

SUPREME COURT OF QUEENSLAND

CITATION: *R v Peirson* [2014] QSC 134

PARTIES: **R**
(Respondent)

v

MICHAEL JAMES PEIRSON
(Applicant)

FILE NO: BS 34 of 2014

DIVISION: Trial Division

PROCEEDING: Application pursuant to s 590AA of the *Criminal Code*

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 19 June 2014

DELIVERED AT: Brisbane

HEARING DATE: 13 May 2014; written submissions filed 28 May 2014

JUDGE: Douglas J

ORDER: **Rule that the evidence of the seizure of the mobile phone and the evidence obtained as a result of its having been taken from Mr Peirson, including evidence from witnesses who have been approached for and provided statements about his dealings with them on the basis of the information contained in the mobile phone, is admissible at his trial.**

CATCHWORDS: CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – POLICE INTERROGATION – PROPRIETY OF POLICE QUESTIONING AND OTHER CONDUCT BY POLICE – GENERALLY – where the applicant exited a taxi and was detained by police officers for possessing an opened alcohol container – where the police officer observed the applicant displaying indicia typical of drug use – where the police officer searched the applicant and found a mobile phone containing drug related text messages – where the police officer then activated a recording device and gave the applicant the standard warnings – where the balance of the encounter was recorded – whether the police officer could have possessed a reasonable suspicion – whether, if there was no such reasonable suspicion, judicial discretion would allow for the admission of the evidence

Criminal Code 1899 (Qld), s 590AA

Police Powers and Responsibilities Act 2000 (Qld), s 29, s 30, s 415(2)(a), s 423

Bunning v Cross (1978) 141 CLR 54, considered

COUNSEL: P Callaghan SC for the applicant
P J McCarthy for the respondent

SOLICITORS: Guest Lawyers for the applicant
Office of the Director of Public Prosecutions (Qld) for the respondent

The issue

- [1] Mr Peirson is charged with drug trafficking. The evidence against him of that charge derives from a mobile phone seized from him by police on 14 August 2012 when he emerged from a maxi taxi in Fortitude Valley as one of a group of young people some of whom at least, including him, were said to be in possession of open containers of alcoholic drinks.
- [2] The issue for determination is whether the mobile phone was legally searched by the police officer who spoke to him that evening pursuant to s 29 and s 30 of the *Police Powers and Responsibilities Act 2000 (Qld)* and, if not, whether I should exclude the evidence obtained directly and indirectly from the inspection of the telephone. The relevant parts of s 29 and s 30 of the *Police Powers and Responsibilities Act* permitting an officer to search anything in the possession of a person detained required the officer to reasonably suspect that the person had something that may be an unlawful dangerous drug or that may be evidence of the commission of a seven year imprisonment offence that may be concealed on the person or destroyed. Those sections provide relevantly:

“29 Searching persons without warrant

- (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.

...

30 Prescribed circumstances for searching persons without warrant

The prescribed circumstances for searching a person without a warrant are as follows -

- (a) the person has something that may be -

...

- (ii) an unlawful dangerous drug; or
- ...
- (vi) evidence of the commission of a seven year imprisonment offence that may be concealed on the person or destroyed; ...”

The evidence

- [3] Senior Constable Price was the arresting officer who saw Mr Peirson getting out of the maxi taxi about 10.30 pm on 14 August 2012. He and another officer, Sergeant Mitchell, were less than three metres away. His evidence was that he spoke to Mr Peirson and another man called Mr Shaughnessy while Sergeant Mitchell spoke to two or three others. He first spoke to Mr Peirson about drinking from an opened alcohol container and told him that was an offence. He said that Mr Peirson was drinking then. He also said that Mr Peirson was unsteady on his feet, that his pupils were dilated, he was sweating a bit but he was “licking his lips profusely”. He also said that he was not smelling highly of alcohol. He then formed the view that Mr Peirson was under the influence of a drug rather than alcohol mainly because he was licking his lips.
- [4] Sergeant Mitchell had also indicated to him that he had located drugs on another man from the group called Jack Green. At that stage, when some of the rest of the group started walking towards a nightclub nearby, he detained Mr Peirson for a search, telling him he reasonably believed he had dangerous drugs on him and asking him to turn out his pockets.
- [5] Mr Peirson had no drugs in his pockets but was visibly shaking and starting to sweat profusely on the upper lip. He had a mobile phone in his possession and Senior Constable Price asked him whether he had any drug related messages on it to which he replied: “Ah, there shouldn’t be” which is when the officer started looking into his mobile phone. It was in the officer’s hands from the time when Mr Peirson had emptied the contents of his pockets into the officer’s cupped hands. Senior Constable Price said that, in his experience as an officer covering about 8 years patrolling in Fortitude Valley, people in possession of drugs use mobile phone text messages to obtain the drugs.
- [6] He found some apparently drug related messages on the mobile phone, activated his recording device, gave Mr Peirson the standard warnings and recorded the balance of the encounter. That recording reveals a conversation about messages on the mobile phone and the delivery of the standard warnings which suggest that the recording device was activated before the warnings were given, perhaps when the officer had commenced to peruse the messages which reflects his evidence that it was likely that he had already begun to read the messages before he activated the recording device. One can conclude that from the passage transcribed including a sentence where he is recorded as saying: “Okay, um mate there’s some messages in here I’m a little bit concerned about --.”¹

¹ See MFI “A” at p 2 ll.45-46.

- [7] Mr Peirson is also recorded as saying to him during the interview that he was shaking because he was nervous. He explained a reference to the owing of money for “gear” as a reference to a jet ski, which drew a sceptical response from the officer. Other evidence indicated that the temperature was “freezing”.
- [8] There was a further interview at a police station that was also recorded during which Mr Peirson explained a further text message that had come on to his phone during the period between his detention and his arrival at the police station asking for “a ten pack” as a request for “Pump No-Doze” which he explained as a particular brand of “No-Doze” available from a “7-Eleven” store. He also explained that he sold synthetic cannabis to friends.
- [9] He was subsequently charged with possessing property suspected of being used in connection with the commission of a drug offence to which he pleaded guilty on 30 August 2012. The charge of trafficking he now faces stems from further information police obtained after interviewing people who had left messages on the mobile phone.
- [10] In cross-examination Senior Constable Price admitted that the first time he put in writing his observations of Mr Peirson’s behaviour causing him to suspect he was in possession of drugs was on 24 April 2014, although he had recorded his recollections first that night on an electronic log. He also recorded a version of the events on a police “QP 9” form on a later occasion, perhaps about 14 May 2013, which he said was virtually copied and pasted from the electronic log. That was effectively repeated for a statement he made on 27 May 2013.
- [11] He explained the later statement of 24 April 2014 as having been made after he had conferred with the Crown Prosecutor, telling him the whole story, having left out his evidence about the behaviour of Mr Peirson previously by saying that he glossed over it, perhaps because Mr Peirson had already pleaded guilty to possession of the mobile phone with the drug messages.
- [12] He said that Sergeant Mitchell’s statement that he had located drugs on Mr Green heightened his suspicions triggered by Mr Peirson’s behaviour. He explained his ability to recall Mr Peirson’s behaviour about 16 months after he first observed it by reference to some funny and unusual aspects of his story, including the reference to the “No-Doze” tablets.
- [13] He agreed that, in spite of his observations, Mr Peirson’s voice was clear enough and he was responsive to his questions. In that context, he denied the suggestion put to him that Mr Peirson was showing no indicia of the kind he had previously described and that there was no reason then to detain him. He also denied the possibility that his search of Mr Peirson began before Sergeant Mitchell said he had found some drugs on Mr Green.
- [14] Sergeant Mitchell’s evidence was that he found drugs on Mr Green on whom he was concentrating. He was not paying attention to Senior Constable Price until he notified him that he had located a dangerous drug and observed him talking to Mr Peirson. He agreed that the events happened quickly. His recording of his dealings with Mr Green appeared to conclude at 11.02 pm, having run for 14

minutes and 47 seconds. On that assumption his interview would have commenced at about 10.47 pm, about eight minutes after the recorded commencement of Senior Constable Price's interview with Mr Peirson.

- [15] Mr Peirson also gave evidence, saying he had drunk a six pack of bourbon and cola since about 7.30 pm that night but not while he was in the maxi taxi. He said he was not sober but nor was he drunk or under the influence of a drug. Senior Constable Price spoke to him, asking him to show him his pockets, took his phone from him and looked at it, not saying much at all. The officer did not ask him whether there were any drug related messages on the phone. When he took the phone there were messages on it and he proceeded to look into them and discuss them with him.
- [16] Mr Peirson denied being told initially that he was not obliged to answer any questions whilst Senior Constable Price was first looking at the phone and did not recall being told that he was detained. He said that it was cold that night, he was only wearing a short sleeved t-shirt and jeans and was shaking because of the cold. He was also, however, nervous at being questioned by police. He denied displaying any indicia of being under the influence of alcohol.
- [17] He had had difficulties in contacting the other people with him at the scene and two of them at least did not want to be involved in these events any more. No doubt that explains why other potential witnesses were not called.
- [18] He said he heard Sergeant Mitchell tell Senior Constable Price about finding drugs on Mr Green after his interview recorded at the scene, which may be consistent with the times recorded for the two interviews. It was possible that he placed his phone in Senior Constable Price's hands but, initially, he said he grabbed it from him. He denied being asked whether he had any drug related messages on his phone or saying: "Ah, there shouldn't be". He also denied licking his lips or sweating and said that he continued answering questions after he was warned because he felt obliged to do so.

Submissions

- [19] Mr Callaghan SC for Mr Peirson submitted that I should conclude that there was no basis for Senior Constable Price to hold a reasonable suspicion because I should conclude that his evidence of Mr Peirson's behaviour was, in effect, unreliable or reconstructed, not having been recorded in his earlier statements and inconsistent with the coherent behaviour of his client as recorded on the sound recording from the field tape. He argued that I should accept his client as a witness of truth and conclude that there was no sufficient basis for suspicion about the appropriateness of searching the mobile phone at that stage.
- [20] He submitted that once it had been established that his client was not in possession of drugs, the authorisation for detaining him was exhausted and he should have been released or have been cautioned pursuant to s 415(2)(a) of the *Police Powers and Responsibilities Act*. It seems significant to me, however, that when his client was warned during the recorded part of the interview, he continued to speak to police

and I doubt that an earlier warning would have deterred him from speaking to them otherwise.

- [21] He also submitted that the likely difference in timing between Sergeant Mitchell's information that he had found drugs on Mr Green from the evidence given by Senior Constable Price was another indication that that source of suspicion was not available to Senior Constable Price when he started to search the mobile telephone.
- [22] What seems to me to be the critical issue is, however, whether I should accept Senior Constable Price's evidence that he had a reasonable suspicion that Mr Peirson had been taking drugs or had been in possession of them derived from the behaviour he observed of him licking his lips, shaking and sweating. There is evidence from Mr Peirson himself that he was shaking which was recorded in the interview with him saying that he was nervous of the whole situation. Mr Peirson's own evidence denying that he was displaying the behaviour referred to by Senior Constable Price itself may not be reliable because of the number of drinks he had consumed since 7.30 pm that night.
- [23] Even if I accept that Sergeant Mitchell's statement about Mr Green being in possession of a dangerous drug was not made until later, that does not necessarily lead to the conclusion that Senior Constable Price was falsifying his evidence or recalling it completely inaccurately. He could well have, in retrospect, confused the timing of his having heard that statement by Sergeant Mitchell and of having connected it with his observations of Mr Peirson's behaviour without consciously falsifying his evidence about the nature of that behaviour.
- [24] In that context it is also significant that nothing appears to be said or picked up recording the information about Mr Green on the field tape recording the interview between Senior Constable Price and Mr Peirson. That might have been because his voice was not necessarily picked up by the microphone but it may also have been because that information was conveyed before the tape commenced.
- [25] Mr McCarthy pointed out that the times recorded for the separate conversations with Sergeant Mitchell and Senior Constable Price by Mr Green and Mr Peirson had not been established as accurately reflecting the true time that the conversations occurred rather than reflecting the time shown on each recording device. He pointed to the evidence of Sergeant Mitchell that he had located a drug upon Mr Green, made his way to Senior Constable Price to inform him of the location of the drugs and then returned to Mr Green and activated his recording device. That may suggest that it was likely that Senior Constable Price had received that information before he commenced looking at the phone and interviewing Mr Peirson on the tape recorder.
- [26] On the assumption that Senior Constable Price had validly formed the suspicion that the person had an unlawful dangerous drug, he submitted that there had been no interruption of his powers allowing him to search anything in Mr Peirson's possession or anything relevant to the circumstance for which he was detained pursuant to s 29(1)(b), something also warranted by s 30 of the *Police Powers and Responsibilities Act* based on the suspicion that evidence of the commission of a seven year imprisonment offence may be concealed or destroyed: see s 30(a)(vi).

- [27] Mr McCarthy submitted that could be supported by the evidence Senior Constable Price gave about asking whether Mr Peirson had drug related messages on the phone and the reply he received: “Ah, there shouldn’t be”. That could also be coupled with his evidence that, in his experience, mobile phones of drug users often had text messages on them.

Discussion of the evidence

- [28] I believe Senior Constable Price’s evidence about his observations of the behaviour of Mr Peirson on the night. By Mr Peirson’s own evidence he was shaking during the interview, not just from the cold, but from nervousness. That behaviour, coupled with what I accept was observed by Senior Constable Price of him licking his lips, is enough for him to have concluded reasonably, with his experience, that the defendant may have been under the influence of dangerous drugs or have been in possession of them.
- [29] In those circumstances I accept that, if he possessed that reasonable suspicion he had the right to stop and detain Mr Peirson and search the mobile telephone in his possession, particularly having regard to the conversation I accept he and Mr Peirson had about its contents. His explanation of why he only recently put down in writing his record of those observations was plausible, because the original offence of possession of a relevant thing connected to a drug offence had already been dealt with in the Magistrates Court.
- [30] Mr Callaghan’s submission that the power to detain him ceased with the negative result of his search for drugs and that there was no power to search the phone does not persuade me. Senior Constable Price was justified to ask about the messages on the phone and to form a reasonable suspicion justifying the continuation of his search of it as well. Even if there had been an unlawful detention of Mr Peirson it could not be characterised as serious or reckless in these circumstances.
- [31] The submission that the officer should have delayed questioning Mr Peirson based on the behaviour he observed because of the effect of s 423 of the Act on the questioning of intoxicated persons was not ultimately persuasive. Mr Peirson’s own performance based on the field tape recording suggested that he then possessed the ability to understand his rights and to decide whether or not to answer questions and he said nothing to persuade me to the contrary in his evidence before me.

***Bunning v Cross* discretion**

- [32] Had I been of a different view about the circumstances in which the evidence was obtained, it still seems to me that, even if the search occurred contrary to the provisions of the *Police Powers and Responsibilities Act*, I should admit the evidence in the exercise of the discretion established in *Bunning v Cross*.²
- [33] If, which I do not accept, there was an unlawful act by Senior Constable Price, it is my view that he was not cynically disregarding his legal obligations or deliberately cutting corners. He and Sergeant Mitchell had engaged in a brief encounter with a

² (1978) 141 CLR 54, 72, 78-80.

number of young people apparently acting in breach of the law about drinking in public in circumstances where they were justified in speaking to them about their behaviour. It may not have been surprising that the subsequent behaviour by the young people in those circumstances could be interpreted in the manner in which the police officers did, namely that they were in possession of drugs. The offence charged of trafficking is also particularly serious and there is a high public interest in identifying drug traffickers.

- [34] There is no evidence that Senior Constable Price's belief was dishonestly held, even if it were held not to be reasonable in the circumstances. Nor does the illegality affect the cogency of the evidence which is a recorded document. It is also significant that Mr Peirson has entered a guilty plea and was sentenced on the offence of possessing property suspected of having been used in connection with the commission of a drug offence on 30 August 2012.
- [35] He was warned at an early stage of the interview and the main part of the interview was recorded shortly after the relevant messages were first discovered. In those circumstances, as was submitted by Mr McCarthy for the prosecution, the balance of the competing interests weighs strongly in favour of the admission of the evidence.

Ruling

- [36] Accordingly, I rule that the evidence of the seizure of the mobile phone and the evidence obtained as a result of its having been taken from Mr Peirson, including evidence from witnesses who have been approached for and provided statements about his dealings with them on the basis of the information contained in the mobile phone, is admissible at his trial.