SUPREME COURT OF QUEENSLAND

CITATION:	*R v Kashani-Malaki* [2011] QSC 308
PARTIES:	**THE QUEEN** (respondent) **v** **MORTEZA KASHANI-MALAKI** (applicant**)**
FILE NO/S:	1258/08
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	5 October 2011
DELIVERED AT:	Brisbane
HEARING DATE:	4 October 2011
JUDGE:	Ann Lyons J
ORDER:	**1. The application for the exclusion of the telephone intercept evidence is refused.**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – where the accused has pleaded not guilty to trafficking in dangerous drugs and importing prohibited imports – where the accused applies pursuant to s 590AA of the *Criminal Code* 1899 for a pre-trial ruling that numerous telephone recordings be excluded on the basis that the Australian Crime Commission (ACC) did not comply with the requirements of the *Telecommunication (Interception Act)* 1979 (the Act) at the time the interceptions were carried out in 2003 and 2004 – whether the ACC sufficiently notified the Managing Director of the carrier of the issue of the warrant in accordance with ss 47 and 60 of the Act – whether the evidence should be excluded *Criminal Code* 1899 (Qld), s 590AA– *Telecommunication (Interception Act)* 1979 (Cth); ss 7, 47, 60 *R v Bunting and Wagner (No 5)* [2003] SASC 253; followed
COUNSEL:	R Richter QC with M Croucher for the applicant G Rice SC with J Hanna for the respondent
SOLICITORS:	Anthony Isaacs Lawyers for the applicant

Director of Public Prosecutions (Cth) for the respondent

ANN LYONS J:

The Charges

[1] Mr Kashani-Malaki (the accused) is charged on a two count indictment with one count of trafficking in dangerous drugs, namely heroin, methylamphetamine, cocaine and 3,4-methylenedioxymethamphetamine(MDMA) between 29 July 2003 and 13 April 2004 (count 1) and one count of importing prohibited imports, namely narcotic goods consisting of a trafficable quantity of cocaine between 8 December 2003 and 28 January 2004 (count 2).

Background

[2] Mr Kashani-Malaki pleaded not guilty and the trial commenced in the Brisbane Supreme Court on 10 July 2009. He represented himself. During the period of the alleged trafficking the Australian Crime Commission (ACC) conducted a surveillance operation which involved extensive telephone interceptions. It is clear that the main evidence implicating the accused involved some 206 intercepted telephone conversations. Recordings of those conversations and transcripts of those conversations were the basis of the evidence at trial. After a three week trial the accused was convicted by a jury of the trafficking charge in count1. The jury were unable to reach a verdict on count 2.

[3] Mr Kashani-Malaki appealed to the Court of Appeal on five grounds namely;

(i) The pre-trial judge erred by holding there were alternative grounds to challenge the authenticity of alleged recordings.
(ii) The pre trial judge erred by ruling that evidence of telephone excerpts was admissible against him.
(iii) The trial miscarried as he was not represented by Counsel.
(iv) There was a miscarriage of justice due to the way in which a note from a juror was dealt with by the trial judge.
(v) There was a miscarriage of justice due to an unfair address by the crown and summing up by the trial judge.

[4] The appeal succeeded on ground (iv) and on 24 August 2010 the appeal was allowed and his conviction for trafficking in dangerous drugs was set aside and a retrial was ordered.

[5] The retrial which is set down for 4 weeks was scheduled to commence on 4 October 2011.

This application

[6] Senior Counsel for Mr Kashani-Malaki, now makes a further application pursuant to s 590AA of the *Criminal Code* 1899 (Qld) to exclude the telephone intercept evidence on the basis that the requirements of the *Telecommunication (Interception Act)* 1979 ("the Act"), have not been complied with.

The legislative scheme

[7] The purpose of the Act was to essentially prohibit the interception of telecommunications except where such interceptions are authorised in special circumstances. Section 7(1) of the Act provides that a person shall not intercept, authorise, suffer or permit another person to intercept or do anything that will enable a person or another person to intercept a communication passing over a telecommunications system. There is therefore a general prohibition on intercepting communications.

[8] Section 7(2) provides exceptions to the general prohibition including s 7(2)(b) which allows "the interception of a communication under a warrant".

[9] The evidence indicates that eight warrants issued to the Australian Crime Commission, two under s 45 and the balance under s 45A. Those warrants are relied on in the present case as authorising the telephone interceptions for the 206 phone calls relied on by the prosecution in this case.

[10] Section 47 however provides a limit on the authority conferred by a warrant and at the relevant time (between July 2003 and April 2004) provided:

> **47 Limit on authority conferred by warrant**
> A warrant issued under section 45, 45A, 46 or 46A does not authorise communications to be intercepted while they are passing over a telecommunications system operated by a carrier unless:
> (a) notification of the issue of the warrant has been received by or on behalf of the Managing Director of the carrier under subsection 60(1); and
> (b) … "

[11] Section 60(1) at the relevant time provided:

> **"60 Notification to managing Director of carrier of issue or revocation of certain warrants**
> (1) Where:
> (a) a warrant (other than a warrant issued under section 48) is issued to an agency; and
> (b) it is proposed, under the warrant, to intercept communications to or from a telecommunications service while they are passing over a telecommunications system operated by a carrier;
> the chief officer of the agency shall cause;
> (c) the Managing Director of that carrier to be informed forthwith of the issue of the warrant; and
> (d) a copy of the warrant, certified in writing by a certifying officer of the agency to be a true copy of the warrant, to be given as soon as practicable to the Managing Director of that carrier."

[12] Certificates were issued by the carriers under s 61 (1) and certify to the receipt of notification of the issue of the warrants. In the present case the carriers were Vodafone, Optus, and Telstra. With respect to Vodafone and Optus the certificates are in terms that "a true copy of the warrant numbered ...was received from the Australian Crime Commission by facsimile." The Telstra certificates are worded "a true copy of warrant.., numbered.., was received by an employee of Telstra Corporation Limited from the Australian Crime Commission by facsimile."

[13] It is clear however that many factual matters are not known. Senior Counsel for the accused essentially argues that this system adopted for compliance with the requirements of ss 47 and 60 of the Act was one whereby the Managing Director was actually precluded from getting the appropriate communications. It is argued that this was not a case of administrative necessity for the receipt of information or copies of a warrant in the event of an absence of a Managing Director but rather a case of a deliberate decision to circumvent the requirements of the Act. It is argued that because the Managing Director would not have the appropriate security clearance, the Managing Directory would never be personally notified of the issue of the warrant or the receipt of the certified copy of the warrant. Those matters are not conceded by Senior Counsel for the Commonwealth.

[14] For the purposes of this ruling Counsel have agreed to the following four factual assumptions;

Assumed facts

1. For each of the telecommunications carriers, during the period covering the issue and execution of the warrants the subject of this application, a system was employed whereby:
   (a) upon the issuing of a warrant to an Agency – in this case the ACC – under either ss 45, 45A, 46 or 46A of the *Telecommunications (Interception) Act 1979* ("the Act"), an ACC member of staff transmitted by facsimile a copy of the warrant to a dedicated and encrypted facsimile number seeking to give to the carrier notification of the issue of the warrant and requesting steps to be taken for its execution; and
   (b) after the receipt by the carrier of the notifications of warrants and requests for their execution, the Managing Directors were not personally informed of any given warrant notifications

2. None of the certificates under s 61(1) of the Act say that notification of the issue of the warrant was received by or on behalf of the managing director of the carrier.

3. None of the certificates under s 61(1) of the Act say that the managing director of the carrier was informed of the issue of the warrant.

4. None of the certificates under s 61(1) of the Act say that a true copy of the warrant certified in writing was given to the managing director as soon as practicable.

The argument for the exclusion of the evidence

[15] Senior Counsel for Mr Kashani-Malaki argues that in the present prosecution, there is no evidence by way of certificates or otherwise with respect to the actual receipt by the Managing Director of the relevant carriers conforming with the provision in s 60(1) as opposed to an employee as certified. (my emphasis)

[16] Senior Counsel argues that the words "or on behalf" in s 47 must be construed strictly given the nature of the legislation and must be construed in the light of the words in s 60(1). It is also argued that absent the wording of s 60(1), at a minimum,

the words cannot mean that anyone (e.g., a clerk, cleaner or technician) within the carrier corporation can validly "receive" notification. Accordingly it was submitted that at the very least, there must be a proper delegation of the function by the Managing Director for the purpose in s 47(a).

[17] It is further argued by Senior Counsel that the clear and specific language of s 60(1) mandates that it is the Managing Director of that carrier who is to be informed forthwith of the issue of the warrant and that a copy of the warrant, certified in writing by a certifying officer of the agency to be a true copy of the warrant, must also be given as soon as practicable to the Managing Director of that carrier.

[18] It was submitted that the seriousness of the required steps is marked by the requirement that the chief officer of the agency is required to take action causing the required actions to be performed thereby ensuring that no lesser person than the Managing Director of the carrier is "informed forthwith" and that he is also "given" a certified true copy of the warrant.

[19] It is further argued that the requirement of personal communication to the Managing Director is not to be demeaned by calling it merely administrative because it is a requirement for the lawful execution of the warrant. Accordingly if the warrant is not being lawfully executed, then it cannot be said that the interception is "under a warrant" within the meaning of s 7(2)(b).

[20] Senior Counsel also argued that when the words "on behalf of the Managing Director" used in s 47(a) are construed, one must avoid the elision into the concept of "by or on behalf of the carrier". There is no evidence that any "notification" has been received on behalf of the Managing Director.

[21] Senior Counsel indicated that it might be argued that any employee of the corporation who received it received it on behalf of the corporation. It was submitted however that such receipt is very different from receiving something as the personal agent of the Managing Director.

[22] It was submitted that the construction argued for is confirmed by the amendments made in March 2011 to the Act. Counsel argued that those amendments make it clear that the designation of the Managing Director as clearly personal is too constricting and needed to be expanded legislatively. In the amendments to s 47, the words "by or behalf of the Managing Director", have been replaced by the words "by an authorized representative". Similarly, in s 60(1), the words "the Managing Director" have been replaced by the words "an [or that] authorized representative". And in s 5, "authorized representative of a carrier" is defined to mean one of the Managing Director, the Secretary or "an employee of the carrier authorized in writing for the purposes of this paragraph by the Managing Director or the Secretary of the carrier".

[23] The Explanatory Memorandum to the Bill which became the Act[1] that effected these amendments to the Act provides as follows:[2]

---

1 The amendments were effected by Schedule 5 of the *Telecommunications Interception and Intelligence Services Legislation Amendment Act 2011* (Cth), which commenced operation on 23 March 2011.

2 Explanatory Memorandum to the Telecommunications Interception and Intelligence Services Legislation Amendment Bill 2010 (House of Representatives) at p 20. (See also the Replacement Explanatory Memorandum to the same Bill (Senate) at p 21.)

> "Under section 47 of the TIA Act, interception under a warrant is only authorized where the Managing Director of the carrier has been notified of the warrant in accordance with subsection 60(1) of the TIA Act and the interception is undertaken by an employee of the carrier.
>
> Subsection 60(1) requires that the 'certifying officer' of the agency to whom the interception warrant has been issued must inform the Managing Director of the carrier that the warrant has been issued. Section 15 places a similar obligation on the Director-General of Security when the Organization intercepts communications with the assistance of a carrier.
>
> Currently, the Managing Director of a carrier cannot nominate anyone else within the carrier to receive the notification, meaning that a warrant cannot be executed if the Managing Director is not readily available. The Bill amends several notification provisions in the TIA Act to allow notifications to be made to a carrier representative authorized by the Managing Director so as to ensure investigations are not stymied by the unavailability of a carrier's Managing Director."

[24] It is therefore argued on behalf of the accused that the legislature considered that, properly construed, ss 47 and 60(1) mean that it is the Managing Director alone who is to receive the notification and that the Managing Director cannot nominate anyone else to do so. It was also noted that unlike other legislation which is designed to correct ambiguities, the amending legislation is not expressed as being "for the avoidance of doubt".

Can the intercepted phone calls be admitted as evidence?

[25] There is no doubt in this case that eight warrants approving telephone intercepts were issued in accordance with the requirements of the Act.

[26] Section 63 (1) however prohibits the use of information which has been gathered through telephone intercepts obtained under a warrant subject to the exceptions in Part VII of the Act.

[27] Section 74 provides that information obtained lawfully may be given in evidence in an "exempt proceeding" and I am satisfied that the current prosecution is such an "exempt proceeding" pursuant to s 5 of the Act.

[28] The question remains as to whether the information gathered through the telephone intercepts was lawfully obtained.

[29] Section 6E provides that lawfully obtained information means information obtained by intercepting communications "otherwise than in contravention of s 7(1)".

[30] Information obtained under a warrant is lawfully obtained information and may be given in evidence in an exempt proceeding if the requirements of s 47 are met.

[31] There is no doubt that s 47 sets out a limitation on the authority given by warrants issued under s 45 and s 45A. Where, as here, the telecommunication services were operated by carriers, the authority of the warrant is only effective upon receipt, "by or

on behalf of the Managing Director" of the carrier, of notification of issue of the warrant under s 60(1).

[32] I accept that there in no evidence before me to indicate that the Managing Directors of the carriers received personal notification of the issue of the warrant that were validly issued. Rather the evidence indicates that the notification of the issue of the warrant was received within a particular carrier by a unit set up within the carrier organisation and the Managing Director was not personally informed of any particular warrant issuing. It is essentially argued that because the requirements of s 60 (1) have not been met due to the failure to personally notify the Managing Director, the requirements of s 47 (a) have not been met and therefore information obtained from the telephone intercepts pursuant to the warrants is inadmissible.

[33] In *R v Bunting and Wagner (No 5)*[3] Martin J in the South Australian Supreme Court considered a similar argument and declined to rule that the evidence obtained through such a process was inadmissible. His Honour held;

> [17] Unlike s 47, s 60 does not refer to notification being received "on behalf of" the Managing Director. Counsel submitted that s 60 imposes an obligation on the Commissioner to cause the Managing Director to be informed personally of the issue of the warrant and to cause a certified copy of the warrant to be given as soon as practicable to the Managing Director personally. The certificate from Optus refers to both the facsimile and the original copy of the warrant being received by an employee of Optus. Each Telstra certificate refers to the facsimile being received by an employee, but the identity of the receiver of the original certified copy is not specified. It appears likely, however, that the original would have been received by an employee. As mentioned, par 5 of each certificate issued by the Commissioner refers to notification to a person acting on behalf of each Managing Director. Paragraph 6 states that as soon as practicable after the issue of a warrant, a certified true copy of the warrant was caused to be given to a person acting on behalf of each Managing Director.
>
> [18] Telephone interceptions amount to serious invasions of the privacy of members of our community. The legislature has put in place a regime designed to strike a balance between facilitating the investigation of serious crimes and protecting the fundamental rights of citizens. Strict duties of disclosure are imposed upon agencies which obtain warrants and intend to intercept communications pursuant to those warrants. It is not surprising that the agencies are required to cause notification to be given to the most senior executive officer of the relevant carrier. From a practical point of view, the carrier is required to facilitate interception. From a policy point of view, however, the legislature considered that the most senior executive officer of the carrier should be aware of the existence of the serious invasions of privacy. For similar reasons, the duty is imposed upon the agency to notify the Managing Director of the revocation of a warrant.

---

3 [2003] SASC 253.

[19] In my opinion, the legislature could not have intended that the Managing Director of the relevant carrier become involved personally with the implementation of each warrant. However, the critical question is whether the legislature intended that the Managing Director must receive personally notification of each warrant and a copy of each warrant.

[20] Section 60(1) speaks only of the Managing Director being informed and being given a copy of the warrant, not of anyone receiving on behalf of the Managing Director. However, s 47(a) refers to notification of the issue of the warrant being received "by or on behalf of the Managing Director of the carrier under subsection 60(1) ...". It appears, therefore, that s 47 contemplates that receipt of notification on behalf of the Managing Director is sufficient for the purposes of s 60(1).

[21] As Gibbs CJ observed in O'Reilly v The Commissioners of the State Bank of Victoria [1982] HCA 74; (1983) 153 CLR 1 at 11, the answer to the question whether a statute requires a power to be exercised personally by the person designated depends on the nature of the power and all the other circumstances of the case. By a majority, the Court held that the Commissioner of Taxation could exercise his powers of giving notices under s 264 of the Income Tax Assessment Act 1936 (Cth) through an authorised officer. Notwithstanding a power to delegate, the majority were of the view that the legislature must have known that "practical necessity" dictated that the powers conferred on the Commissioner of Taxation should be exercised by officers of the Department "who were acting as his authorised agents" (12). In Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40; (1986) 162 CLR 24, Mason J said (38):

> "The cases in which the principle has been applied are cases in which the nature, scope and purpose of the function vested in the repository made it unlikely that Parliament intended that it was to be exercised by that repository personally because administrative necessity indicated that it was impractical for him to act otherwise than through his officers or officers responsible to him."

[22] These authorities are of direct relevance to the discharge of the duty of notification by the Commissioner and whether that duty can be discharged by officers authorised by the Commissioner for that purpose. They are also relevant to any duties imposed upon the Managing Directors of the carriers. They do not directly relate to the question whether the legislature intended that the Managing Director of the carrier be informed personally of the warrant and be given personally a copy of the warrant. However, the practical considerations discussed in the authorities to which I have referred can readily be applied in considering whether Parliament intended such personal involvement of the Managing Directors.

[23] I do not have any information as to whether the Managing Directors have powers of delegation and, if so, whether they have

purported to exercise those powers with respect to matters arising under the Act. Nor do I have information as to whether the Managing Directors have authorised others to receive notifications and warrants on their behalf. There may be arrangements between the Commissioner and the carriers in respect of these matters about which I have not been informed. The Commissioner purported to discharge the duty imposed by s 60(1) by giving notification and by providing a copy of the warrant to persons the Commissioner understood were acting on behalf of each Managing Director.

[24] Having regard to the scheme of the Act, the purposes of notification and practical necessities, in my opinion it is unlikely that Parliament intended that the Managing Directors of the carriers would be personally involved in receiving notification and in receiving copies of all warrants. This view is confirmed by s 47(a) which contemplates that notification to a person acting on behalf of the Managing Director will suffice for the purposes of s 60(1)(c). In addition, the legislature having determined that notification to a person acting on behalf of the Commissioner is sufficient notification to activate the warrant pursuant to s 47(a), it is unlikely that the legislature intended to impose the duty of notification personally pursuant to s 60(1).

[25] In my opinion, therefore, the Commissioner complied with the administrative duties imposed by s 60(1). If I am wrong in that conclusion, in my opinion the failure of the Commissioner to discharge those duties would not affect the validity of the warrants. The failure occurred after the valid issue of a warrant. Pursuant to s 47(a), each warrant was activated when notification of the issue was received by or on behalf of the Managing Director of the carrier. There is no suggestion in the Act that a subsequent defect in carrying out the administrative responsibilities imposed by the Act affects the validity of the issue of the warrant or the commencement of the operation of the warrant. In those circumstances, even if the Commissioner failed as suggested, in my opinion the interceptions occurred under valid warrants for the purposes of s 7(2)(b) of the Act. On that basis, the prohibition in s 7(1) does not apply to the interceptions.

[26] Counsel was unable to refer me to any authority for the proposition that where a warrant is validly issued and lawfully brought into operation, a failure to comply with an administrative duty, being a duty that arises after the issue of the warrant, affects the validity of the warrant or renders the evidence obtained pursuant to the warrant inadmissible. Section 7(1) has no application because the interception occurred under the warrant. The information obtained pursuant to the warrant was obtained lawfully."

[34] Senior Counsel for the accused however argues that Martin J' decision was based on inferences about the system of notifications that was operating at that time within particular carriers. In the present case however it is argued that because of assumed facts there is a greater factual basis and that such a factual basis precludes the drawing of the same inferences.

[35] It is clear that a great deal of difficulty has arisen in this case due to the inherent conflict between the requirements of s 60 (1) and s 47 (a) of the Act. Whereas s 60(1) requires the Managing Director to be informed of the notification of the warrant and to be provided with a certified copy of the warrant s 47(a) indicates that a warrant will not authorise the interception if the notification of the issue of the warrant is not received by the Managing Director "or on behalf of the Managing Director".

[36] Accordingly it would seem that whilst information is required to be provided pursuant to s 60 (1) the warrant will only 'fail' to be 'activated' and not actually authorise an intercept if no notification is received at least on behalf of the Managing Director. It would seem clear therefore that strict compliance with s 60(1) is not required in order to satisfy the requirements of s 47(a). The two sections are not in the same terms. Clearly the words "on behalf of" appear in s 47(a) but not in s 60(1). As Martin J indicated "It appears therefore, that s 47 contemplates that receipt of notification on behalf of the Managing director is sufficient for the purposes of s 60(1)".[4]

[37] I also agree with Martin J that the legislature could not have intended that the Managing Director of the particular carrier needed to become involved personally with the implementation of each warrant and was required to be personally notified of the issue of each warrant and the receipt of each certified copy. The recent amendments confirm that personal notification is not required. Clearly the important feature of the scheme is the actual receipt of the appropriate documentation which is pivotal to the operation of the warrant not the personal knowledge of the Managing Director. Section 47 makes it abundantly clear that notification to a person who receives it on behalf of the Managing Director is sufficient notification to 'activate' the warrant.

[38] Section 47(a) as it stood prior to the recent amendments clearly extended the range of persons who could receive notifications of the issue warrant for the purpose of that section, to persons acting on behalf of the Managing Director. In my view therefore the Explanatory Memorandum where it provides that currently the Managing Director of a carrier "cannot nominate anyone else within the carrier to receive the notification" is contrary to the clear words of the section. I consider that the amendments to the Act in 2011 simply remove the long standing inconsistency in wording between the two sections.

[39] I also consider that there has been sufficient compliance with s 60(1). All the warrants were validly issued to the ACC. All the notifications were sent to a nominated unit within the carriers for the purposes of compliance with s 60(1). All the certified copies of the warrants were ultimately provided to the nominated unit. I accept that there is no evidence that all notifications were specifically addressed to 'the Managing Director' but each carrier describes that there was a system in place for dealing warrant notifications under s 60 (1). In my view such a system must be taken to have been in place under the auspices of the respective Managing Directors. I accept that for practical purposes it was a sufficient discharge of the administrative duty under s 60(1) for the facsimiles to have been addressed and forwarded as they were.

[40] It is clear in my view that the requirements of s 47(a) have been met because the "notification of the issue of the warrant has been received by or on behalf of the Managing Director". It is the receipt of the notification under s.47(a) that removes the limitation on the

---

[4] At [20].

authorisation of the warrant, and renders the information obtained under it "lawfully obtained information" i.e. obtained under a warrant.[3]

[41] The evidence of the telephone intercepts is admissible.

[42] The application for the exclusion of the telephone evidence is therefore refused.