SUPREME COURT OF QUEENSLAND

CITATION:	*R v Briggs* [2011] QSC 337
PARTIES:	**THE QUEEN** (Respondent) **V** **JAMES DANIEL BRIGGS** (Applicant)
FILE NO/S:	24/11
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Mackay
DELIVERED ON:	15 November 2011
DELIVERED AT:	Mackay
HEARING DATE:	8 November 2011
JUDGE:	McMeekin J
ORDER:	The application is dismissed.
CATCHWORDS:	CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE - WARRANTS, ARRESTS, SEARCH SEIZURE AND INCIDENTAL POWERS - where warrant was not obtained - where search was claimed to be conducted to prevent evidence being concealed or destroyed - whether evidence was unlawfully obtained CRIMINAL LAW - EVIDENCE - JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE - Where several people were arrested at scene of search for aggravated possession - Where arrestees provided statements to police - Whether unlawfully obtained evidence admissible *Police Powers & Responsibilities Act* 2000 (Qld), s150, s 151, s 160 *Bunning v Cross* (1978) 141 CLR 54 *R v Day* [2008] QSC 358 *R v Ireland* (1970) 126 CLR 321 *R v Koning* [2001] QSC 131

R v Munck [2010] QSC 416
R v Stead [1994] 1 Qd R 665
R v Williamson [2009] QSC 434
Ridgeway v The Queen (1995) 184 CLR 19

COUNSEL: S McLennan for the Applicant
C Winlaw for the Respondent

SOLICITORS: Morton Lawyers for the Applicant
Department of Public Prosecution for the Crown

[1] **McMeekin J:** This is an application brought pursuant to s 590AA of the Criminal Code by James Daniel Briggs. He is charged with one count of trafficking. He seeks rulings preventing the prosecution leading the following evidence:

(a) Evidence of amphetamines and other items allegedly associated with drug dealing or taking found at a car yard in the course of a police search; and

(b) Testimonial evidence of witnesses arrested during the course of the police search of the car yard.

[2] The complaint is that the police failed to obtain a search warrant prior to conducting the search, had no good grounds for conducting what they referred to as an "emergent search" and had no grounds for making the arrests of the various witnesses and that, as a result, the evidence was obtained unlawfully and ought to be excluded in the exercise of the Court's discretion on the principles explained in cases such as *R v Ireland*[1], *Bunning v Cross*[2] and *Ridgeway v The Queen.*[3]

[3] It is common ground that police attended at a car yard shortly before midday on 22 October 2008. The applicant, along with six others, was then present at the yard. The police located amphetamines in two locations inside a caravan in the yard. The amphetamine was contained in two containers, one a black container found on the floor of the van and the other a small white package found on a shelf. About 12 minutes after the police commenced their search of the yard one David Brown entered the yard. He along with the others was arrested on a charge of "aggravated

1 (1970) 126 CLR 321 at 334-5.
2 (1978) 141 CLR 54.
3 (1995) 184 CLR 19 at 30-31; 38.

possession" of the amphetamines found in the van. Each of the persons arrested, apart from the applicant, later provided police with a statement as to their knowledge of the activities of the applicant at the car yard.

The Search

[4] A police officer's power to enter and search any premises is not at large. A search warrant is usually required and can be obtained, upon proper grounds being shown, from a Justice of the Peace ("JP") under ss 150 and 151 of the *Police Powers and Responsibilities Act* 2000 ("PPRA").

[5] Here no such warrant was obtained. The prosecution rely on the provisions of s 160 PPRA for the legality of the search. That section provides:

> "**Search to prevent loss of evidence**
>
> (1) This section applies if a police officer reasonably suspects—
>
> (a) a thing at or about a place, or in the possession of a person at or about a place is evidence of the commission of a part 2 offence; and
>
> (b) the evidence may be concealed or destroyed unless the place is immediately entered and searched.
>
> ….
>
> (3) A police officer may enter the place and exercise search warrant powers, other than power to do something that may cause structural damage to a building, at the place as if they were conferred under a search warrant."

[6] The justification for failing to first obtain a search warrant is said to be the investigating officer's belief that if he did not act quickly evidence would be lost.

[7] Three of the investigating police officers gave evidence. Sgt. Hayward was one of those investigating officers. He says that in the course of investigating another matter an informant advised him that a sale of amphetamines was taking place, at that time, to several people at the applicant's car yard. The amphetamines were said to be stored in a black container. A large amount of cash was present at the car yard. Drugs were being sold quickly. The informant claimed to the officer that either he or a friend (according to Sgt Hayward the story changed) had obtained

amphetamines from that source. The informant was searched and found to be in possession of amphetamines.

[8] Sgt Hayward determined that there was insufficient time to obtain a warrant. He says that he believed that if he delayed the evidence of a crime might well be lost.

[9] He gathered a small team of police officers, briefed them, and attended at the car yard identified by the informant within 20 minutes or so of receiving information from the informant.

[10] Two matters are asserted by the applicant. It is said firstly that the detaining and searching of the informant was itself an unlawful act and secondly that the information provided by the informant was not such as would ground a reasonable suspicion that evidence would be "concealed or destroyed" if the officer delayed to obtain a warrant.

[11] I do not accept either assertion.

[12] The recollections of the three officers who gave evidence were not identical. But it seems clear that they had a reason to stop and speak with the informant. He was seen by them as they drove past him in a police car. They were patrolling the area. According to one of the officers the informant behaved oddly when the police came into view – he appeared to change course and enter the yard of a set of units. The police stopped the vehicle and questioned the man. He admitted to not living at the unit or knowing anyone who did. He was then searched. One reason for the search was to determine whether he had any implements of house breaking. Such a search was permitted by s 31(c) PPRA. In my view the officers cannot be criticised for their actions.

[13] As to the second ground of attack it is necessary to have regard to the provisions of s 160(1) PPRA. It is conceded by the applicant that paragraph (a) is established – that the officers could reasonably suspect that "a thing at or about [the car yard], or in the possession of a person at or [the car yard] is evidence of the commission of [an indictable] offence". However paragraph (b) it is said is not satisfied here. The officers, it is submitted, could not have reasonably suspected that "the evidence may be concealed or destroyed unless the place is immediately entered and searched."

[14] Two things need to be considered. The first is the extent of any delay in obtaining a warrant. The second is what actions the officers could reasonably suspect might happen if they did not act quickly.

[15] Senior Constable Burnage was one of the investigating officers. He gave evidence that I accept that the delay involved in obtaining a search warrant could be from 30 minutes to two hours. The issue of course is what delay the officers could reasonably expect would occur when confronted on the morning of 22 October 2008 with the information they had.

[16] In this case I would expect that the delay would more than likely fall at the lower end of the range. The officers were not far from the police station when questioning the informant. They had access to a computer there which had on it a template to enable swift completion of the necessary form. The relevant information that had to be supplied, and hence typed, was not extensive. A JP was usually available at the Court House next door to the station. The car yard was a few minutes drive away from the station. The major unknown factor in all this was the availability of the JP.

[17] So I assume that the delay that the officers could reasonably have expected to have been occasioned by staying their hand until a warrant was obtained was in the order of about 30 minutes or so.

[18] I turn then to the second consideration. What might happen in the 30 minutes or so of delay? Could the officers have reasonably suspected that evidence might be "concealed or destroyed"?

[19] First I observe that the officers had every reason to think that the information that they had received might well be accurate. The informant had been found to be in possession of amphetamines which he said he had obtained from a supplier a short distance away. He was on foot. He gave some detail as to the person and his method of storing the drug that he was selling. The detail proffered and the circumstances seemed to confirm his account.

[20] Assuming the accuracy of the information that the informant provided the officers could reasonably expect that with every completed transaction, presumably, a person in possession of drugs might quit the car yard. With each such transaction the quantity of drugs in the possession of a person dealing in the drugs would be

reduced. Assuming the drugs or customers ran out the dealer might pack up and leave or hide the cash or remaining drugs, as the case might be. In my view a 30 minute delay could result in substantial evidence being lost. In the relevant sense the evidence would be "concealed" from the police.

[21] I am not at all critical of the actions of the officers here. It seems to me that where police officers receive apparently reliable evidence of a crime at that moment being committed only a short distance from them then it would be a rare case indeed where they would be expected to not act with alacrity to gather the evidence of that crime.

[22] This is a very different case to those cited to me such as *Koning*[4], *Day*[5], *Munck*[6] and *Williamson.*[7] The principal difference is the fluid nature of the situation and the reasonable prospect of the state of the evidence changing moment by moment.

[23] In *Koning* the investigating officer determined that he should first get a search warrant to enter a motel room where illegal drug activities were believed to be taking place. The officer started the process but the police computer went off line. Mullins J was not persuaded that the delay involved in obtaining a search warrant by the available alternative means was of any significance and further there was no reason to think that the occupant of the motel room who was conducting the illegal drug activities was likely to leave. Again the situation here is significantly more dynamic. Here it is not evident why any person dealing with the supplier would stay any longer than necessary to complete the transaction. Nor could the officers have any idea how long the transactions were likely to go on for. The informant had himself walked from the car yard to the place where he was apprehended and so valuable time had already been lost and more would be lost in assembling and briefing the fellow officers.

[24] In *Day* the police came and went from the suspect motel room on three occasions over two days. They had ample time to obtain a warrant. There was nothing to support the contention that any evidence of a crime was likely to be concealed or destroyed. The police were in a position to secure the premises if they wished.

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4 [2001] QSC 131 per Mullins J
5 [2008] QSC 416 per Lyons J
6 [2010] QSC 416 per Phillipides J
7 [2009] QSC 434 per Byrne SJA

[25] In *Munck* there was no evidence to support the police officer's claim that they suspected there was evidence of an indictable offence in the home that was entered without a warrant, let alone grounds for thinking that the evidence might be concealed or destroyed. They simply entered the home in the hope of finding evidence.

[26] In *Williamson* the officers had arrived at a shed where they suspected evidence of illegal drug activity – in the form of a laboratory or the storing of drugs – might be found. Once they had arrived it was evident that no-one else could enter. It was at that point that the officers decided to proceed to enter and search without a warrant. That static situation and the police control of it are features not found here.

[27] I am not persuaded that the search was illegal. Section 160 PPRA was properly engaged.

[28] Even if that were not so I would not have exercised my discretion to exclude the evidence. It is trite to observe that the illegality of the method of obtaining evidence itself does not render evidence inadmissible. However the fact of such illegality does enliven a discretion to exclude on public policy grounds. The proper approach to the public policy ground was explained in *Ridgeway v The Queen*[8] by Mason CJ, Deane and Dawson JJ:

> "The trial judge has a discretion to exclude prosecution evidence on public policy grounds in circumstances where it has been obtained by unlawful conduct on the part of the police…
>
> "The discretion extends to the exclusion of both … non-confessional evidence and confessional evidence… [I]n its exercise, a trial judge must engage in a balancing process 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'. The basis in principle of the discretion lies in the inherent or implied powers of our Courts to protect the integrity of their processes. In cases where it is exercised to exclude evidence on public policy grounds, it is because, in all the circumstances of the particular case, applicable considerations of 'high public policy' relating to the administration of criminal justice outweigh the legitimate public interest in the conviction of the guilty…

> "The weight to be given to the public interest in the conviction and punishment of those guilty of crime will vary according to the degree of criminality involved…
>
> "The weight to be given to the principal considerations of public policy favouring the exclusion of the evidence – the public interest in maintaining the integrity of the Courts and in ensuring the observance of the law and minimum standards of propriety by those entrusted with powers of law enforcement – will vary according to other factors of which the most important will ordinarily be the nature, the seriousness and the effect of the illegal or improper conduct engaged in by the law enforcement officers and whether such conduct is encouraged or tolerated by those in higher authority in the police force or, in the case of illegal conduct, by those responsible for the institution of criminal proceedings.
>
> When assessing the effect of illegal or improper conduct, the relevance and importance of any unfairness either to a particular accused or to suspected or accused persons generally will likewise depend upon the particular circumstances. Ordinarily, however, any unfairness to the particular accused will be of no more than peripheral importance."[9]

[29] Here the officer had little time to weigh up the competing considerations. In my view he did not err. But, assuming he did, his error was one only of judgment. It plainly did not involve a deliberate flouting of the law, let alone one "encouraged or tolerated by those in higher authority in the police force". I cannot accept its characterisation as either deliberate or reckless as the applicant submitted.

[30] Further the evidence obtained – which included amphetamines, syringes and cash in the sum of $4,000 - was probative of a serious crime. Proof of possession of substantial quantities of amphetamines carries a lengthy period of imprisonment as does, of course, trafficking in such drugs. If the evidence was excluded potentially a person guilty of a serious crime would go unpunished. That involves a high social cost. The balancing out of these considerations clearly favours the admission of the evidence.

[31] In my view the evidence obtained in the search is admissible.

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8 (1995) 184 CLR 19 at 30-31, 38.

9 See also *R v Stead* [1994] 1 Qd R 665, at 671 – 672.

The Arrests

[32] The applicant's submission here depends on two things – first, a finding that the arrests of the several people found at the scene was illegal, and, secondly, that as a result of that illegal conduct they are prepared to provide testimonial evidence incriminating the applicant in accordance with the statements provided to the police.

[33] The difficulty with the submission is that even assuming illegal conduct, and I will say a little more on that in a moment, there is simply no evidence that the statements were provided as a result of the various deponents being arrested. Each of the deponents, save one Polley, records at the conclusion of their statement that they make the statement either of their own free will or voluntarily. Polley says nothing that incriminates the applicant but he does not assert that he was wrongly arrested or that the arrest influenced him in his decision to supply a statement.

[34] The applicant asks that an inference be drawn that these statements would not have been provided but for the arrests. In the absence of evidence I am not prepared to draw that inference. Section 8(2) PPRA reminds us of an important principle: "it is not the purpose of this Act to affect the principle that everyone in the community has a social responsibility to help police officers prevent crime and discover offenders."

[35] Presumably the citizens who provided these statements were complying with that responsibility. There is no evidence that they were not.

[36] In any case it is the testimony that the proposed witnesses will give that is in issue. Presumably the witnesses will be subpoenaed and will give their evidence at a later trial. What evidence they give will not be due to their arrests but because they will be compelled by law to make true answer to the questions asked of them.

[37] As to the claimed illegality of the arrests it is the law that a police officer cannot arrest someone for the purpose of questioning him. The officer must have a reasonable ground for suspecting that the person had committed, or was committing, the crime for which they are arrested: s 365(2) PPRA. The applicant is on reasonably strong ground when he asserts that the arrest of Brown on a charge of possessing the amphetamines found in the van was illegal. He arrived on the scene 12 minutes after the amphetamines had been located in the van and he had had no

apparent access to or connection with it. It is difficult to discern the reasonable grounds for his arrest.

[38] But it is not so clear that the other persons have any cause for complaint. The police were interested in the person or persons who had possession of the amphetamines found in the van. It was submitted that the reference to the charge of "aggravated possession" could never have been sustained even on the police officers' beliefs as to the quantity of the drug found. Sgt Hayward estimated the weight of the amphetamines in the black container at over 63g. As well a small quantity of amphetamines was located in a small white package. Sgt Hayward was wrong in his estimate, as the evidence now shows, but it is not shown that he did not have a genuine belief at that time that he was dealing with a very substantial quantity of the drug. The submission was based on an assumption that Sgt Hayward was referring to a quantity in excess of 200g of the drug, as set out in Schedule 4 of the *Drugs Misuse Regulations* 1987, but that is not necessarily so. The usual charge of aggravated possession that is preferred is possession in excess of 2g pursuant to s 9(b) of the *Drugs Misuse Act* 1986 with its reference to the quantity set out in Schedule 3 of the *Regulations* and not to s 9(a) and the quantity in Schedule 4.

[39] No one claimed possession. Each of the persons in the yard was a potential suspect. The evidence now suggests that the black container and the white packet were each thrown into the van as the police approached. The police officers could reasonably have thought, after locating the drugs, that was precisely what had happened. In those circumstances it is not so clear that the officers could not reasonably entertain a suspicion that each of those present were involved in some way in the possession of the drug - either as principal or as an accessory.

[40] However that may be, the necessary causal link between the claimed illegality and the testimonial evidence is not established.

[41] The application is dismissed.