SUPREME COURT OF QUEENSLAND

CITATION:	*R v Ajax* [2010] QSC 338
PARTIES:	**R** (respondent) **v** **AJAX, Raymond Lawrence** (defendant/applicant)
FILE NO/S:	Indictment No 687 of 2009
DIVISION:	Trial
PROCEEDING:	Criminal Application
COURT:	Supreme Court at Brisbane
DELIVERED ON:	1 September 2010
DELIVERED AT:	Brisbane
HEARING DATE:	2 August and 1 September 2010
JUDGE:	Fryberg J
ORDER:	**Evidence of the sort described in the defendant's application be excluded from the trial of the defendant.**
CATCHWORDS:	Criminal law – Evidence – Judicial discretion to admit or exclude evidence – Evidence unfair to admit or improperly detained – Particular case – Execution of search warrant – Expression of wish to contact lawyer – *Police Powers and Responsibilities Act 2000* (Qld), s 418 not complied with – Admissibility of statements to police Criminal law – Evidence – Judicial discretion to admit or exclude evidence – Police interrogation – Propriety of police questioning and other conduct by police – Generally – Delaying of questioning until accused afforded the opportunity to contact lawyer *Criminal Code* (Qld), s 590AA *Police Powers and Responsibilities Act 2000* (Qld), ch 15 pt 3, s 9, s 415, s 418, s 441, s 442, s 443 *Police Powers and Responsibilities Regulation 2000* (Qld)
COUNSEL:	L K Ackermann for the defendant/applicant R Swanwick the respondent
SOLICITORS:	Robertson O'Gorman Solicitors for the defendant/applicant Director of Public Prosecutions (Queensland) the respondent

HIS HONOUR: This is an application pursuant to section 590AA of the Criminal Code for an order, on the correct interpretation of the application, excluding on the trial of the accused on charges of producing a dangerous drug and possessing a dangerous drug evidence of any admission by the accused to police during the execution of a search warrant at 319 Bestmann Road, Godwin Beach on 11 February 2008.

The evidence discloses that pursuant to a warrant issued the same day the police went to those premises. The warrant was issued in relation to an offence under s 9 of the *Drugs Misuse Act*, possessing a dangerous drug. The police went to the premises in relation to possessing a dangerous drug, namely cannabis sativa.

The offence was said to have been suspected to have been committed by Jules Raymond Ajax who, I infer from the evidence before me, was the son of the defendant.

The warrant authorised seizure of cannabis sativa and nothing else, save that it empowered the police to seize a thing found at that address or on a person at that address that a police officer reasonably suspected might be evidence of a commission of an offence to which the warrant related; that is, an offence by the accused's son of possessing a dangerous drug.

The officers who went to the premises included Senior Constable Wigmore. He was one of five officers from the Tactical Response Group who carried out the search. He

carried a field tape-recorder and recorded the proceedings on it. The tape-recording and its transcript reveal that the applicant's son was not at those premises at the time of the search and that he was alleged by the applicant's daughter not to live there.

The applicant greeted the police with some verbal aggression as did his daughter. Indeed so much so that one officer said to him, "You seem disgruntled, sir". He responded, "I am very disgruntled, sir. I have had enough of this shit, 28 years of it." He was asked whether he resided at the premises and his answer is recorded as indistinct in the transcription. I listened to the tape-recording and without a lot of confidence, I understood him to respond to the question, "You reside here? You're in charge of the premises" in the negative.

He was given a copy of the warrant and it was explained to him. Constable Wigmore told him that when the police did a search of a room they would take one of the people who were at the house, those people included the applicant, his daughter, her husband and their child, so that they could observe the police do the search.

Constable Wigmore told all of them that they had the right to remain silent and gave the full standard warning regarding that topic. He also informed them that they had the right to telephone or speak to a friend or relative to inform that person where they were and to ask them to be present. He

continued,

> "That's if we find something, we take you back to the station and you want to be questioned, then you can contact someone, okay? You also have the right to telephone or speak to a solicitor or lawyer of your choice to inform that person where you are to arrange or attempt to arrange for that person to be present during questioning."

The accused responded, "I'd like to ring my lawyer, yes, solicitor." Constable Wigmore said, "Want to ring one now?", and at that point Sergeant James who was one of the parties intervened and said, "At this stage, that won't be happening." The accused's daughter asked, "Why is that?" Sergeant James said,

> "You're detained at the search. At the completion of the search, if anything is found, you will then have the right to telephone and speak to anyone you want, okay, prior to the interview.At this stage we're searching the joint, you're not obliged to say anything at this time; okay? And we're going to conduct that search now, and as the officer said, is there anything you wish to declare before we start the search?"

The persons there were detained in accordance with the power to do so when executing a search warrant in the *Police Powers and Responsibilities Act*.

The fact that the warrant had someone else's name on it was drawn to Constable Wigmore's attention. He said, "The warrant is for this place, okay. We have information we received that it's in relation to this place, so, therefore, we have a warrant". The accused said, "You should be able to ring your solicitor", and his daughter asked, "Why can't I ring my solicitor?", and Constable Wigmore responded, "As part of

being detained actually, we'll take your phone as well." He then proceeded to take a mobile telephone from the applicant's daughter. It is unclear whether he took one from the applicant, but plainly enough the applicant could have used his daughter's phone to call the solicitor.

A little later the applicant said, "I wondered why I couldn't ring a solicitor", and Sergeant James responded, "Mate, you can talk to them, okay, before we question you about anything, okay?" Wigmore said, "Just we need to get the search done." Sergeant James said, "The reason we don't do that is because if you all want to contact someone, then we've all got to watch you while you do that and do the search warrant at the same time. It's a Workplace Health and Safety issue. We get you all to sit in the one place while we do the search. At the completion of the search, you're welcome to call someone."

The transcript then attributes to Sergeant James, but it appears unlikely that it was he, the words, "Lawyer should be with you while you are doing a search." There is then an indistinct passage which I infer related to Constable Wigmore saying that something about the number of officers who should be present, and the accused said, "All right. There should be one person for every officer." Sergeant James said, "Mate, look, you're not in a position to tell us what our policies are." The accused responded, "Nah." Sergeant James said, "I think I know a bit more about our policies." The accused said, "All right, all right." And his daughter asked "But is that the policy?" Constable Wigmore said, "What's that?", and

she said, "That you're allowed one person to" something indistinct. And Sergeant James said, "I'll tell ya, I'll tell ya, you're detained for the search. If we're going to search that room take someone with us. Okay. It's as simple as that."

After some further conversation about the actions of other police, an unknown officer asked the accused how big the property was. The officer then proceeded to engage him in conversation asking questions about the property and the work which was done. It appears that this occurred as they were walking around the property, and then Constable Wigmore joined in further conversation, and they went to the bedroom of his son. Subsequently, they went outside and conducted a systematic search of the outside of the premises.

In what is described as the backyard, Constable Wigmore located a cannabis plant growing in a pot. The relevant conversation was as follows:

> Constable Wigmore: "Oi, just come over here, mate."
> Accused: "Hand up, mate, yeah, hand up".
> Constable Wigmore: "Hand up. They're all yours, bloke?"
> Accused: "There's only one there, mate, one plant."
> Constable Wigmore: "Oh, is it?"
> Accused: "Yeah."
> Constable Wigmore: "Okay."
> Accused: "Yeah, it's all mine."
> Constable Wigmore: "All yours?"
> Unknown Officer: "That looks all right, mate."
> Accused: "Yeah, there's only one there, mate."
> Unknown Officer: "One plant. Jesus, you've kept it pretty well, didn't you?"
> Accused: "I didn't touch it at all. It's" something.
> Unknown Officer: "Do you water them at all?"
> Accused: "Oh, yeah, I water them", something indistinct.
> Unknown Officer: "I haven't seen a good plant like that for a while. It's got plenty of good heads on it."
> Accused: "Yeah, yeah."

There was then further questioning about the growing of the plant.

A little later, Wigmore said to the accused, "Whose plant is it?" The accused said, "Mine." Wigmore said, "It's your plant?" The accused said, "Yeah", and Wigmore said, "And how long have you been growing that for, mate?" The accused said, "Oh, probably about three months, mate." Wigmore said, "Three months?" The accused said, "Two or three months." From the the photographs, Exhibit 5 and 6, the plant looks remarkably well-developed if that was true.

The conversation continued, "What did you grow it from?" The accused said, "Oh, well, actually, it come up wild and I just kept watering it." Wigmore said, "Where did it come up wild?" The accused said, "In the - in the" indistinct, but I infer he said "pot". Wigmore said, "Okay." The accused said, "There just must have been some stuff got thrown out, that's all". Wigmore said, "All right." The accused said, "And then I just kept watering the plant" - something - "one plant." A little later he said, "The only reason I got it is because I smoke a bit of it myself 'cause I got pins in both me legs from an accident and it just helps with the pain, that's all."

That is enough, I think, to give the flavour of the conversation. The interview - or the conversation - went on for some considerable further time and further incriminatory answers were given by the accused.

He seeks the exclusion of that evidence on the ground that its admission would be unfair having regard to the failure of the police to allow him to call a solicitor and obtain legal advice and, on the further ground that his daughter's mobile telephone was taken so as to prevent that being done. He reinforces the submission that that was unfair with a submission that it was also illegal.

There is no challenge to the legality of the search warrant. Moreover, the applicant accepted the correctness of what was said in paragraph 3 of the respondent's supplementary outline of submissions; namely, that should a police officer during the search question a person about his involvement in the commission of an indictable offence, the safeguards of Ch 15 Pt 3 of the *Police Powers and Responsibilities Act 2000* would be enlivened. That is the starting point for both sides in this application.

Section 418 of that part provides that before a police officer starts to question a relevant person for an indictable offence (and it was common ground that the offences here, the subject of questioning, were indictable offences), the police officer must inform the person that he or she may 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. Subsection (2) provides that the police officer must delay the questioning for a reasonable time to allow the person to telephone or speak to a person mentioned in subs (1). It is not in doubt that that section was not

complied with in the present case.

In the light of the concessions in paragraphs 2 and 3 of the supplementary outline of submissions on behalf of the respondent, I am satisfied that s 415(1) was complied with. That subsection provides for when part 3 applies; that is, if the person is 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. I would reach that conclusion on the evidence before me. The accused was in the company of the police officer by reason of the fact that he was detained pursuant to the powers relating to search warrants, but that was not the only reason for his so being, with the consequence of s 415(2) has no operation.

On the face of the evidence before me, the police prevented the accused from contacting a solicitor. They did so by not affording him the opportunity to do so and by confiscating the mobile phone of the accused's daughter. The failure to afford him the opportunity would not of itself have constituted unlawful conduct had there been no questioning of the accused. The the obligation under s 418 is to delay questioning and there is no requirement to allow the accused to get a solicitor to participate in the search. It was the questioning that caused the difficulty and the failure to make that distinction appears to have infected the thinking of Constable Wigmore.

He was an officer on secondment to the Tactical Response

Group. He was in effect there for three months to learn the ropes. He had transferred to the Queensland Police from the New South Wales Police. I should interpolate at this point that there is no suggestion that he acted in any way out of deliberate malice or in any way deliberately acted beyond his powers.

The respondent sought to justify the questioning under ss 441 and 443 of the *Police Powers and Responsibilities Act*. Section 443 was abandoned because it had no application to the circumstances of the case by reason of the terms of s 442.

Section 441 provides that s 418 does not apply if a police officer reasonable suspects that compliance with the section is likely to result in evidence being concealed or destroyed.

I have searched the affidavit and listened to the oral evidence in vain to find something that would support the conclusion that Constable Wigmore suspected that destruction or concealment of evidence was likely if the section was complied with. Constable Wigmore did not say that he suspected that. He said that, in effect, the police policy was not to allow phone calls because of the possibility that other people might be on the premises and might interfere with the evidence.

For the Crown, Mr Swanwick pointed out there were

out buildings at these premises which might have concealed other persons. He submitted that the police were naturally unable to exclude the possibility of there being other persons. He submitted that police would in these circumstances have what he described as an inherent suspicion that this would be the situation.

I reject those submissions. If police had any such suspicion, I have no doubt Constable Wigmore would have given evidence of it. The facts as disclosed in his evidence and in cross-examination moreover make it plain that there was no reasonable basis for such a suspicion and s 441 requires for its operation that the police officer reasonably suspects, et cetera.

I rule that s 441(1)(c) was not applicable in the circumstances of this case.

The seizure of the telephone is even more difficult to justify. The warrant expressly stated that evidence which might be seized under it was the dangerous drug cannabis sativa and it further authorised the seizure of a thing found at the place or on a person at the place that the officer reasonably suspected might be evidence of the commission of an offence to which the warrant relates. The offence to which the warrant related was, as I have said, an offence by the accused's son of possession of cannabis.

It is difficult to see how the accused's daughter's telephone could have possibly been a thing which the officer reasonably

suspected might be evidence of the commission of that offence. In any event Constable Wigmore did not suggest that he held any such suspicion and it is plain from the recording that the seizure of the phone was taken as part of a police practice. It was, as Constable Wigmore put it in his affidavit, “thought inadvisable to allow persons to retain possession of any telephones”. That seems to have been a reference to inadvisable in the interests of the success of the investigation.

I need not finally rule whether the seizure of the phone by itself was unlawful. No justification for its seizure has been put forward and in particular no justification has been put forward for failing to allow the accused to use it to call a solicitor.

It was suggested on behalf of the Crown that, as I have said, the accused might have been going to call other persons at the property but that could have been avoided simply by asking the accused for the telephone number of his solicitor and having the officer dial the number and listen to the answer. There is no reason why the search should have been delayed but if the section was not complied with, the questioning should have been delayed. Nothing in the evidence before me suggests that delaying the questioning would have caused any difficulty to the police.

It follows that, in my judgment, the failure to allow the solicitor to be called was not lawful and that affects the fairness of allowing the evidence subsequently obtained to be

given.

I am hesitant to reach a definite conclusion that had the accused been given the opportunity to call a solicitor, he would necessarily have done so and that had a solicitor advised him to answer no questions, he would necessarily have done that. The transcript suggests that he was quite happy to talk even though he was given a warning that he did not have to answer questions. That warning, of course, taken literally related to questioning later in the day but I do not think that I should infer the accused took it so narrowly in the absence of any evidence from him. My hesitation about these matters is precisely because he has given no evidence on this application. Had he done so and had he said that he would have called had he been permitted and would have followed any advice to answer no questions, and been believed, the evidence could properly be characterised as illegally obtained evidence.

As it is, I am only prepared to conclude that it is evidence which was obtained in circumstances where at the same time the police did act illegally.

Given that I construe the accused's language and that of his daughter (I do not think the two should be separated) as constituting a clear indication of their desire to call a solicitor, I reach the conclusion that it would be unfair to permit the evidence to be used against the accused.

I, therefore, order that evidence of the sort described in the

application be excluded on the trial of the accused.
