had he been excluded under this provision section 426(1)(a) would have required the police officers to advise the applicant of his rights. Once Ben Hayes was excluded however, the operation of section 441(3) had a similar effect to section 426(1)(a) and the applicant should have been given an opportunity to exercise his rights.

The electronic recording of the interview

[40] In the particular circumstances of this case I am satisfied that the applicant was deprived of any real chance to exercise his right to telephone or speak to a friend, relative or lawyer. The right in section 418 was one to be exercised by the applicant. The questioning by Constable Kowalski and Senior Constable van den Berg should have been delayed until the applicant had made a decision either to exercise the right or not to exercise the right. The choice as to how the right was to be exercised was in effect, made for him by Constable Kowalski's suggestion that the applicant's cousin could act as his "support person". This suggestion was made after the applicant had enquired of his cousin, "Who would I call?" or "Who do I call?" The applicant's response to Constable Kowalski's suggestion was, "Yeah I guess". The unfairness identified by the applicant is that by acquiescing to Constable Kowalski's suggestion, a false impression was created that the applicant had in fact exercised his right.

[41] Shortly after the suggestion was made (only seven questions later) the applicant's cousin was excluded from the questioning. At this stage the questioning should have been delayed for a reasonable time to allow the applicant to telephone a friend, relative or lawyer. The respondent submits that after the applicant's cousin was excluded, the applicant did not indicate that he wanted another person or lawyer present during

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[22] Section 418(2) of the Act.

questioning.[23] This is not the point. At no stage had the applicant stated that he did not wish to exercise his right to have a friend, relative or lawyer present. The fact that he had acquiesced in Constable Kowalski's suggestion for his cousin to act as his support person is consistent with the applicant wishing to affirmatively exercise his right.

[42] Further, there is no evidence that the applicant was placed under arrest after the search had been completed and the drugs located. The questioning continued in a public place in circumstances where Constable Kowalski did not comply with section 22 of the Regulation. I accept the applicant's submission that had he been formally arrested, thereby being placed in custody, taken back to the police station for questioning and advised of the nature of the charges, the applicant may have been more cautious and recognised the seriousness of his situation. This may have further informed the applicant whether to exercise his right to have a friend, relative or lawyer present during questioning, and his right to remain silent.[24]

[43] There is no issue in the present case that the confessional evidence was not voluntary. Nor is there any suggestion that either Constable Kowalski or Senior Constable van den Berg deliberately sought to circumvent the applicant's rights. It remains the case however, that in the particular circumstances of this case, the applicant was deprived of both his right to telephone or speak to a friend, relative or lawyer and ask the person to be present during questioning, and his right to be informed of those matters in section 22 of the Regulation.

[44] The basis upon which I would exercise my discretion to exclude this confessional evidence is that there is a need for the law to protect an accused person's established rights. As identified by McMurdo P in *R v Playford*:[25]

> "In exercising this common law discretion, the emphasis is on fairness to the individual. It is given statutory recognition in s 130 *Evidence Act* 1977 (Qld)."

[45] Section 130 provides:

> "Nothing in this Act derogates from the power of the court in a criminal proceeding to exclude evidence if the court is satisfied that it would be unfair to the person charged with to admit that evidence."

[46] In *Playford* Dalton J considered two of the bases upon which the discretion may be exercised to exclude confessional evidence. The first is as I have already identified above. The second is that even if the admissions were both voluntary and fair, the police officer's conduct in obtaining them was so reprehensible that, as a matter of public policy, they should not be received as evidence in a court of law. Dalton J identified these discretions as separate and discrete but often interrelated:

> "[64] The development of principles in relation to excluding confessions is traced in the judgments in *Cleland v The Queen*. The principle in *R v Lee*, dealing with the discretion of the Court to reject confessional evidence where its reception would be unfair to the accused, pre-dated the

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[23] Respondent's submissions, [2(f)].
[24] Applicant's supplementary submissions, [76].
[25] [2013] QCA 109 at [4].

development of the principles in *R v Ireland* and *Bunning v Cross*. Neither *R v Ireland* nor *Bunning v Cross* was a case involving confessional evidence and, at the time *Cleland* was decided, one of the reasons for granting special leave was that there was confusion in the State Courts of South Australia as to whether the principles in *R v Ireland* and *Bunning v Cross* applied to confessional evidence at all.

[65] In *Cleland* the High Court is very clear that the *R v Lee* discretion is different from the *R v Ireland* discretion. In that regard Gibbs CJ cited the following passage from *Bunning v Cross*:

> 'What *Ireland* involves is no simple question of ensuring fairness to an accused but instead the weighing against each other of two competing requirements of public policy, thereby seeking to resolve the apparent conflict between the desirable goal of bringing to conviction the wrongdoer and the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law. This being the aim of the discretionary process called for by *Ireland* it follows that it by no means takes as its central point the question of unfairness to the accused. It is, on the contrary, concerned with broader questions of high public policy, unfairness to the accused being only one factor which, if present, will play its part in the whole process of consideration.' (my underlining).

[66] The High Court in *Cleland* held that both the unfairness discretion and the public policy discretion applied in cases of confessional evidence, and that the older principle in *R v Lee* was not subsumed in or modified by the newer principle in *Bunning v Cross*. Gibbs CJ said:

> "There can be no doubt that the principles laid down in such cases as *R v Lee* remain quite unaffected by *Reg v Ireland* and *Bunning v Cross*. It would be absurd to suppose that the established rule designed to protect an accused person from being convicted on evidence which it would be unfair to use against him can be weakened by a newer doctrine whose purpose is "to insist that those who enforce the law themselves respect it".'

…

[73] It may be that a confession which would be admitted in the exercise of one discretion is excluded in the exercise of the other. This may be so even if the same factual circumstances are considered, for:

> '… when the question of unfairness to the accused is under consideration, the focus will tend to be on the effect of the unlawful conduct on the particular accused whereas, when the question of the requirements of public policy is under consideration, the focus will be on "large matters of public policy".'"

[47] In *R v Swaffield* Toohey, Gaudron and Gummow JJ observed:[26]

> "In the light of recent decisions of this Court, it is no great step to recognise, as the Canadian Supreme Court has done, an approach which looks to the accused's freedom to choose to speak to the police and the extent to which that freedom has been impugned. Where the freedom has been impugned the court has a discretion to reject the evidence. In deciding whether to exercise that discretion, which is a discretion to exclude not to admit, the court will look at all the circumstances. Those circumstances may point to unfairness to the accused if the confession is admitted. There may be no unfairness involved but the court may consider that, having regard to the means by which the confession was elicited, the evidence has been obtained at a price which is unacceptable having regard to prevailing community standards. This invests a broad discretion in the court but it does not prevent the development of rules to meet particular situations."

[48] I would also exclude the recorded interview on the second basis. The respondent submits that any lack of compliance with the Act and Regulation does not affect the cogency of the evidence. Further, the offences are serious involving the trafficking of a schedule 1 drug.[27] As I have already observed, I accept that neither police officer deliberately disregarded the requirements of the Act and Regulation. Rather, the particular circumstances of the present case resulted in the applicant not being afforded his rights. This was in circumstances where the applicant was 18 years of age and had not been informed of the nature of the charges in relation to which he was to be questioned. Whilst there is a public need to bring to conviction those who commit serious criminal offences, there is the competing public interest in the protection of the individual from unlawful and unfair treatment. I would resolve these competing inferences in the present case in favour of the applicant.

The stored information on the applicant's mobile telephone

[49] I have outlined the evidence in relation to this issue in [17]-[20] above. This evidence discloses that both Constable Kowalski and Senior Constable van den Berg asked the applicant for his PIN prior to the applicant being informed of his right to remain silent and his right to telephone or speak to a friend, relative or lawyer. Further, the applicant had not been placed under arrest, nor cautioned in terms of section 22 of the Regulation.

[50] There is no dispute that there was a proper basis for the applicant's mobile telephone to be seized. The issue however, is whether the applicant's provision of his PIN, which enabled access to the information stored on his mobile, constituted actual consent to this search. Ordinarily there is no difficulty with a police officer asking a suspect for his or her PIN code for the purposes of accessing stored mobile telephone information. The respondent submits that the provision of the PIN by the applicant is similar to a search by consent because without the PIN being provided a search could not occur of the mobile phone. The respondent relies on *R v Bossley*[28] in support of this proposition. The difficulty with this submission is that the PIN was requested in circumstances where drugs had already been located on the applicant and the police officers were

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[26] (1998) 192 CLR 159 at 202, [91].
[27] Respondent's submissions, [6(g)].
[28] [2012] QSC 292 at [17]-[30].

about to commence a recorded interview. Given that the PIN information was requested prior to any cautions being administered, or rights explained, the applicant may have believed that he was obliged or required to provide his PIN. This was in circumstances where the applicant could have lawfully refused to provide his PIN without having committed any offence pursuant to section 205A of the *Criminal Code*. Senior Constable van den Berg having obtained the PIN, was able to utilise the stored information in questioning the applicant. This resulted in the applicant being questioned for significantly more serious offending than being in possession of 14 MDMA pills.

[51] The respondent submits that even if the applicant should have been warned prior to being asked for his PIN the Court should exercise its discretion not to exclude the evidence. One basis identified by the respondent is that the slides from a QPS powerpoint presentation produced by Senior Constable van den Berg in his supplementary statement, "show that the mistake occurred as a result of training provided by the QPS and their interpretation of the provisions of the Act."[29] The relevant slide reads as follows:

> "Is there power to demand the access code for the phone
>
> The pass code is merely the 'electronic' key to the door of the phone so to speak and if they know it and it is available to them – then yes – they would be obstructing police.
>
> > Charrington v Korac [2008] QDC 328
> >
> > **Obstruct Police.** Police have attended an address at Woody Point to execute a search warrant. Front screen door locked. Defendant not an occupier but on premises assisting new tenants to move in and is at front door on arrival of police. Police indicate that they have a warrant to search the premises. Defendant tells police that those tenants have moved out and states that he will not be opening the screen door. Police force entry and defendant is eventually arrested and charged with obstruct. Held:- Search warrant still valid. Defendant obstructed police by failing to open the door **when he had the means and knowledge to do so.**
> >
> > **Comment:** *This was an issue of passive resistance and refusal of entry by non-compliance and could also apply to occupants opening safes, computer passwords etc. but we would need to prove they had the knowledge and ability to open the thing in question.*
>
> If the person refuses to hand over the access Code to the phone – Proceed to seize the phone and make application for a Search Warrant to a Magistrate or Judge (Not JP) with powers to require password etc under PPRA Section 154. If failure to comply – Charge s 205 of the Criminal Code, 'Disobedience to lawful order issued by statutory authority (But you have to negate the issue they haven't just forgotten the password)".

[52] The information on this slide does not in my view, explain why the applicant was not cautioned prior to his PIN being requested. The failure to caution the applicant prior to requesting his PIN constitutes, in the particular circumstances of this case, a breach of

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[29] Respondent's supplementary submissions, [16].

section 431(1) of the Act. This breach in itself is sufficient to warrant an exercise of discretion to exclude the evidence. It would be unfair to the applicant to admit the stored information.

Intoxication

[53] From the extract of the recorded interview set out at [9] above, it is evident that the applicant informed Constable Kowalski that he had taken an MDMA pill at approximately 10.30 pm. This was about three hours prior to the applicant being interviewed. Whilst he stated that he was "not really" under the influence of the drug, he did state that he was "coming down". The applicant seeks leave to add an additional ground for the exclusion of the recorded interview relying on an alleged breach of section 423 of the Act. Section 423(2) requires a police officer to delay the questioning until the police officer is reasonably satisfied the influence of the liquor or drug no longer affects the person's ability to understand his or her rights and to decide whether or not to answer questions. There are indications in the recorded interview that the applicant realised that he was making significant admissions:

> "FORD: I feel like I'm just getting so fucked up with all this information I'm telling you guys [INDISTINCT] …"
>
> "CON KOWALSKI: No I haven't threatened to, to break your legs or promised you a Macdonalds or anything like that?
>
> FORD: No, I'm just a sucker for you guys man, cops can't ask me stuff 'cause …"

[54] In *R v Nash*[30] Ann Lyons J (as her Honour then was) stated:

> "Section 423 provides that the questioning of an 'apparently' drug affected person such as the defendant must be delayed. The provisions of s 423 do not require the police officer to be absolutely satisfied that a person is intoxicated before questioning is to be delayed, but rather the section provides that questioning must be delayed if the person is '*apparently under the influence of liquor or a drug*'. Once that question is objectively raised the section provides the officer must delay the questioning until the officer is reasonably satisfied that the influence of the liquor or drug no longer affects the person's ability to understand his or her rights and to decide whether or not to answer questions."

[55] Here, Constable Kowalski was informed by the applicant that he had ingested drugs three hours previously. The applicant submits that, given the informality of the interview conducted in the early hours of the morning at 1.30 am, where the applicant was not advised if he was under arrest and where he was "coming down" from the MDMA pill, these factors raise legitimate concerns as to a potential breach of section 423. Moreover, as submitted by the applicant, given the disinhibiting effects of the MDMA tablet, the applicant may have been more cavalier and less wary of his rights.[31]

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[30] [2014] QSC 139 at [30].

[31] Applicant's supplementary submissions, [69].

[56] At the hearing of the application however, counsel for the applicant expressly disavowed any reliance on a breach of section 423 of the Act primarily on the basis that the applicant was not "apparently" under the influence at the time.[32] Neither Constable Kowalski nor Senior Constable van den Berg were cross-examined on this issue. In light of my ruling that the electronic recording of the field interview should be excluded, it is unnecessary to further consider the issue of intoxication.

Disposition

[57] The rulings of the Court are that:

(a) the electronic recording of the field interview conducted between Constable Kowalski and Senior Constable van den Berg and the applicant on 20 March 2016 commencing at a time unknown but after 1.25 am and finishing at 1.58 am be excluded from evidence at the applicant's trial;

(b) the stored information on the applicant's Apple iPhone 5 seized on 20 March 2016 be excluded from evidence at the applicant's trial.

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[32] T1-64, lines 10-30.