

# SUPREME COURT OF QUEENSLAND

CITATION: *R v Thomas* [2015] QSC 28

PARTIES: **THE QUEEN**  
v  
**BRADY JOHNATHAN THOMAS**  
(applicant)

FILE NO/S: SC 325 of 2014

DIVISION: Trial Division

PROCEEDING: 590AA hearing

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 20 February 2015

DELIVERED AT: Brisbane

HEARING DATE: 15 December 2014

JUDGE: Ann Lyons J

ORDER: **The Record of Interview conducted at Kawana Waters Police Station on 23 October 2013 is excluded**

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 makes an application for the exclusion of a record of interview at Kawana Waters Police Station pursuant to s 590AA(2)(e) *Criminal Code* 1899 (Qld) – whether the record of interview should be excluded on the basis that the applicant’s confessions were not voluntary – whether the record of interview should be excluded on the basis of unfairness and/or public policy grounds

*Criminal Code* 1899 (Qld), s 590AA  
*Criminal Law Amendment Act* 1894 (Qld), s 10  
*Evidence Act* 1977 (Qld), s 130  
*Police Powers and Responsibilities Act* 2000 (Qld), ss 415, 431  
*Police Powers and Responsibilities Regulation* 2012 (Qld), schedule 9

*Collins v The Queen* (1980) 31 ALR 257  
*McDermott v The King* (1948) 76 CLR 501  
*Pollard v The Queen* (1992) 176 CLR 177  
*R v Lee* (1959) 82 CLR 133  
*R v Swaffield; Pavic v R* (1998) 192 CLR 159  
*Van der Meer v The Queen* (1988) 62 ALJR 656

COUNSEL: D Crews for the applicant  
D Jones for the respondent

SOLICITORS: Fowler Lawyers for the applicant  
Director of Public Prosecutions (Queensland) for the respondent

### **ANN LYONS J:**

- [1] This is an application by Brady Johnathan Thomas for a ruling pursuant to s 590AA(2)(e) of the *Criminal Code* 1899 (Qld), that the record of interview which was recorded between him and police on 23 October 2013, be excluded in its entirety (Record of Interview). Mr Thomas is currently charged on a six count indictment with one count of trafficking in the dangerous drugs methamphetamine, cannabis and 3-4 methylenedioxyamphetamine (3-4 MDMA) over a 10 month period from 31 December 2012 to 24 October 2013 and five counts of supplying 3-4 MDMA and cannabis between 21 April 2013 and 24 October 2013.
- [2] The application is made on two bases. The first basis is that the Record of Interview should be excluded because the applicant's confessions were not made voluntarily. The second basis is that even if the confessions are found to be voluntary, and therefore admissible in law, they should be excluded on the basis of unfairness and/or public policy grounds, which involves an exercise of judicial discretion.

### **Background**

- [3] In September 2012, Queensland Police commenced an operation targeting the trafficking of dangerous drugs in the Sunshine Coast area. In that operation, Nikolas Karl Bloemers and Daniel Sivyer were the major persons of interest as they were suspected of being involved in the manufacturing and trafficking of dangerous drugs. Warrants had been obtained to monitor the telephone numbers of Bloemers and Sivyer. In relation to Sivyer, more than 15,000 calls across six different telephone numbers were monitored in the period of the warrant, the dates of which have not been specified. In relation to Bloemers, in the period from 30 January 2013 to 24 April 2013 some 7,000 communications were monitored. Mr Thomas' phone number was identified due to the 23 telephone communications he had with Sivyer and the 304 telephone communications he had with Bloemers.
- [4] The evidence against Bloemers and Sivyer indicates that during the period of the drug operation, a law enforcement participant (LEP) paid Bloemers \$3,000 for drugs on one occasion, and obtained drugs from Sivyer on eight

occasions with payments totalling \$9,950. Sivyer's home was searched on 27 March 2013 and Bloemers was located at that residence with \$5,420 in cash and 47 methylamphetamine tablets. The operation was closed down on 22 October 2013 when a number of raids were conducted of premises owned by persons of interest in the operation including Bloemers and Sivyer.

- [5] On 23 October 2013, a search warrant was also executed at the residence of Mr Thomas occupied with his mother at Buddina. The search warrant noted on page two that the warrant had been issued in relation to the trafficking of the dangerous drugs methylamphetamine, methylenedioxypropylamphetamine (MDVP- a form of speed) and anabolic and androgenic steroidal agents in a nine month period, as well as possession of those steroids in that period. The search was tape recorded and that recording revealed that Mr Thomas was handed a copy of the warrant and told his address was "a place to be searched in relation to drugs". The specific provisions of the search warrant were not otherwise referred to.
- [6] During the search of his home, a Samsung mobile phone was found, as well as a bong for smoking cannabis and a small quantity of cannabis. After the search, he was asked to accompany the police officers to the station for an interview in relation to the "items which had been found during the search" (ie the cannabis and the bong). He was not told he was to be interviewed in relation to the possession of anabolic and androgenic steroids or the trafficking in speed and steroids over a 9 month period as outlined in the search warrant.
- [7] The essence of Mr Thomas' application is that the subsequent interview at the police station, in which he made extensive admissions about his relationship with Bloemers and Sivyer, was the result of inducements made to him by two of the investigating police officers which led him to believe that he was only going to be charged in relation to the possession of the items found during the search.

### **The evidence of Mr Thomas**

- [8] Mr Thomas gave evidence at the hearing of the application and stated that at 6am on 23 October 2013 he was woken up by police entering the house he lived in with his mother and told that they had a search warrant. He was asked if there was anything he wished to declare and he indicated that there was a bong in the laundry and he showed them where it was. Police also found some green leafy material in the laundry, which he was unaware of, whilst they were searching for the bong. His phone was seized as was the bong and the cannabis. His mother was present during the search.
- [9] Mr Thomas stated that he was then asked if he wanted to accompany police to the station to answer some questions about what had been found during the search. He stated that he was not able to read the warrant prior to the search being carried out and was unaware of its contents. On the trip to the Kawana Waters Police Station, one of the officers asked him if he knew Sivyer or Bloemers. When he indicated they were friends of his, he was told by the officer that a lot of his friends have been arrested over the past few days. The applicant stated he was unaware of this. Mr Thomas indicated in

evidence that it was at this point in time that he was told that he was being taken back to the police station because he was suspected of dealing 'caps' (drugs).

- [10] When they arrived at the Kawana Waters Police Station, he stated that the car was parked at the rear and he was asked if he wanted to have a cigarette before they went in for the interview. He indicated that the officers were very friendly, and were making out that this was no big deal. They refilled his water bottle and told him to have another cigarette before the interview. Whilst he was having a cigarette outside the police station, he was speaking to Andrew Simpson who was the officer who had initiated the search at his home. He stated that Simpson explained to him that he did not usually do this sort of work and was not sure why they put him in charge of the investigation.
- [11] The applicant stated that he was then specifically told by Simpson not to be worried and that he would not be going to jail or fined over \$10,000. He was also told that whatever he got fined he could pay back on SPER. He stated he then chatted with Simpson about random stuff such as hobbies and he expressed his concern about his mother finding out about what was going on. He stated that Simpson told him to tell her that he was there just because they found a bong. In terms of the interview, he was also told by Simpson "just to think of it as a confession, like get a weight off your shoulders and I would feel so much better afterwards". The applicant also stated that Simpson told him he would be able to do a drug diversion course in relation to the charges for possession of the bong and the green leafy material and that the judge would not know about it.
- [12] The applicant also stated that before the interview commenced, he was told by the officers that they were going to ask him if he had sold any drugs to underage kids and he was specifically told to reply "no". He also indicated that after the interview he was taken into another room while the officers sorted out the drug diversion. He was in there for maybe half an hour to an hour and during that time another plain clothed officer came in and asked him to sign a piece of paper stating they could use it in court. He later understood that the piece of paper was a statement the police had prepared for him. He was told that Bloemers would never find out about it and said "It would just look better in the court's eyes if I signed it".

### **The interview**

- [13] Having viewed the recording of the interview, it is clear that during the interview, the applicant made very significant admissions. He confessed to trafficking in dangerous drugs. In particular, he stated he purchased "speed based caps" off Nicholas Bloemers and "would distribute them to friends." He bought 50 capsules at a time for \$600. He indicated that he would make this type of purchase once or twice a month and that he sold them from January 2013 through to early October 2013, and had around 10 customers. He sold a minimum of one capsule and a maximum of 20 capsules at a time to his customers. He sold the capsules for \$20 each and did not offer a discount if his customers bought in bulk. The applicant also stated that he did not allow his drugs to be purchased on "tick".

- [14] This detailed confession is corroborated, at least in part, by text messages and intercepted telephone calls. It is therefore of a high probative value.

**Was the confession voluntary?**

- [15] The applicant points to a number of factors to argue that he was induced to undertake the interview.
- (a) At the conclusion of the search at his home, police asked him to come to the station to talk about what they had found. At the time, police were in possession of a search warrant which identified Thomas as a suspect for drug trafficking. Accordingly, they used a false premise to induce him to accompany police to the station to participate in a record of interview.
  - (b) The police used coercive strategies at the station to lull him into a false sense of security by being overly friendly and giving him drinks and cigarettes.
  - (c) Prior to the interview, the officers undertook an excessive exercise in relation to providing a statutory warning. It is argued that the excessive warnings indicate an awareness that a challenge would be made to the admissibility of the interview. The applicant also states that he was under the impression that he was only to get a fine in relation to the possession of the drug, cannabis, and the bong. He did not consider that the warnings therefore were relevant to him.
  - (d) Furthermore, it is argued that there was no need to obtain a signed statement from the applicant in relation to the activities of Bloemers and Sivyver, given that the evidence they had against them was overwhelming.
  - (e) It is also argued that the police failed to record the conversations after the search of the premises and before the record of interview commenced. There was no field recording of the transport to the police station.
  - (f) The fact that the police did organise a drug diversion for the applicant corroborates the applicant's version of events.

**Was the interview induced?**

- [16] The case against the applicant consists of the text messages found on his mobile phone, the intercepted phone calls and the Record of Interview on 23 October 2013 in which he confessed to trafficking. The videotaped interview indicates that both officers are dressed in jeans and T-Shirts. In my view, the interview has a very real atmosphere of light heartedness and in fact commences with the applicant and the officers all laughing together. Whilst all the formal warnings are given, there is no sense of formality or seriousness. The applicant, in my view, looks much younger than his 23 years and my fundamental impression is one of naivety.
- [17] The current charges are one count of trafficking in the dangerous drugs methamphetamine, cannabis and 3-4 methylenedioxymethamphetamine over a 10 month period and five counts of supplying 3-4 MDMA and cannabis over a six month period.

[18] Section 10 of the *Criminal Law Amendment Act 1894* (Qld) provides:

“No confession which is tendered in evidence on any criminal proceeding shall be received which has been induced by any threat or promise by some person in authority, and every confession made after any such threat or promise shall be deemed to have been induced thereby unless the contrary be shown.”

[19] It is clear that it is for the prosecution to satisfy the trial judge on the balance of probabilities that a confession has been voluntarily made.

[20] The relevant principles to be exercised in relation to the admissibility or exclusion of confessional evidence are well-known and it is clear that a confession must be made in the exercise of a free choice to speak or to remain silent. In *R v Swaffield; Pavic v R*<sup>1</sup>, Brennan CJ referred to the decision of *McDermott v The King*<sup>2</sup> where Dixon J set out the rules in relation to voluntariness which were subsequently adopted unanimously by the High Court in *R v Lee*<sup>3</sup>. Those rules essentially provide that a statement cannot be admitted into evidence unless it has been shown that it was made voluntarily which means that “it has been made in the exercise of free choice and not because the will of the accused was overborne or his statement made as a result of duress, intimidation, persistent importunity or sustained or undue insistence or pressure”<sup>4</sup> and secondly that such a statement is not voluntary if preceded by an inducement, such as a threat or promise, held out by a person in authority. It was held that there is really one rule “the rule that a statement must be voluntary in order to be admissible.”<sup>5</sup>

[21] Brennan CJ stated that if confessions made when the will of the confessionalist is overborne are to be excluded because they are unreliable, the effect of conduct by those in authority upon the will of the confessionalist must be examined to determine whether his will was in fact overborne. His Honour repeated his earlier view in *Collins v The Queen*<sup>6</sup> in the following terms:

“So the admissibility of the confessions as a matter of law (as distinct from discretion, later to be considered) is not determined by reference to the propriety or otherwise of the conduct of the police officers in the case, but by reference to the effect of their conduct in all of the circumstances upon the will of the confessionalist. The conduct of police before and during an interrogation fashions the circumstances in which confessions are made and it is necessary to refer to those circumstances in determining whether a confession is voluntary. The principle, focusing upon the will of the person confessing, must be applied according to the age, background and psychological condition of each confessionalist and the circumstances in which the

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<sup>1</sup> (1998) 192 CLR 159 at 168.

<sup>2</sup> (1948) 76 CLR 501 at 511-512.

<sup>3</sup> (1959) 82 CLR 133 at 144.

<sup>4</sup> (1998) 192 CLR 159 at 168.

<sup>5</sup> (1998) 192 CLR 159 at 168.

<sup>6</sup> (1980) 31 ALR 257 at 307.

confession is made. Voluntariness is not an issue to be determined by reference to some hypothetical standard: it requires a careful assessment of the effect of the actual circumstances of a case upon the will of the particular accused.”

- [22] Turning first to the conduct of the police in the circumstances of this case. At the outset, I should indicate that I am concerned that the applicant proceeded to the police station in the police car conscious only that he was to be interviewed in relation to the items found at his home which related to his private use of marijuana. The Transcript<sup>7</sup> of the search at his home indicates that he is asked to accompany the police to the station in these terms:

“SCON SIMPSON: Alright. Ah, we just need to speak to you about those items that we’ve, we’ve seized from your bedroom and stuff.”

He is also told just prior to getting into the car<sup>8</sup>:

“SCON SIMPSON: And um, and we’ll sort things out. Alright.”

- [23] In my view, this statement resulted in the applicant operating under a fundamental misunderstanding about the purpose of the interview. He was not aware of the fact he was to be asked questions in relation to trafficking in the dangerous drugs 3-4 MDMA and methamphetamine when he agreed to be interviewed. Whilst he was advised during the trip to the police station that his friends Bloemers and Sivyver were under investigation and that he was going to be asked about dealing in “caps”, the applicant stated in his evidence that he had no idea that meant he was under suspicion for trafficking in dangerous drugs.
- [24] The conversation in the car en-route to the Kawana Waters Police Station was not recorded but officers Fairgrieve and Simpson gave evidence that they discussed with the applicant the fact he was to be interviewed in relation to trafficking in dangerous drugs during that journey. That fact is not recorded in their notebooks. Ultimately, I accept the applicant’s evidence that when he arrived at the station he was unaware of the seriousness of the situation he was actually in given the references by police to the prospect of fines and drug diversion. It is also significant that the contents of the warrant and the precise wording of the warrant were not brought to his attention even when he specifically stated during the record of interview that he had not read the warrant.
- [25] It is also evident from the transcript of the subsequent interview that the focus of the questioning relates to his interaction with Bloemers. Ultimately, he signed a statement in which he admitted to purchasing amphetamines as well as “ice” for his personal use from Bloemers. The applicant during the interview also specifically agrees to give that evidence in court. It would seem to me that, at least in the first part of the interview, the applicant would

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<sup>7</sup> At p 26 ll 4-5.

<sup>8</sup> At p 26 l 33.

not have really been aware that the answers he was giving would be used against him in relation to drug trafficking charges.

- [26] Having considered the video recording of the interview, it is obvious that the applicant's demeanour during the interview is consistent with his evidence that he did not think the interview was "any big deal" and he did not realise how much trouble he was in. Furthermore, at the beginning of the interview at the police station he is simply advised that the purpose of the interview is in relation to a drug investigation:<sup>9</sup>

“SCON FAIRGRIEVE: All right. Brady, you agree it's just the three of us here in the interview room at the time?”

THOMAS: Yep.

SCON FAIRGRIEVE: All right. Brady, the purpose of speaking with you this morning is in relation to, ah, a drug investigation that's been carried out over the last – or since December 2012—

THOMAS: Yep.

SCON FAIRGRIEVE: --up until the last couple of days during its closure, and, ah, obviously you've been identified as a person in relation to that investigation.

THOMAS: Yep.

SCON FAIRGRIEVE: And we need to speak with you about certain aspects of that.

THOMAS: Okay.

SCON FAIRGRIEVE: Ah, subsequently a search warrant was conducted at your house this morning, or at your unit, sorry.

THOMAS: Yeah.

SCON FAIRGRIEVE: And, ah, a small amount of property was located during that which we need to speak with you about as well. So do you understand why you're here and what we need to speak with you about?

THOMAS: Yeah, yes.

SCON FAIRGRIEVE: All right.

THOMAS: Yes.

SCON FAIRGRIEVE: As always, Brady, there's certain rights and warnings I must give you in relation to, ah, interviews.

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<sup>9</sup> Transcript at p 2 ll 48-60; p 3 ll 1-31.

THOMAS: Yep.” (my emphasis)

- [27] It would seem to me that the warnings were given in relation to questions he was going to be asked about, which were the items found during the search namely a phone, a bong and a small quantity of marijuana. He is not told at the outset that he is under investigation for trafficking in a number of specified dangerous drugs. It is not until the bottom of page 7 of the transcript of the Record of Interview that Senior Constable Fairgrieve states that there had been a drug investigation in relation to the supply of numerous drugs including MDVP, steroids, cocaine and other drugs. Even at that point, he is told that he was a person of interest because of his contact with another person:<sup>10</sup>

“SCON FAIRGRIEVE: Ah, throughout that investigation, ah, you’ve been identified as a person of interest in relation to that—

THOMAS: Yep.

SCON FAIRGRIEVE: --ah, through another person, and, ah, subsequently the reason we obviously need to speak with you is in relation to your involvement with that person.

THOMAS: Yep.

SCON FAIRGRIEVE: And, ah, your involvement in relation to, ah, as the warrant said, the trafficking in dangerous drugs.

THOMAS: Okay.

SCON FAIRGRIEVE: All right. Do you understand that?

THOMAS: Yep.

SCON FAIRGRIEVE: All right. Mate, we – we’re easy going. We’re just pretty simple as well.

THOMAS: Yep.

SCON FAIRGRIEVE: So if simple is easy for you as it is for me—

THOMAS: Yep.

SCON FAIRGRIEVE: --so we’ll just go through it bit by bit—

THOMAS: Okay.

SCON FAIRGRIEVE: --and, ah, work out where we’re at. Are you happy for that?

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<sup>10</sup> Transcript at p 7 ll 37-60; p 8 ll 1-20.

THOMAS: Yep.

SCON FAIRGRIEVE: Too easy.

THOMAS: Cool.” (my emphasis)

[28] Having viewed that interview, I am not satisfied that the applicant was aware he was being questioned about his role in relation to either the supply or trafficking of drugs but rather he was under the impression he was giving information about Bloemers and Sivyer. I consider that this was reinforced during the interview by the continued reference to his interaction with Bloemers as follows:<sup>11</sup>

“SCON FAIRGRIEVE: All right. In relation to – as I said, did you read the warrant this morning when we attended the house?

THOMAS: Um, I didn’t get a chance, no.

SCON FAIRGRIEVE: Okay. Obviously the warrant is in relation – you – you started to read it I think [INDISTINCT]  
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THOMAS: Yeah.

SCON FAIRGRIEVE: --is in relation to the trafficking of a, as I said, MDVP--

THOMAS: Yep.

SCON FAIRGRIEVE: --which is obviously a – a, ah, form of speed.

THOMAS: Okay.

SCON FAIRGRIEVE: Ah, by Nicholas Carl Blumus [sic], ah, throughout the time, and subsequently the same one for yourself on the warrant, Brady Johnathan Thomas--

THOMAS: All right.

SCON FAIRGRIEVE: --all right, throughout that period, from, ah, the 30<sup>th</sup> of, ah, January 2013 to the 18<sup>th</sup> of October.

THOMAS: Yep.

SCON FAIRGRIEVE: All right. In relation to that time that person by that name of, ah, Nicholas Carl Blumus [sic], how do you know that person?

THOMAS: Um, I went to school with him.”

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<sup>11</sup> Transcript at p 8 ll 22-60.

- [29] The questioning at least until page 26 of the Record of Interview was all about his involvement with Bloemers and the applicant's specific agreement to give evidence in court against him. Having considered that tape recorded evidence, I consider that the applicant presents during the interview as overly friendly and compliant with police. He was clearly operating under a misapprehension which was compounded by his naivety. I note that he told the officers during the interview, that he was educated to Grade 10, he was currently working at Woolworths and that his mother managed all his finances.
- [30] In summary, I consider the following factors to be of concern;
- (a) the applicant had not had the opportunity to read the warrant before the search was conducted nor were the contents of the warrant brought to his attention before the search;
  - (b) the applicant specifically agreed to go to the police station to be questioned about the items found at his home which clearly related to the possession of items used to smoke marijuana;
  - (c) the applicant was not aware before agreeing to go to the station that he was to be questioned about his role in the supplying and trafficking of dangerous drugs including 3-4 MDMA and methylamphetamine;
  - (d) the applicant was told by police at the Kawana Waters Police Station that the likely penalty for possession of marijuana and the bong was a fine and drug diversion;
  - (e) the applicant was specifically told that Bloemers and Sivyver were being investigated for drug trafficking;
  - (f) the applicant agreed during the interview to give evidence in court and provided a signed statement about his involvement with Bloemers and Sivyver;
  - (g) the formal warning given to the applicant at the commencement of the interview appears to relate to the items found at his home; and
  - (h) in the first part of the interview, the applicant is overly co-operative and compliant.
- [31] Turning then to a consideration of the factors outlined in *Collins*, particularly a consideration of the effect on the applicant of the officer's conduct. It would seem to me that the applicant's will was in fact overborne due to a combination of factors. The starting point is the applicant's overt and apparent naivety compounded by the belief that he was being questioned about the items found at his home. Furthermore, his discussions with police prior to the commencement of the interview related only to penalties for the possession of a bong and a small quantity of marijuana. There was no indication until the interview was well underway that he was being questioned about his role in the trafficking of dangerous drugs. In my view, in the circumstances of this case the applicant was not given a free choice of whether to speak or remain silent because he was not aware he was being questioned about HIS role in the trafficking of dangerous drugs when he agreed to participate in the interview.

- [32] I consider that the applicant was induced to participate in the interview on the basis that he was being questioned in relation to the items found in his home.
- [33] During the interview, it is clear that the initial focus of the interview is on the items found at his home and his relationship with Bloemers and Sivyer. He revealed that he had ceased using drugs and had not been involved in any dealings with Bloemers for several weeks. It is not until part two of the interview when some of the intercepted telephone texts and calls are revealed to the applicant that it must have become apparent that he is himself a focus of the investigation. Most of those intercepts relate to February and March 2013 some six or seven months beforehand. There is no doubt that at the point he is made aware of that information, he becomes more circumspect about the information he provides to police.
- [34] I am not satisfied therefore that the prosecution has established on the balance of probabilities that the applicant participated in the Record of Interview in the exercise of a free choice to speak or remain silent because he participated on the basis of a misapprehension that (a) he was discussing the items found in his possession and (b) he was providing information about Bloemers and Sivyer.
- [35] I am not therefore satisfied that the statements made in the Record of Interview were voluntary and they should be excluded.
- [36] The other grounds advanced by the applicant are argued on the basis that the admissions made were voluntary and should essentially be excluded in the exercise of the discretion. Even though I am satisfied that the interview should be excluded on the basis it was not voluntary, I shall turn to an examination of the other grounds advanced by the applicant. Should the interview also be excluded on the other grounds argued by the applicant, particularly in the exercise of the discretion if the interview was voluntary?

**Should the interview be excluded as an exercise of discretion?**

- [37] There is no doubt that the onus is on the applicant to establish that the evidence should be excluded in the exercise of the discretion.
- [38] Section 130 of the *Evidence Act 1977* (Qld) provides:
- “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 the evidence.”
- [39] I also note the provisions of the *Police Powers and Responsibilities Act 2000* (Qld) (PPRA) as well as the *Responsibilities Code* (RC) which is Schedule 9 to the *Police Powers and Responsibilities Regulation 2012* (Qld).
- [40] Section 415(1) of the PPRA provides that Part 3 “applies to a person (relevant person) if the person is in the company of a police officer for the purpose of being questioned as a suspect about his or her involvement in the

commission of an indictable offence.” The exclusionary provisions of s 415(2) do not apply in the circumstances of this case.

[41] Part 3 includes s 431(1) which states:

“A police officer must, before a relevant person is questioned, caution the person in a way required under the Responsibilities Code.”

[42] Division 1 of Part 5 of the RC applies to the questioning of relevant persons about indictable offences as in the present case. It is argued that the investigating officers failed to comply with ss 22 and 26 of the RC.

[43] Section 22 is as follows:

**“22 Asking persons to attend for questioning**

(1) This section applies if a police officer wants to question a person as a suspect, other than a person mentioned in section 398 of the Act.

(2) If the police officer approaches the person when not at a police station or police establishment, the police officer must caution the person in a way substantially complying with the following –

‘I am (name and rank) of (name of police station or police establishment).

I wish to question you about (briefly describe offence).

Are you prepared to come with me to (place of questioning)?

Do you understand that you are not under arrest and you do not have to come with me?’.

(3) If the person is not in the company of a police officer and attends a police station or police establishment for questioning, the caution must substantially comply with the following –

‘I am (name and rank) of (name of police station or police establishment).

I wish to question you about (briefly describe offence).

Did you come here of your own free will?’.

(4) Before the police officer starts to question the person, the police officer must caution the person in a way substantially complying with the following –

‘Do you understand you are not under arrest?’

Do you understand you are free to leave at any time unless you are arrested?’.

- (5) If the police officer reasonably suspects the person does not understand the caution, the officer may ask the person to explain the meaning of the caution in the person’s own words.
- (6) If necessary, the police officer must further explain the caution.”

[44] Section 26 provides:

**“26 Cautioning relevant person about the right to silence**

- (1) A police officer must caution a relevant person about the person’s right to silence in a way substantially complying with the following –

‘Before I ask you any questions I must tell you that you have the right to remain silent.

This means you do not have to say anything, answer any question or make any statement unless you wish to do so.

However, if you do say something or make a statement, it may later be used as evidence.

Do you understand?’.

- (2) If the police officer reasonably suspects the relevant person does not understand the caution, the police officer may ask the person to explain the meaning of the caution in the person’s own words.
- (3) If necessary, the police officer must further explain the caution.”

[45] In *Pollard v The Queen*,<sup>12</sup> Brennan, Dawson and Gaudron JJ stated that in relation to a confession or admission, “Even if it was voluntary, the trial judge has a discretion to exclude it if it would be unfair to the accused to admit it. In addition, the trial judge has a separate discretion to exclude, on the grounds of public policy, evidence which has been improperly or illegally obtained”. In *Pollard*, Deane J stated that the considerations in relation to the two discretions overlap.<sup>13</sup> In particular, he stated that the unlawfulness of police conduct will be relevant to the question on fairness to the accused and that since it is a policy of law that a criminal trial be fair, he considered that considerations of actual or possible unfairness to an accused are likely

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<sup>12</sup> (1992) 176 CLR 177 at 196.

<sup>13</sup> *Pollard v The Queen* (1992) 176 CLR 177 at 201.

to be relevant to the question of public policy. Nevertheless, his Honour reiterated that the two discretions are distinct and independent.

- [46] In relation to the discretion to exclude the evidence on the grounds of public policy, I am not satisfied that the record of interview was conducted in a flagrant disregard for the law. It would seem to me that the officers involved were not normally involved in matters of this sort and had been brought into this drug operation as a number of search warrants had all been executed on the same day in relation to a number of offenders. It would seem to me that the officers were courteous and polite but in fact failed to bring to the attention of the applicant an appreciation that he was being questioned in relation to trafficking and not possession of a bong and some small quantities of cannabis.
- [47] As it is clear that the applicant misunderstood the purpose of the interview, it would have been prudent for officers Fairgrieve and Simpson to have acted in accordance with s 22(5)-(6) and s 26(2)-3) RC. In my view, officers Fairgrieve and Simpson should have suspected that the applicant misunderstood the purpose of the interview, and before proceeding with the interview, they ought to have asked the applicant to explain his understanding of the caution. This would then have allowed officers Fairgrieve and Simpson to clarify any misunderstanding and further explain the caution to the applicant.
- [48] Neither am I satisfied that the excessive statutory warnings necessarily indicate a consciousness of guilt on the part of the police officers as submitted by Counsel for the applicant.
- [49] It would also seem to me that in terms of the public policy discretion, the Crown case can stand without the interview given that there are a number of telephone intercepts which can be relied on as well as text messages on the applicant's phone.
- [50] In *R v Swaffield; Pavic v R*,<sup>14</sup> Toohey, Gaudron and Gummow JJ refer to a fourth basis for the rejection of a statement of an accused person on the basis that there was a power to reject evidence, the prejudicial impact of which is greater than its probative value. Their Honours referred to the decision in *Van der Meer v The Queen*<sup>15</sup> and stated at paragraph 53 of *R v Swaffield; Pavic v R*:<sup>16</sup>

“The question is not whether the police have acted unfairly; the question is whether it would be unfair to use his statement against him ... Unfairness, in this sense, is concerned with the accused's right to a fair trial, a right which may be jeopardised if a statement is obtained in circumstances which affect the reliability of the statement.”

- [51] Accordingly, even if the statements in the Record of Interview were voluntary, I would in any event exclude the Record of Interview on the basis

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<sup>14</sup> (1998) 192 CLR 159 at 189.

<sup>15</sup> (1988) 62 ALJR 656 at 666.

<sup>16</sup> (1998) 192 CLR 159 at 189.

that it would be unfair to the applicant. I am concerned that the applicant attended the police station believing he was there in relation to the items which had been found in his home. The warrant, however, clearly stated that he was a suspect for drug trafficking and that was never made clear to him except in passing once the interview was well underway.

- [52] In my view, in accordance with the statements of the principle in *Van der Meer*, I am satisfied it would be unfair to the accused to use the Record of Interview against him in his trial. In all of the circumstances then, I am satisfied that the Record of Interview should be excluded.

### **Order**

- [53] The Record of Interview conducted at Kawana Waters Police Station on 23 October 2013 is excluded.