

SUPREME COURT OF QUEENSLAND

CITATION: *R v Nash* [2014] QSC 139

PARTIES: **R**
v
CHRISTOPHER LEIGH NASH
(defendant/applicant)

FILE NO/S: Indictment No 32 of 2014

DIVISION: Trial Division

PROCEEDING: 590AA hearing

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 14 May 2014

DELIVERED AT: Brisbane

HEARING DATE: 22 April 2014

JUDGE: Ann Lyons J

ORDER: **The record of the interview conducted at 2 am on 29 June 2013 is excluded pursuant to s 130 of the *Evidence Act 1977 (Qld)***

CATCHWORDS: CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – POLICE INTERROGATION – PROPRIETY OF POLICE QUESTIONING AND OTHER CONDUCT – GENERALLY - where the defendant/applicant was questioned by police at 2 am outside a service station – where the defendant had been searched and questioned on the basis that he was displaying indicia typical of drug use– whether the defendant’s interview with police should be excluded on the basis that he was intoxicated at the time of the interview

Criminal Code 1899 (Qld), s 590AA
Evidence Act 1977 (Qld), s 130
Police Powers and Responsibilities Act 2000 (Qld), s 423
R v LR [2005] QCA 368; [2006] Qd R 435, considered

COUNSEL: J Fenton for the defendant/applicant
S J Klemm for the respondent

SOLICITORS: A W Bale & Son for the defendant/applicant
Director of Public Prosecutions (Queensland) for the respondent

Background

- [1] The defendant/applicant is currently charged on a 34 count indictment, charging:
- one count of trafficking in the dangerous drugs methylamphetamine 3 4-methylenedioxymethamphetamine and cannabis;
 - 30 counts of supplying a dangerous drug;
 - one count of possessing a dangerous drug, namely methylamphetamine;
 - one count of possession of things, namely money, tick sheets a set of scales and a mobile phone, used in connection with trafficking in a dangerous drug; and
 - one count of possession of a thing used in connection with possession of a dangerous drug, namely a quantity of clipseal bags, a glass pipe and a straw.
- [2] The defendant applies for a ruling pursuant to s 590AA of the *Criminal Code* that the record of interview which was conducted at 2 am outside the 7-Eleven store at the service station at Richlands, Brisbane, on 29 June 2013 be excluded. It is argued that he was intoxicated at the time and that the interview should not have proceeded and was in breach of s 423 of the *Police Powers and Responsibilities Act 2000* (Qld) (“PPRA”).

An overview of the evidence of the Interview

- [3] Constable Nick Collins and Senior Constable Keith Skuse were conducting mobile patrols on 29 June 2013 and at approximately 1.40 am they saw the defendant’s motorcycle parked outside the 7-Eleven store at a service station at the intersection of Gardner Road and Progress Road, Richlands. They observed that the defendant was standing near the front counter and was constantly fidgeting with his clothes and face. He could not stand still and was pacing backward and forward. When the registration of the bike was checked they became aware that he had been previously charged with possession of drugs. The defendant was intercepted as he left the 7-Eleven.
- [4] When the defendant was asked about his whereabouts that evening he could not provide a consistent version of events. The defendant was detained under the provisions of the PPRA for the purpose of a search as it was believed he was in possession of dangerous drugs.
- [5] The defendant was searched and a strip search was conducted in the service station toilets. They also searched the bag he was wearing around his waist and within the bag the police located a clipseal bag with 0.1gram of methylamphetamine, an orange straw, a set of digital scales, a glass pipe, a mobile phone and a number of pages with writing on them.
- [6] A field interview on a portable dictaphone commenced at 2.04 am, some 20 minutes after the police first saw the defendant. The interview was conducted outside the service station shop and runs for 54 minutes.
- [7] The basis for a ruling pursuant to s 590AA is to have the field interview conducted on 29 June 2013 excluded in exercise of the judicial discretion. In essence, the defendant contends that the interview was in breach of s 423 of the PPRA and ought to be excluded:
- (a) because it is unfair to admit it pursuant to s 130 of the *Evidence Act 1977*; and
 - (b) unfairness and/or the public policy grounds.

The defendant’s evidence

[8] The defendant gave evidence at the pre-trial hearing and stated that he had been smoking methylamphetamine on the evening in question at a friend's house. He had left in the early hours of the morning and had been intercepted by police at the 7-Eleven shortly after leaving the house. He stated that he had been regularly using methylamphetamine in the four or five days leading up to that evening and had last ingested the substance about "10 to 15 minutes before I left".¹ His evidence was that he had taken "at least that night, half a gram or more"² spread out over the evening. He also stated that he had not slept in the previous four days.

[9] He stated that he stopped at the 7-Eleven to get a drink and when he came out he saw police officers either side of his bike. He had not seen them before he left the store and only saw the officers as he emerged into the darkness. He was interviewed by the officers at the front door of the store "near the gas bottles". His evidence was in the following terms:³

"All right. Just stop there. You say they searched you?---Yes.

So you can't remember any words being spoken prior to you being searched; is that right?---No, I can't.

But they must have said something to you?---I don't – the night is pretty hazy. I was actually pretty high on drugs that night.

But you're not – are you or are you not alleging that they forced you to be searched, or did you consent to the search?---Oh, they searched me straightaway. I remember one of the officers said about the bum pack. It was underneath my bike jacket at the time. They made me take the jacket off, take the bum pack off. They searched me, and then they took me into the 7-Eleven, into the toilets, and strip searched me.

All right. So as I understand your evidence, you're saying that they went through your bum pack; is that right?---Yes.

And that's where there was a small – allegedly a small amount of amphetamines; is that right?---Yes.

And then they went into – they took you into the toilet; is that right?---Yes, in the toilets."

[10] The defendant stated that he recalled seeing a tape recorder and being told that if "I didn't cooperate with them I would be spending the weekend in the lockup".⁴ At the commencement of the interview he said he told the officers that he was confused. At the hearing the defendant elaborated on what he meant during questioning from his counsel as follows:⁵

¹ Transcript 1-8 l 31.

² Transcript 1-8 l 41.

³ Transcript 1-9 ll 25-46.

⁴ Transcript 1-10, ll 20-21.

⁵ Transcript 1-10 ll 26-46.

“And you heard before on the tape you said words to the effect of, when they asked you how you felt, that you were confused. Do you remember that?---Yes.

What did you mean by that?---Confused? I didn’t really know what was going on, what I was really doing at the time. I couldn’t actually – I can’t even remember where I was even going that night.

And why do you think you were confused?---Because I was high.

What do you mean by high?---Under the influence of ice.

And do you recall at one point the police told you that you were detained under the Police Powers and Responsibilities Act?---No, I don’t remember that at all.

So you wouldn’t remember what explanation, if any, they gave you of why they were detaining you under the Police Powers and Responsibilities Act?---No.

You obviously listened to the interview with Senior Constable Collins. What happened after that interview?---After the interview they – I sat on the grass and had a smoke while they were in their car, then they told me I could leave. So I got on my bike, and I actually remember I went to a friend’s house not far away.”

[11] Under cross-examination the defendant agreed that he told police on the night that he understood what was happening and that he did not need anything clarified. He also agreed that in the interview he specifically acknowledged that he understood that he did not have to say anything. He agreed that he told police he had taken drugs about “four or five hours ago at least”⁶ and that he told them that he had “just used a little bit of ice tonight, not much but.”⁷ In his oral evidence he stated that: “A little bit for me for that night is half a gram. I was usually smoking about 16 or 17 points every day.”⁸

[12] The defendant also acknowledged that he told the police officers at the time that he believed that he was not affected by the drug and that he said, “I feel fine. I feel like I know what I am doing.”⁹ He also agreed that his voice was “reasonably clear”,¹⁰ and that answers were responsive to the questions asked. He said, however, that: “At the time I was intoxicated. Now, I’ve been sober for quite a while. And I realise that wasn’t me.”¹¹ He indicated that whilst he thought at the time he was fine he now realises he was not, even though he reiterated on a number of occasions that he was fine to continue. He stated, “About the feeling at the time. I was feeling fine for myself at that time, being under the influence.”¹²

⁶ Transcript of Police Record of Interview p 4.

⁷ Ibid.

⁸ Transcript 1-13 ll 32-34.

⁹ Transcript of Police Record of Interview p 4.

¹⁰ Transcript 1-14 l43.

¹¹ Transcript 1-15 ll 16-17.

¹² Transcript 1-18 ll 4-5.

- [13] The defendant confirmed that he gave sensible answers to the police officers and that all the information he gave them was true. He was questioned by counsel for the DPP about his understanding of his right to silence as follows:

“But the part about understanding your right to silence-silence-you’re saying that was not truthful?--- I believe it was truthful at the time, but not at the same time. I was very confused and very high that night.”¹³

- [14] The defendant agreed that he had previously been questioned by police in relation to possession of drugs on 30 August 2010 and 7 May 2013 and confirmed that on both of those occasions he had been informed of his rights. He also indicated that on those occasions he did not participate in an interview with police.

The evidence of Constable Collins

- [15] Given the defendant’s evidence that he was, in fact, high on drugs at the time of the interview it is necessary to examine the interview and surrounding circumstances in some detail particularly the evidence of Constable Collins. His evidence was that he and his partner were doing street patrols and as they drove past the service station they could see into it and they saw the defendant. He stated that they pulled up in the carpark and “watched him from the carpark as he was inside the petrol station”.¹⁴ Initially they saw the defendant standing at the front counter of the service station “constantly fidgeting with his clothes and face. He could not stand still and he was pacing back and forth”.¹⁵

- [16] As the defendant left the store they detained and searched him. He also indicated that the defendant was shaking, mumbling his words and refused to make eye contact. The Constable stated that after they discovered the drugs he was taken into the toilets of the service station and strip searched.

- [17] Ultimately, however, Constable Collins stated that he formed the view that he was not intoxicated and that he understood his rights and could decide whether to answer questions. He stated that as he was questioning the defendant it became clear to him that he was coherent, he was responding appropriately to the questions he was asked and that his answers in response were clear and concise. His evidence was, essentially, that, despite having had a preliminary view that he was intoxicated because of the observation of his demeanour inside the service station, when they were able to speak to him, he changed his view.

- [18] Constable Collins also indicated that he asked the defendant on several occasions whether he understood his rights. He not only told him that he had the right to remain silent which meant he did not have to say anything or answer questions unless he wished to do so, but he also warned him that if anything was said then it would be used later in evidence in court. Constable Collins stated he then asked the defendant “...what does that warning mean to you?”.¹⁶ The defendant’s reply was in these terms:¹⁷

“Nash: Sorry if anything I say to you can be used in court um-

¹³ Transcript 1-18 ll 7-9.

¹⁴ Transcript 1-26 ll 15-16.

¹⁵ Transcript 1-24 ll 21-23.

¹⁶ Transcript of Police Record of Interview p 2.

¹⁷ Transcript of Police Record of Interview p 3.

Con Collins: Yes, do you have to say anything?

Nash: I don't have to say anything if I don't want to."

- [19] It is clear from the transcript that the constable asked the defendant if he was happy to be interviewed and to confirm that he was not forced into anything and that he had not been promised or offered any inducement. Significantly, Constable Collins asked the following series of questions:¹⁸

"Con Collins: Okay mate in relation ah, to today have you um, consumed any alcohol tonight?

Nash: No I haven't.

Con Collins: How would you say your state of mind is at the moment?

Nash: Um, confused um, um, I'd say upset, confused just- -

Con Collins: What are you confused about

Nash: Oh there's a lot o' things going on in my life at the moment [INDISTINCT] like that's why I was, was using the drugs and stuff like that tonight so I- -

Con Collins: Do you understand what's happening tonight?

Nash: Yes.

Con Collins: Is there anything that you need to be clarified?

Nash: No

Con Collins: Okay you understand why we're doin' an interview?

Nash: Yes I do, yes.

Con Collins: And you understand you don't have to say anything?"

Nash: Yes.

Con Collins: Okay, do you think you're affected by any drugs at the moment?

Nash: Oh not affect by no, I [INDISTINCT] I have had just um, used a little bit of um, the Ice tonight, not much but.

Con Collins: How long ago was that?

Nash: Oh it was four or five hours ago at least.

Con Collins: Okay.

Con Collins: Okay. And how do you know--

Nash: [INDISTINCT]--

Con Collins: that you're not affected by it anymore?

Nash: I feel, I, I feel fine, I feel--

Con Collins: Yeah.

Nash: Like I know what I'm doing I'm - -

Con Collins: You understand everything?

Nash: I understand everything [INDISTINCT] yes.

Con Collins: If any ch-, chance during this interview you don't understand something or you're gettin' more confused--

Nash: Yeah.

Con Collins: Okay or if you do get confused should I say tell me and we can--

Nash: Okay.

Con Collins: Stop it or I can rephrase something to ya or we-

Nash: [INDISTINCT]--

Con Collins: Could um - -

Nash: [INDISTINCT].

¹⁸ Transcript of Police Record of Interview pp 3-5.

Con Collins: Stop the, the questioning, do you understand this?

Nash: Yes.”

[20] Constable Collins also indicated that the defendant was told that “if he obstructed us in any way we could go to the watch house as he is under arrest.”¹⁹ The interview lasted for some 54 minutes and was conducted just adjacent to the door of the petrol station service shop area.

[21] Under cross-examination by Mr Fenton, Constable Collins gave the following evidence:

“I think you said you deal with people who are affected by methylamphetamine on an almost daily basis, unfortunately?---Yes, that’s correct.

So you’re well familiar with how these people act?---The indicia, correct.

One of the indicia of some people under the influence of methylamphetamine, or withdrawal, is shaking; would you agree with that?---I do, I do agree.

Would you agree that another indicia of someone who’s taken methylamphetamines or is withdrawing from it is mumbling?---Correct.

Same question about irritability?---Correct.

They often get confused?---Correct.

They sometimes start sniffing?---That’s more heroin to me, but I believe that’s more of a person coming off heroin or withdrawing from heroin; not quite methylamphetamines.

And what about fidgeting? They – sometimes, they fidget a lot, don’t they?---Yeah, correct.

When I mean fidgeting, the hands keep moving without any real rhyme or reason as to why they’re doing that?---Correct.

And sometimes they’re touching their face, Constable?---Correct.

And they often can’t tell a straight story, if I can put it that way?---Correct.

Like, you ask them – you ask fairly simple questions and sometimes they just can’t - - -?---That’s correct.

Yeah. And sometimes they have tremors, that sort of thing?---That’s correct.

¹⁹ Transcript 1-27 ll 1-2.

And do they pace back and forth sometimes?---Yes, that's correct.

And they can't stand still?---Correct.

And refuse to make eye contact?---A lot of people refuse to make eye contact with us.

...

Yes. So you formed a view that you had reasonable grounds for believing he had dangerous drugs on his person?---That's correct.

And one of the reasons that you thought that was because you saw him acting in a way that was consistent with someone who was under the influence of methylamphetamine?---In – yes, in relation to that, and also the checks that we conducted were informed, information over the system in relation that person – the registered owner of the bike, sorry.

...

And then you saw that person in the 7-Eleven?---That's correct.

And they were – and you observed him – which I think is uncontroversially – Mr Nash constantly fidgeting with his clothes and face?---That's correct.

You observed he couldn't stand still?---That's correct.

You observed he was pacing back and forth?---That's correct.”²⁰

The relevant provisions of the PPRA

“423 Questioning of intoxicated persons

- (1) This section applies if a police officer wants to question or to continue to question a relevant person who is apparently under the influence of liquor or a drug.
- (2) The police officer must delay the questioning until the police officer is reasonably satisfied the influence of the liquor or drug no longer affects the person's ability to understand his or her rights and to decide whether or not to answer questions.”

The relevant law

[22] There is no doubt that the courts have a discretion to exclude confessions which have been obtained using improper, unfair and unlawful methods and that the onus of establishing that the discretion should be exercised rests with the defendant.

[23] Section 130 of the *Evidence Act 1977* (Qld) provides as follows:

“130 Rejection of evidence in criminal proceedings

²⁰ Transcript 1-29 ll 1-40 and Transcript 1-30 ll 19-40

Nothing in this Act derogates from the power of the court in a criminal proceeding to exclude evidence if the court is satisfied that it would be unfair to the person charged to admit that evidence.”

Were the provisions of the PPRA complied with?

- [24] The evidence of Constable Collins is that he was initially concerned that the defendant was affected by drugs because of his behaviour and demeanour at the service station. It is also clear that when they searched the defendant he was found to have drug paraphernalia as well as a small quantity of drugs on him. It would seem to me that the fact that he was found with drugs and drug taking utensils should have raised additional concerns that he was drug affected. In any event the defendant subsequently admitted that he had used drugs that day but said it was some four to five hours earlier. It was obviously a possibility that he had consumed the drugs later in time and was denying recent use lest he be charged with driving under the influence of a drug.
- [25] Constable Collins’ clear evidence was that, despite having observed the defendant earlier and being concerned he was drug affected and despite finding drugs on him, he considered that he was not ‘apparently’ affected by drugs when they activated the tape recorder.
- [26] In my view an objective review of the evidence indicates that it was more likely than not that the defendant was drug affected at the time of the interview. He was obviously fidgeting and pacing at 1.40 am and could not keep still. The fact he appeared ‘drug affected’ was the very reason why the police spoke to him. Those suspicions were then answered in the affirmative because the defendant could not give a consistent account of events that evening. He also told police at the outset that he was “confused”.
- [27] It is also significant in my view that the defendant had been arrested on a number of occasions and had never taken part in an interview before. Not only did the defendant take part in an interview on this occasion but he made significant admissions against his interest. The defendant was questioned in some detail about the meaning of writing on ten pieces of paper and in his answers he clearly incriminated himself by admitting to supplying dangerous drugs to others on a number of occasions. He was later charged with trafficking based on his numerous admissions.
- [28] Having listened to the record of interview it is apparent that the defendant is sniffing throughout the interview and that he mumbles a lot of the time. At other times the defendant is ‘rambling’ and the conversation is disconnected and incoherent. My review of the transcript of the interview indicates that of the 301 occasions where a response is recorded as indistinct, 261 of those occasions relate to the defendant’s response. It is also clear that most of the indistinct responses come when the defendant is required to answer any question at length. My overall impression is that the defendant is overly conversational and almost “too helpful”. There is no element of circumspection or restraint. Viewed objectively I am concerned that there is evidence of, not only rambling and mumbling, but also “dis-inhibition” in the interview.

- [29] The clear evidence of Constable Collins was that at 1.40 am the defendant was agitated, nervous, pacing, mumbling and fidgeting. Initially the officers indicate he was mumbling and unable to make eye contact. Constable Collins, however, considered that within 20 minutes of those observations he was fit to be interviewed as he was coherent and understood his rights. In my view that is inherently unlikely. I consider that the evidence supports a finding that the defendant was “apparently” drug affected at the time given the clear evidence of his condition at 1.40 am and the inferences which can be drawn from his response to the questions from the police as evidenced from the record of interview. Sniffing, mumbling, rambling and disinhibition are all consistent with the actions of a drug affected person.
- [30] Section 423 provides that the questioning of an “apparently” drug affected person such as the defendant must be delayed. The provisions of s 423 do not require the police officer to be absolutely satisfied that a person is intoxicated before the questioning is to be delayed, but rather the section provides that questioning must be delayed if the person is “*apparently under the influence of liquor or a drug*”. Once that question is objectively raised the section provides that the officer “*must delay the questioning until the police officer is reasonably satisfied that the influence of the liquor or drug no longer affects the person’s ability to understand his or her rights and to decide whether or not to answer questions.*”
- [31] In *R v LR*²¹ McPherson JA indicated that the provisions of the PPRA are such that the common law rule that a confession was only inadmissible if the degree of intoxication was “so great as to deprive him of understanding what he was confessing” have been altered by the passing of the Act. His Honour stated that “the focus is the person’s ability to understand his rights *and* to decide whether or not to answer the questions being or about to be put to him. It is enough for this purpose if his ability to do either of those things is ‘affected’...”²²
- [32] In my view, the defendant was so affected and I do not consider the evidence supports a finding that he had the capacity required by s 423. I do not consider that he was affected to a severe degree or deprived of capacity but he was none the less affected and that his decision making processes would have been affected to the extent required by s 423. I consider his ability to make informed choices would have been affected by this level of intoxication. It is clear from the provisions of s 423 that the capacity that a person must possess before being questioned is to first of all understand their rights and then to weigh up the choices available to them and to understand the nature and effect of the answers as well as the consequence of those answers to them personally. In my view the defendant’s capacity in this regard was impaired but not totally deprived. The section does not require deprivation of the capacity but rather impairment.
- [33] I consider that in the circumstances of this case the defendant was a person who was “apparently under the influence” of a drug and that the questioning should have been delayed so that he could weigh up in a sensible and considered fashion whether to answer the officers questions and whether to give answers which incriminated him.

²¹ [2005] QCA 368 at [2].

²² [2005] QCA 368 at [3].

- [34] The fact that the defendant reassured police that he understood what was going on and was happy to continue is no answer. There needed to be an objective determination of his capacity to be involved in the questioning. As Keane JA (as he then was) said in *R v LR*,²³ “The assurances of an obviously intoxicated person that he or she is not adversely affected by that intoxication are a cause for circumspection on the part of the interviewer.”

Should the Interview be excluded?

- [35] The fact that the interview occurred contrary to the provisions of the PPRA does not automatically mean that the interview should be excluded. The fact that a relevant provision has not been complied with clearly enlivens the discretion. As Keane JA explained in *R v LR*,²⁴ “The provisions of the PPR Act to which I have referred do not purport expressly to govern admissibility of evidence, but the authorities suggest that they are to be ‘regarded as a yardstick against which issues of unfairness and (impropriety) may be measured.’” He continued:²⁵

“[52] The decision of the High Court in *The Queen v Swaffield*, and in particular the joint judgment of Toohey, Gaudron and Gummow JJ, requires that the discretion to exclude confessional evidence should be exercised, where voluntariness is not in issue, by reference to considerations of reliability and respect for the right of an accused to stay silent. As their Honours said:

‘... the purpose of that discretion is the protection of the rights and privileges of the accused. Those rights include procedural rights. There may be occasions when, because of some impropriety, a confessional statement is made which, if admitted, would result in the accused being disadvantaged in the conduct of his defence.’”

(footnotes omitted)

- [36] I am not simply concerned that s 423 was not complied with. I am also concerned about the place where the questioning took place. The defendant was questioned outside the petrol station and not taken back to the police station. He was questioned at a door way to a shop for an hour with customers obviously coming and going. That is a very informal setting for a formal record of interview. The informality of such a setting would have done nothing to convey to the defendant the seriousness of the situation he was in. Given those informal surroundings the significance of the questioning by police and the consequences that followed from his admissions may not have been obvious to the defendant.
- [37] I am also concerned that whilst the interview was audiotaped it was not videotaped. Accordingly, it is now impossible to assess the defendant’s behaviour and mannerisms at the time of the interview. In this regard I note that counsel for the defendant in his submissions argues that the inference is that the defendant was interviewed at the petrol station rather than taken to the police station to ensure that he gave answers “as soon as possible whilst drug affected.”

²³ [2005] QCA 368 at [45].

²⁴ [2005] QCA 368 at [51].

²⁵ [2005] QCA 358 at [52].

- [38] In this regard counsel submits that whilst an inadvertent breach might not enliven the discretion a deliberate “taking advantage of a drug affected man compels the exercise of the discretion to exclude.”
- [39] I also note that the admissions made significantly hamper the defendant’s defence of the case.
- [40] Overall I consider that the interview should be excluded on the basis that it was unfair to conduct a record of interview outside the petrol station when there was real cause for concern that he was under the influence of drugs, lacking capacity to understand his rights and unable to exercise his right to decide whether to answer questions because of that lack of capacity.
- [41] I consider that the record of interview should be excluded pursuant to s 130 of the *Evidence Act 1977 (Qld)* as it would be unfair to the defendant to admit that evidence.