SUPREME COURT OF QUEENSLAND

CITATION:	*Wassmuth v Commissioner of Police* [2018] QCA 290
PARTIES:	**WASSMUTH, Candice Louise** **(applicant)** **v** **COMMISSIONER OF POLICE** **(respondent)**
FILE NO/S:	CA No 247 of 2017 DC No 337 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal) Appeal against Conviction
ORIGINATING COURT:	District Court at Townsville – Date of Conviction: 22 September 2333017 (Durward SC DCJ)
DELIVERED ON:	26 October 2018
DELIVERED AT:	Brisbane
HEARING DATE:	31 May 2018
JUDGES:	Philippides JA and North and Henry JJ
ORDERS:	**1. The applicant be granted leave to appeal the judgment of the District Court made on 22 September 2017.** **2. The appeal be allowed and it is ordered that the order of the District Court made on 22 September 2017 be set aside.** **3. The conviction entered in the Magistrates Court at Townsville on 16 November 2016 be quashed and a verdict of not guilty be entered.** **4. The parties are directed to lodge with the registry and serve written submissions as to the costs of proceedings in this Court (not to exceed two A4 pages) within 14 days of the delivery of this judgment.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – WARRANTS, ARREST, SEARCH, SEIZURE AND INCIDENTAL POWERS – WARRANTS – SEARCH WARRANTS – GENERALLY, ISSUE AND VALIDITY – REASONABLE GROUNDS – where the applicant was ordered to provide the access information to her mobile telephone pursuant to a search warrant – where the applicant refused to do so and was convicted of disobeying a lawful order without lawful excuse under s 205 of the *Criminal Code* – whether the applicant had a lawful excuse for refusing to comply with the order –

alternatively whether there was a failure on behalf of the police to comply with the mandatory requirement to give written notice to the applicant

Criminal Code (Qld), s 205, s 205A
District Court of Queensland Act 1967 (Qld), s 118
Police Powers and Responsibilities Act 2000 (Qld), s 5, s 154, s 154B, s 157, s 158, s 397

Ballis v Randall (2007) 71 NSWLR 282; [2007] NSWSC 422, cited
Black v Breen & Anor [2000] NSWSC 987, cited
Lee v New South Wales Crime Commission (2013) 251 CLR 196; [2013] HCA 39, applied
McDonald v Queensland Police Service [2017] QCA 255, cited
Potter v Minahan (1908) 7 CLR 277; [1908] HCA 63, applied
R v LR [2006] 1 Qd R 435; [2005] QCA 368, considered
Wright v Queensland Police Service [2002] 2 Qd R 667; [2002] QSC 46, cited
X7 v Australian Crime Commission (2013) 248 CLR 92; [2013] HCA 29, applied

COUNSEL: J A Greggery QC for the applicant
M L Franklin for the respondent

SOLICITORS: Purcell Taylor Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **PHILIPPIDES JA:** I agree with North J's reasons and the additional reasons of Henry J.

[2] **NORTH J:** On 16 August 2016 a Magistrate at Townsville issued a search warrant under the *Police Powers and Responsibilities Act* 2000 (Qld) ("PPRA") authorising the search of premises at Cranbrook in Townsville.[1] Among the powers specified in the warrant that a police officer might lawfully exercise were:

- "power to seize a thing found at the relevant place, or on a person found at the relevant place, that the police officer reasonably suspects may be **warrant evidence or property**[2] to which the warrant relates; and
- power to search anyone found at the relevant place for anything sought under the warrant that can be concealed on the person."

[3] The warrant identified that the offences for which the warrant was issued were the supply of dangerous drugs and the possession of dangerous drugs contrary to s 6 and s 9 respectively of the *Drugs Misuse Act* 1986 (Qld) ("DMA").[3] More particularly it was alleged that on 16 August 2016 the applicant supplied a dangerous drug to another person and had possession of the dangerous drug methylamphetamine. The warrant specified the 'warrant evidence or property' that

1 ARB p 57.
2 Emphasis added.
3 ARB p 58.

might be seized under the warrant as methylamphetamine, Australian currency and included:

- "Any document or thing, whether in written or electronic form, used to record the purchase or exchange of the dangerous drugs; and
- Any thing or apparatus used in connection with the...distribution of dangerous drugs, including but not limited to…laptop or personal computers and Mobile phones".[4]

[4] Further, the warrant provided:

> "This search warrant orders the person in possession of access information for a storage device in the person's possession or to which the person has access at the relevant place –
>
> - to give a police officer access to the storage device and the access information necessary for the police officer to be able to use the storage device to gain access to stored information that is accessible only by using the access information; and
> - to allow a police officer given access to a storage device to any of the following in relation to stored information stored on or accessible only by using the storage device –
>   - use the access information to gain access to the stored information;
>   - examine the stored information to find out whether it may be evidence of the commission of an offence;
>   - make a copy of any stored information that may be evidence of the commission of an offence, including by using another storage device.
>
> Failure, without reasonable excuse to comply with this order may be dealt with under the Criminal Code, section 205."

[5] Thus far it is clear that the warrant issued pursuant to s 151 of the PPRA and the order recorded in it had purportedly been made under s 154.

[6] It was not in dispute that during the search the applicant was provided with a copy of the search warrant, and a pro forma document labelled 'Statement to Occupier'.[5] The Statement to Occupier form[6] allows for officers to select, by ticking or checking boxes, the powers and obligations contained in the warrant. It was common ground that the form was provided to the applicant as a standard blank document and did not select any specific powers by ticking or checking any boxes. In particular the form provided to the applicant contained the following beside and after an unchecked box:[7]

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4 ARB p 58.
5 ARB p 62.
6 On its face authorised by s 158 of the PPRA and s 4 of the *Police Responsibilities Code* 2000 (Qld).
7 See the form at ARB p 63.

> "This search warrant orders the person in possession of access information for a storage device in the person's possession or to which the person has access at the relevant place-
>
> > to give a police officer access to the storage device and the access information necessary for the police officer to be able to use the storage device to gain access to stored information that is accessible only by using the access information; and
> >
> > to allow a police office given access to a storage device to any of the following in relation to stored information stored on or accessible only by using the storage device-
> >
> > > use the access information to gain access to the stored information;
> > >
> > > examine the stored information to find out whether it may be evidence of the commission of an offence;
> > >
> > > make a copy of any stored information that may be evidence of the commission of an offence, including by using another storage.
>
> (The search warrant must be issued by a magistrate or a judge.) Failure, without reasonable excuse to comply with this order may be dealt with under the Criminal Code, section 205."

[7] The search warrant was executed at the applicant's residence on 17 August 2016. During the search, officers located a mobile telephone. The officers asked the applicant for the access code. The applicant did not provide the access code to police, and was charged with and convicted of an offence under s 205 of the *Criminal Code* ('Code') for disobeying a lawful order.

[8] The warrant contained an order pursuant to s 154(1)(a) of the PPRA requiring the applicant, in effect, to provide the PIN code to her mobile telephone. It was conceded by counsel for the applicant that no issues of lawfulness surrounding the issue of the warrant arose. Counsel also conceded that the warrant was lawful, except in relation to the order to compel the applicant to provide the PIN code.

[9] The applicant appealed her conviction to the District Court at Townsville. The appeal was dismissed. She has not yet been sentenced.

[10] There is no right of appeal directly to this Court from the District Court of Queensland in its appellate jurisdiction. Under s 118(3) of the *District Court of Queensland Act* 1967 (Qld) a party dissatisfied with a judgment may appeal only with leave of this Court. The appeal is a strict appeal where the court considers whether there was an error below.[8] Leave is not given lightly in the circumstances where an applicant has already had the benefit of two judicial hearings. The fact that an error has occurred or can be detected may not be sufficient to attract the

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[8] Usually one of law but intervention can be justified if it can be demonstrated that there was a clear error of factual inference. See for example *McDonald v Queensland Police Service* [2017] QCA 255 at [12]-[13].

grant of leave. Usually leave will only be granted to correct substantial injustice and where there is a reasonable argument that there is an error to be detected.[9]

[11] The applicant now relies on two grounds of appeal to this Court, that:

1. The learned judge below erred in construing s 158(1)(a) of the PPRA; and
2. The learned judge below erred in finding that the applicant did not have a reasonable excuse for contravening the order to provide access information contained in the search warrant.

[12] The purposes of the PPRA at the time were:

> "**5 Purposes of Act**
>
> The purposes of this Act are as follows—
>
> (a) to consolidate and rationalise the powers and responsibilities police officers have for investigating offences and enforcing the law;
>
> **(b) to provide powers necessary for effective modern policing and law enforcement;**
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> (c) to provide consistency in the nature and extent of the powers and responsibilities of police officers;
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> (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;**
>
> (f) to enable the public to better understand the nature and extent of the powers and responsibilities of police officers;
>
> (g) to provide for the forced muster of stray stock."
>
> [Emphasis added]

[13] Keane JA (as his Honour then was) considered the objects of the PPRA in *R v LR*:[10]

> "[41] One of the main reasons advanced for the passage of the PPR Act in 2000 was to "provide powers necessary for effective modern policing and law enforcement" however it was also the intention of the legislature to "ensure fairness to, and protect the rights of, persons against whom police officers exercise [those] powers…". Section 5 of the PPR Act states that it "is Parliament's intention that police officers should comply with this Act in exercising powers and performing responsibilities under it". A breach by a police officer of an obligation

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9 *McDonald v Queensland Police Service* [2017] QCA 255 at [39] citing *Pearson v Thuringowa City Council* [2006] 1 Qd R 416 at [14] per Keane JA; *Burke v Commissioner of Police* [2016] QCA 184 at [5] per McMurdo P; and *Pickering v McArthur* [2005] QCA 294 at [3] per Keane JA.

10 [2006] 1 Qd R 435 at [41].

imposed by the PPR Act amounts, at minimum, to a breach of discipline."

[Footnotes omitted]

[14] At this juncture it is helpful to set out the relevant statutory provisions in force at the time of the issue of and execution of the warrant. At the time the warrant was executed, s 154 of the PPRA provided:

"**154 Order in search warrant about information necessary to access information stored electronically**

(1) If the issuer is a magistrate or a judge, **the issuer may, in a search warrant order the person in possession of access information for a storage device in the person's possession or to which the person has access at the place—**

(a) **to give a police officer** access to the storage device and **the access information necessary for the police officer to be able to use the storage device to gain access to stored information** that is accessible only by using the access information; and

(b) to allow a police officer given access to a storage device to do any of the following in relation to stored information stored on or accessible only by using the storage device—

(i) use the access information to gain access to the stored information;

(ii) examine the stored information to find out whether it may be evidence of the commission of an offence;

(iii) make a copy of any stored information that may be evidence of the commission of an offence, including by using another storage device.

(2) In this section—

access information **means information of any kind that it is necessary for a person to use to be able to access and read information stored electronically on a storage device.**

storage device **means a device of any kind on which information may be stored electronically.**

stored information **means information stored on a storage device.**"

[Emphasis added]

[15] Section 158 of the PPRA relevantly provided:

"158 Copy of search warrant to be given to occupier

> **(1) If a police officer executes a search warrant for a place that is occupied, the police officer must—**
>
> (a) if the occupier is present at the place—**give to the occupier a copy of the warrant and a statement in the approved form summarising the person's rights and obligations under the warrant**; or
>
> (b) if the occupier is not present—leave the copy in a conspicuous place.
>
> (2) If the police officer reasonably suspects giving the person the copy may frustrate or otherwise hinder the investigation or another investigation, the police officer may delay complying with subsection (1), but only for so long as—
>
> (a) the police officer continues to have the reasonable suspicion; and
>
> (b) that police officer or another police officer involved in the investigation remains in the vicinity of the place to keep the place under observation."
>
> [Emphasis added]

[16] Section 205 of the Code provided that:

> "**205 Disobedience to lawful order issued by statutory authority**
>
> (1) Any person who **without lawful excuse**, **the proof of which lies on the person**, disobeys any **lawful order issued** by any court of justice, or **by any person authorised by any public statute in force** in Queensland to make the order, is guilty of a misdemeanour, unless some mode of proceeding against the person for such disobedience is expressly provided by statute, and is intended to be exclusive of all other punishment.
>
> (2) The offender is liable to imprisonment for 1 year."
>
> [Emphasis added]

[17] I will consider the second ground first.

Did the applicant have a lawful excuse for not providing the access code to the telephone?

[18] Counsel for the applicant submitted that the applicant had a "lawful excuse" within s 205 of the Code for not complying with the discretion contained in the warrant to give to the police officer the access information for the phone, being the right to claim privilege against self-incrimination.

[19] In support of the submission that the privilege against self-incrimination was not impliedly abrogated by s 154 of the PPRA the applicant referred to and relied upon the reasons of a number of justices of the High Court. In *X7 v Australian Crime Commission*[11] Hayne and Bell JJ (with whom Kiefel J agreed)[12] quoted O'Connor J

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11 (2013) 248 CLR 92.

in *Potter v Minahan*,[13] who in turn quoted from Maxwell's on the Interpretation of Statutes:[14]

> "It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, *or depart from the general system of law*, **without expressing its intention with irresistible clearness**; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used."
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> [Footnotes omitted, emphasis added]

[20] As their Honours point out the privilege is a substantive right or privilege not merely a rule of evidence.[15] The principle has been often quoted, approved of and applied.[16] The privilege was extensively considered in *Lee v New South Wales Crime Commission*[17] where, for example, Kiefel J said:[18]

> "*The principle of legality*
>
> [171] As Gleeson CJ observed in *Al-Kateb v Godwin*, the principle of legality is not new. In 1908, O'Connor J, in *Potter v Minahan*, referred to a passage from the fourth edition of *Maxwell on Statutes* which stated that "[i]t is in the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness". **Absent that clarity of expression, the courts will not construe a statute as having such an operation**. In *Electrolux Home Products Pty Ltd v Australian Workers' Union*, Gleeson CJ said "[t]he presumption is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law". The principle has been cited and applied on many occasions as a rule of statutory construction. The principle was applied in *X7*.
>
> [172] In *Coco v The Queen*, it was explained that the insistence on express authorisation of an abrogation of a fundamental right, freedom or immunity must be understood as a requirement for a manifestation or indication that the legislature not only directed its attention to the question of abrogation, but has also determined to abrogate the right, freedom or immunity. **General words will rarely be sufficient to show a clear**

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12 Ibid at [157] and [158].
13 (1908) 7 CLR 277 at 304.
14 (2013) 248 CLR 92 at [86].
15 Ibid at [104] and [105].
16 See for example the cases referred to by Crennan J in *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at [126].
17 (2013) 251 CLR 196 ('*Lee*').
18 Ibid at [171]-[173].

manifestation of such an intention because they will often be ambiguous on the aspect of interference with fundamental rights. The same requirement must apply to any interference with fundamental principles or departure from the general system of law to which *Potter v Minahan* drew attention.

[173] The applicable rule of construction recognises that legislation may be taken necessarily to intend that a fundamental right, freedom or immunity be abrogated. As was pointed out in *X7*, it is not sufficient for such a conclusion that an implication be available or somehow thought to be desirable. The emphasis must be on the condition that the intendment is "necessary", which suggests that it is compelled by a reading of the statute. Assumptions cannot be made. It will not suffice that a statute's language and purpose might permit of such a construction, given what was said in *Coco v The Queen*."

[Footnotes omitted, emphasis added]

[21] Further, in *Lee*, Gageler and Keane JJ said:[19]

"[307] The principle of construction now sought to be invoked can be traced to a statement of Marshall CJ in the Supreme Court of the United States in 1805:

> "Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness, to induce a court of justice to suppose a design to effect such objects."

That statement, amongst others, was relied on in successive editions of *Maxwell on the Interpretation of Statutes*, first published in 1875, in support of the existence of a "presumption against any alteration of the law beyond the specific object of the Act".

[308] In Australia, the principle is generally traced to the adoption and application in *Potter v Minahan* of a passage in the fourth edition of *Maxwell*, published in 1905. After stating that "[t]here are certain objects which the Legislature is presumed not to intend" and that "a construction which would lead to any of them is therefore to be avoided", the passage as quoted and applied continued:

> "One of these presumptions is that the Legislature does not intend to make any alteration in the law beyond what it explicitly declares, either in express terms or by implication; or, in other words, beyond the immediate scope and object of the statute. In all general matters beyond, the law remains undisturbed. **It is in the last degree improbable that the Legislature would**

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19 *Lee* (2013) 251 CLR 196 at [307]-[313].

> **overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness;** and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used."

The passage concluded:

> "General words and phrases, therefore, however wide and comprehensive in their literal sense, must be construed as strictly limited to the actual objects of the Act, and as not altering the law beyond."

[309] Modern exposition of the principle in this Court is to be found in the joint reasons for judgment in *Bropho v Western Australia* and the joint reasons of four Justices of the Court in *Coco v The Queen*. **The joint reasons for judgment in *Bropho*, after referring to the existence of various "'rules of construction' which require clear and unambiguous words before a statutory provision will be construed as displaying a legislative intent to achieve a particular result", stated that "[t]he rationale of all such rules lies in an assumption that the legislature would, if it intended to achieve the particular effect, have made its intention in that regard unambiguously clear"**. The joint reasons for judgment described the passage in *Maxwell* adopted and applied in *Potter* as articulating "the rationale of the presumption against the modification or abolition of fundamental rights or principles".

[310] The joint reasons for judgment in *Coco* repeated that rationale, adopting again the same quotation. Consistently with that rationale, the joint reasons for judgment in *Coco* introduced the principle by stating:

> "The insistence on express authorisation of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them."

Reflecting again the same rationale, the joint reasons for judgment made the additional observation that "curial insistence on a clear expression of an unmistakable and unambiguous intention to abrogate or curtail a fundamental freedom will enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights".

> [311] The additional observation in *Coco* was echoed in a later, and now frequently cited, statement of Lord Hoffmann which explains the principle of legality as meaning that "Parliament must squarely confront what it is doing and accept the political cost" and goes on to explain that "[f]undamental rights cannot be overridden by general or ambiguous words … because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process".
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> [312] More recent statements of the principle in this Court do not detract from the rationale identified in *Potter*, *Bropho* and *Coco* but rather reinforce that rationale. That rationale not only has deep historical roots; it serves important contemporary ends. It respects the distinct contemporary functions, enhances the distinct contemporary processes, and fulfils the shared contemporary expectations of the legislative and the judicial branches of government. As put by Gleeson CJ in *Electrolux Home Products Pty Ltd v Australian Workers' Union*, in terms often since quoted with approval, the principle "is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted". Gleeson CJ pointed out that the principle is to be applied against the background that "modern legislatures regularly enact laws that take away or modify common law rights" and that the assistance to be gained from the principle "will vary with the context in which it is applied".
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> [313] Application of the principle of construction is not confined to the protection of rights, freedoms or immunities that are hard-edged, of long standing or recognised and enforceable or otherwise protected at common law. The principle extends to the protection of fundamental principles and systemic values. The principle ought not, however, to be extended beyond its rationale: it exists to protect from inadvertent and collateral alteration rights, freedoms, immunities, principles and values that are important within our system of representative and responsible government under the rule of law; it does not exist to shield those rights, freedoms, immunities, principles and values from being specifically affected in the pursuit of clearly identified legislative objects by means within the constitutional competence of the enacting legislature."
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> [Footnotes omitted, emphasis added]

[22] Counsel submitted that the "clear words" described in the "construction principle" were only inserted into the PPRA after the execution of the warrant with the insertion of s 154B into the Act on 9 December 2016:

> "**154B Compliance with order about information necessary to access information stored electronically**

> A person is not excused from complying with an order made under section 154(1) or (2) or 154A(2) on the ground that complying with it may tend to incriminate the person or make the person liable to a penalty."

[23] At the same time the Code was amended to insert a new offence under s 205A of the Code:

> "**205A Contravening order about information necessary to access information stored electronically**
>
> A person who contravenes—
>
> (a) an order made under the *Police Powers and Responsibilities Act 2000*, section 154(1) or (2) or 154A(2); or
>
> (b) an order made under the *Crime and Corruption Act 2001*, section 88A(1) or (2) or 88B(2);
>
> commits a crime."

[24] It was further submitted that prior to the insertion of s 154B into the PPRA it was unclear whether the legislature had directed its attention to the question whether privilege against self-incrimination was abrogated by the operation of s 154 of the Act. It was also submitted that the terms and context of the PPRA, which expressly preserved a person's right to silence[20] when being questioned as a suspect by police, supported this approach, as only express words could abrogate the fundamental right to privilege against self-incrimination.

[25] Counsel for the respondent submitted that there was no evidence that the applicant was exercising her right to silence, or alternatively, the purpose and effect of s 154(1) was so clear that it abrogated the right to silence. It was submitted that the applicant failed to express that she was exercising her right to silence at any stage during the search. Counsel submitted that the applicant's actions in providing a statement to officers that "the phone was not her phone", after being provided the appropriate cautions by the officers, demonstrated that she was not exercising a right to silence, and that the applicant was in fact deliberately obstructive. Further, counsel noted that at no point during the two previous hearings did the applicant provide evidence that she was exercising a right to silence, and it was therefore open to those courts to conclude that the applicant did not discharge the onus.

[26] With regards to the alternative argument, counsel submitted that the subsequent amendments to the PPRA and Code to explicitly exclude the right to claim privilege against self-incrimination does not inform the current argument, and is the result of perhaps a cautious or more comprehensive expression of the law which was sound at the time. Counsel submitted that the wording of s 154(1) clearly contemplated overriding a person's right to silence in the limited scope of accessing electronic devices, and that it lacked any efficacy if it could be subject to the "right to silence". Counsel noted the generality of s 205 of the Code and its application to a number of breaches of lawful orders of different statutes, and submitted that the specificity of s 154 demonstrated Parliament's purpose to override the right to silence. It was also

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20 PPRA s 397.

submitted that the purposes of the PPRA in s 5 did not contradict such a construction.

Discussion

[27] Without suggesting or implying anything concerning the character of the applicant, it is a commonplace investigative avenue of gathering evidence by police officers concerned with offending with respect to dangerous drugs to search and obtain details of the records held in mobile phones relating to phone calls, and more importantly text messages. Frequently it is these text messages that lay the foundation for the proof of offending, be it the possession of dangerous drugs (s 9 DMA), the supply of dangerous drugs (s 6 DMA) or trafficking in dangerous drugs (s 5 DMA). In seeking and obtaining an order from the Magistrate directing the applicant to supply the information necessary to access the stored data on the phone plainly the police officer was searching for evidence of drug offending going beyond the instances alleged in the warrant. The potential for self-incrimination by a suspect should that person answer questions acknowledging ownership or possession of the phone, or knowledge of the access information or familiarity with how to use the phone, is obvious.

[28] The cases relied upon by the applicant demonstrated by the passages quoted above shows that the privilege against self-incrimination is a right closely protected by the courts. The consequence is that for a statute to abrogate the privilege clear and unambiguous intent must be shown usually demonstrated by words expressing a clear, unambiguous and irresistible intention that the privilege is abrogated.

[29] Significantly in the context of this case it was s 205 that created the offence of which the applicant was convicted. That section had nothing in express terms to say about the privilege of self-incrimination but importantly it expressly contemplated a "lawful excuse". Section 154 of the PPRA to like effect has no express statement touching upon the privilege. In my view the applicant had a lawful excuse for failing to provide to the police officer the access information to the phone. That lawful excuse was her right to insist upon her privilege not to incriminate herself by demonstrating the extent of her knowledge of the information necessary to access the phone and its data, and thus to demonstrate she knew how to use the phone and that she had used it and its PIN code. I am fortified in the conclusion I have reached by the amendments made by the Parliament subsequent to the events with which this Court is concerned to insert provisions into the PPRA and the Code of which the former expressly refer to and in terms remove a person's privilege against self-incrimination in this context.

[30] It follows that the applicant, having a lawful excuse not to comply with the order contained in the search warrant was not guilty of the offence with which she was convicted. The applicant has been convicted of an offence punishable by imprisonment. The conviction is based upon an error. She is entitled to a grant of leave to appeal.

[31] Orders should be made granting the applicant leave to appeal, allowing the appeal and quashing the conviction.

Was there a failure to comply with the mandatory requirement to give the written notice?

[32] The thrust of the applicant's contention was that the failure to check or tick the boxes in the notice required by s 158 of the PPRA rendered the search and the request for information unlawful. Reliance was placed upon two decisions of justices in New South Wales where, when considering comparable legislation and circumstances where an incomplete notice had been given, it was held that the search was unlawful.[21] The circumstances that apply here are arguably distinguishable from those applying in the cases decided in New South Wales. Here the form was intact but it had not been completed by marking or identifying which of the powers referred to in the form had been granted. Evidence was given by the police officer, which was accepted by the Magistrate,[22] that he gave the applicant an explanation of which powers had been granted. Thus it was submitted for the respondent that the non-compliance with s 158 was technical and that it would be "hypercritical" to hold that the warrant and the search was unlawful.[23]

[33] Nevertheless because of my conclusions upon the second ground this issue does not, strictly speaking, arise. The applicant had a lawful excuse for not complying with the order made by the Magistrate contained in the warrant. Whether the failure to check or tick a box in the notice given pursuant to s 158 of the PPRA had the consequence that the search was unlawful is hypothetical. Even if the form had been completed correctly by checking or ticking the relevant boxes the applicant was not required to comply with the order. The further consideration of this issue and what consequence it might have for the admissibility of evidence gained in the circumstances of an incomplete notice under s 158 should await determination in another case where the point arises squarely and unambiguously.

[34] **HENRY J:** I agree with the orders proposed by North J.

[35] The application for leave to appeal was sought on the basis that the proposed grounds of appeal raised an important point of law regarding search warrants and was necessary to correct a substantial injustice to the applicant. The merits of the prospective two grounds of appeal were argued in the application.

[36] The second ground went to whether the exercise of privilege against self-incrimination could constitute a lawful excuse for disobedience of the purportedly lawful order. I agree with the reasons of North J for concluding that it could and that it did so in this case.

[37] As noted by North J that conclusion is sufficient to dispose of the case. However, I wish to say something further as to ground one, it having attracted much attention in argument and below.

[38] Ground one before this Court related to a deficiency in the statement to occupier. That document was given to Ms Wassmuth at the outset of the search pursuant to s 158 PPRA. That section relevantly provides:

> **"158 Copy of search warrant to be given to occupier**
>
> If a police officer executes a search warrant for a place that is occupied, the police officer must –

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21 See *Black v Breen & Anor* [2000] NSWSC 987 and *Ballis v Randall* [2007] NSWSC 422.

22 See ARB p 50 l 18.

23 See for example the observations of Holmes J (as her Honour then was) in *Wright v Queensland Police Service* [2002] 2 Qd R 667 at [38].

> (a) if the occupier is present at the place–give to the occupier a copy of the warrant and a statement in the approved form summarising the person's rights and obligations under the warrant …" (emphasis added)

[39] The content of the statement to occupier contained an explanation that it was a summary of the occupier's rights and obligations. It then listed the standard powers exercisable pursuant to s 157(1)(a) of the PPRA. The statement continued:

> "If authorised, a police officer also has the following powers: …"

[40] The powers then listed included the particular power purportedly conferred by the search warrant ordering the provision of access information. It listed a number of other powers. Boxes appeared to the left of each listed power. None of the boxes were ticked or crossed so as to distinguish them from any of the other powers listed against boxes. Nor were any of the other powers crossed out so as to make it plain they were not included. There were no words in the statement to occupier to explain the significance or otherwise of the boxes or the fact they were marked or unmarked. On the face of the statement all of the powers were powers authorised under the warrant. But they were not. At least four of the powers against which a box appeared were not powers conferred by the search warrant.

[41] Despite this concerning laxity in including (or not excluding) non-existent powers the statement to occupier did correctly state the power of present interest by stating the order contained in the warrant granting that power. The applicant's assertion, however, is that the failure to tick the relevant boxes meant the statement was not in the approved form. This grounds a consequential argument that the search was therefore illegal and, therefore, the seizure of the phone to which access was sought was unlawful and, therefore, the applicant had a lawful excuse under s 205(1) to disobey the purported order to give access (the "consequential argument").

[42] Section 205(1), the offence provision under which the applicant was convicted provides:

> "Any person who without lawful excuse, the proof of which lies on the person, disobeys any lawful order issued by any court of justice, or by any person authorised by any public statute in force in Queensland to make the order, is guilty of a misdemeanour, unless some mode of proceeding against the person for such disobedience is expressly provided by statute, and is intended to be exclusive of all other punishment." (emphasis added)

[43] It follows it was for the applicant to establish, on the balance of probabilities, the factual premise of the excuse now asserted in connection with ground one, namely the premise that the statement was not in the approved form.

[44] The applicant only ever sought to do this by complaining the relevant box was not ticked, not by contending the form used was not an approved form.[24] As to the latter, the evidence at trial was that the form was sourced from the Queensland Police Service systems but the validity or otherwise of that source went unexplored. This left the above premise to be proved solely by reliance upon the content of the

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[24] The statement to occupier referred in its heading to s 4 *Police Responsibilities Code* 2000 which, by the time of the execution of the search warrant on 17 August 2016, had actually long been superseded by the *Police Responsibilities Code 2012* contained in the *Police Powers and Responsibilities Regulation 2012* at schedule 9.

exhibited statement to occupier and the fact it contained boxes which were not ticked or crossed. However, there was nothing in the content of that document alluding in any way to the significance or purpose of the boxes, let alone stipulating a requirement that they be ticked or crossed. The above premise is therefore unsupported by evidence. This renders the consequential argument academic.

[45] Were this ground the only issue (it was the only issue raised before the learned Magistrate at first instance) I would have declined to give leave to appeal.