

SUPREME COURT OF QUEENSLAND

CITATION: *R v BXT (No 2)* [2016] QSC 212

PARTIES: **R**
(respondent)
v
BXT
(applicant)

FILE NO/S: Indictment 263/16

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 15 September 2016

DELIVERED AT: Brisbane

HEARING DATE: 5 September 2016

JUDGE: Peter Lyons J

ORDER: **The application is dismissed.**

CATCHWORDS: CRIMINAL LAW - EVIDENCE - JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE - EVIDENCE UNFAIR TO ADMIT OR IMPROPERLY OBTAINED - where the applicant's car was searched by police – where illegal drugs and other items were located – where police have a power under ss 31 and 32 of the *Police Powers and Responsibilities Act 2000* (Qld) (“PPRA”) to search vehicles without a warrant if they have a reasonable suspicion that prescribed circumstances exist – where the applicant alleges that the police officer did not have reasonable grounds for the suspicion and the search was therefore unlawful – whether the evidence resulting from the search should be excluded on the basis that it was improperly obtained

Justices Act 1886 (Qld) s 110A(6C)(c)
Police Powers and Responsibilities Act 2000 (Qld) ss 31, 32, sch 6

Bunning v Cross (1978) 141 CLR 54, cited
C (1997) 93 A Crim R 81, cited
Coulstock (1998) 99 A Crim R 143, cited
R v P & anor [2016] QSC 49, cited
Salem (1997) 96 A Crim R 421, cited

COUNSEL: M Copley QC for the applicant
J Robson for the respondent

SOLICITORS: Mulcahy Ryan Lawyers for the applicant
ODPP for the respondent

- [1] The applicant is charged on indictment¹ with the unlawful possession of methylamphetamine in a quantity exceeding two grams, on 5 December 2014.
- [2] The charge arises out of a search of a vehicle driven by the applicant, conducted on the date which appears in the indictment. The applicant has applied for the exclusion of evidence resulting from the search, on the ground that, it not being shown that the search was lawful, evidence resulting from it should be excluded in the exercise of the discretion referred to in *Bunning v Cross*².

Factual overview

- [3] Early in the morning of 5 December 2014, Constable Turner and Constable Shaw were travelling outbound on Brunswick Street from Fortitude Valley towards New Farm when they saw a black Lexus sedan travelling in the opposite direction along Brunswick Street. They were in a marked police iLoad van, driven by Constable Turner. The vehicle performed a U-turn. At some point its lights and siren were activated; and subsequently the Lexus came to a stop in the vicinity of the Customs House on Queen Street. It was accepted for the applicant that the interception was lawful.
- [4] Constable Turner, after a short conversation with the applicant, administered a random breath test and conducted a “pat down” search of the applicant, neither of which produced any result adverse to him.
- [5] Shortly after these events, although he had no search warrant, Constable Turner conducted a search of the Lexus. That resulted in the discovery of, amongst other things, a clip seal bag containing a number of other clip seal bags which in turn contained a crystalline substance, weighing 21.68 grams, analysed, it was said without contradiction, to show a pure weight of 16.056 grams of methylamphetamine.
- [6] After the completion of the search, the applicant was taken to the Royal Brisbane Hospital for treatment in relation to his diabetes condition.

Power to search

- [7] The following provisions of the *Police Powers and Responsibilities Act 2000 (Qld)* (“PPRA”) were relied upon by the respondent as authorising the search of the Lexus:-

“31 Searching vehicles without warrant

(1) A police officer who reasonably suspects any of the prescribed circumstances for searching a vehicle without a warrant exist may, without warrant, do any of the following—

- (a) stop a vehicle;
- (b) detain a vehicle and the occupants of the vehicle;

¹ Indictment 263/16.

² (1978) 141 CLR 54.

(c) search a vehicle and anything in it for anything relevant to the circumstances for which the vehicle and its occupants are detained.

32 Prescribed circumstances for searching vehicle without warrant

The prescribed circumstances for searching a vehicle without a warrant are that the vehicle is being used by, or is in the possession of, a participant in a criminal organisation or there is something in the vehicle that —

(c) may be an unlawful dangerous drug.”

[8] Schedule 6 of the PPRA includes the following:

“*reasonably suspects* means suspects on grounds that are reasonable in the circumstances.”

Contentions

[9] An audio recording which commenced shortly after the Lexus was stopped in Queen Street included the following statement by Constable Turner to the applicant³:

“We certainly can search the car. We have reasonable suspicion that there’s drugs inside the car or possibly weapons based on your behaviour. You’re shaking. You’re ... you’re extremely nervous. You failed to stop immediately and continued to drive, so that’s the reason that we are searching your car.”

[10] The applicant did not challenge the evidence that showed that Constable Turner had a suspicion, identified in this extract. Rather, it was submitted that this was a comprehensive statement of the grounds on which Constable Turner acted in coming to the suspicion, and that they did not amount to “grounds that are reasonable in the circumstances” for the suspicion. On that basis, the search was unlawful, and the evidence was not lawfully obtained.

[11] It was also submitted for the applicant that the discretion to exclude unlawfully obtained evidence was to be exercised by reference to the considerations listed by Applegarth J in *R v P & anor*⁴. The conduct of Constable Turner amounted to a cavalier disregard of the law, for the purposes of the considerations set out in paragraphs (a) and (e) of that list. It would have been easier to comply with the law by obtaining a warrant. These factors meant that, in the proper exercise of the discretion, the evidence should be excluded; although it was accepted that the other matters identified by his Honour either favoured the admission of the evidence, or, at best for the applicant, were neutral.

[12] For the respondent, it was submitted that the evidence of Constable Turner that the statement quoted earlier was not an exhaustive account of his reasons for the suspicion should be accepted. In particular, the evidence that he also relied on the results of checks by Constable Scott on the QLite system maintained by the Queensland Police Service, should be accepted. The reference in that statement to the possibility of weapons echoed that information. That evidence could only be rejected on the ground that it was

³ Exhibit 4 p 2.

⁴ [2016] QSC 49 at [63].

dishonestly given, a finding which should not be made in the present case. The factors referred to in *R v P* favoured admission of the evidence in any event. The only significant factor advanced by the applicant in favour of excluding the evidence was that the suspicion held by Constable Turner was not held on reasonable grounds. This was not a case of a deliberate or reckless disregard of the law. Nor was it suggested that Constable Turner's statement that he had a reasonable suspicion about the matters he referred to was not an accurate reflection of his state of mind at that time. It followed that, on the applicant's case, he mistakenly thought his suspicion was reasonable, a circumstance which did not provide strong support for the exclusion of the evidence.

- [13] It was common ground that the onus lay on the respondent to establish, on the balance of probabilities, that the evidence was obtained lawfully⁵; and if this was not established, the onus lay on the applicant to show that the Court's discretion should be exercised to exclude the evidence.
- [14] It is at this point convenient to refer more fully to the evidence in this case.

Additional evidence

- [15] Constable Turner provided a statement under s 110A(6C)(c) of the *Justices Act 1886* (Qld), dated 24 June 2015⁶. In that statement he said that when he first observed the Lexus on Brunswick Street, Constable Shaw performed a check on the registration of this vehicle. Constable Shaw then informed Constable Turner that "the vehicle had been flagged for previous activity involving the trafficking of dangerous drugs, namely methylamphetamine"⁷.
- [16] Shortly afterwards, according to the statement, the police vehicle took up a position a short distance behind the Lexus, at which point Constable Turner activated its lights and siren. This occurred at the intersection of Ann Street and Gipps Street. The Lexus did not stop, and continued to travel on Ann Street, and then into Queen Street, coming to a halt adjacent to the Customs House, at a point approximately 350 metres past the point where the lights and siren had been activated.
- [17] The statement records that Constable Turner then spoke to the applicant. The applicant's hands were visibly shaking on the steering wheel of the Lexus, despite it being a warm night. Constable Turner asked the applicant why he did not stop when the lights and siren were activated, to which the applicant said, "I didn't see any safe place to stop". Constable Turner then said "You have passed more than ten legal parking spaces on the way to this location and have now parked illegally in a bus zone."
- [18] Constable Turner then said, "Why are you shaking? Is there something in the car that shouldn't be?" The applicant replied "I am not shaking". The statement recorded that Constable Turner then observed that the applicant's forehead was beaded with sweat, and formed a suspicion that dangerous drugs or other illicit items were in the vehicle. At that point he activated both his audio recorder and his video recorder.

⁵ But see *C* (1997) 93 A Crim R 81, 95; *Salem* (1997) 96 A Crim R 421, 429; *Coulstock* (1998) 99 A Crim R 143, 147.

⁶ Exhibit 1.

⁷ Exhibit 1 para 7.

- [19] In his oral evidence, Constable Turner said that the Lexus appeared to be speeding when it was first seen on Brunswick Street. Constable Shaw carried out a check on the police QLite system, using an iPad. Constable Turner said that the lights and siren were activated at a point on Ann Street after Gipps Street, and near Gotha St. The lights were a rotating light on the top of the police vehicle, and the lights at the front of the police vehicle blinked on and off alternately. The Lexus slowed down in Queen Street, but continued as far as the Customs House. He gave evidence that he thought the driver of the vehicle was “secreting” items, and that he could see the silhouette moving. When the police vehicle stopped behind the Lexus, Constable Shaw showed Constable Turner the results of the QLite system, which referred to a methylamphetamine supplier, and possession of a sawn-off shotgun; and the applicant having a handgun strapped to his leg, giving a false name, and running from the police. Another person associated with the vehicle may have been involved with drug trafficking. Constable Turner and Constable Shaw then got out of the police vehicle.
- [20] Constable Turner was asked to identify the indicia on which he relied for the suspicion which led to the search. He said that the applicant’s forehead was beaded with sweat, his hands were shaking, he talked very rapidly, and he did not listen to what was said to him very carefully. He did not make eye contact. He appeared very distracted.
- [21] In cross-examination, Mr Copley QC, who appeared for the applicant, put to Constable Turner that it was in Adelaide Street, after Ivory Street, that the lights of the police vehicle were activated; a proposition which Constable Turner rejected. It was also put that Constable Turner’s statement did not refer to the Lexus travelling at speed in Brunswick Street, nor to the applicant secreting things, a matter which would have been important. It was also put to Constable Turner that the QLite information, the lack of eye contact, and the speed of the Lexus were not matters which led to his decision, denied by Constable Turner.
- [22] Constable Shaw’s evidence was broadly supportive of the evidence of Constable Turner. In his oral evidence, he did not clearly reject the proposition that the police vehicle’s lights and siren were activated in Adelaide Street, though his evidence in chief referred to turning from Brunswick Street into Ann Street (when he lost sight of the Lexus briefly); and on the basis of his statement the lights and siren would have been activated in Ann Street.

The QLite information

- [23] There is no reason to reject the evidence of Constable Shaw that, when he saw the Lexus on Brunswick Street, he carried out a check on the QLite system which provided information which he communicated to Constable Turner⁸. There was some suggestion on behalf of the applicant that evidence of the speed of the Lexus on Brunswick Street was a recent intervention, made unnecessarily to bolster the evidence of the QLite check. However, it was not suggested that the check was not carried out, and it seems a likely thing to do, and to explain the decision to follow the Lexus. Nor did I observe anything in the course of their evidence which would lead me to reject this evidence from the police officers. Accordingly, I accept that Constable Shaw performed the check, and conveyed the results to Constable Turner, at least to the extent they referred to an association of the Lexus with the trafficking of methylamphetamine.

⁸ See Exhibit 5 para 6 and Exhibit 1 p 2.

- [24] It was submitted that I should reject Constable Turner's evidence that this information formed part of the basis for his suspicion in relation to the Lexus. That was because he had made a contemporary statement of the grounds for his suspicion, set out in the passage quoted earlier. For that reason, his evidence about the statement not being exhaustive should be rejected.
- [25] As was acknowledged in the oral submissions for the applicant, the statement was made "in the heat of the moment". That is to say, it was made after the vehicle had been pulled over, and shortly after Constable Turner approached the applicant, during which time he made some brief observations of the applicant. There seems to me to be a real prospect that in such circumstances, a statement of reasons would not necessarily be exhaustive. On the other hand, there appears to me to be a degree of improbability in the view that, having learnt that the vehicle had some association with drug trafficking, Constable Turner would have disregarded that in considering whether he had a reasonable suspicion that drugs (or for that matter, weapons) might be found in the car. Indeed, it seems to me that the initial part of the statement by Constable Turner, quoted earlier, echoes information from the QLite system. Accordingly, I accept his evidence that the recorded statement was not exhaustive; and that the basis for his belief included the QLite information.
- [26] I did not understand it to be suggested that, if I made that finding, the respondent had not established that the grounds for Constable Turner's suspicion were reasonable in the circumstances. Accordingly, my finding disposes of this application. There are, however, some other matters which were agitated to which I shall refer briefly.

Other matters

- [27] Some challenge was made to Constable Turner's evidence about the distance which the Lexus travelled after the siren and lights were activated. That was based upon the evidence of Constable Shaw, which was less specific, and which indicated that the siren and lights might have been activated closer to the place where the Lexus came to a stop. At one point, Constable Shaw suggested that lights and siren may have been activated in the vicinity of Eagle Street, which was plainly wrong. Constable Shaw seemed to me to have a less clear recollection of these matters. Constable Turner was the driver of the vehicle, and the person who activated the lights and siren. He was likely to have been more aware of the location where these things occurred. His oral evidence is reasonably consistent with his statement. Accordingly I accept his evidence on this point.
- [28] There was no evidence that the lights and siren were activated in Adelaide Street, rather than Ann Street. The cross-examination on this point does not lead me to reject Constable Turner's evidence to the contrary.
- [29] Constable Turner's evidence about observing the silhouette of the person in the Lexus as it was followed by the police vehicle, and about an attempt to hide something, was based on a recollection which, so far as the evidence goes, he first identified recently. In those circumstances, I am not prepared to find this evidence reliable. It was not suggested to Constable Turner that this evidence was dishonestly given, nor did I form that impression when he gave it. The difficulties with recollection even after a period of time which is not particularly long, are well known.

- [30] The written submissions for the applicant challenged the evidence of Constable Turner that the applicant appeared to be nervous and anxious, and sweating, by reference to the video recording⁹. The quality of the recording is poor. However, so far as can be seen from it, the applicant's face appeared to me to have a sheen, consistent with sweat. He also appeared to be somewhat agitated and distracted, which seems to me to be consistent with the evidence of Constable Turner to the effect that he was nervous and anxious. These matters do not cast doubt on the evidence of Constable Turner which I have accepted.
- [31] Had it been necessary to consider whether to exercise the discretion discussed in *Bunning v Cross*, I would have accepted the submission for the respondent that Constable Turner had attempted to act lawfully, and honestly believed that he had a reasonable suspicion as to the presence of drugs, and possibly weapons, in the car; notwithstanding that the grounds were not sufficient to provide a reasonable basis for that suspicion. I would also have considered that the other factors identified in *R v P* generally weighed against the exercise of the discretion to exclude the evidence.

Conclusion

- [32] I am satisfied Constable Turner had grounds which were reasonable in the circumstance for suspecting that drugs were in the Lexus when it was intercepted on 5 December 2014. It follows that the search of the Lexus conducted on that date was lawful, and that the evidence resulting from it was obtained lawfully.
- [33] I dismiss the application.

⁹ See para 29.