SUPREME COURT OF QUEENSLAND

CITATION:	*R v Wright* [2013] QCA 178
PARTIES:	**R** **v** **WRIGHT, David Alexander** (appellant)
FILE NO/S:	CA No 72 of 2012 SC No 432 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	12 July 2013
DELIVERED AT:	Brisbane
HEARING DATE:	11 April 2013
JUDGES:	Holmes and Gotterson JJA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – OTHER CASES – where the appellant was convicted of attempting to possess a marketable quantity of unlawfully imported border controlled drugs – where the appellant was sentenced to three and a half years imprisonment with a non-parole period of 21 months – where during a pre-trial hearing the judge made a ruling that the record of interview of the appellant was admissible and the exercise of a search warrant was validly issued – whether the judge erred in making those rulings CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – OTHER CASES – where the appellant referred to photographs of the intercepted parcel at various stages between its interception and consignment on the controlled delivery – where the appellant contended that the continuity evidence was insufficient for the jury to have been satisfied that the intercepted substance was the same substance from which a sample was taken for scientific examination – whether the evidence established a clear and consistent continuity of identity of the substance that was intercepted with the substance that was sampled for analysis

Criminal Code 1899 (Qld), s 590AA
Crimes Act 1914 (Cth), s 3E, s 3H, s 3R

Bunning v Cross (1978) 141 CLR 54; [1978] HCA 22, considered
R v Craig Anthony Wright [2012] QCA 212, cited
Robert Bax and Associates v Cavenham Pty Ltd [2013] 1 Qd R 476; [2012] QCA 177, followed
Wright v The Queen [2013] HCASL 54, cited

COUNSEL: The appellant appeared on his own behalf
D R Kent for the respondent

SOLICITORS: The appellant appeared on his own behalf
Director of Public Prosecutions (Commonwealth) for the respondent

[1] **HOLMES JA:** I agree with the reasons of Gotterson JA and the order he proposes.

[2] **GOTTERSON JA**: On 7 March 2012 the appellant was convicted by a jury of a Commonwealth offence, attempting to possess a marketable quantity of unlawfully imported border controlled drugs. He was sentenced on the following day to three and a half years imprisonment with a non-parole period of 21 months.

[3] The appellant appeals against his conviction. His notice of appeal filed on 5 April 2012 sets out one ground of appeal only. It arises out of a pre-trial hearing of an application made under s 590AA of the *Criminal Code* 1899 (Qld) by the appellant and a co-accused. The hearing had taken place over three days in May 2011. Following that hearing, rulings were made on 24 June 2011 concerning the admissibility of the record of interview of the appellant and the liability to exclusion from the trial of evidence obtained in exercise of a search warrant which the appellant contended had been invalidly issued. The stated ground of appeal is that the learned judge erred in ruling that the record of interview was admissible.

[4] At the hearing of this appeal, the appellant represented himself. He was granted leave to amend his grounds of appeal to include two further grounds. One of them also concerns the pre-trial rulings. It is that the learned judge erred in ruling that evidence obtained in exercise of the search warrant was admissible. The other is that the verdict was unsafe and unsound in that the continuity evidence adduced at trial was insufficient for the jury to have been satisfied to the requisite standard that a substance which had been intercepted was the same substance from which a sample was taken, scientifically analysed and found to contain pure amphetamine and which was the subject of the count.

[5] Also, at the hearing of the appeal, the appellant confirmed that he had withdrawn an application for leave to appeal against sentence which had been filed on 5 April 2012.

Factual circumstances

[6] The prosecution case was that a package containing 987 grams of powder, including 681 grams of pure amphetamine (which is at the higher end of the "marketable" quantity for that unlawful drug), arrived in Australia from the Netherlands. Customs officers in Sydney intercepted it. The package was addressed to a house

property at Sunshine Beach then occupied by Ms Backhouse, a co-offender. It was passed on to the Australian Federal Police ("AFP") who replaced the drugs with an inert substance and inserted a listening device into the wrapped package. They arranged a "controlled delivery". The listening device recorded Backhouse's previous partner, Watson, after receiving the package, referring to a prospective collection of it by the appellant's son, Craig Wright.

[7] Craig Wright subsequently did remove the package from the Backhouse property to his own house with the appellant doing the driving. The appellant then took the package from Craig Wright's house to his own house, and consistently with noise recorded on the device, the package was there opened. Police officers immediately executed a search warrant at the appellant's house. After being cautioned, the appellant made comprehensive admissions. Later, in a record of interview, following repeated cautions, the appellant made further comprehensive admissions.

Craig Wright's conviction and appeal

[8] Following his conviction on three possession-related counts at a separate trial, Craig Wright mounted an appeal to this Court. He challenged the adequacy of the continuity evidence and the rulings made at the same pre-trial hearing in relation to the admissibility of his record of interview and of the search warrant evidence. These challenges were rejected.[1] His convictions were, however, quashed and he was granted a retrial, but for reasons to do with the trial process, not the strength of the evidence against him or its admissibility.

[9] Craig Wright applied for special leave to appeal to the High Court of Australia against the order of this Court that he be retried. He proposed grounds of appeal were that the search warrant was not duly authorised and that the record of interview was inadmissible. His application was refused[2] by Hayne and Crennan JJ on 10 April 2013, the day immediately preceding the hearing of this appeal. In their Honours' opinion, there was no reason to doubt the correctness of the decision of this Court on both issues.[3]

Grounds of appeal

[10] Given this course of events, the appellant prepared his oral argument for the appeal under the impression that his son's proposed grounds of appeal to the High Court could still be viable in this Court. Hence the arguments advanced by him at the hearing of the appeal in support of the record of interview ground and the search warrant ground closely resembled those that had been advanced on behalf of Craig Wright in his appeal and which were rejected by this Court and, more recently, by the High Court. Where the arguments differed, the differences largely related to matters of fact.

Record of interview

[11] The record of interview tendered was a transcription of a tape recording made at the time of execution of the search warrant at about 6 pm on 20 December 2007. Due to a malfunction of the tape recorder, the first thirteen minutes period immediately after the AFP Officers arrived at the premises was not recorded. The transcript

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1 *R v Craig Anthony Wright* [2012] QCA 212.
2 *Wright v The Queen* [2013] HCASL 54.
3 At [4].

begins with Agent Andalis stating that he would "go through the caution and the rights again first".[4]

[12] At the pre-trial hearing, the appellant testified that during the thirteen minute period he was stunned and bewildered;[5] that no caution was given to him then;[6] that he told the officers "what he could" thereby implicating himself[7] and that he was offered an inducement to the effect that he would not be charged if he told them what he knew, who was involved and why he did it.[8]

[13] Agent Andalis testified at the hearing that a caution was given at that time both in evidence-in-chief[9] and in cross-examination.[10] He denied in cross-examination discussing with the appellant at that time any benefit that might be available for cooperation.[11] It was not put to Agent Andalis that a benefit of the kind of which the appellant spoke was offered.

[14] In this state of the evidence, her Honour was required to make findings of credit which she did. These findings must stand unless it can be shown that she had "failed to use or palpably misused [her] advantage" or had acted on evidence which was "inconsistent with facts incontrovertibly established by the evidence" or which was "glaringly improbable".[12] It is no misstatement to say that at the hearing of the appeal, the appellant did not attempt to impugn her Honour's credit findings as defective on any such account.

[15] The presently relevant part of the reasons of the learned judge given for the rulings are paragraphs [38] to [53]. Her Honour said:

> "[38] David Wright claims that when the agents entered his house he was told 'I'm from the Federal Police' and with that he was spun around, taken in a hold with his left hand held down and his right arm up behind his back. He said he felt some pain 'probably more so to the fact that I was actually stunned by the way I was grabbed more than anything else'.
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> [39] Agent Grant accepted he put the accused in a form of hold known as a 'soft hands escort hold' which, he accepted was holding him firmly. The accused says he was pushed into a wall and onto the ground. Grant denies that and says the accused was placed on the floor so he could be searched.
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> [40] The accused claims Grant said 'We know what you've been up to. Tell us where the drugs are. We'll rip the house apart and we'll pull the walls out if we have to' and that he saw that as an inference he should tell what he knew 'I told them what I could'.
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> [41] Agent Grant denied the incident and it seems unlikely that he would have said 'Tell us where the drugs are' because he

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4 AB 603.
5 AB 177 T3-28 LL40-42.
6 AB 185 T3-36 LL40-45.
7 AB 178 T3-29 LL49-50.
8 AB 180 T3-31 LL50-55.
9 AB 26 T1-11 LL45-50; AB 28 T1-13 LL6-11.
10 AB 50 T1-35 LL20-30.
11 AB 56 T1-41 LL49-54.
12 *Robert Bax and Associates v Cavenham Pty Ltd* [2012] QCA 177 at [84]-[85].

knew the drugs had been substituted. It is also unlikely that he threatened to 'rip the house apart' or to 'pull the walls out'. The accused had been observed leaving his son's house at 5:41pm and going to his own home. At 5:50pm the police executed the warrant. There was no time for the concealment of the bag in walls or in a way that would require 'ripping the house apart'.

[42] The accused complains that Grant spoke in a loud, abrupt and domineering way. I observed when Grant gave evidence that he had a firm voice and a somewhat abrupt speech pattern but nothing out of the ordinary and probably not noteworthy in absence of the complaint by the accused.

[43] The evidence from Agent Andalis is that he unsuccessfully attempted to activate a recorder shortly after entry. He realised the problem after some thirteen minutes.

[44] Andalis says that during that thirteen minutes he cautioned the accused. The accused denies this.

[45] When Andalis realised the recording had failed, he activated his recorder correctly. The recording shows Andalis indicating twice that the caution would be given again. The accused did not demur to the proposition that the caution would be given <u>again</u>.

[46] The principal contention by the accused is that during the unrecorded portion of the interview, the police told him 'Tell us what you know and who's involved and why you did it, and you won't be charged' (T-31 L54).

[47] If this was so, it would be an inducement as envisaged by section 10 of the *Criminal Law Amendment Act 1984*.

[48] I do not accept the accused on this issue. It is clear that the accused and his son had only come to the police attention for the first time earlier that afternoon. The agents could not possibly have known the precise role of the accused. As I pointed out during the evidence, at that point the agents would not have known whether the accused was the 'Mr Big' or the person who had arranged the transaction. Indeed, the fact that the package ended up at the accused's home may have lent to that view. It is not believable that the agents would tell him at that early stage he would not be charged.

[49] The contents of the Record of Interview also contradict the claim by the accused.

[50] At question 6 of the recorded interview, the accused was asked 'What's your understanding of the caution?'. He volunteered 'That anything I say could incriminate me.'

[51] At question 22 he states his reason for cooperating as ' … I'm the silly bugger that just has been caught in the middle

> here and trying to keep people out of trouble, and I'm not prepared to wear that, so'.
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> [52] At answer 80 he said 'I should have told them all to fuck off. What's going to happen to me?' and later 'I'm not going to do time am I?'
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> [53] These volunteered responses run completely contrary to the proposition that he had been told he would not be charged."[13]

[16] Her Honour made these four principal findings, all of them reasonably open and not vulnerable to challenge on appeal. They were:

(a) The appellant exaggerated the force actually and legitimately used against him, as the police moved to ensure their control of a person, just apprehended red-handed, dealing with a substantial quantity of illegally imported drugs.

(b) The appellant made allegations of police threats in relation to their intended search of his premises which were both over-the-top and improbable, having regard to the knowledge the police had of how the package had come to be at the house and how short a time it had been there.

(c) There was no reason to doubt the police explanation about the absence of earlier recording, an explanation corroborated by the appellant's implicit acceptance, during subsequent recorded exchanges, that he had been cautioned at an earlier time.

(d) It was improbable that the police would have promised exoneration in return for cooperation, in view of the limited police appreciation, by that stage, of the particular roles of the appellant and his son.

Together, these findings thwarted every reason advanced on behalf of the appellant for exclusion of the record of interview from evidence at trial.

[17] It was a compelling case for her Honour to conclude, as her reasons suggest she did, that the extravagance of the appellant's claims in challenging the confession, was explained by his frustration at being caught-out in circumstances where – as may, for present purposes, be accepted – his sole motivation had been to help out his hapless son. That motivation cannot, however, negate his own criminal responsibility.

[18] Insofar as this ground of appeal challenges the pre-trial ruling not to exclude the record of interview, it cannot succeed.

[19] At the hearing of the appeal, the appellant raised two further matters. One was a claim that a note made by Agent Andalis referred to a communication with the appellant's lawyer about the possibility of a letter of comfort for the appellant. Obviously, any communication of that kind must have occurred after the search warrants had been executed. It has no relevance to the voluntariness of the admissions made in the record of interview; nor could it corroborate the offering of a benefit of the kind that the appellant claimed Agent Andalis had offered to him before the tape recording began.

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13 AB 210-212.

[20] The other matter was an alleged non-compliance with s 23B of the *Crimes Act* which requires that a copy of the transcript of an interview be made available to the interviewee within seven days of its preparation. The appellant says that the transcript should have been given to him on 27 December 2007 but was not given to him until 17 January 2008. Even if one were to accept that there had not been a timely provision of the transcript as the appellant alleges, that oversight would have had no adverse consequence for its admissibility at his trial.

[21] This ground of appeal cannot succeed.

Search warrants

[22] The second ground of appeal relates to the ruling in favour of admissibility of evidence obtained in exercise of the search warrant obtained by Agent Andalis for the appellant's house property on 20 December 2007.

[23] At the hearing of the appeal, the appellant was reminded on several occasions that in order to succeed on this ground, it was necessary for him to show error on the part of the learned pre-trial application judge in ruling that evidence obtained in exercise of the search warrant at his house property was admissible.[14] He referred to an evidential deficiency in the prosecution case with respect to compliance by the issuing magistrate with ss 3R(4) and (8) of the *Crimes Act*. The same deficiency had been raised in Craig Wright's appeal. It is sufficiently explained in the following paragraph from the reasons for judgment in his appeal:

> "[53] There was no evidence at the pre-trial hearing of a form of warrant which had been completed and signed by the magistrate in conformity with s 3R(4) for either address. No such form of warrant was attached to the material as required by s 3R(8). Also, there was no direct evidence at that hearing that otherwise proved that the magistrate had completed and signed any such forms of warrant. In those circumstances, s 3R(9) would require the Court to assume that the exercise of the search power at each address was not duly authorised."

[24] The learned judge had adopted an interpretation of s 3R(4) to the effect that compliance with it by the issuing magistrate was discretionary.[15] On appeal, this Court disagreed, taking the view that compliance is mandatory.[16] However, as appears from the following paragraph in the reasons of this Court, the interpretative error did not avail Craig Wright in his appeal:

> "[54] It need be said at once that counsel for the appellant all but conceded that absence of due authorisation for each search on that account, would not have had the consequence that evidence seized during the search would have been inadmissible at the trial. Counsel accepted that the cogency of the evidence seized – including the controlled delivery package in the case of Count 1, the quantity of amphetamine in the case of Count 2 and the lysergide tablets in the case of Count 3, and the facts that absence of due authorisation was

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14 Tr1-28 LL35-37; 1-29 LL10-15, 55-57.

15 AB 210; Reasons [35].

16 Reasons [55].

> attributable solely to the conduct of the magistrate and was not caused by any improper conduct on the part of the constable who applied for the warrants, would weigh the balancing exercise required by *Bunning v Cross*[17] strongly in favour of reception of the evidence seized during the searches. It follows that, as a vehicle for rejection of that evidence from the trial, this ground, too, could not succeed."

[25] The virtual concession made by Craig Wright's counsel, was, in my view, correctly made. He was the same counsel who had appeared at Craig Wright's trial and at the appellant's trial.

[26] At the hearing of the appeal. the appellant submitted that there were "glaring mistakes" which tipped the *Bunning v Cross* discretion in his favour.[18] When asked to identify them in the record of the pre-trial hearing, the appellant referred to two matters.[19] One of them was the evidential deficiency with respect to procedure on the part of the issuing magistrate to which I have referred.

[27] The other matter arises from evidence given at the pre-trial hearing. Agent Andalis gave evidence that he made an after-hours telephone application to a Southport magistrate at 5.15 pm on 20 December 2007. During this call, he applied for three search warrants: two for premises, one of which was the appellant's house property; and the other for a vehicle of which the appellant was the registered operator.[20] The search warrant in relation to the appellant's vehicle was granted at that time, whereas the search warrant in relation to his house property was granted at 5.50 pm that afternoon during a further telephone application to the on-call magistrate. Both the vehicle and the house property were searched within a few minutes of receiving authorisation from the magistrate.

[28] Agent Andalis gave evidence that he attended the Southport Magistrates' Court on the following day with the forms of warrant for the two premises and the vehicle and that they were returned apparently endorsed by the magistrate who had granted the applications on the previous day.[21]

[29] According to his evidence, after he entered the appellant's house property, Agent Andalis showed the appellant a search warrant which had been issued under s 3E of the *Crimes Act*. He said that it was not a warrant for those premises because that warrant had just been issued over the phone.[22] The s 3E warrant related to the Backhouse property but otherwise contained the same conditions as would be applicable to the appellant's premises. He said that he explained the conditions on the s 3E warrant to the appellant, following which a caution was given.[23]

[30] The appellant sought to argue from these facts that there had been a deficiency in the execution of the s 3R warrant. His argument was premised on the proposition that the provisions of s 3H of the *Crimes Act*[24] are applicable to a s 3R warrant in that the first-mentioned section is to be read as applying to the form of warrant that

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17 (1978) 141 CLR 54.
18 Tr1-30 LL35-38.
19 Tr1-31 LL5-20.
20 AB 21-24.
21 AB 24 Tr1-9 LL21-43.
22 AB 26 Tr1-11 LL31-32.
23 AB26 Tr1-11 LL28-35.
24 Relevantly, s 3H(1) which requires the warrant to be shown to the occupier of the premises.

an applicant must complete in accordance with s 3R(6). This argument was not advanced before the learned pre-trial application judge. Thus, no question of her having erred by accepting or rejecting the argument, or by not having regard to the alleged deficiency in a *Bunning v Cross* context, can arise on this appeal. For this reason alone, it is neither appropriate nor necessary to consider the argument further.

Continuity

[31] This issue first arose as a ground for exclusion of evidence on the s 590AA application. However, at the beginning of the pre-trial hearing, the Court was advised that it would not be pursued at that point. The appellant's then counsel did not demur to an observation by her Honour that the issue was "a jury question".[25]

[32] The issue was re-agitated by the appellant at the hearing of the appeal. He made submissions on it, referring to photographs of the intercepted parcel at various stages between its interception and consignment on the controlled delivery. As noted, he contended that the continuity evidence was insufficient for the jury to have been satisfied that the intercepted substance was the same substance from which a sample was taken for scientific examination.

[33] During the trial, Mr Joshua Button, a Customs officer in Sydney, gave evidence. It was he who first opened the parcel, a cardboard post pack, for examination. He testified that "inside the parcel was wrapped in plastic or in a plastic bag an off-white waxy kind of paste substance". It was in "multiple wraps".[26] He explained that he removed the contents of the parcel and made a small incision in the plastic bag. Once he had finished his examination, Mr Button replaced the plastic bag and contents in the post pack. He then placed the parcel in another plastic bag on which he put a unique Customs seal number.[27] Then he gave it to Customs officer Coleman, an event recorded on a trial exhibit called a Transfer Document.[28]

[34] At the hearing of the appeal, counsel for the respondent provided a summary of the evidence relating to the chain of custody of the parcel and its contents. That evidence established the following:

1. The parcel was checked against a register by Officer Coleman[29] and placed into the narcotics safe.[30]

2. It was next handled by Customs officer Kriaris[31] who transferred the parcel to Agent Millar of the AFP.[32]

3. The parcel at this stage still had a Customs seal on it. Agent Millar resealed it with an AFP seal and put it in a further plastic wrapper before delivering it to Agent O'Brien of the AFP.[33]

4. Agent O'Brien brought the parcel to Queensland, first taking it to the Gold Coast where it was kept in a safe, and then transporting it to Brisbane.

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25 AB 17 Tr1-2 LL21-57.
26 AB 247 Tr1-38 LL48-53; AB 266 Tr1-57 LL52-56.
27 AB 252 Tr1-43 LL57- AB 253 Tr1-44 L7.
28 AB 250 Tr1-41 L30; Trial Exhibit 2.
29 AB 271 Tr1-62 L30.
30 *Ibid* L55.
31 AB 277 Tr 1-68 LL23-27.
32 *Ibid* LL48-52.
33 AB 279 Tr1-70 LL46-53.

5. In Brisbane, Agent O'Brien handed it over to Ms Catherine Farrugia at the AFP Brisbane office.[34]

[35] Ms Farrugia also gave evidence at the trial. At the relevant time, she was a Senior Scientific Officer at the AFP. She undertook a deconstruction of the parcel and its wrappings. She took samples from the wrapped powdered substance for submission to the Australian Government Analytical Laboratory for chemical analysis.[35]

[36] Ms Farrugia testified to the weight and dimensions of the parcel, referring to notes made by her at the time, to which no objection was taken at trial.[36] She described it as consisting of a white cardboard packet with a white plastic satchel similar to an Australia Post pre-paid satchel inside. Inside the satchel were five further layers of clear plastic containing compressed powder.[37] Agent O'Brien remained present for the duration of the examination.

[37] Photographs were taken of the various stages of deconstruction of the parcel. They were tendered as exhibits during the trial. The appellant referred to several of these and to several of the photographic exhibits taken during Mr Button's handling of the parcel. The appellant suggested that there were inconsistencies between, on the one hand, the evidence of Mr Button and Ms Farrugia, and on the other, what was depicted on the photographs, with respect to the packaging. I am not persuaded that any of the matters to which the appellant referred constitutes a significant inconsistency. Moreover, those matters relate to continuity of intermediate packaging material rather than continuity of the powdered substance or its immediate packaging, from interception to sampling.

[38] The evidence listed in the summary and that of Ms Farrugia established a clear and consistent continuity of identity of the substance that was intercepted with the substance that was sampled for analysis. It was not insufficient for the purpose of satisfying the jury to the requisite standard on this issue. This ground of appeal is not made out.

[39] The appellant embellished his submissions on this topic with an allegation of conspiracy by the AFP to set-up himself and his son.[38] It ought be said at once that no evidence in support of such an allegation was adduced at the trial. Nor was it then put to AFP witnesses. It should be seen for what it is, as baseless.

Disposition

[40] As none of the grounds of appeal advanced by the appellant have succeeded, this appeal must fail.

Order

[41] I would propose the following order:

1. Appeal dismissed.

[42] **DAUBNEY J:** I concur.

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34 AB 432 – 433.
35 AB 374-378.
36 AB 377 Tr2-69 LL43-54.
37 AB 378 Tr2-70 LL19-22.
38 Tr1-21 L52 - 1-22 L58.