SUPREME COURT OF QUEENSLAND

CITATION:	*R v Grimes* [2012] QSC 229
PARTIES:	**R** **v** **GRIMES, Ross Francis** (applicant)
FILE NO:	SC No 28 of 2011
DIVISION:	Trial Division
PROCEEDING:	Application pursuant to s 590AA *Criminal Code* 1899 (Qld)
DELIVERED ON:	5 April 2012
DELIVERED AT:	Brisbane
HEARING DATES:	12, 13 September; 30 November 2011
JUDGE:	Peter Lyons J
ORDER:	
CATCHWORDS:	CRIMINAL LAW - EVIDENCE - JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE - PREJUDICIAL EVIDENCE - GENERALLY - where applicant is charged with 12 counts of drug related offences - where a witness gave a police statement testifying as to her participation in transactions related to counts 1-5 on the indictment - where the applicant applies for the entirety of the statement to be excluded on the ground that the prejudicial effect of the statement outweighs its probative value - whether the statement is prejudicial - whether matters of witness credibility speak to the probative value of the statement CRIMINAL LAW - EVIDENCE - JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE - EVIDENCE UNFAIR TO ADMIT OR IMPROPERLY OBTAINED - where the applicant submits that the police statement is unreliable as a result of the circumstances surrounding the giving of it - whether the admission of the police statement would result in an unfair trial CRIMINAL LAW - PROCEDURE - ADJOURNMENT, STAY OF PROCEEDINGS OR ORDER RESTRAINIING PROCEEDINGS - STAY OF PROCEEDINGS - GENERALLY - where counts 1-5 on the indictment relate to five production offences on dates unknown - where particulars were given referring to the time of the first offence as being shortly after the sample sale - where particulars were given as to the quantity involved in one offence being larger than the quantity in the others - where particulars were given

as to the location of the offences - where the applicant applies for a stay of counts 1-5 on the indictment on the basis the counts lack particularity - whether sufficient particulars had been provided to allow the transactions to which each of the counts relate to be identified

CRIMINAL LAW - PROCEDURE - ADJOURNMENT, STAY OF PROCEEDINGS OR ORDER RESTRAINIING PROCEEDINGS - STAY OF PROCEEDINGS - DELAY - where a witness is not available for cross examination - where an audio recording of an identification of the applicant by a covert police officer using a photo board has been lost - where in 2002 a witness gave a document to a police officer who was associated with the investigation - where the applicant applies for a stay of counts 1-5 on the indictment on the basis of the effect of the unavailability of witnesses and evidence and other effects of the passage of time - whether due to the unavailability of evidence and witnesses, or the other effects of the passage of time, the continuation of the proceedings would involve unacceptable injustice or unfairness, or would be so unfairly and unjustifiably oppressive as to constitute an abuse of process

CRIMINAL LAW - EVIDENCE - HEARSAY - EXCEPTIONS GENERALLY - where a witness gave a statement that a second witness told him the name of the applicant in relation to transactions that form the basis of various counts on the indictment - where it is submitted the former witness supplied ephedrine to the latter witness for the purpose of its re-supply to the applicant - where it is submitted that both witnesses were aware of this common purpose - where applicant applies to have statement excluded on the ground it is hearsay - whether there is sufficient material to determine if the two witnesses acted in 'pre-concert' such that the statement may be an exception to the hearsay rule

CRIMINAL LAW - EVIDENCE - IDENTIFICATION EVIDENCE - MODES OF IDENTIFICATION - PHOTOGRAPHS - GENERALLY - where covert police officer saw a man said to be the same man on two occasions - where police officer identified the man he saw from a photoboard - where the applicant applies for exclusion of the identification evidence on the ground the selection of photographs on the photoboard was unfair - whether, if a discretion to exclude identification evidence exists on the basis that the selection of photographs was "unfair", the selection of photographs was prejudicial or unfair

CRIMINAL LAW - EVIDENCE - RELEVANCE - where count 12 on the indictment charges the applicant with the unlawful possession of a document containing instructions on how to produce methylamphetamine - where a document

purporting to give instructions for the production of methamphetamine from Vicks nasal inhalers was found in a car on the applicants property - where expert evidence suggests the instructions would only be successful if Vicks inhalers made for the American market were utilised - where the applicant applies for the exclusion of the document and a stay of count 12 on the basis no evidence had been lead to show the instructions were for the production of methylamphetamine - whether the document contained either an intention to instruct on the production of methylamphetamine

Criminal Code 1899 (Qld) ss 564, 571, 573, 590AA
Drugs Misuse Act 1986 ss 4, 8A, 119

Bunning v Cross (1978) 141 CLR 54 considered
Dietrich v R (1992) 177 CLR 292 considered
Doney v R (1990) 171 CLR 207 followed
Driscoll v R (1977) 137 CLR 517 considered
Festa v R 208 CLR 593 considered
Harris v DPP [1952] AC 694 considered
Jago v The District Court of New South Wales (1989) 168 CLR 23 considered
Johnson v Miller (1937) 59 CLR 467 considered
Nicholls v R (2005) 219 CLR 196 considered
PPP v R (2010) 27 VR 68 considered
R v Baker ex parte Attorney-General (Qld) [2002] 1 Qd R 274 distinguished
R v Brookes [1992] QCA 103 considered
R v Christie [1914] AC 545 considered
R v Courtney-Smith (No 2) (1990) 48 A Crim R 49 applied
R v Edwards (2009) 83 ALJR 717 applied
R v Falzon [1990] 2 Qd R 436 distinguished
R v Foley [2000] 1 Qd R 290 considered
R v Hasler ex parte Attorney-General (Qld) [1987] 1 Qd R 239 considered
R v Ireland (1970) 126 CLR 321 considered
R v King (1995) 78 A Crim R 53 considered
R v Lambert (2000) 111 A Crim R 564 considered
R v McLean and Funk ex parte Attorney General (Qld) [1991] 1 Qd R 231 considered
R v Pearce [1992] QCA 168 distinguished
R v Rogers [1998] QCA 83 considered
R v Sang [1980] AC 402 considered
R v Skirving [1985] 1 QB 819 considered
R v Swaffield (1998) 192 CLR 159 considered
Rozenes v Beljajev [1995] 1 VR 533 considered
S v R (1989) 168 CLR 266 considered
Sutton v R (1984) 152 CLR 528 followed
Tripodi v R (1961) 104 CLR 1 followed
Walton v Gardiner (1993) 177 CLR 378 followed
Warmenhoven v R [2006] QSC 64 considered

COUNSEL:	A Boe, with A O'Brien, for the applicant D Balic for the respondent
SOLICITORS:	Nyst Lawyers for the applicant Director of Public Prosecutions (Queensland) for the respondent

[1] An indictment has been presented in this Court charging the applicant with a number of drug related offences. He seeks rulings under s 590AA of the *Criminal Code* 1899 (Qld) for the exclusion of certain evidence and a stay of the indictment.

Background

[2] The witness whose evidence was the major focus of the application is, it is common ground, an informer for the purposes of s 119 of the *Drugs Misuse Act* 1986 (Qld). In view of its provisions, and the uncertainty about the extent of the knowledge of others as to her identity in connection with the proceedings against the applicant, it seems appropriate not to include her name in these reasons. Accordingly, I shall refer to her as Ms A. Likewise, I shall refer to another witness whose evidence is also the subject of the application as Mr B.

[3] In about the middle of the 1990s Ms A became a drug user, and subsequently an addict. She supported her addiction by prostitution, and by selling drugs. At this time, she lived and worked on the Gold Coast. She there met Mr B, with whom she became friendly. Late in 1996, Ms A was injured in a motor vehicle accident, and was found to be in the possession of drugs. She was charged, pleaded guilty, and sentenced to probation and community service. There is evidence indicating that in March 1997, Ms A was registered as a police informant.

[4] When she recovered from the accident, Ms A returned to the Gold Coast. She has stated that she then did jobs for a Mr Cannon and a Mr Donnelly, delivering drugs, including delivering and selling drugs to other people for them. In this period, she met the applicant, from whom she sometimes purchased "speed".

[5] In the latter part of the 1990s, Ms A lived in various places, including on a property in a rural area near the Queensland-New South Wales boarder.

[6] Ms A's statement referred to an occasion when she drove to the Gold Coast and met with Mr B and Mr Donnelly. Mr Donnelly made it known that he had access to ephedrine, which could be used to produce speed, and he asked Ms A to help him find buyers. According to Ms A's statement, the ephedrine was to be stored at Mr B's unit on the Gold Coast, for which Mr B would be paid. Ms A contacted the applicant, as a potential purchaser of ephedrine. Her statement referred to meeting him near Logan Village where he paid approximately $1,000 for a sample of the ephedrine (*the sample sale*). Ms A gave the money to Mr B, at his unit.

[7] According to Ms A's statement, a couple of days later the applicant telephoned her, wanting to get 2 kilograms of ephedrine. Arrangements were made for the sale, and the applicant came to Mr B's unit at night, where he paid $70,000 in cash, in exchange for 2 kilograms of ephedrine (*the first transaction*). Ms A has stated that ephedrine was sold to the applicant on five occasions, one involving a quantity of 4 kilograms, and the others each involving 2 kilograms. The price was always

$35,000 per kilogram. The first three purchases occurred within a short time, and then was a break of perhaps three months, before the last two purchases occurred. The transactions always took place at Mr B's unit. However, in the period during which the sales to the applicant occurred, Mr B moved from one unit to another in Surfers Paradise. Ms A said that the first unit was at ground level, with a balcony at the back adjacent to a canal, and on the western side of the Gold Coast highway. The second unit was in a building with carports at ground level, and units above. Both units were not far from the Pink Poodle Motel.

[8] In the second half of 2002, Ms A was living on her parents' property, when it was raided by police. Her statement indicated that in the course of the raid, glassware (apparently related to the production of drugs) was found. Shortly after, Ms A made contact with police, giving them information about a number of people involved in drug-related activities, including the applicant. She also gave them a document containing information of a similar character, which cannot now be located. In January 2003, she provided a formal statement, signed on 4 January 2003, (*Ms A's January 2003 statement*), on its face said to be provided as a proof of evidence so that she could be considered for an indemnity against prosecution. What has been set out thus far in these reasons is generally based on that statement.

[9] On 14 January 2003, the applicant was charged with a number of drug related offences. On 9 August 2005 he was committed for trial in respect of these offences. The material indicates that a "deal" was then reached involving a plea of guilty by the applicant, on the basis that charges against his de facto partner would be discontinued. Subsequently, additional counts were added. The applicant later made an application for a stay of the additional charges, unsuccessfully, and his appeal against the refusal of the stay was dismissed. However the prosecution has given an undertaking not to rely in the current proceedings upon the admissions implicit in the pleas.

[10] On 6 March 2007, an undertaking was given by the Attorney-General to Ms A that information she provided in the course of her evidence in the proceedings against the applicant, or any information obtained as a direct or indirect consequence of such information, would not be used in evidence against her in any civil or criminal proceedings, other than in proceedings in respect of the falsity of any evidence she might give. In light of that undertaking, on 24 March 2011, the Director of Public Prosecutions stated in writing that it is not intended to prosecute her for other offences.

[11] Committal proceedings in respect to the matters with which the applicant is currently charged took place on 26, 29 and 30 September 2008; 17, 18, 19 and 20 February 2009; and 5 August 2010. Ms A gave evidence-in-chief on 29 and 30 September 2008, her cross-examination commencing on the latter date. Her cross-examination continued on 17, 18 and 19 February 2009 as well as on 14 July 2009 and 5 August 2010.

[12] The indictment against the applicant includes 12 counts. Counts 1 to 5 charged the applicant with the unlawful production of a dangerous drug. In each case, the basis of the charge is the purchase of ephedrine by the applicant from Ms A, at Mr B's

apartments on the Gold Coast, these being alleged to be acts preparatory to the production of a dangerous drug[1].

The present application

[13] The application seeks the exclusion of all of the evidence of Ms A from the applicant's trials in respect of all counts on the indictment. This is sought on a discretionary basis, it being said that it is of little probative value and that it is highly prejudicial; and that it should be excluded by reason of a number of matters said to affect its probative value, including that she was an accomplice and an informer who was indemnified and paid a reward. There are specific parts of her evidence which, it is alternatively submitted, should be excluded.

[14] The application also seeks a stay of the indictment, on the basis that the occasions relied upon in support of counts 1 to 5 have not been properly particularised.

[15] In addition, rulings are sought as to the inadmissibility of some of the evidence of Mr B; some of the evidence of Mr Jason Gough, the arresting officer; evidence of a photoboard identification by a covert police officer; evidence of an analysis of a computer owned by the applicant's de facto partner; evidence relating to the finding of a clip seal bag and related items; and evidence relating to a Ms Nicholls.

[16] Count 12 of the indictment charges the applicant with the unlawful possession of a document containing instructions about the way to produce methamphetamine. A stay of proceedings in respect of that count is sought, on the basis that prosecution evidence does not establish that the document contains instructions for the production of methamphetamine.

[17] It is convenient to commence with the application to exclude the totality of Ms A's evidence.

Application to exclude all of the evidence of Ms A

[18] Both bases for this application might be traced back to the fundamental right of an accused to a fair trial[2] (or, perhaps more accurately, the right of an accused not to be tried unfairly[3]). The fairness involved is the fairness of the criminal trial to which the accused is subjected, and not some general notion of fairness relating to broader or other considerations.[4]

[19] A matter relevant to both bases is the way that criminal trials on indictment are commonly conducted in higher courts in Australia, with the jury being the trier of fact, and accordingly the body responsible for the assessment of evidence. A consequence of the discretionary exclusion of evidence is that relevant evidence (that is, evidence which makes more probable than not the existence of a fact, the existence of which is in issue, or which, taken alone or with other facts, makes more probable than not the existence of a fact in issue[5]) is not presented to the jury,

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1 See the definition of "produce" in s 4 of the *Drugs Misuse Act* 1986 (Qld).

2 In relation to the prejudicial basis see *Driscoll v R* (1977) 137 CLR 517, 541; *R v Swaffield* (1998) 192 CLR 159 at [64]. For the unreliability basis, see *Rozenes v Beljajev* [1995] 1 VR 533, 549.

3 See *Dietrich v R* (1992) 177 CLR 292, 299-300.

4 *R v Swaffield* (1998) 192 CLR 159 at [64]; *Rozenes v Beljajev* [1995] 1 VR 533, 549.

5 Compare *Nicholls v R* (2005) 219 CLR 196 at [37], per McHugh J, citing from *Goldsmith v Sandilands* (2002) 76 ALJR 1024 at [31].

notwithstanding the public interest in the conviction of offenders,[6] and the general entitlement of the prosecution to adduce relevant evidence in support of a charge.[7]

[20] Different formulations of the first basis for the exercise of the discretion appear in the authorities. Thus in *R v Sang*[8] Lord Diplock said:

> "A trial judge in a criminal trial has always a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value."[9]

[21] In *Driscoll v R*[10] Gibbs J said:

> "It has long been established that the judge presiding at a criminal trial has a discretion to exclude evidence if the strict rules of admissibility would operate unfairly against the accused. The exercise of this discretion is particularly called for if the evidence has little or no weight, but may be gravely prejudicial to the accused …."

[22] At appellate level in this State, it has been held that prejudicial evidence is not to be excluded unless it is "insufficiently substantial, of trifling weight or of small probative value".[11]

[23] The submissions for the applicant do not elaborate on the proposition that Ms A's evidence is prejudicial. In this context, prejudice means the danger of improper use of the evidence by a jury to reason to guilt. Evidence is not prejudicial for the purpose of this ground for exclusion, simply because it tends to establish the guilt of the accused.[12] No relevant prejudice has been demonstrated. For that reason, the application on the first basis is unsuccessful.

[24] I should add that the submissions seemed to suggest that the probative value of the evidence is determined by a consideration, not of what it would prove if accepted, but of reasons for not accepting it. That approach seems to me, with respect, to fail to realise the effect of the test, and the difference between the functions of a judge and a jury.

[25] This basis for the exclusion of evidence is often traced back to *R v Christie,*[13] where Lord Moulton said:[14]

> "In my opinion, therefore, a judge would in most cases be acting in accordance with the best traditions of our criminal procedure if he exercised the influence which he rightly possesses over the conduct

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6 *R v Ireland* (1970) 126 CLR 321, 335; *Bunning v Cross* (1978) 141 CLR 54, 65, 74; See *R v Hasler ex parte Attorney-General* [1987] 1 Qd R 239, 243.

7 *Harris v DPP* [1952] AC 694, 710; *R v Hasler ex parta Attorney-General* [1987] 1 Qd R 239, 245; *R v Duke* (1979) 22 SASR 46, 47.

8 [1980] AC 402, 437.

9 See also *Sutton v R* (1984) 152 CLR 528, 534 per Gibbs CJ.

10 (1977) 137 CLR 517, 541; see also *Bunning v Cross* (1978) 141 CLR 54, 73-74.

11 *R v Hasler ex parte Attorney-General* [1987] 1 Qd R 239 at 244 per Connolly J; see also at 251 per Thomas J; *R v Roughan & Jones* (2007) 179 A Crim R 389 at [75].

12 *R v King* (1995) 78 A Crim R 53, 61; *Festa v R* (2001) 208 CLR 593 at [22] ; *Tofilau v R* (2007) 231 CLR 396 at [3]; *HML v R* (2008) 235 CLR 334 at [12].

13 [1914] AC 545.

14 Ibid at p 560.

> of a prosecution in order to prevent such evidence being given in cases where it would have very little or no evidential value."

[26] The evidence under consideration in *Christie* was the behaviour of the accused when he denied the charge. His Lordship's statement was a reference to the evidential value of the content of the evidence, not the credit of the witness who gave it. In the same case, Lord Reading spoke[15] of evidence which has "little value in its direct bearing upon the case". The test adopted by Connolly J in *R v Hasler ex parte Attorney-General* [16] was whether the prejudicial effect of the evidence "would be out of proportion to its true evidential value".

[27] In *Sutton v R*,[17] Brennan J, in the context of the admissibility of similar fact evidence, to be assessed by considering its probative value and its prejudicial effect,[18] said:[19]

> "The third principle of general application is that the cogency of evidence of the commission of other offences is to be ascertained by reference to the whole body of proof in the case viewed in the light of experience. To determine the cogency of such evidence, it is necessary to identify and to keep steadily in mind the particular fact which the evidence is tendered to prove and how it tends to prove it."

[28] These passages indicate that the question is not whether the witness is credible; but rather whether the evidence, if accepted by the jury, plays a significant role in establishing guilt. In my view, the first discretionary basis relied upon by the applicant does not call for an assessment of the credibility or reliability of the witness; but rather an appreciation of the significance of the evidence in establishing the guilt of an accused person.[20]

[29] The evidence in the present case from Ms A is that she participated in the transactions which form the basis of counts 1 to 5 on the indictment. Her evidence, if accepted, is strongly probative of a critical fact in each case. For that reason also, I would not be prepared to exclude the evidence of Ms A on the first discretionary basis advanced for the applicant.

[30] The matters relied upon in support of the second basis for the exclusion of Ms A's evidence may be summarised as follows:

(a) On her evidence, she was an accomplice in the criminal acts of the applicant and it is in respect of those acts that she is to give evidence;

(b) She has a form of indemnity in respect of matters arising from her evidence;

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15 Ibid at pp 564-565.

16 *General* [1987] 1 Qd R 239, 244.

17 (1984) 152 CLR 528.

18 Ibid at p 547.

19 Ibid p 549.

20 In a different context, namely, the discretionary exclusion of a confessional statement, circumstances which may affect the reliability of the confession are taken into account: *Van der Meer v R* [1988] 62 ALJR 656, 666; *R v Swaffield* (1998) 192 CLR 159, [53]-[54]; *Em v R* (2007) 232 CLR 67 [73]. These cases are not concerned with the reliability of the witness who gave evidence of the making of the confession, but with the quality of the evidence given by the witness, that is to say, whether the confession itself reflects the truth.

(c) To assist police Ms A asked for some financial reward; and she was paid $7,000 (the date on which Ms A was paid is unclear, but it appears to have been subsequent to October 2005; on one view of the evidence, it was for assistance in a covert operation relating to a Mr Charles Cannon, rather than the provision of information relating to the applicant, the money being paid after Mr Cannon's conviction).

(d) Charges were brought against Ms A in early January 2003, which led to her making the statement signed on 4 January 2003, and in respect of which a *nolle prosequi* was entered on 4 February 2005, without explanation;

(e) There is strong evidence in support of the guilt of Ms A for a number of offences, for which she is not protected from prosecution by the indemnity;

(f) Her evidence is of only slight, if any, probative value because of its "vagueness, confusion and contradictions".

[31] Differing views have been expressed about discretion to exclude evidence, by reference to the credibility of the person giving it. Thus in *R v McLean and Funk ex parte Attorney General (Qld),*[21] Carter J said:[22]

> "In my view therefore there is no scope for the exercise of a judicial discretion to exclude evidence which is based wholly or primarily upon an assessment by the trial judge of the credibility of the witness whose evidence it is sought to exclude and/or upon the judge's conclusion that the witness' evidence may be unreliable. To exercise a discretion in these circumstances involves in my view the unwarranted assumption by a trial judge of one of the most integral of the jury's functions. There is not the slightest reason to believe that any properly instructed jury is incapable of properly performing that function."

[32] The other two members of the court expressed a different view, but because they differed in the determination of the ultimate question about whether the evidence should have been excluded in that case, it is debatable whether there is a binding ratio. Thus Kelly SPJ considered there was discretion to exclude admissible evidence from a competent witness who had received an indemnity, but it was not possible to categorise the circumstances in which the discretion would be exercised.[23] Derrington J considered that serious probative evidence might be excluded, but only where the level of inducement is such that it might be considered to be an exceptional feature.[24]

[33] In *Rozenes v Beljajev*[25], having examined the judgments in *McLean and Funk*, the Victorian Full Court preferred the view of Carter J.[26] However, their Honours went on to say:

> "But if this view be too extreme, then at least it would have to be said that the circumstances calling for a favourable exercise of the discretion would have to be most exceptional."

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21 [1991] 1 Qd R 231.
22 Ibid at p 260.
23 Ibid at p 240.
24 Ibid at p 246.
25 [1995] 1 VR 533
26 Ibid at p 559.

[34] The reason for that conclusion was that, to justify the exclusion of the evidence on a discretionary basis, the considerations affecting the reliability of the evidence must be such that they were not "comprehensible to a jury and capable of assessment by them as the proper tribunal of fact".[27]

[35] Their Honours also made reference to the High Courts decision in *Doney v R.*[28] In that case, the court held that a judge conducting a criminal trial has no power to direct the jury to enter a verdict of not guilty on the ground that, in the judge's view, a verdict of guilty would be unsafe or unsatisfactory.[29] The High Court said:[30]

> "It follows that, if there is evidence (even if tenuous or inherently weak of vague) which can be taken into account by the jury in its deliberations and that evidence is capable of supporting a verdict of guilty, the matter must be left to the jury for its decision."

[36] In *Beljajev*, the court said:[31]

> "*Doney* is against the existence of a discretion to exclude evidence of significant probative value on a ground of its unreliability."

[37] Their Honours later said:[32]

> "The approach of the courts has been and should be one with a very strong predisposition to the view that, questions of fact and credibility being for the jury and the jury being an institution in whose capacity and integrity confidence is reposed by the courts, evidence which is probative should go to the jury despite its infirmities, accompanied by the trial judge's directions concerning the considerations, both general and particular, affecting its reliability, including of course in an appropriate case the matter of corroboration. Trial judges must be at pains to ensure that the discretion to exclude admissible evidence on the ground of unfairness is not used (contrary to *Doney*) to withdraw a case from the jury on the footing that any conviction would be unsafe or unsatisfactory."

[38] In *Beljajev*, the court accepted that there is a discretion in a criminal case to exclude evidence on the ground that to receive it would be unfair to the accused, in the sense that the trial would be unfair.[33] In considering the exercise of that discretion in relation to evidence said to be unreliable, their Honours noted that it was the role of the jury to determine whether evidence is unreliable, with the aid of directions from the trial judge.[34] Their Honours considered that evidence might be excluded on a discretionary basis if this process is unlikely to result in a fair trial. Apart from cases where evidence might be excluded because of its prejudicial effect, their Honours gave as an example, evidence that could not be effectively tested (such as a

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27 See *Rozenes v Beljajev* [1995] 1 VR 533, 559, quoting from the judgment in *R v Peirce* [1992] 1 VR 273, 277.

28 (1990) 171 CLR 207.

29 Ibid at p 215.

30 Ibid at pp 214-215.

31 *Rozenes v Beljajev* [1995] 1 VR 533, 550.

32 Ibid at p 554.

33 Ibid at p 549.

34 Ibid at pp 556-557.

written statement of a deceased person, which could not be the subject of cross-examination).[35] Otherwise, their Honours doubted that occasion would arise for the exclusion of evidence on the basis of its unreliability.[36]

[39] It should be noted that *Beljajev* was a case where at first instance, the evidence of an accomplice who had been sentenced in respect of the offence, and who had been given a limited form of indemnity, was excluded from evidence. The court granted declarations to the effect that the primary judge erred in excluding the evidence. An application for special leave to appeal to the High Court was refused.[37] The decision has been referred to with approval in other States at appellate level;[38] and at a trial level in this State.[39]

[40] In *McLean and Funk*, the majority of the court answered the second question raised by the Attorney-General's reference, namely, whether the evidence of an indemnified accomplice should in that case have been excluded, in the negative. I have not identified in it any binding decision on a question of law which would be inconsistent with the principles stated in *Beljajev*; indeed, in the latter case, the court considered its views to be consistent with those of Carter J in relation to the exclusion of evidence simply on the basis of its unreliability; and with the other two members of the Court in holding that there is a discretion to exclude evidence on the ground of unfairness (in the sense that its admission would result in an unfair trial).

[41] For the applicant it was submitted that, notwithstanding *Beljajev*, that there was a discretion to exclude evidence solely on the basis of its unreliability, (apparently if its unreliability was sufficiently demonstrated). It was also submitted that *Doney* was concerned with a decision on a "no case" submission, and accordingly was not relevant to the exercise of the discretion to exclude evidence.

[42] I do not accept these submissions. A defendant's right not to be tried unfairly does not cease at the conclusion of the prosecution case. It follows from *Doney* that a trial in which the prosecution evidence is tenuous or inherently weak or vague may nevertheless proceed, without being an unfair trial. In the present case it was accepted, on behalf of the applicant, that a favourable exercise of the discretion depended upon the proposition that the trial would otherwise be unfair. The applicant's position is therefore inconsistent with *Doney*. It may also be noted that in *Doney*, the Court recognised that a judge may be required to consider whether evidence already admitted should be withdrawn from the jury.[40] It would be inconsistent with the decision in *Doney* to conclude that this extends to the exclusion of evidence considered to be unreliable because it is tenuous or inherently weak or vague.

[43] In *R v Falzon*,[41] evidence of a witness was excluded on a number of bases, including the fact that the witness was indemnified. Reference was also made to the

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35 Ibid, 556-557.
36 Ibid at p 556-557.
37 Ibid at p 573.
38 *Adnan Darwiche* [2011] NSWCCA 62 (indemnified informers who received financial benefit – the issue is whether the admission of their evidence resulted in a miscarriage of justice); *Hardwick v Western Australia* [2011] WASCA 164; *R v Lobban* (2000) 77 SASR 24.
39 *Warmenhoven v R* [2006] QSC 64 (evidence of a prison informer not excluded).
40 *Doney v R* (1990) 171 CLR 207, 214; see also 212.
41 [1990] 2 Qd R 436.

fact that the evidence was "in many respects vague, confused and contradictory."[42] In *McLean and Funk*, Carter J considered that *Falzon* was correctly decided, and that it was essentially based upon of the discretion dealt with in *Bunning v Cross.*[43] A similar view was taken by the court in *Beljajev.*[44] *Falzon* was decided prior to *Doney*. It seems to me that it should not be regarded as authority for the proposition that a sufficient ground for the exclusion of evidence of a witness is that it is vague, confused and contradictory.

[44] In my view, therefore, the authorities establish two relevant principles. The first is that the unreliability of evidence is not, of itself, a sufficient reason to exclude it. The second is that evidence may be excluded if its admission would result in an unfair trial. Situations in which a trial might be unfair would include cases where the directions of a trial judge may well not be sufficient to enable the evidence to be assessed properly by a jury (such as in cases where its prejudicial nature may continue to affect a jury, notwithstanding the directions of a trial judge); or where evidence which might well be unreliable cannot be tested by cross-examination.

[45] The submissions made on behalf of the applicant focus on features which indicate that the evidence of Ms A is, or may be, unreliable. They do not, however, identify any reason (other than the unreliability of the evidence) demonstrating why the trial might be unfair, if the evidence is admitted.

[46] Accordingly, in my view, the applicant has not established a proper basis for the exclusion of the whole of the evidence of Ms A.

Application for stay of indictment: particulars

[47] The application for a stay was based, in relation to counts 1 to 5, on the lack of particularity of these counts. It was also based on difficulties with evidence resulting from the passage of time. Ultimately, the application in relation to counts 1 to 5 became an application either for a permanent stay of proceedings in respect of these counts; or a stay in relation to them until further particulars were provided.

[48] Counts 1 to 5 allege that the production offences occurred on dates unknown between 1 January 2000 and 31 December 2001, at the Gold Coast. On 16 May 2011, the applicant's solicitors sought particulars of these counts. The applicant then sought particulars of the date, time, and place of each transaction; the amount of money paid, and the amount of ephedrine received. The response, dated 19 May 2011, relied upon the dates alleged in the indictment. In respect of each count it was said the time of day was unknown. The location was said to be at the Gold Coast, in the unit occupied by Mr B. Reference was made to the evidence found in Ms A's statement, and given by her at the committal.

[49] The effect of that evidence was summarised in the response, and may be stated as follows. There were approximately five occasions on which the applicant gave her money in exchange for ephedrine. On one occasion, the quantity of ephedrine was four kilograms; and on the other occasions it was two kilograms. The price was always $35,000 per kilogram. The exchanges occurred over a period of about a year. The first transaction occurred shortly after the sample sale. It was the result

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42 Ibid at 439.

43 *R v McLean and Funk ex parte Attorney General (Qld)* [1991] 1 Qd R 231, 253-254.

44 *Rozenes v Beljajev* [1995] 1 VR 533, 548.

of a telephone call from the applicant. The last occasion was in about April 2001. According to Ms A's statement, the first three transactions occurred relatively close in time; there was then a break of some months; after which the other two transactions took place "pretty close together". They were instigated by the applicant. They always occurred at the unit of Mr B, but he moved from one unit to another (both near Surfers Paradise) in this period.

[50] Section 564 of the *Criminal Code* requires an indictment to include "such particulars as to the alleged time and place of committing the offence … as may be necessary to inform the accused person of the nature of the charge." Section 573 provides that the Court may, if it thinks fit, direct particulars to be delivered to the accused person of any matter alleged in the indictment. Further, under s 571, an indictment is not open to objection for omitting to state the time at which the offence was committed, unless the time is an essential element of offence; nor for stating imperfectly the time at which the offence was committed.

[51] The language of these sections provides only limited assistance in determining whether particulars provided to a defendant are sufficient. No doubt further guidance can be obtained from cases under the general law, and cases dealing with other statutory provisions relating to the laying of charges.

[52] Some principles can be identified. A defendant is entitled to be told, "not only of the legal nature of the offence with which he [or she] is charged but also of the particular act, matter or thing alleged as the foundation of the charge."[45] One function of particulars is to demonstrate that a charge relates to an identifiable transaction which meets the description of the offence in the charge; though multiple, substantially similar, charges may be brought, provided that the evidence demonstrates separate, identifiable transactions which can be related to counts on the indictment.[46] Nevertheless, an indictment is not bad simply because it alleges that an offence was committed within a relatively lengthy period of time.[47]

[53] There are statements in earlier decisions which explain the significance of particulars. For example, the particularisation of the offence charged might be important when there is some prospect that a defendant might rely on an alibi;[48] or some other defence.[49] Beyond that, particularisation may be important subsequently, where a defendant might wish to plead autrefois convict or autrefois acquit.[50]

[54] In *PPP v R*[51] Redlich JA summarised the role of particulars in the following passage:

> "The starting point is the proposition that for a trial according to law, the accused must be apprised not only of the offence with which they are charged but must have particulars of the act constituting the

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45 *Johnson v Miller* (1937) 59 CLR 467, 489; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at [26].

46 *R v Rogers* [1998] QCA 83 at [24] per Dowsett J.

47 S*v R* (1989) 168 CLR 266, 272, 282.

48 *S v R* (1989) 168 CLR 266, 286.

49 286.

50 See Ibid at p 281.

51 (2010) 27 VR 68 at [42].

> offence. These particulars are designed to serve a number of important purposes:
> (1) to enable the accused to exercise the right to object to evidence on the ground of relevance;
> (2) to permit the accused to know how the charge might be answered;
> (3) to provide the accused with the opportunity to test the credibility of the complainant by reference to the surrounding circumstances disclosed as a result of a particularisation of the count;
> (4) to enable the trial judge to instruct the jury properly as to the law to be applied;
> (5) to ensure that there is a unanimity of view by the jury as to a specific act by the accused;
> (6) in the event of conviction, to enable the court to know the offence for which the defendant is to be punished;
> (7) to ensure that the record discloses of what offence a person has been acquitted or convicted in order for that person to avail himself or herself, if the need should arise, of a plea of *autrefois acquit* or *autrefois convict*." (*citations omitted*)

[55] The applicant's submissions relied, in respect of the particulars, on three cases: *Johnson v Miller*,[52] *S v R*,[53] and *R v Baker ex parte Attorney-General (Qld)*.[54]

[56] In *Johnson v Miller*, the defendant was charged with an offence which occurred if a person was seen coming out of licensed premises outside certain hours. The complaint alleged that "a certain person" was seen coming out of the premises outside certain hours, but the prosecutor proposed to prove that 30 persons were seen doing this. At first instance, the complaint was dismissed on the grounds that it was defective, a decision upheld in the High Court. Sir Owen Dixon said:[55]

> "For a defendant is entitled to be apprised not only of the legal nature of the offence with which he is charged but also of the particular act, matter or thing alleged as the foundation of the charge. The court hearing a complaint or information for an offence must have before it a means of identifying with the matter or transaction alleged in the document the matter or transaction appearing in evidence."

[57] His Honour referred to the fact that it was not possible for the court to determine which of the 30 events was the subject of the complaint.

[58] A similar difficulty emerged in *S v R*. There, a man was charged with three counts of carnal knowledge of his daughter. Each act was alleged to have occurred on a date unknown, but within a 12 month period specified for each act: 1 January to 31 December 1980; 1 January to 31 December 1981; and 8 November 1981 to 8 November 1982. The complainant gave evidence of two specific acts, and that there were numerous other acts, over a period of two years ending November 1982. She could not give details of frequency, other than to say that the conduct occurred "every couple of months for a year". Convictions of the defendant were quashed,

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52 (1937) 59 CLR 467.
53 (1989) 168 CLR 266.
54 [2002] 1 Qd R 247.
55 *Johnson v Miller* (1937) 59 CLR 467, 489-490.

on the basis that the indictment was affected by a latent ambiguity, it not being possible to say which of the events referred to in the complainant's evidence was the subject of each of the three counts. There was a risk that the jury might have convicted, some accepting the complainant's evidence in respect of one occasion and some in respect of another, with the result that there was unanimity that an offence had been committed within each specified period, but no unanimity about any particular occasion.

[59] *R v Baker* was also a case of sexual offences committed against a girl, in that case, under 12 years of age. It appears that evidence was intended to be led of a number of similar events, the charge being said to relate to the first of those events. On an Attorney-General's reference, the court took the view that it was generally insufficient to specify the conduct the subject of the charge as the "first occasion" on which a number of similar events occurred, in the absence of some objective fact or event to which that occasion could be related.[56]

[60] For the respondent it was submitted that *R v Baker* and *S v R* were distinguishable, because the first transaction was adequately particularised, and the subsequent transactions were adequately particularised, because of, among other things, their relationship to the first transaction. Implicit in this submission is the proposition that the two cases were concerned with a prospect that, there being no means of relating any offence of which the complainant gave evidence to some objective fact, then there was a prospect that the jury might all agree there was a first occasion, but they might not all have the same event in mind. Here, the first occasion being distinctive, the fact there was a sequence, sufficiently specified the other occasions. The submission may derive support from what appears to be the English practice.[57]

[61] In my view, the present case may be distinguished from *R v Baker*. Here there is no intention by the prosecution to prove a number of uncharged acts. Nor is the first count distinguished from other offences, simply by saying that is the first of a series of similar events. In my view, the evidence to which reference has been made provides a clear means of identifying the event the subject of the first charge. It occurred a relatively short time after the applicant is alleged to have met with Ms A at Logan Village, and there to have purchased a sample of ephedrine from her. The offence is alleged to have occurred at Mr B's apartment, at a time getting on towards evening. Some specific details of the transaction have been provided.

[62] In addition, one transaction may be distinguished from others by reason of the fact that it involved a quantity of 4 kilograms.

[63] If the 4 kilograms transaction had taken place at the first of the units occupied by Mr B, then it would be possible to distinguish another transaction, by saying that it was a transaction involving 2 kilograms, and which occurred at the second unit occupied by Mr B. The material to which I have been referred, however, does not make that clear.

[64] Otherwise, it seems to me that the jury would not be able to distinguish three of the counts, one from another, in the absence of further particulars.

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56 *R v Baker ex parte Attorney-General (Qld)* [2002] 1 Qd R 247, 278.

57 Richardson (ed) *Archbold, Criminal Pleading, Evidence and Practice* 2006 para 1-132, p 87.

[65] In *S v R*, convictions were quashed, and a new trial was ordered, though there appears to have been some difference of opinion as to whether proper particulars could be provided.[58] In the present case, the applicant has sought either a stay of the indictment, or a stay of counts 1 to 5, until the charges are properly particularised. In the circumstances of this case, it seems to me that three of the counts should be stayed, until they are further particularised.

Application for stay of indictment: other grounds

[66] As mentioned earlier, the application was also based on the effect of the passage of time on the availability of some evidence.

[67] This, in part, relates to a Mr Beardmore, who is not available to give evidence. Some understanding of the applicant's case may be obtained from the following paragraphs (taken from the applicant's submissions in chief, and amended to reflect the applicant's submissions received on 13 September 2011):

> "62. Secondly, officer Beardmore, who was the 'controller' of the covert police operation, has a depressive illness and is unable to give evidence. He is important in the following respects:
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> a. He was responsible for recording records of moneys expended;
> b. He had met with the covert police [officer];
> c. He had meetings with [Ms A] about her involvement including discussing payments made to her;
>
> 63. Moreover, Mr Beardmore made numerous entries in the operation running sheet (it is 94 pages long). His entries create a picture of [Ms A] being an unreliable and opportunistic informant. In particular, the following entries are very relevant:
>
> a. 'Controller is suspicious about the sudden change of heart and the explanation given by the informant is dubious';
> b. 'Controller is suspicious that the informant may be meeting with Grimes to convey 'speed' back to [a rural location in Queensland]';
> c. 'Informant is being evasive';
> d. 'Informant appears evasive and non-committal';
> e. 'Informant gets defensive and claims ignorance saying that she did what she was asked and rang and ordered the amount'; and
> f.'Controller has concerns that the informant is being evasive about disclosing details of the arrangements made with GRIMES. As the deal was not organized by the CPO, the controller has concerns about the welfare of the CPO'."

[68] The respondent contended that Mr Beardmore's evidence "is of a peripheral and supporting nature". It was also submitted that the admissibility of the evidence was doubtful, being "matters of opinion about the witness (Ms A)".

[69] In subsequent written submissions, the applicant submitted that the unavailability of Mr Beardmore was of significance not so much because the applicant was therefore deprived of the ability to elicit the opinions Mr Beardmore expressed, but because the applicant was deprived of the opportunity to cross-examine Mr Beardmore

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58 See *S v R* (1989) 168 CLR 266 per Toohey J at 283; Gauldron and McHugh JJ at 288.

about the facts and circumstances which led to the recording of his opinions. It was also submitted that the evidence which the applicant would seek to adduce from Mr Beardmore would be admissible as an exception to the rule excluding the calling of collateral evidence, relying on *Nicholls v R*.[59]

[70] No explanation was given of the significance of Mr Beardmore's role in recording moneys expended. To the extent that this is intended to be a reference to money paid to Ms A, there is evidence from another police officer about this. There is no reason to think that Mr Beardmore's evidence (if admitted) would add significantly to this evidence.

[71] The evidence referred to in paragraph 63 of the applicant's submissions is evidence of Mr Beardmore's opinions about the reliability of statements made by Ms A, and some possible criminal misconduct by her. In my view, evidence of Mr Beardmore's opinion of the reliability of her statements on those occasions is irrelevant. The reliability of a witness, as has been discussed earlier, is a matter for the jury. As such, it is not a matter which is properly the subject of evidence. In *R v Foley*,[60] the Court said:

> "The resort by counsel to questions which invite a witness to answer by reference to comment on the truthfulness of other witnesses is to be deprecated … The literal object of such a question is to obtain an opinion whether someone else is a liar, and that of course is not an issue in the case or a matter for any other witness to express an opinion, it is a matter for the judge or jury … Such questions are inadmissible … ."

[72] It is difficult to see how, if Mr Beardmore had been available to give evidence, he could have been cross-examined about the matters forming the basis of the opinions referred to in paragraph 63 of the applicant's submissions, without first eliciting the opinions themselves, and then seeking to identify the statements of Ms A, and the factual matters relied upon for the opinions. However, it was submitted that this difficulty could be addressed by a *Basha* style hearing[61].

[73] Even if this course were followed, the exercise seems to me to be designed as an attack on the credit of Ms A. As *Nicholls* shows, the rule preventing a party calling evidence on a matter which is collateral only, remains in force.

[74] However, the High Court in *Nicholls* expressly confirmed the corruption exception to the collateral evidence rule.[62] In this context, corruption has been described as a "willingness to swear falsely".[63] *Wigmore* also describes corruption as "a willingness to obstruct the discovery of the truth by manufacturing or suppressing testimony".[64] Other exceptions to the collateral evidence rule are also recognised:

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59 (2005) 219 CLR 196.

60 [2000] 1 Qd R 290, 297.

61 A reference to *R v Basha* (1989) 39 A Crim R 337.

62 *Nicholls v R* (2005) 219 CLR 196 at [270] per Hayne and Heydon JJ; [1] per Gleeson CJ; [60] per McHugh J; [175] per Gummow and Callinan JJ.

63 *Wigmore on Evidence*, Chadbourn rev (1970) Vol 3A p 803 para [957], cited in *Nicholls v R* (2005) 219 CLR 196 at [173]; see also *R v De Angelis* (1979) 20 SASR 288, 295, cited in *Nicholls* at [174].

64 *Wigmore Op cit* at para [956]; cited in *Nicholls v R* (2005) 219 CLR 196 at [173].

bias towards a party to litigation; interest in the outcome of litigation; and previous inconsistent statements.[65]

[75] What cross-examination of Mr Beardmore might reveal is at present unknown. It is conceivable that none of his answers would come within the exceptions to the collateral evidence rule. Even if one were to assume the contrary, it does not follow that the indictment should be stayed. It will be convenient to return to this question, after referring to the other matters relied upon by the applicant.

[76] The applicant's submissions point out that an audio recording of an identification of the applicant by a covert police officer, using a photo board, has been lost. In 2002, Ms A gave a document to one of the police officers associated with the investigation. It is submitted that the document is the first record of her participation as a police informant, and that she has named in it various persons involved in drug-related activity. The evidence of Ms A and Mr B is affected by the passage of time. It was said that a combination of these factors warranted the grant of a stay, reliance being placed primarily on principles stated in *Jago v The District Court of New South Wales.*[66]

[77] For the respondent, reliance was placed on *R v Edwards*.[67] The facts in that case are of some assistance. The respondents, a pilot and first officer of a Qantas aircraft, were charged with failing to reactivate runway lights by means of a radio signal, on their departure from the Launceston airport, the control tower of which was unattended. By the time they were charged, the flight data recorder had been overwritten. At first instance, an order was made staying proceedings. That order was overturned on appeal to the High Court.

[78] In such a case, the court confirmed the test was that approved in *Walton v Gardiner*,[68] which was, "whether, in all the circumstances, the continuation of the proceedings…would involve unacceptable injustice or unfairness", or whether the "continuation of the proceedings would be 'so unfairly and unjustifiable oppressive' as to constitute an abuse of process".[69]

[79] In applying that test, the court said:

> "Trials involve the reconstruction of events and it happens on occasions that relevant material is not available; documents, recordings and other things may be lost or destroyed. Witnesses may die. The fact that the tribunal of fact is called upon to determine issues of fact upon less than all of the material which could relevantly bear upon the matter does not make the trial unfair."[70]

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65 See *Nicholls v R* (2005) 219 CLR 196 at [61]-[71] per McHugh J: the passage from *Piddington v Bennett and Wood Pty Ltd* (1940) 63 CLR 533, 545 cited by McHugh J makes reference to previous inconsistent statements.

66 (1989) 168 CLR 23, 28, 31, 74.

67 (2009) 83 ALJR 717.

68 (1993) 177 CLR 378, 392.

69 See *R v Edwards* (2009) 83 ALJR 717 at [23]-[24].

70 Ibid at [31] referring to *Jago v District Court (NSW)* (1989) 168 CLR 23, 34 per Mason CJ and 47 per Brennan J; *Williams v Spautz* (1992) 174 CLR 509, 519 per Mason CJ, Dawson, Toohey and McHugh JJ.

[80] It seems to me that the loss of the flight data recorder in *R v Edwards* was potentially of greater significance than the matters relied upon by the applicant in the present case. With reference to Mr Beardmore, it may be accepted that the applicant has lost an opportunity which may (or perhaps may not) have been of some benefit to him. It is difficult to see that the loss of the recording of the photoboard identification is likely to be a significant disadvantage to the applicant. There is no positive reason to think the document Ms A gave to the police in 2002 would provide any significant benefit to the applicant; indeed, the contrary may be true. For reasons previously expressed, any impairment of the recollections of Ms A and Mr B is a matter to be considered by the jury. It does not mean that there cannot be a fair trial.

[81] In my view, the applicant has not demonstrated that, in respect of the matters relied upon, in respect of the unavailability of evidence and witnesses, nor the other effects of the passage of time, the continuation of the proceedings would involve unacceptable injustice or unfairness, or would be so unfairly and unjustifiably oppressive as to constitute an abuse of process. Accordingly, I am not prepared to order a stay of the indictment on this ground.

Evidence of Mr B

[82] The applicant seeks a ruling that evidence to come from Mr B to the effect that Ms A identified the applicant to Mr B, is inadmissible. He seeks a ruling that evidence identified by reference to paragraphs in a statement by Mr B signed on 3 March 2003 (*Mr B's statement*) is irrelevant, and therefore inadmissible.

[83] It will be recalled that the effect of Ms A's evidence is that on five occasions, she supplied substantial quantities of ephedrine to the applicant in exchange for significant sums of money, at units successively occupied by Mr B, the ephedrine having been provided by Mr Donnelly. Mr B had not met the applicant and does not know him. At the time of each of the transactions, Mr B was in the unit, but in another room.

[84] Mr B's evidence is that, when Mr Donnelly indicated he wished to sell ephedrine, Mr B contacted Ms A about that matter. She subsequently told him she knew somebody who would be interested, and at some stage she stated that the person's name was Ross. Mr B has also given evidence which provides some support for the evidence of Ms A: that he occupied units successively in the Surfers Paradise area; that Ms A came to those units; that Mr Donnelly delivered drugs to the units; and that Ms A received cash, some of which came to Mr B, and most of which he passed on to Mr Donnelly. He also gave evidence to the effect that he and Ms A were partners, splitting the difference between the amount he retained from the moneys received on these occasions, and the amount passed on to Mr Donnelly. In cross-examination in the committal, Mr B stated that Ms A used the name "Ross" when referring to somebody coming to the unit to purchase ephedrine, and that she used that name in this context "on quite a few occasions".

[85] For the applicant, it was submitted that the evidence is hearsay evidence, if relied upon to establish that the applicant was the purchaser of the ephedrine.

[86] The respondent relied upon *Tripodi v R*;[71] and the respondent submitted that it is a fair inference from the evidence of Ms A (including her statement that she told the applicant that she had "someone on my back trying to sell" some ephedrine), that the applicant knew, when he told her that he wanted to purchase some ephedrine, that she would have to arrange to obtain it from someone else.

[87] The applicant's written submissions in reply point out that evidence is admissible under *Tripodi* only once there is reasonable evidence of a "pre-concert" between the person making the statement and the person charged with the offence, and that there is no such evidence in the present case. They also point out that such evidence is admissible only when a statement made in the absence of the defendant is one made in furtherance of the common purpose, on behalf of the accused (relying on *R v Courtney-Smith (No 2.)*)[72]

[88] The principles relied upon by the applicant may be accepted as correct.

[89] The essence of the relevant counts of the indictment is that the applicant was doing an act preparatory to the production of speed, namely the purchase of a large quantity of ephedrine for that purpose. According to Ms A's statement, when she first learnt that Mr Donnelly had access to ephedrine, he told her that it could be used in making speed. That, and the quantity involved in each of the orders, provides evidence that Ms A knew the purpose for which the applicant is alleged to have purchased the ephedrine, and accordingly, the purpose of the arrangements she made with Mr B which led to the transactions. It seems to me, therefore, that there is evidence that the applicant's obtaining large quantities of ephedrine to manufacture methylamphetamine was a purpose common to Ms A and the applicant.

[90] Further, there is also evidence that Ms A was to receive a financial reward as a result of each transaction. The circumstances, taken together, seem to me to be sufficient to provide reasonable evidence of community of purpose between Ms A and the applicant.

[91] As the submissions of the applicant pointed out, however, not every narrative statement or account of some event made by a party to a pre-concert is admissible against another party. In *Tripodi*, it was said that such statements or accounts are generally not admissible.[73] However, directions, instructions, arrangements or references accompanying acts, if they otherwise come within the principle, are admissible.[74]

[92] The present state of the evidence makes it difficult to rule finally on the admissibility of the evidence of Mr B on this question. The evidence does not clearly identify the circumstances in which Ms A told Mr B that the person purchasing the ephedrine was a person called Ross. For example, if Ms A had done no more than, when she first learnt that Mr Donnelly wished to sell ephedrine, state that Ross was a person who might be interested in purchasing it, it seems to me that that would not be admissible. On the other hand, if Ms A, when arranging the transactions with Mr B, told Mr B that the purchaser was Ross, that seems to me to

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71 (1961) 104 CLR 1.
72 (1990) 48 A Crim R 49.
73 See *Tripodi v R* (1961) 104 CLR 1, 7.
74 Ibid.

be admissible. That would have occurred as part of the making of arrangements for the carrying out of the common purpose. *Tripodi* indicates that that is a sufficient basis for implying that Ms A had authority to communicate the applicant's name to those associated with the supply of the ephedrine, including Mr B at whose unit the transactions were to occur.[75] In any event, the identity of the purchaser, including the fact that he was known to Ms A, is likely to have been of some importance both to Mr B and to Mr Donnelly. That seems to me to be so, by reason of the nature of the transaction itself, the supply of a large quantity of ephedrine, likely to be used for the production of methylamphetamine.

[93] In my opinion, the admissibility of evidence that Ms A communicated the name Ross to Mr B will depend upon matters not made clear in the material placed before me. Accordingly, it would be inappropriate to rule on this part of the applicant's application.

Objection to specific parts of the evidence of Ms A and Mr B

[94] It is convenient to deal together with the objections to paragraphs 4 to 11 in Ms A's statement (the objection to paragraph 9 is confined to the first four words). With the exception of paragraph 9, these paragraphs are supported only in respect of "establishing a time line that may be relevant to the production charges". In view of the nature of the issue, I do not propose to summarise the evidence in these paragraphs.

[95] In my view, evidence of the following matters dealt with in these paragraphs is relevant:

(a) When Ms A commenced taking drugs;
(b) The circumstances in which Ms A commenced taking drugs (including the fact she was in a relationship with a "speed dealer");
(c) The fact that at this stage she became an addict;
(d) Ms A's inability to support herself, and the fact that she was selling speed, purchased from a person other than her boyfriend;
(e) The fact that she met Mr Cannon.

[96] It seems to me that some of this evidence is relevant in assisting Ms A to establish approximately when it was that she began her association with Mr B, that association being a matter of some importance in her evidence. It was also of some relevance in explaining her role in the supplying of ephedrine to persons who might use it to manufacture speed.

[97] The objection to paragraph 5 is to the words that associate Ms A's meeting Mr B with the events referred to in paragraphs 4 to 8. It will be apparent that in my view, that association is relevant.

[98] Other than the matters identified as relevant, I consider the evidence in paragraphs 4 to 8, 10 and 11 to be inadmissible.

[99] It is accepted by the respondent that evidence in paragraphs 13 to 19, part of paragraph 22, and paragraphs 23 to 33 is not to be led at the trial. Paragraph 34 then opens, "at some stage around this time" Ms A met a person sometimes referred to as

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75 Ibid.

Russ and sometimes as Ross. Objection is taken to the opening words just quoted. It seems to me that those words are inadmissible, as they seek to relate the meeting with events which are not to be led.

[100] Objection is taken to paragraphs 36 to 42 of Ms A's statement. In those paragraphs, she recounts falling pregnant, the birth of her daughter, living on the Gold Coast and northern New South Wales shortly after that, returning to the Gold Coast, moving to Melbourne, returning to the Gold Coast, and ultimately to rural Queensland.

[101] The respondent supports the admissibility of some of this evidence on the basis that it forms an introduction to paragraph 43, referring to the applicant learning that Mr Donnelly was able to supply ephedrine.

[102] In my view, the evidence in these paragraphs is irrelevant, save as follows:

(a) The date of the birth of Ms A's daughter;
(b) The locations where Ms A and her daughter lived after the daughter's birth, and the approximate periods for which they lived at these locations, leading up to Ms A's learning that Mr Donnelly was able to supply ephedrine.

[103] In my view, the evidence which I would not rule to be irrelevant is of some assistance in establishing when it was that Ms A learnt that Mr Donnelly was able to supply ephedrine; and as a result, when it was that the transactions involving the applicant, of which Ms A gives evidence, occurred.

[104] The applicant objects to the introductory words of paragraph 43, which relate Ms A's learning that Mr Donnelly could supply ephedrine, to the events mentioned in paragraphs 36 to 42. It follows that those words should not be excluded, though they will only refer to the parts of those paragraphs which I consider to be admissible.

[105] Objection is taken to paragraph 67 to 76 of Ms A's statement. The evidence found in these paragraphs, the admissibility of which is supported by the Crown, is limited to evidence in paragraph 73, dealing with the applicant's involvement in manufacturing methylamphetamine, referred to as "cooking speed".

[106] In my view, the evidence contained in paragraphs 67 to 76 is inadmissible, save for:

(a) Evidence of statements by the applicant to the effect that he was "cooking speed" at times reasonably proximate to the time when Ms A was able to arrange the supply of ephedrine from Mr Donnelly;
(b) Evidence that the applicant identified that he did this on a property in Lismore;

[107] In my view, the evidence which I consider to be admissible is evidence which the jury might accept as establishing the transactions of which Ms A gives evidence were for the purpose of the manufacture of methylamphetamine.

[108] Otherwise, the objections taken to specific passages in Ms A's statements are not contested, and I propose to uphold them.

[109] The applicant objects to paragraphs 6 to 19 of Mr B's statement on the grounds of relevance. On that evidence, the respondent proposes to lead evidence orally of the

length of time for which Mr B knew Ms A, and the length of time for which he knew Mr Donnelly.

[110] In my view, the evidence in paragraphs 6 to 19 is generally irrelevant. However, in my view, the respondent should be permitted to lead evidence of the period of time for which Mr B knew Ms A, and the period of time for which Mr B knew Mr Donnelly. That may require the admission of some limited factual matters raised in these paragraphs. For example, Mr B identifies his meeting Mr Donnelly by reference to the time when he started work at Launton Pty Ltd. Accordingly, I propose to rule these paragraphs inadmissible, save to the extent that Mr B relies on a fact in them to establish when he first came to know Ms A or Mr Donnelly.

[111] The other objections to passages from Mr B's statement are conceded, and I propose to uphold them.

Photoboard identification

[112] A covert police officer using the name Scott Barnes gave evidence that on 9 December 2002 he was contacted by a male person who identified himself as a friend of Ms A. They arranged to meet shortly thereafter. The male person provided a jar containing a pink substance (apparently drugs) in exchange for the sum of $2,200. Mr Barnes used a cassette recorder secretly to record their conversations.

[113] Mr Barnes also gave evidence that on 12 January 2003, in the company of Ms A, he went to a location on Reedy Creek Road at Burleigh, for the purpose of purchasing a quantity of speed. When they stopped the vehicle, the same person that Mr Barnes had met on 9 December 2002 approached the vehicle. He asked Ms A to come with him, and they left for a short time in a vehicle driven by the other person. Ms A then returned to the car, no drug transaction apparently having taken place. The appearance of the male person can be seen rather clearly on a surveillance video recording.

[114] Mr Barnes gave evidence on 27 May 2003 that he performed a photoboard identification, resulting in his selecting a photograph of the applicant as the person who he had seen on 9 December 2002 and 12 January 2003. In his oral evidence he said that an audio recording was made at the time of the photo identification but no video recording.

[115] In the proceedings before me, a document which appears to be a black and white photocopy of the photoboard was provided. It is not clear whether the photoboard used for the identification included only black and white photographs, or whether some or all of them were in colour

[116] In the hearing before me it emerged that the original photoboard has been lost. The applicant expressly chose not to seek a ruling in these proceedings based on the fact that the original is no longer available.

[117] Mr Barnes' statement dated 10 June 2003 and tendered in the committal included a description of the person he met on 9 December 2002. It is as follows:

> "This person is described as being about 40 years old, black hair pulled back in a ponytail, solid build with a go-tee (sic) beard and about 183 cm tall."

[118] It appears that on 9 December 2002, Mr Barnes provided his controller with a description of the man he had met as follows:

> "Russ is described as late 40s, tanned complexion, black hair, long hair pulled back in a ponytail. He has a long goatee beard, wearing blue football shorts and a black singlet and work boots. Medium build and is about 178 to 180cm."

[119] In his oral evidence, Mr Barnes said that the person he met on 12 January 2003 was also wearing a black singlet.

[120] For the applicant it was submitted that Mr Barnes' identification evidence should be excluded. It was submitted that the photoboard was unfair, because only one photograph depicts a man wearing a singlet, and with pulled back hair. In addition, it was submitted that an identification board could be seen at the bottom of the photograph and that this was unfairly prejudicial to the applicant.

[121] In *R v Brookes*[76] the court said that what matters is whether the collection of photographs is fair; that the collection must include photographs of persons sufficiently similar to the suspect; and that there must be nothing which draws attention to the suspect. In *R v Pearce*[77] the court said that the description provided by a witness before a collection of photographs is assembled must provide guidelines for collecting photographs; further, "A collection of photographs is unlikely to be fair if one photograph and one only, fits the description which has been given by the witness, at least if the differences exhibited by the other photographs relate to significant features of the person described".

[122] However, in *R v Lambert,*[78] the court said that it was not a "dogmatic requirement" that most of the photographs in a collection used for a photo identification must be of persons who meet the verbal description given by the witness of the offender. They noted that verbal descriptions might often be poor.

[123] *R v Pearce* was an appeal against conviction on the ground that it was unsafe or unsatisfactory, and, for reasons discussed earlier, such a case does not, in my view, demonstrate that identification evidence may be excluded. However, *R v Brookes* appears to recognise that identification evidence may be excluded if unfair. In *R v Lambert*, the Court considered that discrepancies between the earlier description of the accused which had been provided by the witness, and the photographs used for the identification, were matters for the jury. However the court recognised that there was a discretion to exclude identification evidence.[79] In *Festa v R* reference was made to a discretion to exclude such evidence if obtained illegally, or if its prejudicial effect outweighed its probative value.[80]

[124] All of the photographs in the photoboard are of men with beards. Some appear to show men with full beards, though a number do not. The complexions of the men depicted in the photographs do not appear markedly different from the complexion apparent in the photograph of the applicant, although there is some variation which

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76 [1992] QCA 103.
77 [1992] QCA 168 at p 6.
78 (2000) 111 A Crim R 564 at [10].
79 Ibid at [11]-[12].
80 208 CLR 593 at [24] per Gleeson CJ: see also at [50]-[52] per McHugh J; [161] per Kirby J (dissenting on the admission of the evidence); [216] per Hayne J.

appears to be the result of differences in lighting. It is however difficult to compare the complexions of the men photographed when only a black and white photocopy is available. The colour of hair of the men depicted in the photographs is generally similar to the colour of the hair of the applicant as shown in the photograph; though it is difficult to be confident that each of them has black hair. It is not possible to see a ponytail in any of the photographs. It is possible that a number of men shown in the photographs had ponytails, not visible behind their heads. At least one other had hair long enough to be tied in a ponytail, though it was loose in the photograph. The photograph of at least one other man would suggest that his hair is not long enough for a ponytail.

[125] The applicant is the only person wearing a dark singlet, though some others appear to be wearing dark T-shirts.

[126] Mr Barnes, in cross-examination at the committal, gave evidence that, although the person whom he met had his hair pulled back in a ponytail, it was pulled back "messily", with "bits of it coming out". The photograph of the applicant does not reveal an arrangement of hair which could be described as "messy"; indeed, it would appear to be consistent with a person who has short hair.

[127] While it is relatively uncommon to see a person wearing a black singlet, nevertheless clothing, being something easily changed, seems to me not to be a significant feature of the description or the photograph of the applicant; nor is it significant that other persons shown on the photoboard were not wearing a black singlet. I note that in two of the photographs, it is difficult to identify what the person was wearing. The evidence does not suggest that Mr Barnes' identification was influenced by the singlet.

[128] The identification board is not particularly obvious in the photograph of the applicant, although an examination of the photograph makes it clear that he was standing behind a white object when the photograph was taken. There is no reason, in my view, to think that the identification board unduly prejudiced the identification.

[129] It cannot be said that the photograph of the applicant clearly fits the physical description which Mr Barnes had provided of the person he met on the two occasions mentioned; nor, if it does, that it is the only photograph which does so. In my view, some of the photographs are sufficiently similar to the description which Mr Barnes initially provided. Moreover, the photograph of the applicant does not appear to be particularly distinctive from a number of the other photographs, to warrant describing the photoboard as unfair. It might be criticised for the fact that some of the men had full beards, but that is by no means true of all of the men shown in the photographs; and in any event, the identification occurred some four months after the second occasion referred to in Mr Barnes' evidence.

[130] The applicant's submissions did not directly identify the basis of the Court's power to exclude the identification evidence. There was however no suggestion that the evidence was illegally obtained. The submissions did not seek to demonstrate that the evidence was of little probative value; or its prejudicial effect.

[131] The evidence of Mr Barnes, including his identification evidence, is direct evidence of counts six and seven, each relating to the supply of methylamphetamine. It is not

clear whether it will be relied upon as circumstantial evidence supporting the charges of production.

[132] In my view, the evidence is of significant probative value in relation to counts six and seven. For that reason, it should not be excluded in the exercise of a discretion to exclude evidence because of its prejudicial effect. It is highly likely that the jury will be warned about the dangers of identification evidence. That may be thought to support the proposition that such evidence may be misused by a jury, and hence be prejudicial to an accused. In this case, however, the jury will have a better opportunity than on many occasions to assess the reliability of the identification evidence, because of the video surveillance recording of 12 January 2003. It may also derive some assistance from the audio recording of 9 December 2002, though it was conceded for the prosecution that the quality of the recording was not particularly good.

[133] It has not been clearly demonstrated that there is a discretion to exclude identification evidence simply on the basis that the identification, or the selection of photographs, was "unfair". If there is such a discretion, the material available to me does not satisfy me that there was unfairness warranting the exclusion of the evidence. Nor do I consider that its reception would result in an unfair trial, in the sense referred to in *Beljajev*.

[134] I am not prepared to exclude the identification evidence given by Mr Barnes.

Instructions for producing methylamphetamine

[135] Count 12 charges the applicant with the unlawful possession of a document containing instructions about the way to produce methylamphetamine.

[136] For the applicant it was submitted that there is no evidence to establish that the contents of the document were instructions for the production of methylamphetamine. Reliance was placed on the need for expert evidence of a matter outside the experience of an ordinary person, based on *R v Skirving.*[81] It was also submitted that the document, having been found in a vehicle situated on the applicant's property at the time of a police search, was not shown to be "relevant against" the applicant.

[137] For the respondent, it was submitted that the contents of the document demonstrate that it is a document for drug production. In any event, the respondent indicated that if necessary, a chemist would provide an opinion. To that end a statement of Mr Culshaw, who holds qualifications in chemistry and works as a forensic chemist, was tendered. In it, Mr Culshaw said that the document contained a series of steps describing the extraction of methylamphetamine from Vicks nasal inhalers. However, the process would not be effective if the inhalers had been manufactured for the Australian market, as these do not contain methylamphetamine; whereas it would be effective if the inhalers were manufactured for the United States market.

[138] For the applicant, it was also submitted that Mr Culshaw's evidence did not go so far as to demonstrate that the document contained instructions for the production of methylamphetamine.

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[81] [1985] 1 QB 819, 822.

[139] The offence is created by s 8A of the *Drugs Misuse Act* 1986 (Qld). That section includes the following:

> "A person who … unlawfully has possession of a document containing instructions, about the way to produce a dangerous drug commits a crime."

[140] The document itself consists of a series of sections, with margin notes, usually intended to identify individual steps. The final step, step 11, reads: "Evaporate the solution in the pyrex dish on low heat and the remaining crystals will be methamphetamine". An end note states: "Police are now calling this 'THE NEW COCAINE'"; and includes a recommendation that before use, the product is "cut … with something like glucose or Epsoms salts".

[141] In my view, to prove that a document contains instructions "about a way to produce a dangerous drug", it is not necessary to lead evidence that following the instructions will, or may, result in the production of a dangerous drug. Rather, it seems to me that the contents of the document may be sufficient to demonstrate that the document satisfies the description in s 8A. In other words, it seems to me that a document which contains instructions, from which it is apparent that compliance with them is intended to result in the production of a dangerous drug, will usually be a document "containing instructions, about the way to produce a dangerous drug". In the present case, the document contains instructions which are intended to achieve that purpose.

[142] In any event, it seems to me that Mr Culshaw's evidence, particularly in paragraph 8, demonstrates that the document is one which contains instructions, compliance with which would result in the production of methylamphetamine. It might be said that the instructions are incomplete, because they do not specify that the inhaler must be one not manufactured for the Australian market; but that does not seem to me to alter the nature of the instructions, or the fact that, when used with an appropriate substance, compliance is apt to result in the production of methylamphetamine.

[143] Accordingly, I consider the document to be admissible; and that there is no basis for a stay of count 12.

[144] I should add that little was said about the admissibility of the document, on the basis that it was found in a vehicle situated on the applicant's property. I was not referred in detail to the evidence on this topic. I was, however, told that at about the time the document was found by police, the applicant admitted that the vehicle was his (though its registration identified a company as the owner). In light of that evidence, against the background of other evidence relating to the applicant's involvement in the production of methylamphetamine, it seems to me that this evidence forms part of a chain of evidence from which the jury might conclude that the document was in the applicant's possession, and in that sense is "relevant against" him.

Other matters

[145] Mr Gough, described as "the arresting officer", has provided a number of statements. It was conceded that his statement dated 12 May 2003 is admissible (on the present prosecution case) against the applicant. It was submitted on behalf of

the applicant that other statements of Mr Gough, dated 23 September 2008, 24 September 2008 and 10 February 2009 contain inadmissible material. There was no contest by the prosecution as to these challenges. Accordingly, I propose to rule that the evidence in Mr Gough's statement dated 12 May 2003 is admissible; and that other evidence contained in the other three statements is inadmissible.

[146] The applicant has sought a ruling that evidence of Mr Christopher Murphy relating to the forensic examination of a computer be excluded from the trials of all counts on the indictment. The submissions made in support of that application make reference to an attachment to a document which has not been able to be opened. The prosecutor has conceded that the material challenged should not be admitted. It seems to me that the concession is correct, although the position might change if the attachment were able to be retrieved. Accordingly, I propose to grant this application.

[147] It was conceded that documents and evidence of documents referring to a Ms Lesa Nicholls found during a search on 14 January 2003 should be excluded from evidence in the trials of all counts on the indictment, and I propose so to order.

[148] Paragraphs 9 and 10 of the application refer to evidence relating to a clip seal bag found during a search on 14 January 2003, and to call charge records for a telephone in the name of Mr B. Neither of these matters was the subject of argument, and accordingly I propose not to deal with them.

Conclusion

[149] Subject to further submissions as to the form of the order, I would make rulings to the following effect:

(a) I refuse the application for the ruling that the whole of Ms A's evidence be excluded from the trials of all counts on the indictment.

(b) The evidence of Mr Gough in his statement dated 12 May 2003 is admissible; but other evidence in his statements dated 23 September 2008, 24 September 2008, and 10 February 2009 is not admissible.

(c) Evidence of Ms A identified earlier in these reasons is inadmissible, and be excluded from the trials of all counts on the indictment.

(d) On the material available, it is not appropriate to rule on the admissibility of the evidence of Mr B that Ms A identified a person called Ross or Russ as the purchaser of the drugs.

(e) Other evidence of Mr B identified earlier in these reasons is inadmissible, and be excluded from the trials of all counts on the indictment.

(f) I refuse to exclude the identification evidence of Mr Barnes from the trials of the counts on the indictment.

(g) The evidence of Mr Murphy relating to a forensic examination of the computer found in a search of the applicant's residence on 14 January 2003 is excluded from the trials of all counts on the indictment.

(h) The documents and evidence of the documents referring to Ms Lesa Nicholls found during the search of 14 January 2003 is excluded from all counts on the indictment.

(i) I refuse to order that the document purporting to record instructions for the manufacture of methylamphetamine, found during the search on 14 January 2003, be excluded from the trials of all counts on the indictment.

(j) In respect of counts 1 to 5 on the indictment, I would invite the prosecutor to identify which count is said to relate to the first transaction between Ms A and the applicant, the subject of her evidence; and to identify which count relates to a transaction involving the supply of 4 kilograms of ephedrine; I would then be prepared to order that the other three counts be stayed, until better particulars are provided of the offence referred to in each of them.

(k) Otherwise the application is dismissed.