SUPREME COURT OF QUEENSLAND

CITATION:	*R v Toon* [2015] QSC 117
PARTIES:	**THE QUEEN** (Respondent) **v** **DANIEL STEWART TOON** (Applicant)
FILE NO/S:	SC No 17 of 2014
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Mackay
HEARING DATE:	15 April 2015
DELIVERED EX TEMPORE ON:	15 April 2015
DELIVERED AT:	Mackay
JUDGE:	Henry J
ORDER:	**1. The application is upheld.** **2. The evidence of what was found in the search of the motor vehicle is excluded from the evidence that can be adduced in this case.**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – ILLEGALLY OBTAINED EVIDENCE – where the police officer searched a motor vehicle without a warrant – where the officer was granted a post-search approval warrant – whether the search undertaken without warrant needed to be conducted urgently in order to prevent loss of, or interference with, evidence - whether the search involved a deliberate or reckless disregard of the law Police Powers and Responsibilities Act, s 31(3), s 161 *Bunning v Cross* (1977/78) 141 CLR 54, considered *R v Fuentes* (2012) QSC 288, cited *R v Pohl* (2014) QSC 173, cited *R v Versac* (2013) QSC 46, considered *R v Williamson* (2009) QSC 434, cited
COUNSEL:	BJ Hartigan for the applicant

	SJ Hedge for the respondent
SOLICITORS:	Morton Lawyers for the applicant Office of the Director of Public Prosecutions for the respondent

[1] **HIS HONOUR**: This is an application to exclude evidence of the finding of items in the search of a Toyota Kluger motor vehicle on the 8th of November 2013. The fruits of that search give rise to two of the three drug offence counts on the indictment presently before the Court. The applicant defendant has pleaded guilty to the remaining count.

Facts

[2] Early on the morning of the 8th of November 2013 police were called to a disturbance at room 210 of the Windmill Hotel in the suburb of Mount Pleasant at Mackay.

[3] A female, Katrina McDonald, answered the door. She had a laceration to her forehead. Police announced they were entering the unit under the Domestic and Family Violence Protection Act. Some green leaf material, presumably cannabis, and a used needle and syringe were on the kitchen table. The unit was searched for other persons and the applicant was found hiding in the bathroom. He was detained under the Domestic and Family Violence Protection Act and taken outside.

[4] It was discovered he was wanted on a warrant. He tried to flee but was caught and placed under arrest in respect of the warrant. His person was searched and various items, including car keys, were found. He was processed at the watch house and remained in custody. He later declined questioning.

[5] Meanwhile, back at the unit other drug-related items and a loaded handgun were found. There is evidence to suggest other citizens earlier in the day witnessed the applicant in possession of a handgun.

[6] The uniformed constable who had conducted the pat-down search of the applicant used the car key unlock button to search for and find the car the keys related to in the vicinity of the motel car park. It was a Toyota Kluger. The constable only went so far as locking

and unlocking it, apparently for the limited purpose of identifying the car to which the keys related.

[7] Plain Clothes Senior Constable S, from the Brisbane Flying Squad, which was in town, arrived at the motel and was briefed by the uniformed constable. He gave Plains Clothes Senior Constable S the keys.

[8] Officer S went to the Kluger. The keys were used to unlock it. It was searched and various items, including an ammunition round, clip seal bags, scales, cannabis and 33.317 grams of a white crystalline substance containing a pure weight of 22.178 grams of methylamphetamine were found. Ten days later, on the 18th of November 2013, police obtained a post search approval order in respect of the search of the vehicle.

[9] Officer S testified that he conducted the search pursuant to s 31(3) of the *Police Powers and Responsibilities Act* 2000 (Qld). That section did not empower him to conduct such a search because the vehicle had not been, and was not, detained pursuant to that section or, indeed, at all. The Prosecution accepts that the search was not lawful.

[10] Officer S explained in evidence that he realised that fact back in Brisbane on the 18th of November 2013 after he discussed the case with a superior or supervising officer. That officer, apparently, urged upon him the idea or option of seeking a post-search approval order and on the same date such an order was sought. The application for that order, under s 161 of the *Police Powers and Responsibilities Act*, is before me as part of exhibit 2. Not one part of it founds a basis for the critical element required to secure such an order, namely, that circumstances existing before the search suggested a reasonable likelihood that evidence would be concealed or destroyed. While there are other considerations in play in an application of this kind, it is the premise that the search undertaken without warrant needed to be conducted urgently in order to prevent loss of, or interference with, evidence, which is at its heart.

[11] Officer S gave evidence that he was quizzed by the Magistrate on the application and I infer he must have told the Magistrate much more than appears in the application to cause the Magistrate to be satisfied so as to make an order. In any event, the fact that an order was made is not per se of immediate relevance in an application of this kind. It may

afford some civil protection to an officer but it does not of itself have any immediate bearing on whether or not evidence should or should not be excluded. What occurred in respect of that post-search application does, however, have relevance in the present case in a way I will shortly explain.

[12] **The Discretion**

[13] In *Bunning v Cross* (1977/78) 141 CLR 54 at 72, Stephen J and Aickin J cited the Chief Justice's observations in *R v Ireland* (1970) 126 CLR 321 at 335 as representing the law in Australia in respect of unlawfully obtained evidence, vis:

> *Whenever such unlawfulness or unfairness appears, the Judge has a discretion to reject the evidence. He must consider its exercise. In the exercise of it, the competing public requirements must be considered and weighed against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand is the public interest and the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion.*

[14] Stephen and Aickin JJ went on to say at 74:

> *What Ireland involves is no simple question of ensuring fairness to an accused, but instead the weighing against each other of two competing requirements of public policy thereby seeking to resolve the apparent conflict between the desirable goal of bringing to conviction the wrongdoer and the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law.*

[15] That being the aim of the discretion process their Honours went on to explain that the question of unfairness to the accused was not the pivot point of the matters under consideration. They warned at 77 that it was not appropriate to state in the abstract criteria relevant to the exercise of the discretion. They approached consideration of the facts of that case by reference to a number of considerations. The considerations to which they had regard are not necessarily the only considerations that may be relevant in a matter of this kind.

[16] In brief, they were, firstly the nature of the unlawfulness, particularly in the sense of whether or not it involved a deliberate or reckless disregard of the law by those whose duty it is to enforce it. The second consideration was whether or not the illegality affected cogency. The third was the ease with which the law might have been complied with in procuring the evidence in question. The fourth was the nature of the offence charged.

[17] I note in *R v Versac* (2013) QSC 46 at 6 that Applegarth J extracted seven considerations or factors of a kind that may be relevant in the exercise of the public policy discretion here in play. They are useful and illustrative, but I bear in mind what was said in *Bunning v Cross* about criteria that may be relevant not being identified merely in the abstract, observations which herald the importance of focusing on the case at hand.

[18] I have been referred to a variety of single judge decisions in which a discretion of the kind I am now asked to exercise was exercised and in different ways - see *R v Williamson* (2009) QSC 434, *R v Fuentes* (2012) QSC 288, *R v Versac* (2013) QSC 46 and *R v Pohl* (2014) QSC 173. Those cases are illustrative, however the exercise in which I am engaged necessarily involves a quintessential exercise of a discretion that turns upon the facts of an individual case.

Discussion

[19] In this case, the importance of the evidence in the proceeding is self evident. Indeed it is critical, for it appears if the evidence is excluded the prosecution case in respect of the two counts to which the seized methylamphetamine and cannabis relate cannot be proceeded with. Plainly that consideration is a consideration that favours admission.

[20] So too is the seriousness of the alleged offending. The quantity of pure methylamphetamine was significant. In and of itself it bespeaks a commercial purpose. The broader circumstances in which it was found supports such an inference rather than detracts from it. In the event of a conviction in this case after trial, I would have thought that the approximate head sentence range, at least as a starting point, would fall at or about the four year mark. It might be on a favourable sentencing exercise that features would be put before a court resulting in a lesser sentence. Equally, it might be there are considerations I am unaware of that may give rise to a slightly higher sentence. An

obvious illustration in this case about the variability of relevant considerations on sentence that are presently unknown, is what part the fact that a handgun was found inside the motel unit might ultimately play. At the very least, one might have thought, unless it is disassociated completely from this offender, that it might bear upon a consideration of his character in arriving at a just sentence.

[21] In any event, it is self evident that this is serious criminal behaviour if it be proved, and that is an element favouring its admission. No court would take any pleasure in excluding evidence which on its face demonstrates serious criminal behaviour. It is, however, not the only consideration.

[22] The respondent here is not disadvantaged by this being a case of deliberate unlawfulness. I generally regard plainclothes officer S's testimony as being credible, and I certainly did not detect any indication of dishonesty on his part.

[23] In some cases the relevance or otherwise of superior officers condoning unlawful behaviour is a relevant consideration. Here it was urged upon me the fact that Officer S sought advice from his supervisor which resulted in what on the face of it was a misconceived application for post-search approval was said to be relevant. It seems to me that the evidence on that topic is not sufficiently clear for me to conclude that this was a case in which there was some kind of condoning or urging by a superior of the perpetuation of one error by another.

[24] The issue of cogency in this case appears to be a neutral consideration.

[25] Turning to the considerations weighing against the allowing of the unlawfully obtained evidence, it would have been very easy for Senior Constable S to have complied with the law in this case. This was a search in suburban Mackay. The city was but five to 10 minutes drive away. It was a working day. It would have been a simple thing to leave a police officer to guard the car while another went and secured a warrant. It is inevitable, in my view, that a search warrant, had it been applied for, would have been issued. The police had found evidence of likely drug offending and firearm offending in a motel unit in which this applicant was found hiding from police. He tried to flee from police. On his person was a key to the motor vehicle in the nearby car park. The prospect of evidence

of drug offending or firearm offending being located in that motor vehicle was high. The prospect, therefore, of a warrant being issued, had it been applied for, was also high.

[26] It seems to me the ease with which the law could have been complied with in this case is not, as it seems to have been in *Bunning v Cross*, a neutral consideration. In the context of this case it is a fact that favours exclusion. If it is too much to expect police to be bothered to get a warrant in such a simple case as this, then when might society expect police to do so? Put differently, given the ease with which police could have behaved lawfully, the court ought be reluctant to signal that in such a situation the court will settle for such a lax approach to compliance with legislative requirements that bear upon the government's interference with the property of citizenry.

[27] In making those observations, I reiterate I accept that in this case Senior Constable S' unlawful conduct was not deliberately unlawful. It is the grave laxity of approach or standards which I am here concerned by and am concerned not to condone or encourage by admitting the evidence.

[28] In my view, while the officer's error on the 8th was not deliberate, it was, given the contextual gravity of the error, reckless. It is true the officer had some appreciation of the law relating to searches, but the error here was very elementary for an experienced police officer, as this officer was. The Court does not expect police, even plainclothes officers, to have broad legal knowledge of the kind that a legally qualified practitioner does, but it is not unreasonable to expect that police ought know the laws which regulate their own powers as police to search the property of citizens.

[29] This was a genuine error, yes, but given its context it was nonetheless reckless. Police generally, and not only Senior Constable S, must know that the Court will not turn a blind eye to this level of ignorance in the exercise of police power in order to help perpetuate prosecution cases based on unlawfully obtained evidence.

[30] I am fortified in concluding that this was a reckless disregard of the law by Senior Constable S' evidence by the events which followed vis-à-vis the application for the post-search approval order. Those events are intrinsically connected with this very matter. They do not fall for consideration in isolation of it. If it be the case, as Officer S

acknowledged, that he had made an error unwittingly flowing from his misunderstanding of the relevant provision of the *Police Powers and Responsibilities Act*, it is extraordinary that against that background he made an application founded on another provision of that Act without, as he acknowledges, examining that provision. Had he done so it is very obvious that either he would not have made the application at all or it would have taken a considerably different form. It is a surprisingly lax approach considered in isolation. In the context of this case it fortifies the conclusion that it is appropriate to characterise the error on the 8th as reckless, rather than something less serious than that.

[31] The events associated with the application for post-search approval also fortify my reluctance in this case to forgo deterring unlawfulness of the kind that occurred on the 8th and my reluctance to be seen as condoning it.

Conclusion

[32] Weighing up all of the considerations for and against causes me to conclude, in the exercise of my discretion, that the evidence of what was found in the search of the motor vehicle should be excluded from the evidence that can be adduced in this case.

[33] The application is upheld.