SUPREME COURT OF QUEENSLAND

CITATION:	*The Queen v Tesic* [2011] QSC 255
PARTIES:	**THE QUEEN** (Respondent) **V** **DUSKO TESIC** (Applicant)
FILE NO/S:	20/11
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Rockhampton
DELIVERED ON:	23 August 2011
DELIVERED AT:	Rockhampton
HEARING DATE:	17, 18 August 2011
JUDGE:	McMeekin J
ORDER:	1. **The evidence of the conversations referred to in paragraph 8 of these reasons is inadmissible and is not to be led in evidence in the prosecution case.** 2. **The application is otherwise dismissed**.
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – CONFESSIONS AND ADMISSIONS – STATEMENTS – Records of interview – Other matters – where applicant charged with serious drug offences – where applicant made admissions which were not electronically recorded – where interviewing police officer did not comply with the requirements of the *Police Powers and Responsibilities Act 2000*, s 437 – where applicant contends that the evidence of the admissions is inadmissible at trial – whether the Court's discretion under s 439 to admit the "record" could be exercised – interpretation of s 439 CRIMINAL LAW – EVIDENCE – MATTERS RELATING TO PROOF – Where search conducted of vehicle without

warrant – Whether requirements *Police Powers and Responsibilities Act 2000*, s31, 32 met – where applicant contends that the evidence of the objects discovered is inadmissible at trial – whether facts to found reasonable suspicion

CRIMINAL LAW – EVIDENCE – MATTERS RELATING TO PROOF – Continuity of possession of evidence – whether evidence produced is same as evidence seized

Police Powers & Responsibilities Act 2000 (Qld)

The Criminal Code s 590AA

Dobbs v Ward & Anor [2002] QSC 109

R v Smith [2003] QCA 76

R v McMillan [2010] QSC 309

Mowday v Western Australia (2007) 176 A Crim R 85

COUNSEL: D Murray for the Applicant

MR Byrne SC for the Respondent

SOLICITORS: Legal Aid Queensland for the Applicant

Director of Public Prosecutions for the Respondent

[1] Dusko Tesic is charged with one count of possessing a dangerous drug, namely cocaine, in a quantity exceeding 2 grams, and two counts of possession of a dangerous drug, namely methylamphetamine and 3,4 methylenedioxymethamphetamine.

[2] The offences allegedly occurred on 19 September 2009.

[3] This is an application brought pursuant to s 590AA of the Criminal Code. The prosecution wish to lead evidence of confessional statements said to have been made by Mr Tesic, as well as physical evidence obtained from his motor vehicle, namely a jar said to have contained the drugs mentioned in the indictment.

[4] Mr Tesic objects to the admission into evidence of these statements and items.[1] I will deal with each complaint in turn. There are three.

The Confessions

[5] The investigating officers are Detectives Columbus and Smith. Mr Tesic first came to their notice when he overtook their unmarked police car by travelling over double white lines and at a speed in excess of 140 kph. They followed his vehicle and pulled up behind him when he parked.

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1 The application in fact speaks of "quashing the indictment" but counsel agreed that the intent was to have the evidentiary points determined.

[6] The relevant statements were allegedly made in the course of a conversation shortly after the investigating police officers approached Mr Tesic concerning the breaches of the traffic regulations that they had observed.

[7] Detective Columbus gave the following evidence in relation to the impugned statements, after stating that he had seen a glass jar in a pocket of door of the vehicle:

> "So sorry, just tell me again what you say you saw in the pocket of the vehicle?-- A jar with some clip seal bags.
>
> Mmm?-- And a white powder.
>
> So what did you say to him about it?-- Well, I - I told him that he's now detained for the purpose of a search.
>
> Mmm-hmm?-- Yep. And then I asked him what's in the - and sorry, I directed him towards Detective Smith.
>
> Yes?-- And asked him what's in the jar.
>
> And what did he say, if anything, to that?-- He said a couple of ecstasy tablets.
>
> After he told you that what, if anything, did you say?-- I then warned him of his right to remain silent."

[8] And a little later in his evidence:

> "Now, did you ever talk to him about the contents of the jar?-- Yes, I did.
>
> Please relate that conversation as best you recall it?-- Okay. So I conducted a search of the vehicle. At the conclusion of the search of the vehicle I grabbed the jar and returned to our police vehicle, to the driver's side.
>
> Mmm-hmm?-- And from there I started removing items from the jar. And I first removed the Glad snap-lock bag, which contained some powder in it, and I asked him, "What's this?"
>
> What, if anything, did he say in response to that?-- He said, "Cocaine."

[9] Detective Smith says that she overheard those statements in which the applicant demonstrated knowledge of the nature of the substances in the jar.

[10] Later testing has shown that the powder sent by the police to the forensic laboratory, and said by them to have come from the jar, was cocaine.

[11] Mr Tesic gave evidence on the application and denied making the incriminatory statements.

[12] The applicant's submission is that the alleged statements were not recorded, that there was an obligation on the police to electronically record them, or, if that was not practicable, to make a written record of them and give the applicant the opportunity to adopt them as having been made at the earliest available opportunity

and the officers did not do so. The failure to do these things it was submitted rendered the confessional statements inadmissible. Reliance was placed on sections 436 and 437, particularly 437(6), of the *Police Powers & Responsibilities Act* 2000 (Qld) ("the Act").

[13] Those sections are in these terms:

> **"436 Recording of questioning etc.**
>
> (1) This section applies to the questioning of a relevant person.
> (2) The questioning must, if practicable, be electronically recorded.
> (3) If the person makes a confession or admission to a police officer during the questioning, the confession or admission is admissible in evidence against the person in a proceeding only if it is recorded as required by subsection (4) or section 437.
> (4) If the confession or admission is electronically recorded, the confession or admission must be part of a recording of the questioning of the person and anything said by the person during questioning of the person."
>
> **437 Requirements for written record of confession or admission**
>
> (1) This section applies if a record of a confession or admission is written.
> (2) The way the written record of the confession or admission is made must comply with subsections (3) to (7).
> (3) While questioning the relevant person, or as soon as reasonably practicable afterwards, a police officer must make a written record in English of the things said by or to the person during questioning, whether or not through an interpreter.
>
> (4) As soon as practicable after making the record—
>
> > (a) it must be read to the person in English and, if the person used another language during questioning, the language the person used; and
> > (b) the person must be given a copy of the record.
>
> (5) Before reading the record to the person, an explanation, complying with the responsibilities code, must be given to the person of the procedure to be followed to comply with this section.
> (6) The person must be given the opportunity, during and after the reading, to draw attention to any error in or omission from the record he or she claims were made in the written record.
> (7) An electronic recording must be made of the reading mentioned in subsection (4) and everything said by or to the person during the reading, and anything else done to comply with this section.

[14] These provisions appear in Part 3 of Chapter 15 of the Act. It can be seen that the obligations that the two provisions speak of apply to the questioning of a "relevant person". Section 415(1) of the Act, which appears in the same Part of the Act as ss 436 and 437, under the heading "When does this Part apply to a person", provides the definition:

> "This part 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."

[15] At the time the conversation concerning the ecstasy tablets occurred Mr Tesic was not a "relevant person" as defined as he was not "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" and so there was no relevant obligation. The complaint in respect of that part of the conversation is unfounded.

[16] The same cannot be said of the later conversation concerning the cocaine. By then Detective Columbus had formed the view that he was indeed investigating the possible commission of an indictable offence. The legislation prohibits the admission into evidence of a record of the conversation unless recorded as required: ss 436(3). It was not so recorded. However there is an exception to that absolute prohibition. Evidence of a record of the conversation can be admitted if the provisions of s 439 of the Act have been satisfied. That section provides:

> **439 Admissibility of records of questioning etc.**
>
> (1) Despite sections 436 and 437, the court may admit a record of questioning or a record of a confession or admission (the ***record***) in evidence even though the court considers this division has not been complied with or there is not enough evidence of compliance.
> (2) However, the court may admit the record only if, having regard to the nature of and the reasons for the non-compliance and any other relevant matters, the court is satisfied, in the special circumstances of the case, admission of the evidence would be in the interests of justice."

[17] The failure to record the conversations electronically at the scene is understandable. The officers had been investigating an unrelated matter earlier in the day, had not brought a tape recorder with them and, initially at least, thought that they were dealing only with a traffic matter. It was not practicable to electronically record the conversation.

[18] The failure to comply with s 437 cannot be so easily excused. There was no attempt made to reduce the confessional statements to writing until long after the event – if I understood the evidence correctly only when statements were prepared perhaps as much as 12 months later. Nor was any attempt made to read the alleged confessions over to Mr Tesic, give him a record of them, or give him an opportunity to correct any errors.

[19] The officers' explanation for not recording the claimed conversation was that it was an "error" or an "oversight." The only possible explanation for this, and the officers did not advance it themselves in evidence, is that when asked whether he wished to engage in an interview Mr Tesic declined to do so. He had a right to do that. However his right to remain silent does not absolve the officers of their responsibility to record the confessional statements nor provide him with a record of them.

[20] In my view there was a plain breach of ss 437(3), (4), (5), (6) and (7) of the Act.

[21] There seems to me to be two issues – the first is whether I have any discretion at all to admit the evidence. The second is, assuming the discretion in s 439 to be properly in consideration, whether there are "special circumstances" justifying reception.

[22] At the hearing counsel assumed that my discretion under s 439 was enlivened in the circumstances here and indeed, as I understood Mr Murray's submissions, he felt

that there was not much he could say against the exercise of it in favour of admission. I disagree.

[23] My understanding following the initial hearing was that the prosecution wished to put in evidence the recollection of the two officers of the conversation, not any record of it they may have made long after the event. There is authority to the effect that these legislative provisions render inadmissible evidence of such confessions or admissions unless recorded as the legislation requires: *R v Smith* [2003] QCA 76. Counsel did not discuss *Smith* in their submissions.

[24] The facts in *Smith* were very similar to those here. The investigating officer, Detective Kitching, had made no record of the incriminating admission until six months after the event. He gave evidence of his recollection of the statements at the trial. On appeal McPherson JA said, after analysing the relevant provisions as they were then numbered (I can see no difference in the wording to the present provisions, the equivalent numbering of which I have provided):

> "The result is that his Honour had no power or discretion under s 266 [the equivalent of s 439] to admit, or for that matter to reject, the evidence of Det Sgt Kitching. It was not "a record of questioning" or "a record of confession or admission" that was tendered at the trial, but Kitching's independent recollection of what had been said to him in the course of the conversation on 21 October 2001. In consequence, s 266 [s 439] did not apply so as to authorise the court to admit the evidence if it was not otherwise admissible under the Division. Even though it was not a "record" of the questioning or the confession or admission, was it otherwise not admissible? That inquiry must in my opinion be answered in the affirmative. Section 263(3) [s 436(3)] renders a confession or admission admissible in evidence in a proceeding against the person making it *only* if it is recorded as required by s 263(4) [s 436(4)] (electronically) or s 264 [s 437] (in writing). The confession or admission here was, for the reasons I have given, not recorded as required by s 264(4) [s 437(4)] and by force of s 263(3) [s 436(3)], was not admissible in evidence at the appellant's trial. Under s 266(1) [s 439(1)], the judge had no power or discretion to admit."[2]

[25] McPherson JA's reasoning reflected the views of the remaining members of the Court. So far as I am aware the decision has never been doubted. That represents the law in this State. It follows that no evidence can be led of the recollections of the officers as to the conversation.

[26] I held a further hearing of the matter today to allow counsel to make submissions on the effect of *R v Smith*. The prosecution concedes that I have no discretion to admit the recollections of the officers. That concession was rightly made.

[27] Mr Byrne of senior counsel for the Director of Public Prosecutions today eschewed any intention of leading evidence of the record of the admissions made long after the event, that is, the statements of the officers.

[28] I direct that evidence of the conversations that I have quoted concerning the applicant's alleged knowledge of the substance in the bag as cocaine may not be led.

The Search

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[2] At [28]. Byrne SJA came to a similar conclusion in *R v McMillan* [2010] QSC 309 in respect to the present legislation

[29] The officers' right to search Mr Tesic's vehicle is constrained by legislation. Sections 31 and 32 of the Act are relevant and provide, inter alia:

> **"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) …;
>
> (b) detain a vehicle and the occupants of the vehicle;
>
> (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 there is something in the vehicle that—
>
> ….
>
> (c) may be an unlawful dangerous drug;
>
> …."

[30] The complaint is that Detective Columbus formed an intention to search the vehicle before he had any reasonable grounds for suspicion justifying a search of the vehicle as ss 31 and 32 of the Act required. The jar was therefore found in an illegal search. There is no reason to admit the evidence thus illegally obtained on *Bunning v Cross* principles. So went the submission.

[31] Detective Columbus' account was that he observed the jar and saw that it appeared to contain clip sealed bags with some white powder within it whilst standing next to the car door whilst Mr Tesic was retrieving his licence from the vehicle. It was only then that he formed a reasonable suspicion and determined to search the vehicle. He reached in and took out the jar.

[32] Mr Tesic gave a very different version. His relevant evidence was:

> "Tell his Honour what happened then?-- He walked towards me and he - and he said, "What's the reason for speeding?" I said, "'Cause I was in a hurry," I was going to a buck's party. And he said, "Okay." And then he said, "I want to search your car."
>
> Can I stop you there. Did he introduce himself and tell you who he was?-- He said he was Matty from the cop shop, yeah.
>
> Did that occur before or after the question about, "Why were you going so fast?"?-- No, that was before.
>
> Okay. All right. You said that he said, "I'm going to search your car."?-- Yes.
>
> Did he ask your name?-- No.
>
> Did he say - did he call you by name?-- Yes, he did.

> All right. What happened then?-- And then he-----
>
> Did you say anything to him when he said, "I'm going to search your car."?-- Yeah, I did, I said, "Don't you need a search warrant?" And he said - and he just pointed to his badge and he said, "That's all I need," and yeah.
>
> And what happened then?-- And then he - then he asked me for my licence and I said, "Oh, it's in the car." And I opened a door and knelt down to get my licence and, yeah, and I showed him the licence and that's when he said - that's when he started searching the car."

[33] Detective Colombus denies that this occurred.

[34] Detective Smith was not able to hear all that occurred as she was distracted by a radio call for a short time although to the extent that she did hear what happened she corroborated Detective Colombus' version. She said that she had never heard Detective Columbus behave in the manner the applicant suggests that he did on this day on any other occasion that she had worked with him.

[35] It is not in issue that if I accept the version of the police officers then the search was not illegal. Effectively the defence asked that I disbelieve the detective's evidence.

[36] The relevant issue is whether it was open to the detective to form a reasonable suspicion in all the circumstances: *Dobbs v Ward* [2002] QSC 109. I am required to be satisfied on the balance of probabilities and the prosecution bear the onus of proof.

[37] It is relevant that Detective Columbus knew of Mr Tesic and believed that he had some involvement with drugs prior to the day in question. They had never met but Mr Tesic had been pointed out to the detective at an earlier time and he had made some investigation of him on the police computer. The detective recognised Mr Tesic as soon as he alighted from his vehicle and before he spoke. I observe that all these matters presumably came to light because the detective volunteered them. If I found it necessary to determine all the disputed issues of fact, and as it will be seen I have not, then that would have been a relevant circumstance favouring the prosecution.

[38] The defence argue that because of this prior knowledge, which so far as Mr Tesic's alleged drug activities was concerned was apparently all hearsay and unsubstantiated, the detective determined to search without any reason to suspect Mr Tesic of anything.

[39] The common feature of the evidence of all three witnesses is that no attempt was made to search the vehicle until after the licence was produced. Nor is it in dispute that detective Columbus was next to the car door when Mr Tesic went to retrieve his licence. It is in dispute as to what precisely could be seen from that vantage point. Both detectives say that they could see from their respective positions that there was a jar with a yellow lid in the pocket of the door of the car. Detective Smith says that she could not see what was in the jar – the clip sealed bags and the white powder - from where she was on the passenger side.

[40] Mr Tesic says that he had no knowledge of the jar being there.

[41] To an extent it is irrelevant what view I take of the dispute between the parties as to what occurred before the detective arrived at the door of the car. That is so because any police officer would have reasonable grounds for searching a vehicle if he or she observed clip sealed bags containing white powder in a jar in the door of the vehicle. That would obviously suggest the possible presence of illegal drugs.

[42] The legislation requires that the officer "reasonably suspects" one of the prescribed circumstances. To adapt what was said by Holmes J in *Dobbs* the statutory requirement that one "reasonably suspects" is a requirement of "the existence of facts which are sufficient to induce that state of mind in a reasonable person". Suspicion is "a state of conjecture or surmise where proof is lacking".[3]

[43] If Detective Columbus saw clip sealed bags containing white powder in a jar in the door of the vehicle, then it is irrelevant that he may have already, and inappropriately, formed an intention to search as he had ample grounds then to justify a search without warrant. I do not mean, by this, to say that I have formed the view that he had acted as Mr Tesic asserted.

[44] I am satisfied on the balance of probabilities that the detective did see what he claims to have seen as he stood waiting to receive Mr Tesic's licence. The reconstruction in exhibits 9 and 10 show that a jar, present in the door of a similar car, very likely could be seen from Detective Columbus' position. There is corroboration from Detective Smith that a jar could be seen from the passenger side. I cannot see that there is any evidence to put against these two corroborative pieces of evidence.

[45] Hence, at the time the search commenced, there were grounds for reasonably suspecting the presence of a dangerous drug as the legislation required.

[46] Detective Columbus pointed to other factors as relevant to him forming a suspicion – the demeanour of Mr Tesic and the "cracking" of his voice – and I have no reason to disbelieve the detective. Mr Tesic did not disagree with his observations. However I see no need to explore the factual debate further.

[47] I reject the defence submission.

Continuity

[48] The complaint here is that the jar, or the drugs said to have been in the jar, did not remain continuously in the detectives' possession from the time they were found in the door of the car to the time they were placed in a secure safe at the police station. Hence it is unsafe for the evidence to go before the jury as the drugs eventually analysed may not be the substances located in the container when first found.

[49] The question here is whether any reasonable jury, properly directed, could convict in the present state of the evidence. I take the prosecution case at its highest.

[50] While the precise relevant times are not known it seems that the police arrived back at the Gladstone police station from the road side where Mr Tesic was arrested at about 12.30 pm. The jar containing the relevant substances was on the seat of the police vehicle during the drive from the road side to the police station. The vehicle

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[3] *Dobbs v Ward & Anor* [2002] QSC 109 at [19]-[20] citing *George v Rockett* (1991) 170 CLR 104 at 112

was then driven into a lock – a secured part of the police station. The officers then placed their pistols into a box adjacent to the car, probably one at a time. The jar remained on the seat of the vehicle. Mr Tesic was then taken into the watch-house and the watch-house keeper went through the necessary protocols. During this time the jar was taken by one of the officers and placed on the counter of the watch-house. Detective Columbus thought that it was never more than metre from him and within his view at all times when on the counter. The jar was then taken to the day room – a room a short distance from the counter of the watch-house - where the contents of the jar were weighed. Detective Smith thought that she carried out the weighing. The weighing carried out there was consistent with the weights of the drugs found by the forensic analyst after adjustment is made for the weight of the clip sealed bags. The relevant contents were then sealed and placed in a "drop safe". The seals bear the initials of Detective Columbus.

[51] Neither officer saw any person, other than themselves, touch the jar or its contents.

[52] No officer recalls any third party being present in the police station or watch-house although it is possible other officers were present. Obviously the watch-house keeper was present. No civilians were seen to be present or are now recalled as being present.

[53] The substances that the prosecution says were found in the jar were placed in a "drop safe" shortly after 1.41 pm. There is no dispute that the analysts' certificates reflect what was placed in the drop safe.

[54] This summary of what occurred is a condensation of the evidence of the officers. There was some uncertainty from them, particularly Detective Smith about details and to an extent some inconsistencies. This account takes the prosecution case at its highest.

[55] Mr Tesic did not claim to have seen any third party in the police station or watch-house at any relevant time or that he saw any third party touch the jar or its contents. At one point in his evidence he accepted that the jar was in the custody of Detective Columbus when in the watch-house.

[56] Mr Murray submitted that the extent of the inconsistencies between the officers renders this evidence sufficiently unreliable to require its exclusion.

[57] I cannot accept the submission. There are several relevant matters. One is that there is no evidence whatever of any positive interference with the jar or its contents. Secondly, the only possible persons who had any access to the jar or its contents, other than the two investigating detectives, were serving police officers on duty. It is highly improbable that such officers would tamper with evidence or have any reason to touch the jar or its contents particularly when the investigating officers were in the immediate vicinity. Thirdly, Detective Columbus' evidence effectively precludes any person having any opportunity to tamper with the drugs. Even if that evidence were not accepted – and I do not see it as my function to determine that issue – all that raises is the theoretical possibility of misconduct by a serving police officer "based on nothing more than opportunity". That would not prevent a jury being satisfied of guilt to the requisite standard.[4]

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[4] See comments to this effect in *Mowday v Western Australia* (2007) 176 A Crim R 85 at [5] per McClure JA

[58] It is for a jury to decide whether they are satisfied that the drugs examined by the analyst were those found in the car.

[59] Again I reject the defence submissions.

Orders

[60] The orders will be:

(a) The evidence of the conversations referred to in paragraph 8 of these reasons is inadmissible and is not to be led in evidence in the prosecution case.

(b) The application is otherwise dismissed.