SUPREME COURT OF QUEENSLAND

CITATION:	*Bensted v Edwards* [2003] QCA 145
PARTIES:	**HAZEL BENSTED** (appellant/applicant) **v** **JONATHON DAVID EDWARDS** (respondent)
FILE NO/S:	CA No 325 of 2002 DC No 46 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Cairns
DELIVERED ON:	4 April 2003
DELIVERED AT:	Brisbane
HEARING DATE:	24 March 2003
JUDGES:	de Jersey CJ, Jerrard JA and White J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal refused with costs to be assessed**
CATCHWORDS:	FIRE, EXPLOSIVES AND FIREARMS – FIREARMS – LICENCES AND RELATED MATTERS – GENERALLY – where applicant was licensed to possess certain firearms – where firearms found to be not stored in accordance with s 60(2) *Weapons Regulation* 1996 (Qld) – whether firearms were in applicant's physical possession at material time CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – WARRANTS, ARREST, SEARCH, SEIZURE AND INCIDENTAL POWERS – WARRANTS – SEARCH WARRANTS – EXECUTION – where terms of both warrants defective – where both warrants purported to grant the power to do anything that might cause structural damage – where earlier warrant also defective being described as issued in relation to a forfeiture proceeding – where defects did not result in any conduct by the executing officers which exceeded the authorisation granted – whether defects made conduct of police officers unlawful MAGISTRATES – APPEALS FROM AND CONTROL OVER MAGISTRATES – QUEENSLAND – APPEAL –

WRONGFUL ADMISSION OR REJECTION OF EVIDENCE – where defects in warrants arose in a technical sense and not from a deliberate or reckless disregard for the law – where no evidence to suggest executing police officers acted in violation of any law, statutory or common property right – whether Magistrate erred in failing to exercise discretion to exclude evidence obtained through execution of defective warrants

Police Powers and Responsibilities Act 2000 (Qld), s 68
Weapons Regulation 1996 (Qld), r 60(2)

Bunning v Cross (1978) 141 CLR 54, considered
George v Rockett (1990) 170 CLR 104, considered
Horinack v Suncorp Metway Insurance Limited [2001] 2 Qd R 266, distinguished
Reeve v Wardle; ex parte Reeve [1960] Qd R 143, cited
The Case of Swans (1592) 77 ER 435, considered

COUNSEL: A C Wrenn for the applicant
A R Philp for the respondent

SOLICITORS: Solicitor for Commissioner of Police for the respondent

[1] **de JERSEY CJ**: I have had the advantage of reading the reasons for judgment of Jerrard JA. I agree with those reasons.

[2] **JERRARD JA**: On 3 August 2001 the applicant Hazel Bensted was convicted in the Mareeba Magistrates Court of an offence against s 60(2) of the *Weapons Regulation* 1996 (Qld). Conviction was by order made after a reserved judgment. She was fined $300.00 and allowed two months to pay. On 13 September 2002 her appeal to the District Court in Cairns against that conviction was dismissed. She has applied to this court pursuant to s 118(3) of the *District Court Act* 1967 for leave to appeal that order dismissing her appeal from the Magistrates Court.

[3] The grounds of appeal complain that the District Court Judge erred in law in determining that two search warrants executed upon the premises in which the applicant was residing were "lawful", and further that the judge erred in accepting that the Magistrate has correctly exercised her discretion to admit evidence obtained during the execution of those two warrants. The applicant also argues that the judge erred in determining that four firearms, the subject of the charge, were not in the applicant's physical possession at the material time, and finally that the applicant's conviction was unsafe and unsatisfactory.

Background Matters

[4] The relevant facts are well described in the Magistrate's judgment. Mrs Bensted, a person licensed pursuant to the *Weapons Regulation* to possess and use three particular rifles and a shot gun, was charged with having offended against s 60(2) of those regulations, in that on 7 February 2001 at a time when it was alleged she possessed those weapons, but when they were not in her physical possession, she had not, as she was required to do, stored them unloaded in a locked container with the bolt removed or the action broken.

[5] It was common ground that on 7 February 2001, Mrs Bensted did possess a Norinco Rifle, a Remington Rifle, a Goldcup Rifle, and a Savage Shot Gun, as her licence entitled her to do. It was also common ground that on that day four police officers attended at the property and premises located at Kay Road in Mareeba where Mrs Bensted lived with her husband and children. Those police went there by reason of a warrant issued on 6 February 2001 by a Justice of the Peace, pursuant to s 68(2) of the *Police Powers and Responsibilities Act* 2000. That warrant had been issued to obtain evidence of the suspected commission of an offence by one Diethardt Bruderle; the offence suspected was stealing two bulls, the property of one James Evans. The document entitled "Grounds for Search Warrant", signed by the police officer who applied for the warrant, described in its contents circumstances capable of establishing that the applicant's husband, Ross Bensted, had taken the two bulls alleged to have been stolen to the Mareeba Cattle Sale in a truck, and apparently on behalf of the person Diethardt Bruderle. The two bulls were described in the document as having been recognised at that cattle sale by Mr Evans and identified as his property. The warrant issued authorised a search of the Kay Road property occupied by Ross Bensted, and authorised the seizure of, inter alia, Waybills, Bank Records, and documentation relating to the movement of stock to and from (Mr Bruderle's) property.

[6] On 7 February 2001 that warrant was executed. Mr and Mrs Bensted were present. Their dwelling was a shed, converted into a temporary home, and it had one toilet. That toilet was searched after their 15 year old child Lachlan Bensted had come out of it. In it, the police officer observed a wooden gun rack able to hold four fire arms, and then empty. The four firearms themselves were located in the toilet behind the door. A shipping container was seen on the property; and it was common ground that that container would satisfy the "locked container" requirement of Reg 60(2) of the *Weapons Regulation*. However, the toilet door did not have any suitable locking device.

[7] The applicant had first said that day, when asked where the firearms were, words to the effect that she did not know. The police conducting the search asked about them because they knew she was licensed. After a conversation with her husband she said that they were in the toilet, but that one of the children was using it. The firearms were then located. Later that day and when another property was being searched, and when Mr and Mrs Bensted went to that property, the applicant declined to be interviewed about any possible breach of the regulations. The police omitted to take possession of those four firearms that day, and subsequently obtained a search warrant issued by a Magistrate on 25 February 2001, authorising a second search of the Bensted residence. This time the search was for the four specified fire arms, and when the police arrived the applicant directed them to the shipping container in which the firearms, were then lawfully stored. That warrant was executed and the firearms were seized.

The Warrants

[8] The applicant made a number of complaints to the Magistrates, District, and this Court, about those warrants. The first complaint is that the grounds for the first warrant were not sworn, and should have been. Section 68(5) of the *Police Powers and Responsibilities Act* 2000 requires that an application for a warrant must be sworn and state the grounds on which the warrant is sought. In this Court the applicant's counsel referred to *George v Rockett* (1990) 170 CLR 104 at 113,

wherein the High Court wrote regarding the then provisions of s 679(b) of the *Criminal Code* (Qld) that:

> "….the grounds for the issue of the warrant cannot be made to appear to the issuing justice from statements made by an applicant otherwise than by complaint on oath."

Assuming that s 68(5) transposes that requirement into the *Police Powers Act,* the appeal record demonstrates that this was actually satisfied. The application in Form 9 for a warrant, at AR 173-4, was sworn before a Justice of the Peace and on its face refers to the "attached page" for "reasons", which appears a plain reference to the "Grounds for Search Warrant". The application was sworn, and the attachment did state the grounds in some considerable detail. It may have put the matter beyond argument had the grounds themselves recorded on their face that those were sworn, but they were certainly signed by the police officer who made the sworn application to which they were attached. The attachment was part of the application,[1] and was therefore included within the applicant's declaration that "the information set out in this application is true and correct to the best of my knowledge". There is really nothing in this complaint by counsel of the applicant.

[9] The applicant then makes the valid point that both the warrant dated 6 February 2001, and the warrant dated 25 February 2001, purported to authorise the police executing those "to do anything at the relevant place that may cause structural damage to the building" being searched, whereas if it is intended by an applicant for a warrant to do anything which may cause such damage, the application must be made to a Supreme Court Judge. There was no evidence that the applicant police officers were intending at any time to cause structural damage on either occasion to any building, and there was none done. The Magistrate hearing the charge on 25 Mary 2001 quite correctly regarded it as an oversight on the part of both the issuing Justice of the Peace and the issuing Magistrate respectively that those authorities to cause structural damage had not been deleted from the respective warrants, which on their face and in their standard form contained that provision. They had both specifically deleted the powers of personal search, and to search vehicles, that may be granted by s 74(2) of the *Police Powers Act,* and by either a Magistrate or a Justice of the Peace. The fair conclusion is that there was no intent to apply for any authority to damage property, no intent to authorise it, and that it appears on the warrants by oversight. Both the Magistrate and the District Court Judge so held.

[10] The evidence identified a second error apparent on the face of the warrant issued on 6 February 2001. This is the declaration, printed in the standard form of that warrant, that:

> "This warrant is issued in relation to a forfeiture proceeding authorised under the *Police Powers and Responsibilities Act* 2000".

Those words had not been struck through by the issuing Justice. Section 68(3) of that Act specifies that an application for a warrant must be made either to a Supreme Court Judge or Magistrate, if the thing to be sought under the proposed warrant is evidence of the commission of an offence only because –

(i) it is a thing that may be liable to forfeiture or is forfeited; or
(ii) it may be used in evidence for a forfeiture proceeding; or

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[1] The facts here are different from those in *Horinack v Suncorp Metway Insurance Limited* [2001] 2 Qd R 266 (at 267, 269) where the requirement that a notice "contain" an explanation for a delay was not satisfied when the explanation was provided at a different time in another document.

(iii) it is a property-tracking document

[11] The Magistrate who conducted the hearing had heard arguments on the applicability of s 68(3) to the warrant issued on 6 February 2001. The evidence before the Magistrate was that property had been seized under that warrant, including two waybills, two computer hard drives, and a copy of an account for the sale of the bulls. The Magistrate declared that on her understanding the items seized were not seized for the purpose of forfeiture or in connection with forfeiture proceedings, as relevantly defined in the *Crimes (Confiscation) Act* 1989, to which definition the *Police Powers Act* 2000 then made reference.

[12] The learned Magistrate was also satisfied that the relevant items were not seized "for the purpose of property tracking documents". Rather, they had been seized, as she understood it, to obtain evidence with respect to matters going to the ownership, and potential offences arising out of that ownership, of the two bulls. Accordingly, she was satisfied that s 68(3)(a)(iii) did not apply, and that the things seized did not include documents that were evidence of the commission of an offence only because they were property tracking documents. That finding was not challenged on this appeal, and accordingly it is unnecessary to consider whether, for example, the waybills could be regarded as evidence of the commission of theft of the bulls only because they are property tracking documents within the then applicable definition in the *Crimes (Confiscation) Act* 1989. (That definition, erroneously omitted from the *Crimes (Confiscation) Act* 1989 by Act No. 5 of 2000, was reinserted by Act No. 68 of 2002).

[13] It follows that both warrants had defects apparent on their face. The defect in common was the purported grant of power to do anything that might cause structural damage when it was clear the warrant was not issued by a Supreme Court Judge. The extra defect apparent on the face of the earlier warrant was the description that it was issued in relation to a forfeiture proceeding, when it had not been given as required by a Magistrate. All those defects are apparent after a study of the *Police Powers Act.* Mr and Mrs Bensted would have been confronted with documents apparently authorising forfeiture of the property of an unidentified person, perhaps one or both of them; and purportedly authorising the doing of damage to their residence. The defect in these warrants resulting from the omission to strike through those portions of the warrant would be capable of misleading both the persons on whom the warrant was executed and the police officers executing it.

[14] Both warrants were plainly invalid to the extent of the authorising the doing of structural damage. It is clearly highly desirable that the standard form of search warrant, made available for issuing both by Justices of the Peace and by Magistrates, already have deleted from it those declarations of what the warrant authorises which are beyond the respective powers of Justices or Magistrates. Police officers executing warrants, and persons whose premises are searched, should not be exposed to the risk of doing or suffering unauthorised and unlawful conduct. Obviously, Justices and Magistrates issuing warrants should equally understand what they are not empowered to authorise.

[15] These defects invalidating one part of both warrants and misdescribing portions of the earlier warrant did not result in any conduct by the executing officers which exceeded the authorisation the Justice could and did grant. The property that was seized on each occasion was lawfully taken under an appropriate authorisation. The

inclusion by oversight of other and irrelevant authorisation did not make the conduct of the police officers unlawful.

[16] The outline of argument submitted by the appellant's counsel further complained that the details endorsed on the face of the warrant, describing the particulars of the offence in respect of which it was issued, were completely unrelated to the address or the occupier (Mr Bensted). There is no merit in this point. The fact that Mr Bruderle was the person suspected of stealing the bulls did not mean for one moment that evidence of their theft could not to be found at Mr Bensted's residence.

[17] Counsel's written outline also contended that the things for which the search was authorised were so broadly described that they could not satisfy the requirement in s 69, that a warrant issue only if the (Justice) was satisfied there were reasonable grounds for suspecting evidence of the commission of the relevant offence was at Mr Bensted's residence. As to that, the grounds for suspecting complicity by Mr Bensted, whether intentional or unintentional, in transporting for Mr Bruderle cattle allegedly stolen from Mr Evans appears in the "Grounds for Search Warrant" with tolerable clarity, and the documents sought were relevant to those grounds. There is nothing in that complaint.

[18] The learned District Court Judge hearing the appeal agreed with the Magistrate that the technical deficiencies already described on the face of the warrants did not lead to their (overall) invalidity. For the reasons expressed I agree. As observed in both the Magistrate's Reasons for Judgment, and the remarks in argument by the Chief Justice during the appeal, the Justice of the Peace who issued the warrant on 6 February 2001 quite clearly actively turned her mind to the application before her. This is demonstrated by the hand written note on the application itself, recording that:

> "After questioning the applicant, I am of the opinion that this is genuine warrant application and not vexatious in any way."

Discretionary Exclusion

[19] That leaves a very limited area in which the Magistrate could appropriately exercise any discretion to exclude the evidence obtained as a result of execution of those warrants. The defects in them were irrelevant to what actually occurred, and as the learned Magistrate held, arose in a technical sense rather than from deliberate or reckless disregard of the law, or of the provisions of the *Police Powers and Responsibilities Act*. As the Magistrate also held, there was no evidence to suggest that any of the police officers were conscious of acting in violation of any law or disregard of any statutory or common law property rights or privacy rights of the applicant; and the Magistrate noted that the grounds of the application were "included" in the sworn application for the warrant. In those circumstances, the Magistrate exercised the discretion recognised to exist by the decision of the High Court in *Bunning v Cross* (1978) 141 CLR 54 in favour of admitting the evidence obtained pursuant to the warrant.

[20] The Magistrate's judgment gave careful consideration to all matters apparently relevant to the exercise of that discretion. The learned Judge of the District Court who heard the appeal which complained about the exercise of the discretion correctly held that it was appropriate for the Magistrate to so decide, and the submissions made on this appeal have not identified any error made by the Judge in

her acceptance of the manner in which the Magistrate had exercised that discretion. That ground of appeal therefore fails.

Possession of the Weapons

[21] Counsel for the appellant submitted that the judge had "erred in law and/or fact" in determining that the weapons were **not** in the applicant's physical possession at the material time. The only evidence the applicant placed before the Magistrate as to why the four guns were in the toilet was the evidence of Lachlan, who was also the holder of a relevant *Weapons Regulation* Licence. Lachlan's evidence was that he had woken up that morning, gotten dressed, asked his mother for the keys to the shipping container, received the keys, taken the guns out of the container, put them on a table which partly intruded into his room, and started cleaning them. He had been doing that for about 15 minutes when he heard the police arrive, and he had then taken all four guns and put them in the toilet.

[22] The learned Magistrate did not believe that evidence. She gave eight separate reasons for that, which included that on 25 February when executing the second search warrant, a Detective Edwards had a conversation with the applicant in which she had acknowledged that the guns were not secured on 7 February 2001, but had been after that. The Magistrate noted that there was no evidence contradicting or denying that conversation. (The applicant did not give evidence herself). The Magistrate's reasons also included the observations that there were no empty toilet rolls or toilet paper in the gun rack despite Lachlan's evidence that it was used for that purpose; the fact that there was a gun rack in the toilet able to accommodate four fire arms; that Lachlan's evidence contained no logical explanation for his having wanted to conceal the firearms from the police; that Lachlan was describing unusual behaviour for a boy intending to go to school that day; and that Lachlan had twice remarked in evidence that the guns were normally stored locked "when we're not home". After rejecting Lachlan's evidence, the Magistrate accepted the submission that the four firearms were simply being kept unlocked in the toilet on 7 February 2001.

[23] The submissions on appeal by the applicant's counsel simply failed to grasp that the Magistrate had made findings based on credibility and of fact, and which were open to her to make. Instead, counsel made submissions which appeared blithely to assume that both the District Court Judge and this Court should accept Lachlan's evidence as uncontradicted. On that basis, counsel then submitted that the applicant had retained physical possession of all four guns at the relevant time, because she had been in close proximity to her son and the firearms, and therefore still exercising control over them.

[24] As was remarked upon in the reasons for judgment of the learned judge, the Magistrate herself had described how even if Lachlan's evidence was accepted, there was no evidence before her that the applicant was actually supervising or in any physical proximity to Lachlan when the firearms were said to be being cleaned. The learned judge further observed that Lachlan gave no evidence of any conversations with the applicant regarding the guns, no evidence that the applicant had knowledge of his intentions regarding the guns, no evidence of her whereabouts while he was cleaning them, and certainly no evidence from which any inference could be drawn that she was supervising him in that cleaning. The submissions by the applicant's counsel on this appeal overlooked all of those matters, and that the

position is that even an acceptance of Lachlan's evidence would fail to establish the necessary physical possession required by Reg 60(2) of the *Weapons Regulation*. Accordingly, that ground of appeal must be dismissed.

[25] The last ground of application, likewise without foundation, is that the conviction is unsafe and unsatisfactory. The applicant was in possession of the firearms which were not stored as required in a locked container.

[26] One other matter deserves mention. During submissions counsel for the applicant actually submitted that ownership of unbranded cattle depended simply upon ownership of the land upon which those cattle were running.[2] That proposition is entirely wrong,[3] and interestingly enough reflects statements described in the "Grounds for Search Warrant" as being made by Mr Bruderle to Mr Evans. Anyone giving legal advice consistent with counsel's submission would be causing a serious mischief.

[27] The court has already dismissed the application for leave to appeal. These have been the reasons for that order.

[28] **WHITE J**: I have read the reasons for judgment of Jerrard JA and agree with his reasons.

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[2] Blackstone's Commentaries on the Laws of England (Book 2) make clear (at page 390) that the common law position that a calf is the property of the owner of the cow was distinguished in 1592 from the law regarding cygnets in *The Case of Swans* (1592) 7 Co Rep 155b; 77 ER 435. This is because swans mate for life, and the male swan shares care for the cygnets.

[3] See *Reeve v Wardle*; *ex parte Reeve* [1960] Qd R 143 at 150.