# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Bennetts* [2018] QCA 99 |
| PARTIES: | **R**<br>**v**<br>**BENNETTS, Brenden Jacob**<br>(appellant) |
| FILE NO/S: | CA No 231 of 2017<br>SC No 1432 of 2016 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Appeal against Conviction |
| ORIGINATING COURT: | Supreme Court at Brisbane – Date of Conviction: 14 September 2017 (Lyons SJA) |
| DELIVERED ON: | 29 May 2018 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 17 April 2018 |
| JUDGES: | Sofronoff P and Mullins and Bowskill JJ |
| ORDER: | **The appeal is dismissed.** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – OTHER CASES – where the appellant was found guilty after trial of murder – whether the learned trial judge erred in refusing to exclude statements made and answers given by the appellant during police questioning – whether the evidence was unlawfully obtained – whether the appellant was, at the relevant time, in the company of a police officer for the purpose of being questioned as a suspect about his involvement in the commission of an indictable offence pursuant to s 415 of the *Police Powers and Responsibilities Act* 2000 (Qld)<br><br>*Criminal Code* (Qld), s 668D(1)(a)<br>*Police Powers and Responsibilities Act* 2000 (Qld), s 415<br><br>*Bailey v Costin* [1993] QCA 404, cited<br>*George v Rockett* (1990) 170 CLR 104; [1990] HCA 26, considered<br>*Maeda v Director of Public Prosecutions (Cth)* [2015] VSCA 367, cited<br>*Nabole v R* (2014) 43 VR 542; [2014] VSCA 297, cited<br>*Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266; [1966] HCA 21, considered<br>*R v Kyriakou, D'Agosto and Lombardo* (1987) 29 A Crim R 50, |

cited
*R v O'Donoghue* (1988) 34 A Crim R 397, cited
*R v Raso* (1993) 68 A Crim R 495; [1993] VicSC 519, cited
*Willis v The Queen* (2016) 261 A Crim R 151; [2016] VSCA 176, cited

COUNSEL: M J Copley QC for the appellant
V A Loury QC for the respondent

SOLICITORS: Mulcahy Ryan Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of Bowskill J.

[2] **MULLINS J:** I agree with Bowskill J.

[3] **BOWSKILL J:** The appellant was convicted of the murder of Jayde Kendall, a 16 year old school girl. He appeals against his conviction on the sole ground that the learned trial judge erred in refusing to exclude from the evidence at trial statements made and answers given by the appellant to police between about 6 pm and midnight on 18 August 2015.

[4] The deceased was last seen alive after she left school on Friday, 14 August 2015. Her body was not discovered until Wednesday, 26 August 2015, when she was found on rural land near Gatton.

[5] The appellant was spoken to by the police at 3.48 pm on 18 August 2015 and then again at about 6 pm on that day, following which he accompanied police to a police station. He remained in the company of police until about midnight.[1] During that time, he provided a written statement to police (about how he knew the deceased, the last time he had seen her, and text messages he had exchanged with her),[2] had an unrecorded conversation with police (about CCTV footage depicting him making withdrawals from the deceased's bank account, and an account from the appellant about what he and the deceased had done on the Friday afternoon)[3] and then participated in a longer recorded conversation with police from 10.50 pm to 11.56 pm.[4]

[6] The appellant applied to exclude this evidence, on the basis that it was unlawfully obtained because he was not warned or cautioned as required by s 418 (as to his right to communicate with a friend, relative or lawyer) and s 431 (by reference to the requirements under the Police Responsibilities Code, which includes the requirement to caution a person as to their right to silence) of the *Police Powers and Responsibilities Act* 2000 (Qld) (**PPRA**).

[7] Those provisions are within part 3 of chapter 15 of the PPRA. Section s 415(1) of the PPRA provides that part 3:

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1 *R v Bennetts* [2017] QSC 181 at [4].
2 AR 973 to 980.
3 AR 168 to 169.
4 AR 1431 to 1467.

> "applies to a person (***relevant person***) if the person is in the company of a police officer for the purpose of being questioned as a suspect about his or her involvement in the commission of an indictable offence."

[8] The appellant argued that the warnings and cautions were required, because he was being questioned as a suspect at the relevant time. Although accepting the police may not have had a suspicion about an unlawful killing by this time, the appellant argued the police had formed a suspicion about an indictable offence of some kind having occurred, for example deprivation of liberty. The evidence of the police officers was that whilst the appellant was considered to be an eyewitness to the deceased's disappearance, and was being questioned in order to get information about her whereabouts, the appellant was not, as at the evening of 18 August 2015, a suspect in relation to involvement in any indictable offence.[5]

[9] The evidence of the police officers was that the appellant became a suspect on the following day, 19 August, based on information they received on that day, including that the deceased's wallet had been found discarded on the Warrego Highway.[6]

[10] On this appeal, the appellant contends the learned trial judge erred in concluding that on 18 August 2015 he was not a person who was in the company of police officers for the purposes of being questioned as a suspect about his involvement in the commission of an indictable offence.

[11] The learned trial judge's reasons for reaching that conclusion were as follows:

> "[24] There is no doubt that the evidence indicates that the detectives were worried for the safety of Jayde Kendall by the evening of 18 August. Detective Nixon agreed that by that stage he was 'troubled'. He stated however that at that stage it was still a missing person investigation and that whilst the applicant was 'definitely a suspect for the missing person' he had not at that point thought there was a possibility that the applicant had killed the deceased. In answer to the question whether there was a possibility that Jayde Kendall was being held somewhere against her will he replied; 'No. Yet again, there was no evidence of her being taken into a vehicle forcefully or anything along those lines.'
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> [25] In my view the following factors are relevant to the determination as to whether or not the police had formed a view by Tuesday, 18 August 2015 that the applicant was a suspect:
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> - The evidence indicated that the deceased had voluntarily got into a red car near the school on Friday afternoon, 14 August. There was no evidence that she had been forced into the car.
> - Whilst by Tuesday, 18 August there was a preliminary analysis of the call charge records from the deceased indicating that there had been text communication with

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5 *R v Bennetts* [2017] QSC 181 at [23]-[24].

6 *R v Bennetts* [2017] QSC 181 at [22].

the applicant's phone, there was no content to those text messages at that point in time.

- When the applicant was first contacted at 3.48 pm on 18 August he told DSS O'Connell that he had last seen Jayde Kendall on Thursday 13 August but could not remember when he last had telephone contact with her.

- The statement by the applicant to police that he had last seen the deceased on Thursday 13 August when he picked up Matthew Ross from work was reinforced by Matthew Ross' statement that he had also last seen the deceased on Thursday 13 August at McDonalds when he was picked up by the applicant after work.

- When police attended at Matthew Ross' home on Tuesday 18 August they actually searched his home looking for Jayde Kendall.

- When it was put to the applicant that Matthew Ross had identified him as the person in the image taken from the close circuit television at the ATM, the applicant accepted it was him.

- *The account given by the applicant was a plausible account involving an unhappy 16 year old girl who wished to leave home and that he had helped her obtain money and had given her a lift out of town.*

- *The interview commencing at 10.50 pm was clearly designed to [elicit] information about the location of the deceased. The interview revealed that she had given the applicant her key card and her PIN number and that money had been withdrawn.*

- *The applicant's account that he had withdrawn the money at the deceased's request because she needed to get out of town, that he had then dropped her at the Windmill Markets on the Warrego Highway and that she had asked him to promise not to speak to anyone about her plan to run away was plausible*.

- *There were numerous reports to Crime Stoppers from 15 August through to the morning of 19 August alleging sightings of the deceased at various points along the Warrego Highway*.

- The applicant voluntarily agreed to be interviewed, had provided his fingerprints and DNA and had surrendered his car, phone and other items to the police for testing.

- The evidence at that point in time was consistent with Jayde Kendall having left town of her own accord.

> [26] Accordingly I am satisfied on the balance of probabilities that at the time police took the statement from the applicant on 18 August 2015 around 6 to 8 pm, and at the time they interviewed the applicant on 18 August 2015 at 10.50 pm, there was no evidence whatsoever that a crime of any variety had been committed. Rather, the evidence was that a 16 year old girl was missing and that the applicant had assisted her by driving her to the bank to get some money, by driving her to the outskirts of town and by helping her cover her tracks as to her whereabouts. Viewed objectively, the applicant's actions were consistent with him assisting Jayde Kendall and not harming her. Furthermore when viewed objectively it is clear that police were still actively searching for Jayde Kendall on the evening of 18 August.
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> [27] I am satisfied on the balance of probabilities that on the evening of 18 August whilst the applicant was considered to be an eyewitness to the disappearance of Jayde Kendall he was not at that point in time a suspect in relation to involvement in an indictable offence.
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> [28] Accordingly as the applicant was not a suspect at that point in time the requirements of the PPRA which mandated that he be advised of his right to silence and be given the other warnings and cautions did not apply. Neither do I consider that there was any unfair or improper conduct on behalf of the police at that point in time. There is no evidence that the applicant was overborne or unduly pressured to make a statement or agree to an interview. Whilst the questioning in the interview was persistent it would seem to me that police were endeavouring to get information about Jayde Kendall's whereabouts so that she could be located. The questioning was directed at her disappearance. At no stage did the applicant show a reluctance to speak or decline to answer questions but rather he was very keen to give police his account which indicated he had assisted Jayde as a friend and that she was alive when he last saw her. I accept the Crown's submission that the statements he continued to make on 18 August can be seen as statements that were advantageous to him."[7]

[12] Section 668D(1)(a) of the *Criminal Code* confers a right of appeal against a person's conviction on any ground which involves a question of law alone. The finding by the learned trial judge that the appellant was not, on the evening of 18 August 2015, a suspect in relation to involvement in an indictable offence for the purposes of s 415(1) of the PPRA was a finding of fact. In order to succeed on this appeal, the appellant needs to be able to show that there was no evidence to support the finding or that the learned trial judge applied wrong principles, or that the

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7 Italics added and footnotes omitted.

evidence was all one way. If the finding was one which it was open to the learned trial judge to make, this Court will not intervene.[8]

[13] There is no definition in the PPRA of "suspect" for the purposes of s 415(1).[9] The learned trial judge adopted with apparent approval the appellant's oral submissions below, that "suspect" is to be construed according to its ordinary meaning, as informed by the dictionary definition, and reflected in *George v Rockett* (1990) 170 CLR 104 at 115.[10]

[14] In *George v Rockett* at 115 the High Court said that:

> "Suspicion, as Lord Devlin said in *Hussien v Chong Fook Kam*,[11] 'in its ordinary meaning is a state of conjecture or surmise where proof is lacking: "I suspect but I cannot prove."' The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown. In *Queensland Bacon Pty Ltd v Rees*,[12] a question was raised as to whether a payee had reason to suspect that the payer, a debtor, 'was unable to pay [its] debts as they became due' as that phrase was used in s 95(4) of the *Bankruptcy Act* 1924 (Cth). Kitto J said:[13]
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> > 'A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to 'a slight opinion, but without sufficient evidence', as Chambers's Dictionary expresses it. Consequently, **a reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence**. The notion which 'reason to suspect' expresses in sub-s (4) is, I think, of something which in all the circumstances would create in the mind of a reasonable person in the position of the payee an actual apprehension or fear that the situation of the payer is in actual fact that which the sub-section describes – a mistrust of the payer's ability to pay his debts as they become due and of the effect which acceptance of the payment would have as between the payee and the other creditors.'"[14]

[15] The distinction drawn by Kitto J in *Queensland Bacon Pty Ltd v Rees* between a reason for suspicion that a person has committed an offence and a reason for investigating whether a person has done so has been referred to in a series of Victorian Court of Appeal decisions on the meaning of the phrase "questioned as a

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8 *R v Kyriakou, D'Agosto and Lombardo* (1987) 29 A Crim R 50 at 57; *R v O'Donoghue* (1988) 34 A Crim R 397 at 401; *Willis v The Queen* (2016) 261 A Crim R 151 at [95]-[102] per Weinberg and Beach JJA. See also, by analogy, *Bailey v Costin* [1993] QCA 404.

9 Cf the definition of "suspect" in s 229, for the purposes of chapter 11 of the Act, as meaning "a person reasonably suspected of having committed or being likely to have committed, or of committing or being likely to be committing, a relevant offence".

10 *R v Bennetts* [2017] QSC 181 at [19]-[20].

11 [1970] AC 942 at 948.

12 (1966) 115 CLR 266.

13 (1966) 115 CLR 266 at 303.

14 Emphasis added.

suspect" in s 23V(1) of the *Crimes Act* 1914 (Cth).[15] The principle established in those cases is that the provision only applies to the former. A person who is being questioned in the context of an investigation of a possible offence is not being questioned as a suspect. The word "suspect" requires a degree of conviction extending beyond speculation as to whether an offence has been committed and requires that it be based upon some factual foundation.[16]

[16] It has also been held that the test is a subjective one. That is, for a person to be "questioned as a suspect", the officer must have actually formed a positive opinion that the person questioned is suspected of having committed an offence.[17]

[17] There is sufficient analogy between s 23V(1) of the *Crimes Act* and s 415(1) of the PPRA, to conclude that the same approach to construction ought to be applied to the latter.

[18] The meaning of "suspect" was not controversial on this appeal. Nor was it disputed that it is the police officer's (subjective) belief that is relevant for the purposes of s 415(1) of the PPRA. Whilst the authorities just referred to were not adverted to by the parties, they are consistent with the approach taken by the learned trial judge, and it is useful to have those principles in mind, in considering the challenge which the appellant does make to the learned trial judge's finding.

[19] Cognisant of the limitations of an appeal from a finding of fact, counsel for the appellant deployed the language of relevant and irrelevant considerations, in order to argue that the trial judge misdirected herself. But in my view the argument in that regard is an attempt to challenge the finding of fact on its merits. In essence, on this appeal the appellant repeats the argument advanced, but rejected, at first instance – that the police officers lied – and argues the trial judge ought to have reached a different conclusion, on the facts.

[20] The irrelevant considerations said to have been taken into account by the learned trial judge are the matters referred to in the italicised bullet points from [25] of the ruling, set out above. As to the first three of those bullet points, it is said that these matters emerged from the taped conversation which commenced at 10.50 pm. The appellant argues that circumstances which occurred, or knowledge gained, after the time at which the obligation to warn allegedly arose, are necessarily irrelevant to the question whether, at an earlier time, there was an obligation to warn. As to the fourth of those bullet points, concerning reported sightings of the deceased, the appellant argues this too was an irrelevant consideration.

[21] In so far as the first three matters are concerned, I do not accept that those were irrelevant to the question the trial judge had to determine. The first of the italicised bullet points arose from the unrecorded conversation on 18 August. The next two arose from the recorded conversation. It was relevant to have regard to the whole of

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15 That section provides that "If a person who is being questioned as a suspect … makes a confession or admission to an investigating official, the confession or admission is inadmissible as evidence against the person in proceedings for any Commonwealth offence unless" the confession or admission was tape recorded. See *R v Raso* (1993) 68 A Crim R 495 at 506 per Phillips CJ and Marks J and at 527 per Ormiston J; *Nabole v R* (2014) 43 VR 542 at 553-554 per Redlich JA, Weinberg and Priest JJA agreeing, at 556; *Maeda v Director of Public Prosecutions (Cth)* [2015] VSCA 367 at [49]-[52], [55] per Maxwell P, Redlich and Osborn JJA.

16 *R v Raso* at 527 per Ormiston J; *Maeda v Director of Public Prosecutions* at [54].

17 *Maeda v Director of Public Prosecutions* at [49], referring to *R v Raso* at 528 per Ormiston J.

the exchanges between the appellant and the police, on the evening of 18 August, in order to determine the question whether, at any point during that evening, he was in the company of the police for the purpose of being questioned as a suspect about his involvement in the commission of an indictable offence. Her Honour was not satisfied of that, taking into account, among other factors, that the appellant had given police a plausible account consistent with the deceased being an unhappy 16 year old girl, who wanted to leave home, and that the questioning of him by police, during the recorded interview, was designed to elicit information about where she was – consistent with the evidence of the police officers that, at that stage, they were investigating a missing person.

[22] In so far as the reports of alleged sightings of the deceased are concerned, the evidence before the court included the log of calls to Crime Stoppers.[18] Keeping in mind the appellant was in the company of the police until just after midnight on 18 August (making it then 19 August) it was plainly relevant to refer to the numerous reports of alleged sightings which were made from 15 August to the morning of 19 August – in the context of the police officer's evidence that, during the evening of 18 August, they were still investigating a missing person, not questioning the appellant as a suspect in relation to a crime of any variety.

[23] The relevant considerations said to have been overlooked by the learned trial judge were that on the evening of 18 August 2015 the police took the appellant's phone, computer, car, fingerprints and a sample for DNA purposes. The learned trial judge did not overlook these matters. Her Honour referred to them, as is apparent from the second last bullet point in [25]. As is recorded in that bullet point, none of those things occurred as a result of compulsion by the police.

[24] I do not regard any of these matters as reflecting the application of a wrong principle by the learned trial judge.

[25] The finding of fact made by the learned trial judge, that the appellant was not, on the evening of 18 August 2015, in the company of the police for the purpose of being questioned as a suspect about his involvement in the commission of an indictable offence, was open and supported by the evidence before the trial judge. On the evidence of the police officers, whose credibility the trial judge had the opportunity to assess, and which her Honour accepted, it was plainly open to conclude that whilst the appellant was being questioned in the context of an investigation of a *possible* offence, he was not, as at the evening of 18 August 2015, being questioned as a suspect about his involvement in the commission of any indictable offence. No basis for this Court to interfere with the trial judge's factual finding has been established.

[26] I would dismiss the appeal.

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18 AR 991-993.