

SUPREME COURT OF QUEENSLAND

CITATION: *R v Fuentes* [2012] QSC 288

PARTIES: **THE QUEEN**
v
HAROLD FUENTES
(applicant)

FILE NO/S: SUP 1373/10

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 27 September 2012

DELIVERED AT: Brisbane

HEARING DATE: 26 and 27 July 2012

JUDGE: Dalton J

ORDER: **Application dismissed**

CATCHWORDS: CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – EVIDENCE UNFAIR TO ADMIT OR IMPROPERLY OBTAINED – application pursuant to s 590AA of the *Criminal Code* to exclude evidence of searches – where the defendant charged with various drug offences – whether there is any requisite state of mind required before a licence check can be performed pursuant to s 60 PPRA – whether police officers properly exercised powers under s 160 PPRA to conduct a search of defendant’s home without warrant – whether reasonable suspicion that an immediate search was necessary – whether discretion should be exercised to admit the evidence – whether discretion should be exercised to exclude telephone message because of an absence of outgoing messages

Evidence Act 1977 (Qld)
Police Powers and Responsibilities Act 2000 (Qld)
Transport Operations (Road Use Management) Act 1995 (Qld)

Bain v Police [2011] SASC 228
Bunning v Cross (1978) 141 CLR 54
George v Rockett (1990) 170 CLR 104
R v Edwards (2009) 255 ALR 399
R v Rondo [2001] NSWCCA 540

COUNSEL: Ms D Hawkins for the applicant
Mr P McCarthy for the respondent

SOLICITORS: City Attorneys for the applicant
Director of Public Prosecutions (Qld) for the respondent

- [1] Mr Fuentes is remanded in custody on three counts. One is that between 27 November 2009 and 7 February 2010 he trafficked in methylamphetamine and cocaine. The second is that on 6 February 2010 he had possession of over two grams of cocaine. The third is that on that same day he had in his possession paraphernalia for use in connection with trafficking in dangerous drugs.
- [2] An application is made on behalf of Mr Fuentes pursuant to s 590AA of the *Criminal Code* to exclude:
- (a) evidence found as a result of a search of Mr Fuentes' car on 6 February 2010;
 - (b) evidence found as a result of the search of Mr Fuentes' home on 6 February 2010;
 - (c) text messages on Mr Fuentes' telephone;
 - (d) any admissions made by Mr Fuentes as a result of the search of his home.

Search of Car

- [3] The evidence is that on 6 February 2010 at about 9.00 pm, Sergeant Faria and Constable Lewis of the South Brisbane District Tactical Crime Squad were in uniform driving a marked police car in Ipswich Road, Woolloongabba. They were patrolling generally. The squad to which they were attached was a uniformed squad and one of its targets was offences involving drugs. The police officers saw a new, expensive-looking, convertible black BMW with two men in their 20's as the driver (Mr Fuentes) and passenger. The police officers decided to pull the car over to check the licence of the driver and did so under lights and siren in Balaclava Street, Woolloongabba. Sergeant Faria was somewhat reticent about what motivated them to choose this particular car to pull over. Constable Lewis was more forthcoming. He said:

“It is our usual procedure. It's what our squad does. We conduct a large number of vehicle intercepts. We target drugs and that sort of stuff. We also have a legislative power to intercept vehicles and check licences and that sort of stuff as well.

Why did you pull the vehicle over, that particular vehicle?-- Because we looked at it and said, ‘Yep. It looks good.’ It looked like a usual vehicle. The guys looked at us and looked quite startled when they initially saw us which is, you know, something that we look for. Whenever we drive past someone if we see a reaction that causes us suspicion then we will go and intercept that vehicle.” – t1-77.

“It is the case, isn't it, it was a flashy car, I think you said and they were young guys in it; isn't that right?-- It was part of the observations, yes.” – t1-78.

- [4] The car pulled over next to the curb and the police car parked behind it. Mr Fuentes was driving. The other occupant was in the front passenger seat. Sergeant Faria went to the driver's side door and Constable Lewis went to the passenger's side door. Sergeant Faria asked the driver for his licence and Mr Fuentes produced a learner's permit. Sergeant Faria's evidence was that in the course of this interaction he saw a backpack on the passenger's front floor. He said this "drew my attention straight away". He described this as an instinctive reaction. He said that he thought both the passenger and Fuentes were nervous and explained the physical manifestations he observed to come to this conclusion.
- [5] Constable Lewis said that when he initially went to the car he thought that the passenger was trying to conceal the backpack against the centre console by pushing it with his leg. Constable Lewis said he thought both Mr Fuentes and the passenger were nervous and explained the physical observations he made to draw this conclusion. When Constable Lewis observed what he thought was the passenger trying to conceal the backpack he asked him straight away what was in it and received no reply. Constable Lewis swore that at the time both Mr Fuentes and the passenger were still in the car he said to Sergeant Faria that he thought there was something "dodge" about it and asked if Sergeant Faria wanted to do a search. Constable Lewis said that Sergeant Faria agreed when Constable Lewis expressed the opinion that something was "dodge". Further, Constable Lewis recalled that he said to Sergeant Faria that the passenger was trying to hide the backpack. I accept this evidence from Constable Lewis.
- [6] Sergeant Faria did not have any recollection of these matters but he did recall that he very soon lost interest in his enquiries as to the licence and asked Mr Fuentes to get out of the car. Sergeant Faria refreshed his memory from his notebook and his notebook was tendered in evidence before me. I accept that the questions, answers and observations recorded in it at pp 97-99 are substantially accurate as to the sequence of events and the questions and answers which were made immediately after the initial enquiry as to Mr Fuentes' licence was made:
- "As I spoke to Fuentes observed a backpack situated in footwell of front passenger's seat next to gears.
- Fuentes accompanied me to rear of vehicle where I had following conversation.
- Q: Is there anything in that car that shouldn't be there?
A. I don't think so.
Fuentes appeared extremely nervous.
- Q. Whose backpack is that in front of the car?
Fuentes got very ... and began to breathe shallow and fast.
A. It's not mine.
- Q. There's drugs in it isn't there?
A. No answer and question repeated.
- A. After a short period he replied, yeah. But it's not mine."
- [7] Sergeant Faria was cross-examined extensively as to why he did not continue making his licence check when a learner's permit was produced by Mr Fuentes.

That is, he was asked why he then did not enquire whether or not the passenger was fully licensed as is required by law. He made the following answers to those types of questions:

“I think I’d gone past that stage ... I wasn’t really concerned about Mr Fuentes being unaccompanied on a learner’s permit when he’d made admissions as to what was in the car.” – t1-22.

“That may have been a conversation that would have taken place at some point if everything had gone the way it normally would have, but due to his demeanour and my attention to that bag I asked him in regards to that bag and that’s when he told me that it wasn’t his.” – t1-23.

“At that point, no. That was a consideration, for sure, but I was starting to head down another path, which is in regards to why Mr Fuentes was so nervous, and the backpack in the car.” – t1-35.

- [8] Further as to his thinking during this initial part of the interaction with Mr Fuentes, Sergeant Faria was cross-examined as to why he did not activate his tape recorder at an earlier stage:

“Well why didn’t you start the tape rolling then if you’d started to---?--- I didn’t have any affirmative evidence that anything untoward had taken place or was taking place. It was the initial investigation. I didn’t have any reason to at that point.

There was only a possibility; is that right?-- For which, for there being something with that bag?

Yeah?-- It was a gut feeling, so there was a possibility, but it wasn’t confirmed, no, until later.

Maybe not even a possibility, just a gut feeling?-- Well, no, there was a possibility otherwise I wouldn’t have asked him to alight from the vehicle.” – t1-50.

- [9] Sergeant Faria’s recollection was that after the questioning recorded at [6] above, he spoke to Constable Lewis to relay what Mr Fuentes had told him about the contents of the backpack. At that point Sergeant Faria said that he reached into the car, picked up the backpack and looked inside. There were over 2,000 grey tablets in clip seal bags in the backpack.
- [10] Constable Lewis’ evidence was that at about the same time that Sergeant Faria got Mr Fuentes out of the car, Constable Lewis got the passenger out of the car. He conceded it may have been slightly before, or slightly after, but essentially it was coincident in time. Both Mr Fuentes and the passenger were asked to step out of the car immediately after the conversation between Constable Lewis and Sergeant Faria to the effect that there was something “dodge” going on, and Constable Lewis enquired whether Sergeant Faria wished to undertake a search. Constable Lewis said that immediately after this conversation he got the passenger out of the car and announced he was conducting a search of the car.

- [11] Immediately Constable Lewis got the passenger out of the car he asked him, “Whose bag is this?” Cross-examination as to this elicited the following:

“... it was at the time that he got out that you said straight away, did you, ‘Whose bag is it?’ – ‘Whose bag is this?’, at paragraph 20. Because you said – you asked him to get out and stand on the kerb; right?-- Yes.

You say he appeared nervous, and then you said – you say you asked him, ‘Whose bag is this?; right?-- Yes.

Because that’s what your attention was drawn to, wasn’t it, before he even got out of the car?-- Yes.

Right, so you wanted to know straight away what was going in – going on with that bag; isn’t that right?-- Yes.

So, you would have asked him immediately, right? You weren’t mucking around with him, were you?-- Sorry?

You would have asked him immediately he got out. After you first asked him about the bag and he said no, you would have said ‘Whose bag is this’ straight away, wouldn’t you, as he was getting out, or just being – standing near the front tyre?-- I believe it was after he’d stepped out.

Yeah, but straight away or ---?-- Soon after he stepped out probably, yeah.” t2-6

- [12] Constable Lewis said that when he repeated the question as to what was in the bag the passenger said that there were ecstasy tablets in the bag and said that there were about 2,000. In fact that was partly right – there were 2,039 tablets in the bag but on analysis they have been proved to contain no illegal drug. Constable Lewis’ evidence was that Sergeant Faria then reached into the car, opened the bag and found a large quantity of tablets in two clip seal bags. I accept Constable Lewis’ evidence set out in the above paragraphs.
- [13] Events progressed from there with both Mr Fuentes and the passenger arrested and handcuffed. A search of the car was undertaken after a second crew attended at the scene. A large amount of money was found in the centre console and another large sum in the boot. Two telephones were found. I note that the defendant Mr Fuentes faces no charge specifically in respect of possessing money. Before me was an unsworn letter from his girlfriend (of the time) claiming she lent him 6000 Euros which was said to be relevant to the ownership of, and reason for his possessing, this money. It is difficult to discern any compelling connection in this regard from the letter. I note the explanation given by Mr Fuentes, as to his possession of the money, to police (as recorded in the post-search approval application) had nothing to do with this loan.
- [14] I should note that the Crown conceded it would not rely on the admission made by Mr Fuentes as to his knowledge of what was in the backpack – t2-44-45. That question ought not to have been asked until after a caution had been given to Mr Fuentes. Sergeant Faria’s evidence in relation to this was:

“Once it was established that he had incriminated himself there was no further questioning had and at that point when I was satisfied that there was – had an offence taken place, he was officially cautioned by Constable Lewis and an electronic recording device was implemented.” t-1-52.

This is obviously entirely unsatisfactory. It seems that Sergeant Faria did not understand that the point of a warning against self-incrimination was that it occurred before someone incriminated themselves – see t1-62-63.

[15] Section 60 of the *Police Powers and Responsibilities Act 2000* (Qld) (PPRA) permits a police officer to require the person in control of a vehicle to stop that vehicle, *inter alia*, “to check whether the vehicle or person is complying with a transport Act” – s 60(3)(b). A transport Act is defined in the dictionary schedule to the PPRA and the dictionary schedule to the *Transport Operations (Road Use Management) Act 1995* (Qld) as including that latter Act, and it is a requirement of that latter Act that a driver be licensed – s 78. There is no requirement that a police officer have any state of mind – such as a reasonable suspicion etc – before exercising a power under s 60(1) and (3)(b) of the PPRA, compare, for example, s 58(1)(b) of the PPRA. Thus, when the police officers pulled Mr Fuentes’ car over and checked that he was a licensed driver, they had power to do so which did not depend on their having any reasonable suspicion, or any other state of mind in relation to Mr Fuentes and his passenger. This is a major point of distinction between this case and the case of *R v Rondo*¹ which was relied upon heavily by the applicant Fuentes. In this case there was a proper basis to stop Mr Fuentes’ car – cf [4] and [48] of *Rondo*, where there was not. It does not matter to this point that the police officers chose Mr Fuentes’ car to stop because they saw two young men in an expensive car. They were not required to have a reasonable suspicion to stop the car under s 60 of the PPRA.

[16] Section 31 of the PPRA provides:

“Searching vehicles without warrant

31(1) A police officer who reasonably suspects any of the prescribed circumstances for searching a vehicle without a warrant exist may, without warrant, do any of the following—

- (a) stop a vehicle;
- (b) detain a vehicle and the occupants of the vehicle;
- (c) search a vehicle and anything in it for anything relevant to the circumstances for which the vehicle and its occupants are detained.”

[17] Section 32 of the PPRA provides that the prescribed circumstances for searching a vehicle without a warrant include that there is something in the vehicle that may be a weapon (subparagraph (a)) or may be an unlawful dangerous drug (subparagraph (c)) or may be stolen property (subparagraph (d)).

[18] Similarly s 29 of the PPRA provides that:

“Searching persons without warrant

¹ [2001] NSWCCA 540.

29(1) A police officer who reasonably suspects any of the prescribed circumstances for searching a person without a warrant exist may, without a warrant, do any of the following—

- (a) stop and detain a person;
- (b) search the person and anything in the person's possession for anything relevant to the circumstances for which the person is detained.”

[19] Section 30 of the PPRA provides that the prescribed circumstances for searching persons without warrant include that the person has something that may be a weapon (subparagraph 1) or may be an unlawful dangerous drug (subparagraph 2) or may be stolen property (subparagraph 3).

[20] After the police officers in this case stopped Mr Fuentes' car and after Sergeant Faria began enquiries as to Mr Fuentes' licence, but before enquiries in relation to the learner licence Mr Fuentes produced were completed, the officers' minds began to work in a different direction. After checking with Sergeant Faria that he wished to search the car, Constable Lewis announced that he was searching the car. Both he and Sergeant Faria asked the occupants of the car to alight from the car and both were questioned. The Crown relies upon sections 31 and 32 of the PPRA as justifying these actions. It was not said that the search of the backpack was not a search of the vehicle, but if it was not, then the analogous sections 29 and 30 of the PPRA are the only sections available under that Act to justify the conduct. Whether action is taken under s 29 or s 31 of the PPRA, there can be no detention and search unless a police officer reasonably suspects one of the prescribed circumstances.

[21] The term “reasonably suspects” is defined in Schedule 6 to the PPRA as meaning, “suspects on grounds that are reasonable in the circumstances”. There is also well-established common law authority in relation to both the concept of suspicion and the concept of reasonable suspicion. The meaning of suspicion in this context is discussed by the High Court in *George v Rockett*.² A suspicion and a belief are different states of mind. A suspicion is a state of conjecture or surmise. It is more than idle wondering. It is positive feeling of apprehension or mistrust, but it is a slight opinion without sufficient evidence. Facts which reasonably ground a suspicion may be quite insufficient to reasonably ground a belief. Nonetheless, to have a reasonable suspicion some factual basis for the suspicion must exist. There must be sufficient factual grounds reasonably to induce the suspicion.³ The facts must be sufficient to induce the suspicion in the mind of a reasonable person.⁴ The suspicion must be reasonable, as opposed to arbitrary,⁵ irrational or prejudiced. That a young man is driving a smart car with some panel damage is not sufficient to give rise to a reasonable suspicion.⁶

[22] In this case according to Constable Lewis, it was largely the fact that the driver and passenger of the expensive BMW were young, combined with the nature of the car they were driving which caused the police to stop the car for a licence check.

² (1990) 170 CLR 104, 115-116.

³ Above p 113.

⁴ Above p 112.

⁵ Above p 112.

⁶ See the facts of *Rondo* (above).

However, as explained above, stopping the car in that fashion was lawful. There was no requisite state of mind required before a licence check could be performed pursuant to s 60 of the PPRA. Having stopped the car, both Sergeant Faria and Constable Lewis noticed that the occupants seemed nervous. Both noticed that there was a backpack in the front of the car and Constable Lewis noticed that the passenger was attempting to conceal that backpack. They formed the view that there was something suspicious about the backpack. Constable Lewis asked the passenger what was in the backpack as soon as he noticed attempts to conceal it. That question was not answered. That Sergeant Faria also focussed on the backpack is evident from the questions he asked when he took Fuentes out of the car: his second question concerned the backpack and his third question was an allegation that there were drugs in the backpack. While Sergeant Faria was cross-examined at length and while challenges to his credit were made, I accept the sequence of events I have outlined above, including the sequence of four questions recorded in Sergeant Faria's notebook.

- [23] Like Sergeant Faria, Constable Lewis questioned the passenger immediately about the backpack and the backpack was opened very shortly after the two men were detained.
- [24] In my opinion the search conducted of the car and backpack was lawful. At the time the car was pulled over there were insufficient grounds for the police to have a reasonable suspicion in order for them to exercise their powers under s 31 (or s 29) of the PPRA. However, by the time the occupants of the car were asked to alight from it there was, in my view, sufficient to justify the use of the detention and search powers. Both officers by then reasonably suspected that there were drugs in the backpack. Constable Lewis allowed for the possibility that there was a weapon in it. That suspicion had been raised because of the apparent nervousness of the occupants of the car and the actions of the passenger in attempting to hide the backpack and refusing to answer Constable Lewis' question about what was in it. Those matters were sufficient basis for both officers to reasonably suspect that there were drugs (or a weapon) in the car, or backpack. Their immediate and focussed enquiries as to exactly that issue when they took Mr Fuentes and his passenger out of the car demonstrate that they genuinely suspected this. As I say, the grounds for the suspicion were reasonable in the circumstances and within the case law as to reasonable suspicion.
- [25] In this regard the matter compares to the reliance on the driver's placing an item in the glove box immediately after the car was stopped in *Rondo* – see [58]. The factual circumstances here are similar to those in *Bain v Police*.⁷ There, exercising undoubted authority under the *Road Traffic Act 1961* (South Australia), officers pulled over a car which they noted had an expired registration. During the course of making enquiries and exercising powers under the *Road Traffic Act*, one of the police officers asked the driver about drug use, and in addition, obtained information from the computer system in the police car which revealed that the driver's licence had expired and he was a drug user. The driver admitted using drugs, including quite recently. Altogether these facts were held to be sufficient to give rise to a reasonable suspicion allowing a search of the car, which then took place.

⁷ [2011] SASC 228.

- [26] Even if I had reached a conclusion that the search of Mr Fuentes' car was unlawful, I would not have exercised the *Bunning v Cross*⁸ discretion in favour of Mr Fuentes. The police on this occasion exercised judgment, and in my opinion exercised it reasonably. There was no deliberate flouting of the law. While there are difficulties with the evidence obtained from the car – the tablets on analysis contained no drug and there is some controversy as to the ownership and purpose of the cash – the evidence is still cogent in the sense that it is real evidence found in the car being owned and driven by Mr Fuentes. The trafficking offence with which Mr Fuentes is charged is serious.

Search of Residential Unit

- [27] Once the tablets were found in the backpack Sergeant Faria organised a second team of police to attend Balaclava Street and a search of Mr Fuentes' car was carried out. Then scenes of crime officers were contacted and they attended to photograph various aspects of the car and what was found in it. This process took some 45 minutes. After that, the car was driven back to the Dutton Park police station, some two or three minutes away. There, the police already working on the matter took up with other police and they attended at the block of units where both Mr Fuentes and the passenger had said they lived. They searched both units without warrants.
- [28] The searches began at approximately 10.37 that night, that is about one hour and 40 minutes after Mr Fuentes' car was initially pulled over.
- [29] As to the reason for the search being without warrants, the evidence was that one of the telephones found in the possession of Mr Fuentes was constantly ringing after the police intercepted the vehicle. Sergeant Lewis said that he saw that the same number was calling a number of times – t2-10. The telephone rang constantly during the time that Mr Fuentes and the passenger were in Balaclava Street. It would ring out and then within a matter of seconds would begin ringing again. This, combined with the number of tablets and the amount of cash found in the car, led the police officers to believe that Mr Fuentes and the passenger were expected somewhere. In particular, they suspected they were expected to deliver drugs or money somewhere. The police officers were concerned that, as Mr Fuentes was not answering his phone, it may be that a person expecting him to attend began to suspect that he had run into some sort of trouble. This in turn might lead such a person to destroy evidence. As well, the police said that they knew from experience that often, when people undertake trips in cars to deliver drugs or money, a second spotter car accompanies the car in which these people are travelling, so that again gave cause for concern that other persons involved in drug dealing with Mr Fuentes and the passenger might have been alerted to their interception by police, and might in turn cause them to destroy evidence.
- [30] As well, more generally, the police evidence was that the car had been intercepted in a busy part of Woolloongabba and that it was a recognisable car, so that friends or associates of Mr Fuentes and the passenger might notice that it had been intercepted by police, and was apparently pulled over by police in Balaclava Street, and thus alert others involved in drug dealing to destroy evidence. It was thought that the possibility of this was increased by the fact that Mr Fuentes and the passenger lived nearby the scene of the interception – in Kangaroo Point.

⁸ (1978) 141 CLR 54.

Mr Fuentes' car had initially been intercepted travelling south, that is away from Kangaroo Point. Further, it was said that the area of the intercept was very busy with vehicular traffic at 9.00 pm on Saturday night.

- [31] When Mr Fuentes' home was searched, 17 grams of cocaine was found in two clip seal bags in a box of Uncle Toby's Oats. Scales and clip seal bags were found in the kitchen, and clip seal bags of pills were also found in the kitchen. On analysis they also proved to contain no illegal drug.
- [32] Mr Fuentes and the passenger each gave an address in the same block of units and the police wished to search both units at the same time so that one search did not alert the occupants of the other premises to the fact that it might also be searched. There were therefore manpower concerns and attempts were made to find more available police to assist with the search. As well, the police said that to find a Justice of the Peace at 9 or 10 o'clock on a Saturday night was very difficult and that it was anticipated that, had an application for a search warrant been made, it would have delayed the search by about two to three hours.
- [33] An application was made to a magistrate for post-search approval. This was granted.
- [34] The Crown relies on s 160 of the PPRA to justify the search of the units at Kangaroo Point. Section 160 of the PPRA provides:
- "Search to prevent loss of evidence
- 160(1) This section applies if a police officer reasonably suspects—
- (a) a thing at or about a place, or in the possession of a person at or about a place is evidence of the commission of a part 2 offence; and
- (b) the evidence may be concealed or destroyed unless the place is immediately entered and searched.
- ...
- (3) A police officer may enter the place and exercise search warrant powers, other than power to do something that may cause structural damage to a building, at the place as if they were conferred under a search warrant."
- [35] As a preliminary point I note the fact that the magistrate exercised an administrative jurisdiction to grant a post-search approval has no bearing on my decision as to the lawfulness of the police search of the unit without a warrant.⁹
- [36] The factual matter which has given me most difficulty in relation to this part of the application is whether or not any police officer did reasonably suspect that an immediate search was needed. The car Mr Fuentes was driving was pulled over at about 9 o'clock at night. There was no search of his premises until 10.37 pm. The matters relied upon to found the reasonable suspicion of the necessity of an immediate search must have been evident to the police officers by 9.15 pm, 9.30 pm

⁹ *R v Williamson* [2009] QSC 434 [49].

at the latest. Yet there was no immediate search, nor was there any immediate preparation for a search.

- [37] The evidence of Sergeant Faria was quite vague and rather contradictory as to when he formed the suspicion that evidence might be destroyed and an emergent search would be necessary. The factors which he, and the other officers, relied upon as supporting the reasoning behind that suspicion were obvious within 15 minutes after 9.00 pm that night. Sergeant Faria's evidence was that he discussed the matter with Constable Lewis and that they decided a search without warrant was justified. I assume this was before 9.15 pm when Sergeant Candale said he arrived at Balaclava Street. Sergeant Faria said later in his evidence that he discussed the matter with Sergeant Candale and they decided that a search without warrant was justified. So that discussion took place after 9.15 pm when Sergeant Candale arrived at Balaclava Street. At that stage – 9.15 pm – there were five officers in Balaclava Street, shortly joined by scenes-of-crime photographers. It is very difficult to understand why all those officers were required at Balaclava Street watching scenes-of-crime photographers take photographs of what was found in the car. Sergeant Candale said this took 45 minutes. There were two sergeants of some considerable seniority present. No attempt was made to explain why Sergeant Faria and some other of these five police officers could not have returned to the Dutton Park police station, some two or three minutes away by car, and attempted to contact a Justice of the Peace and prepare the paperwork necessary for a search warrant, or on the other hand, if it was thought an immediate search was necessary, bring that about. At length, everyone proceeded back to Dutton Park police station where attempts were made to find other officers to assist with the search. Two other officers were found. A briefing took place, and the search commenced at 10.37 pm.
- [38] It seems to me likely that any reasonable suspicion required by s 160 must have been formed at about 9.15 pm, and by 9.30 pm at the latest. The fact that action was taken so slowly after that, when there was ample opportunity and manpower for matters to be progressed, causes me to conclude that the officers did not in fact form a reasonable suspicion that an immediate search was necessary. The officers no doubt came to the conclusion that it was possible that Mr Fuentes and his passenger were on their way to traffic in drugs and that, because of the ringing of the phone, they might be missed. They no doubt appreciated that they wished to search Mr Fuentes' home and that, if he had been missed, there was a possibility that evidence at his home might be destroyed. No doubt the officers also had a view that it might take longer to obtain a warrant to search the home than if they proceeded without a warrant. However, s 160 of the PPRA does not invite the police to make a comparison between the time taken to search with a warrant, and to search without a warrant. It requires the police to form a reasonable suspicion that evidence will be destroyed, "unless the place is immediately entered and searched". The word immediately must mean what it says. On all the evidence in this case I do not believe the police formed a reasonable suspicion that evidence would be destroyed if Mr Fuentes' home was not immediately entered and searched. They made no haste to search the unit or prepare to search the unit. I do not accept that they formed a reasonable suspicion that evidence there might be destroyed or concealed unless the unit was immediately searched.
- [39] At the unit 17 grams of cocaine (several times the aggravated limit) was found, together with some other tablets (which have proved not to contain any unlawful drug). As well, admissions were made by Mr Fuentes. I see that evidence as cogent

and bearing upon serious criminal activity. While I find that the search was unlawful, I am not convinced that there was any deliberate flouting of the law or even deliberate cutting corners. Weighing all these factors, I conclude that the balance favours allowing the evidence to be used, in accordance with *Bunning v Cross* (above).

- [40] I note that there was no separate basis other than the illegality of the searches relied upon by the applicant to exclude admissions made by Mr Fuentes at the search of his home – see paragraph [2](d) above.

Telephone Transcript

- [41] One of the two telephones carried by Mr Fuentes was sent for analysis. The contents of the text messages on the telephone has been transcribed. A large number of incoming text messages were found on the telephone. Very few outgoing text messages were found on the telephone. It was accepted by the applicant that everything which was found on the telephone has been transcribed. There was no admission made by Mr Fuentes that it was he who deleted outgoing messages from the telephone.
- [42] The applicant's case is that, in the absence of outgoing messages on the telephone, the jury is left with only half a conversation, as it were (or, in fact, half of several different conversations), in circumstances where the incoming text messages are themselves rather cryptic in the way that such text messages, or transcripts of intercepted telephone calls, in drug cases often are. It is said that this leads to particular unfairness to this defendant because outgoing messages which may clarify the ambiguity of the incoming calls as innocent are not available to him, even if he were minded to give evidence of the circumstances of the messages.
- [43] This part of the application relies upon s 130 of the *Evidence Act 1977* (Qld).
- [44] Having looked at the text messages, it seems to me that there is evidence in them from which a jury could draw inferences that the applicant was involved in supplying dangerous drugs. There is ambiguity in them of the type I have mentioned. This ambiguity is common in drug trafficking trials. I accept that to some extent there is a greater ambiguity because the outgoing messages are not available. However, I do not see that this difficulty is one which cannot be remedied by warnings given by the trial judge. I note the comments of the High Court in *R v Edwards*¹⁰ as to fairness in circumstances where a jury has less than all relevant material. I refuse to exercise my discretion to exclude the telephone transcripts as being unfair to the applicant within the meaning of s 130 of the *Evidence Act*.

¹⁰ (2009) 255 ALR 399 [31].