SUPREME COURT OF QUEENSLAND

CITATION:	*LAR v Commissioner of the Queensland Police Service and Ors* [2014] QSC 78
PARTIES:	**THE QUEEN** **v** **LAR** (applicant/defendant)
FILE NO:	SC 100 of 2012
PARTIES:	**LAR** (applicant) **v** **COMMISSIONER OF THE QUEENSLAND POLICE SERVICE** (first respondent) and **CHAIRPERSON OF THE CRIME AND MISCONDUCT COMMISSION** (second respondent)
FILE NO/S:	SC 972 of 2014
DIVISION:	Trial Division
DELIVERED ON:	1 May 2014
DELIVERED AT:	Brisbane
HEARING DATES:	29 January 2014; 14 March 2014
JUDGE:	Martin J
ORDER:	**Each application dismissed**
CATCHWORDS:	EVIDENCE – FACTS EXCLUDED FROM PROOF – ON GROUNDS OF PUBLIC POLICY – OTHER MATTERS – where the applicant participated in a recorded interview with officers of the Crime and Misconduct Commission – where the applicant was properly cautioned and understood that he was not compelled to say anything, and that if he did it might be used as evidence in Court – where the applicant subsequently sought to be declared an informer - whether circumstances of confidentiality existed so as to justify such a declaration *Criminal Code*, s 590AB *Drugs Misuse Act* 1986, s 119, s 120, s 121
CASES:	*R v Mason* (2000) 77 SASR 105; [2000] SASC 161, applied *R v The Stipendiary Magistrate at Southport; Ex parte Gibson* [1993] 2 Qd R 687, referred to

The Commissioner of the Queensland Police Service v Cornack [2004] 1 Qd R 627; [2003] QCA 383, applied

COUNSEL: S Lynch for the applicant in SC 972 of 2014 and the applicant/defendant in SC 100 of 2012
B Power for the Crown in SC 100 of 2012
B Kennedy for the first respondent in SC 972 of 2014, directly instructed
DJ Younger for the second respondent in SC 972 of 2014, directly instructed

SOLICITORS: Moloney MacCallum Lawyers for the applicant in SC 972 of 2014 and the applicant/defendant in SC 100 of 2012
The Office of the Director of Public Prosecutions for the Crown in SC 100 of 2012

[1] LAR has been charged with unlawfully producing the dangerous drug cocaine, and unlawfully possessing that dangerous drug as well as 3,4-Methylenedioxymethamphetamine, lysergide and cannabis. He has made two applications to the court, one in its civil jurisdiction and one in its criminal jurisdiction. Both applications require consideration of particular provisions of the *Drugs Misuse Act* 1986 (DMA) which, in Part 6, makes provision for the protection of the identity of informants.

[2] The applicant claims to be an informer. In the civil application he seeks a declaration that he is an informer for the purpose of s 119 DMA. In the criminal application he seeks orders under s 121 DMA prohibiting publication of:

(a) this application,
(b) the material relied upon by the parties and any part of the proceedings brought by the applicant under the *Uniform Civil Procedures Rules*,
(c) any part of the trial of the applicant.

[3] The document about which the applicant is most concerned is a record of interview in which he took part. He also assisted in the preparation of a statement but he has not completed or signed that statement. Unless he is an informer and the provisions of the DMA apply, the Crown will be required to disclose[1] that record of interview (at least) to the representatives of, among others, HOL. The applicant has expressed concern that, should HOL become aware of the statements made in the Record of Interview, his personal safety and well being will be at risk. In an affidavit prepared for these proceedings, the applicant sets out in some detail the reasons for his fear for himself and for his family. He says: "I firmly believe that if HOL is made aware that I have at any stage provided assistance to the Police, no matter how limited, that I and my family will be killed.

[4] He has expressed concern about these matters to the police and the possibility of a witness protection arrangement has been raised but not pursued.

[5] Mr Joe Wicking is the applicant's solicitor. He has sworn an affidavit in which he says that, from a meeting held on 29 August 2012 with Crime and Misconduct

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1 See *Criminal Code* s 590AB.

Commission officers, he has a note that the CMC had registered the applicant as an informant. This was denied in an affidavit by Detective A/Inspector Cameron Burke who was in the position of Acting Operations Coordinator, Crime of the CMC. He says that LAR was never registered as a "confidential source" or informant by the CMC. In the absence of any cross-examination or further material I am inclined to accept the direct evidence from Mr Burke rather than the uncertainty of a note without further detail.

[6] The original application for orders under the DMA had the Commissioner of Police as the sole respondent. As the CMC had conducted the record of interview I required the applicant to join the CMC as a respondent. For reasons best known to itself the CMC adopted the position that it would neither consent to nor oppose the orders sought. This was a singularly unhelpful position to take and, given the consequences of making the order sought, bewildering.

What is an informer?

[7] Sections 119 and 120 are premised upon an "informer" supplying information to a police officer in respect of the commission of an offence defined in Part 2 of the DMA.[2]

[8] Section 119 provides that where an informer supplies information of that type then the informer's identity shall, at all times, be kept confidential. Section 120 provides that in those circumstances the prosecutor, a person who appears as a witness for the prosecution or where a police officer appears as a witness for the defence, that police officer shall not be asked and may not be compelled to disclose the name of an informer or a particular that might be likely to lead to the informer's identification.

[9] The issue for determination on these two applications is whether or not the applicant is an informer within the meaning of the DMA. That Act does not provide any definition of the term "informer".

[10] The term was considered, with respect to an earlier version of the DMA, in *R v The Stipendiary Magistrate at Southport; Ex parte Gibson*.[3] In that case a magistrate had ordered that an undercover police officer who was the principal witness against the accused be permitted to give his evidence under an assumed name and to withhold his true identity from the court, the applicant and her legal representatives. In ruling that such an order could not be made at common law, Ambrose J considered the meaning of the term "informer"[4]. He said:

> "Dealing first with the question whether Green acting as undercover police officer comes within the category of 'informers' attracting the application of ss 46 and 47 of the *Drugs Misuse Act*[5] it is my view that both those sections clearly distinguish between 'informers' and 'police officers'.
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> Although the term 'informer' is not defined either in the *Criminal Code* or in the *Drugs Misuse Act,* **it is a term that has long been**

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2 The complete provisions are set out in the Schedule.

3 [1993] 2 Qd R 687.

4 On this point Williams and Cooper JJ agreed with him.

5 Sections 46 and 47 are now sections 119 and 120 of the *DMA.*

> **used in the criminal law to describe a person who is not a member of the police force who informs police officers of facts relating to the proposed commission of offences and the criminals involved or of the identity of persons involved in the commission of criminal offences already committed**." (emphasis added)

[11] The term was further considered in *The Commissioner of the Queensland Police Service v Cornack*.[6] The case concerned questions sought to be asked of a police officer who was giving evidence under an assumed name in committal proceedings for offences under the DMA. Williams JA identified ss 119 and 120 of the DMA as being the governing provisions in that particular case. He referred to some early decisions concerning the definition of "informer" and said:

> "[5] In all of those cases **the underlying factor rendering the giver of the information an 'informer' was the confidentiality of the information provided which resulted in a public prosecution. It is that element of confidentiality which distinguishes the 'informer' from other persons who provide information to police officers. It is not everyone who in some way provides a police officer with information which aids in the investigation of a crime who is an 'informer' for purposes of statutory provisions such as those referred to above.**" (emphasis added)

[12] Further consideration of the meaning of the word "informer" was given by Jerrard JA.[7] He said:

> "[40] These examples and arguments demonstrate that **it is proper to construe the expression 'an informer' in s 119 and s 120 as describing a person who supplies information in confidence to a person known or believed to be a police officer, in respect of the commission of an offence by another.** As Williams JA remarked during argument that appropriate concept is reasonably well expressed in s 454(2)(b) of the *Police Powers and Responsibilities Act*, in its description of a 'confidential source of information, in relation to the enforcement or administration of the law...'
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> …
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> [42] I respectfully observe that an informative and useful discussion of this topic appears in the judgment of Bleby J in *R v Mason* [2000] SASC 161; (2000) 77 SASR 105, and particularly at pages 110-116. After considering (at 111) the variety of circumstances in which information will be provided to the police, ranging from those who give a formal interview intending it to be the basis of their evidence given in court to those who anonymously provide information, his Honour expressed the view that **given the rationale for the (common law) rule, namely the preservation of anonymity, there must be present an element of confidentiality in the identity of the informer; and that it is only the assurance of confidentiality of that identity that prevents the valuable sources of information from drying up. He went on (at 112) to observe that the**

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6 [2004] 1 Qd R 627.

7 Agreed with by Williams JA and Muir J.

> **community will only protect the identity of a person where the information is given upon condition that the confidence is honoured and that the person's identity will not be disclosed or upon an assurance by the recipient that that will be the case**." (emphasis added)

Was there the requisite confidentiality?

[13] The concept of the information being given in confidence to a police officer is central to the identification of a person as an informer. In order to determine the applicant's status, then, it is necessary to consider the circumstances in which he participated in the record of interview which he gave to the officers of the Crime and Misconduct Commission. On 20 April 2011 the applicant was engaged in a record-of-interview of approximately two hours. It began in the usual way with the parties to the interview identifying themselves and it being said by one of the interviewers that the applicant's attendance had been arranged in order to "provide an interview in relation to [our] investigation … you've previously been arrested … for some serious drug … offences …"

[14] The applicant was then reminded that he had been advised of his right to silence and the following exchange took place:

> "Interviewer: Because you've got ongoing court matters that you need not say anything to us in relation to any questions that we may ask of you as everything you do say will be recorded by means of the audio and video disks that you see basically in the instrument in front of you.
>
> LAR: Yes.
>
> Interviewer: And **can later be used in evidence** okay. Do you understand that?
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> LAR: I do.
>
> Interviewer: You understand you don't have to say anything to us.
>
> LAR: I do.
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> Interviewer: All right at any time um you feel or if you feel that you need any legal advice we can certainly suspend the interview for such time and you could ring your solicitor. Um there's a phone there we can leave the room, leave you have a conversation with him if you need to. Um, so if you think you do need to speak to him about anything, just let us know. Same with if there's any person you wish to contact or let them know where you are, we can do that as well.
>
> LAR: Okay.
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> Interviewer: It's up to you. Is there any questions you want to ask before we get started.
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> LAR: No I'm ready to go.

…

Interviewer: So I, we have to warn **you that you don't have to make any statements here today, you don't have to answer any questions that we ask you today. Everything you say and, and every statement you make here is being recorded**.

LAR: **Yep and it's take into account**.

Interviewer: **And will may later be produced in court as evidence**.

LAR: Yep.

Interviewer: So you just have to be aware of that …

LAR: I fully understand, I fully understand that."

At the end of the interview the following exchange took place:

"Interviewer: For the time being um, if there is nothing else you want to say, if they are – if there some questions in closing we need to sort of ask you anyway just to make sure you know yourself that.

LAR: Righto.

Interviewer: **Um you, you came here voluntarily?**

LAR: **Certainly did.**

Interviewer: Um you were warned at the commencement of the interview that you didn't have to take part?

LAR: I was cautioned.

Interviewer: Fully cautioned by the both of us?

LAR: Yes.

…

LAR: I understood those cautions.

…

Interviewer: **Have you been threatened by anyone to, to come here or**?

LAR: **No**.

Interviewer: Has anyone made any?

LAR: I came here of my own free will.

Interviewer: **Anyone made, anyone made any promises to you or**?

LAR: **No promises**." (emphasis added)

[15] There is no reference in the record-of-interview to the confidentiality or lack thereof of the material and information supplied by LAR.

Can confidentiality be assumed?

[16] It was argued on the applicant's behalf that there was an assumption of confidentiality. That arises, it was argued, from the concern held by the applicant, which was known to the police, about the possibility of retribution being visited upon the applicant by one of the persons about whom he spoke in the record-of-interview.

[17] The manner in which an implied confidentiality might arise was considered by Bleby J in *R v Mason.*[8] In those reasons (agreed in by Doyle CJ and Mullighan J) his Honour said:

> "24. Individuals give information to the police about crime for a variety of reasons and in a variety of ways. Some will give a formal interview which will form the basis of the evidence given in court. Such statements will be given sometimes willingly, sometimes reluctantly, but usually openly. It is nevertheless valuable information, and may well become admissible evidence.
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> ….
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> 27. **Is it sufficient if a person merely expresses a desire that his or her identity remain confidential, or must it be a condition of the giving of the information that the informer's identity remains confidential? The rationale for the immunity requires that there be protection of actual confidences, or of information given in confidence. That means, on a true analysis, that the immunity will only protect the identity of a person where the information is given upon condition that the confidence is honoured and that the person's identity will not be disclosed, or upon an assurance by the recipient that that will be the case. Anything less would seem not to be justified by the rationale for the immunity**.
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> 28. The question then arises as to **the appropriate standard of proof** of the fact that a condition of confidentiality of the informer's identity applied to the giving of the information. Must the court be satisfied on the balance of probabilities that such a condition was imposed, or is it sufficient that there is a real risk or a real chance that it was given in confidence? Does the court merely need to be satisfied that there were reasonable grounds for the police officer to believe that the information was given in confidence, or need the court only be satisfied that it was reasonable for the police officer to believe that there was a chance that it was given in confidence? **I would reject any test which made it dependant upon the reasonable belief of the police officer**. Ultimately, it is the court which grants the immunity. It is for the court to be satisfied that the conditions for the granting of the immunity are fulfilled. Furthermore, **it would be an unjustified departure from ordinary standards if the court merely had to be satisfied that there was a real risk or chance that the informer gave the information on a condition of confidentiality. In my opinion the court should be**

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8 (2000) 77 SASR 105.

satisfied on the balance of probabilities that the information was given on the basis that the informer's identity would remain confidential.

> 29. **There will, of course, be many reasons why people wish to impose a condition of confidentiality of their identity**, often coupled with restrictions on the amount of information they are prepared to give. **For some it will be for reasons of self-protection**. For others it will be a desire not to become embroiled in the criminal justice system. For others it may be out of a desire not to disclose their own involvement in criminal activity. There may well be other reasons**. Whatever the reasons, the court cannot be concerned to inquire into them or to inquire into the genuineness of the claim**.
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> …

31. **None of the cases suggest that the existence of a threat to the informer is a condition precedent to the operation of the rule. It is therefore not necessary to establish that there is such a threat. For the same reason it is not necessary to establish the existence of any other condition which might justify the preservation of the confidentiality of the informer's identity. The rationale for the rule is the flow of intelligence about the perpetration of crime. That does not require any inquiry as to the reasons why confidentiality might be sought in a particular case. The only question is whether the condition of confidentiality exists**.

32. Can the court be satisfied that the condition exists where, as in this case, there is no express condition imposed by the informer as to the confidentiality of his identity? There will be many cases, as in this one, where the information is almost encoded, where it merely consists of a non-verbal sign, or where the person may not even want to be seen to have had contact with the police, let alone to convey information. It will seldom be elaborate; it is likely to be information only about one particular fact. The information may not even identify a suspect. It may just be that a crime of some sort is likely to be committed at a given time or place. In none of these cases is it likely that a condition of confidentiality will have been mentioned, let alone agreed upon. Yet, if there were any suggestion that the identity of the informer would be released, the information would probably not have been forthcoming.

33. **Merely because nothing is said does not mean that a condition of confidentiality has not been acknowledged. Often it will be implied from the conduct of the parties and from the other surrounding circumstances**. In the examples I have mentioned above, the very brevity or incompleteness of the information will be a strong indicator that the condition applies. It is pointless to attempt to list all the circumstances which might give rise to an inference that the informer intended that the information should be given conditional upon his identity remaining confidential.

> 34. **Where the informer has not made known explicitly the basis upon which the information is given, and in particular has not made known that it is given conditional upon his identity remaining confidential, then in the absence of evidence to the contrary, I consider that a court should be prepared readily to draw the inference from any conduct of the informer or from other surrounding circumstances that it was given on such a condition**. Such an approach is consistent with the purpose and rationale of the rule, namely to give effect to the public interest in ensuring that a person is not deterred, for whatever reason, from giving relevant information to the police for the detection and prevention of crime." (emphasis added)

[18] In [34] of his reasons Bleby J refers to the absence of any evidence to the contrary that information is being given on the basis that the identity of the informer remain confidential. There is, in this case, substantial evidence to the contrary. The warnings that were given to LAR were complete and were repeated. His answers were more than simply affirmations, they lead to a conclusion that he fully understood what he was doing and that is supported by his responses to questions at the end of the interview. He knew that what he said might be used as evidence. He was invited to make any comment or ask any questions he wished to. It was open then for him to make any statement he wished about confidentiality. He did not do that because the statement was not confidential. He knew the purposes for which the record-of-interview was being given, namely, to collect evidence which might be used against him or someone else. He has, since then, had a change of heart and now wishes to claim confidentiality, no doubt driven to a large extent by a fear, justified or not, of retribution.

Conclusion

[19] The applicant was not an informer within the meaning of that term as used in the DMA. Each application is dismissed. I will hear the parties on the question of costs in the civil application.

SCHEDULE

119 Protection of informers

(1)Where an informer supplies information to a police officer in respect of the commission of an offence defined in part 2 the informer's identity at all times shall be kept confidential.

(2)A person who discloses the name of an informer, or any other particular that may be likely to lead to the informer's identification, is guilty of a crime.

Maximum penalty—5 years imprisonment.

(3)A person is not criminally responsible for an offence defined in subsection (2) if the person proves that the disclosure was made in good faith for the protection of the interests of the informer or for the public good.

120 Source of information not to be disclosed

(1)Where an informer supplies information to a police officer in respect of the commission of an offence defined in part 2 then in any proceedings whether under this Act or otherwise—

(a) the prosecutor; or

(b) a person who appears as a witness for the prosecution; or

(c) where a police officer appears as a witness for the defence, that police officer;

shall not be asked and if asked shall not be compelled to disclose the name of an informer, or other particular that may be likely to lead to the informer's identification, or the fact that in respect of the offence he or she received information from an informer or he or she furnished information to an informer or the nature of the information.

(2)In any proceedings arising out of a charge of having committed an offence defined in part 2 a police officer appearing as a prosecutor or witness shall not be compelled to produce any reports or documents, made or received by the police officer in the police officer's official capacity or containing confidential information in relation to such offence, or to make any statement in relation to such reports, documents or information.

121 Power to prohibit publication of proceedings

(1)In any proceedings arising out of a charge of having committed an offence defined in part 2—

(a) a magistrate hearing and determining the matter summarily or conducting the examination of witnesses; or

(b) the judge presiding at the court to which a person has been committed for trial or sentence;

may make an order (which shall remain in force for such time as the magistrate or judge orders) prohibiting the publication of the whole or any part of such proceedings and the name and address of any witness.

(2)An application for an order under subsection (1) may be made in chambers in the presence of such person as the magistrate or judge permits and no other person.

(3)On the hearing of the application the magistrate or judge may receive and act upon such information as the magistrate or judge thinks fit.

(4)When considering an application to prohibit publication regard shall be had to—

(a) the safety of any person; and

(b) the extent to which the detection of offences of a like nature may be affected; and

(c) the need to guarantee the confidentiality of information given by an informer.

(5)A person who acts in contravention of an order made by a magistrate under subsection (1) commits an offence against this Act.

Maximum penalty—2 years imprisonment.

(6)A person who acts in contravention of an order made by a judge under subsection (1) is guilty of a crime.

Maximum penalty—5 years imprisonment.

(7)This section is in addition to and not in substitution for the *Child Protection Act 1999*, sections 192 and 193 and the *Youth Justice Act 1992*.