SUPREME COURT OF QUEENSLAND

CITATION:	*R v Healy* [2016] QCA 334
PARTIES:	**R** **v** **HEALY, Shaun Daniel Joseph** (appellant)
FILE NO/S:	CA No 49 of 2016 SC No 449 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Conviction: 9 February 2016
DELIVERED ON:	13 December 2016
DELIVERED AT:	Brisbane
HEARING DATE:	11 October 2016
JUDGES:	Gotterson and Philip McMurdo JJA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – OTHER CASES – where the appellant was found guilty after trial of two Commonwealth drug offences – where the pre-trial application judge admitted into evidence intercepted telephone calls between the appellant and a co-offender who was cooperating with police – where it is alleged that the evidence of the intercepted calls is inadmissible because: (1) the calls, although made to a service the subject of a warrant, were diverted to a different service and therefore in contravention of the *Telecommunications (Interception and Access) Act* 1979 (Cth); and (2) the evidence of the co-offender was indicative of illegalities and improprieties on the part of the investigating police officers – where the co-offender cooperated and freely provided his statement to police and in the hope or expectation of a personal benefit – whether the calls ought to have been excluded *Crimes Act* 1914 (Cth), s 23F, s 23U, s 23V *Telecommunications (Interception and Access) Act* 1979 (Cth), s 5, s 5F, s 5H, s 6, s 7

R v Falzon [1990] 2 Qd R 436, cited
R v Lawrence (No 3) [2003] NSWSC 655, cited
R v Playford [2013] 2 Qd R 567; [2013] QCA 109, cited
R v Swaffield; Pavic v The Queen (1998) 192 CLR 159, cited
Question of Law Reserved (No 1 of 1998) (1998) 70 SASR 281 [1998] SASC 6634, cited

COUNSEL: J R Hunter QC, with K E McMahon, for the appellant
G R Rice QC for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Commonwealth) for the respondent

[1] **GOTTERSON JA:** At a trial over four days in the Supreme Court at Brisbane, the appellant, Shaun Daniel Joseph Healy, was found guilty on 9 February 2016 of two drug-related offences. Count 1 on the indictment alleged an offence against s 307.1(1) of the *Criminal Code Act* 1995 (Cth) in that between 5 October 2008 and 24 May 2009 in Thailand and at Brisbane and elsewhere, the appellant imported a commercial quantity of a border controlled drug, namely, cocaine. The second count alleged an offence against s 307.5(1) of that Act in that between 5 October 2008 and 28 May 2009 in Thailand and at Brisbane and elsewhere, the appellant attempted to possess a commercial quantity of cocaine.

[2] The appellant was sentenced to 11 years six months imprisonment on each count. A declaration that some 1,419 days of pre-sentence custody be deemed time served under the sentence was made. A non-parole period of five years and nine months was fixed.

[3] On 8 March 2016, the appellant filed a Form 26 notice of appeal against conviction and an application for leave to appeal against sentence.[1] On 5 October 2016, he filed an amended Form 26 by which he has appealed against the convictions only. The grounds of appeal concern the admission into evidence of the testimony of an associate of the appellant, Brett Neville Dunn, and of intercepted telephone calls between the appellant and Dunn. In August 2014, a pre-trial application for the exclusion of this evidence was heard by a judge who was not the trial judge. His Honour dismissed the application on 23 September 2014.

The circumstances of the appellant's alleged offending

[4] The appellant was alleged to have facilitated the importation into Australia of a quantity of cocaine with a pure weight of 5.939 kilograms. A package containing the cocaine addressed to "Robert Clarke" at a unit in Fairfield in Brisbane,[2] and ostensibly despatched from New York, was brought into Australia on 23 May 2009. The package was intercepted by Australian Customs and the Australian Federal Police. They removed the contents of it and substituted them with another substance. The package was then delivered by an undercover police officer to the unit. The unit was occupied by two men, one of whom was Dunn.

[5] Dunn was responsible for accepting delivery of the package, although the other occupant actually signed for it. Dunn subsequently participated in a controlled delivery of the package to a person called Miles Firmin at the request of police.

---

1 AB1289-1291.

2 Evidence was led at the trial that a "Robert Clarke" had taken out a rental agreement on the unit and that Dunn had collected the keys for it from a person who introduced himself by that name.

[6] Dunn was the first witness called in the prosecution case. His evidence attributed a central role to the appellant in the importation. It is sufficient to illustrate the role to refer to some aspects of Dunn's evidence-in-chief. He said that he first met the appellant in Ban Dung in Thailand in about 2005. In 2008, he told the appellant that he was short of money. In October and November 2008, he had conversations with the appellant in which the appellant offered him a way to make money. He would have to sit in a room in Australia, wait for a box to be delivered, and then wait for someone to come and pick it up. The appellant promised Dunn that he would be paid US$12,500 for doing the job and that he would be "right". Dunn agreed to undertake the role.

[7] The appellant then told Dunn that once he was back in Australia, he was to obtain a second mobile phone. He was to notify the appellant of its number and to use it only for "the job". He was to call the appellant "Shoes" and use construction-site jargon as a code for their communications. "The steel has arrived" would mean that "the box has arrived".[3]

[8] Dunn identified the other occupant of the unit as a friend of his from Lennox Head, Ron Watt. Watt had told Dunn that he, too, was short of money. Dunn invited Watt to accompany him to Brisbane to do a job. He told Watt that he had "to sign for a box". There would be "$5,000 in it" for him for doing that. Watt did as Dunn asked him to do.[4]

[9] According to Dunn, two packages were delivered to the unit on different dates. When the first one arrived on about 14 May 2009, Watt signed for it. Dunn advised the appellant that it had arrived and was told by the appellant that he was to get a backpack, put the contents of the package in it, and deliver the backpack to a man that he was to meet at Fairfield Gardens (Firmin). He did that.[5]

[10] The second package was delivered to the unit late in the morning of 27 May 2009. It was "a big box". Watt signed for it. When Dunn and Watt left the unit during the afternoon, they were intercepted by police.[6] It was this package that contained the cocaine the subject of the two counts.

[11] From 28 May 2009 to 2 June 2009, Dunn was effectively a protected witness. The controlled delivery took place in Fairfield Road during the afternoon of 2 June 2009. At that point, Dunn and Firmin were arrested. Federal Agent M K Wilson was the arresting officer. The appellant was arrested much later in March 2012 after his removal to Australia from Thailand had been secured.

The bases of the challenge to the evidence

[12] The challenge to Dunn's evidence was based upon alleged illegalities and improprieties on the part of two investigating officers, Federal Agent Wilson and Federal Agent A P Hale. It was contended that because of the illegalities and improprieties, a written statement which Dunn gave to investigating officers and which formed the basis of his evidence at the committal and subsequently at trial, was improperly obtained. It was contended that the evidence ought to have been excluded in exercise of the public policy discretion.

[13] The intercepted telephone calls to which objection was taken were ones made between 28 May 2009 and 2 June 2009. They were made after a warrant had been

---

3 AB236 l45 – AB240 l2.
4 AB247 l41 – AB248 l44.
5 AB249; Tr1-23 l27 – AB250; Tr1-24 l36.
6 AB254; Tr1-28 ll17-45.

obtained on 26 May 2009 for the interception of calls to telecommunications service 0403 738 280 ("the 280 service"). The name of the customer for this service was "Robert Clarke" although Dunn had possession of the mobile phone for it. These calls were, in fact, made by the appellant from his mobile telephone to Dunn's personal mobile telephone service 0406 890 029 ("the 029 service"). Police had diverted calls made to that service to the service named in the warrant.

[14] The challenge to those calls was based upon an allegation that the diversion of Dunn's mobile phone service was in contravention of the provisions of the *Telecommunications (Interception and Access) Act* 1979 (Cth) ("TIAA") and also upon the alleged illegalities and improprieties which, it was said, had secured Dunn's participation in the telephone calls. Here, too, it was submitted that the public policy discretion should have been exercised to exclude this evidence.

The evidence relied on for the challenge

[15] The pre-trial application was heard over two full days in the course of which Dunn and Federal Agents Wilson and Hale testified. The latter two were cross-examined in detail. Numerous documents were tendered at the hearing. Drawing on those documents, the evidence given at the hearing and evidence given at the trial, counsel for the appellant prepared a summary of evidence which they included in their Outline of Argument.

[16] I propose to set out the summary for the purpose of giving context to the submissions for exclusion of the evidence which were made to the pre-trial application judge and which have been renewed on appeal. It is as follows:

> "**Dunn's interactions with police**
>
> 10. … The evidence established the following chronology of events between the police and Dunn:
>
> a. On **27 May 2009**, police intercepted Dunn at the Fairfield unit and took him to police headquarters where he declined to participate in an interview under advice from a lawyer called Lucy Webber. Very shortly afterwards he agreed that he would take part in an 'induced statement'. At the start of the interview Dunn read out the following passage:
>
> 'This statement is made on the basis that it will be used to support an application to the Commonwealth Director of Public Prosecutions and to other prosecuting authorities in Australia, for indemnity from prosecution, for any offences disclosed in it.
>
> The statement is also made on the basis that it will not be used in evidence, in any criminal proceedings against me, except in proceedings arising out of falsidity (sic) in, in the making of the statement. I also acknowledge that no assurance or guarantees have been given, in relations (sic) to grant of such an indemnity.'
>
> b. He was told that it was not within the power of the Federal police to grant him an indemnity and that only the Commonwealth prosecution had that power. Ms Webber contacted the Commonwealth DPP on Dunn's behalf and was advised that an indemnity could not be guaranteed by

them for Dunn. Dunn agreed to participate in a controlled delivery of the package. He was not charged or detained by police and was put in a motel.

c. On **28 May 2009**, Ms Webber advised Dunn that an indemnity was not guaranteed and would be a 'tough' argument. She said he might be better off putting his resources into running a defence rather than making an argument for an indemnity that she did not think would succeed.

d. Dunn's mobile telephone with the number 0403 738 280 was returned to him. Police also returned his personal mobile to him. Police diverted Dunn's personal mobile phone to 0403 738 280.

e. At the request of police Dunn sent a text message and made a phone call to the appellant. The appellant called him back and told him that the package would be picked up in a day or two. This was a diverted phone call.

f. Dunn gave evidence that when he agreed to make the delivery for police and to make and receive telephone calls for them he did not realise that he was creating evidence against himself. Dunn felt he had to continue doing what the police had asked him to do. He did not think about it being used as evidence against him.

g. On **28 May 2009**, police commenced taking a statement from Dunn. Dunn was of the belief that the evidence in the statement could not be used against him.

h. Another solicitor, Mr Stephen Tully ("Tully"), from New South Wales, made contact with Dunn and Agent Wilson. Later the same day, Dunn rang Tully. Dunn repeatedly raised the fact he had done an induced statement. Tully told Dunn that he would be charged, 'look they know they've got you' and 'you're doing the right thing insofar as you've made the election to do that thing to assist them'. Dunn gave evidence that during that phone call he was seeking guidance from Tully and that he had no idea what was going on. He did not know if the induced statement could be used against him and was relying heavily on what Tully told him.

i. On **30 May 2009**, police continued taking the statement from Dunn. Dunn then had two recorded conversations with the appellant about the collection of the package where Dunn expressed concern the package was not being collected fast enough. The appellant said he could not give him a specific day but that it would not be long. Both conversations were diverted phone calls from Dunn's personal mobile phone.

j. Tully advised Dunn they could not use the induced statement against him and that his statement was separate from his charging.

k. On **31 May 2009**, Wilson sent Tully the statement via email. Wilson described it as 'a work in progress'. That statement did not contain the passage extracted at paragraph 10(a) above. It had been removed at some unidentifiable time between 29 and 30 May 2009.

l. Tully told Dunn he had the statement. Dunn asked about the indemnity and Tully told him essentially that he had not yet read the statement and there was no rush in signing it.

m. On **1 June 2009**, Dunn asked the police whether the statement was still induced. Wilson said 'we've probably gone beyond that now' and that it was something he should talk to his lawyer about. Dunn said he was happy to help.

n. Dunn gave evidence that he had no idea what was going on and was just doing as he was told. He said he was happy to help because the stress had got to him. Agent Wilson accepted in evidence that this conversation was the first time Dunn was told he would be charged. There was no reason why he was not told until then.

o. Later in the day, Dunn was read section 16A of the *Crimes Act* by police and it was emphasised to him that the degree to which he had co-operated with law enforcement agencies would be taken into account in any sentence. Dunn gave evidence that he did not really understand about (sic) the Commonwealth sentencing law. He thought he was being read his rights.

p. Dunn arranged over the telephone to meet Firmin the next day. During a diverted phone Dunn and the appellant spoke about the package.

q. Dunn rang Tully and made veiled references to the call from the appellant. Tully said that the police had told Dunn they were going to charge him and that the induced statement he had done was in the past and couldn't be changed now. Dunn later said of this conversation that he had participated in the delivery the next day because he had been trying to 'make something wrong, right because he knew he had stuffed up big time'.

r. On **2 June 2009**, Dunn participated in the controlled delivery to Firmin. Dunn did an interview during which police had him adopt the statement without the passage about an indemnity. Dunn was charged.

s. On **23 June 2009**, Dunn was removed from a correctional centre to sign the statement.

t. In **February 2010** Dunn pleaded guilty to an offence of attempting to possess cocaine. His sentence was reduced because of his undertaking to testify against the appellant.

Evidence of Agent Wilson

11. Agent Wilson had made the decision to remove the words 'this is an induced statement' himself and had done so sometime on either 29 or 30 May. He had done it because he thought a non-induced statement would be a stronger statement and given more weight.[7]

12. He did not warn Dunn that by making the telephone calls he might incriminate himself. He was aware that he would need to do so in order to use that evidence against Mr Dunn but it 'didn't come up'. He understood Mr Dunn to be a protected suspect. The failure to caution him just meant the evidence could not be used against him.

13. He gave evidence at committal that he had always intended to charge Dunn with an offence. At pre-trial hearing he said on 27 May he did not have enough evidence. It was difficult for him to say at what stage Dunn had 'gone beyond [the] stage' of the induced statement. If Dunn had stopped participating after the controlled delivery he would have used the induced statement in a derivative way. His focus was on people higher up the chain.

14. Agent Wilson accepted that the taking of the statement was unrecorded. He said this was because they were taking a witness statement and not a confession.

15. Over the weekend he had conversations with Mr Tully where he agreed that the statement no longer needed to be an induced statement. He kept no notes or records of those conversations. At committal, he said that he remembered a conversation with Tully where he agreed that an indemnity wasn't going to happen so an induced statement was therefore irrelevant at that state. When he gave evidence in the pre-trial hearing he did not remember ever discussing an indemnity with Mr Tully.

16. He denied that Dunn had been read the provisions of the *Crimes Act* on 1 June to ensure his continued participation in the controlled delivery. It had been because it was 'fair to Mr Dunn'. He denied it was an inducement and had done it before. He did not think there was a need to record that conversation but he had done so to show the court the conversation he had.

17. He had diverted the phone on 28 May 2009. He did not check the telephone interception warrant before doing it. He did not think it was necessary. He has never done it before. He has been an AFP officer for over 20 years. He did not get any advice from his superiors about it or inform the commissioner who was responsible for bringing the application. He did not believe that other offenders would be calling Mr Dunn on his personal phone. He was aware that he could have obtained a warrant for

---

[7] At the hearing of the pre-trial application, Federal Agent Wilson accepted that he had removed those words from the statement then because of his perception that it would be seen as stronger by the court without them: AB77; Tr1-68 ll10-22.

the diverted number. He did not do so because it was not something he considered at the time and because one of the factors would have been resources and time. He had not mentioned the diversion in his first police statement because he did not think it was relevant. Hale was present when he did the diversion but he did not discuss it with him before he did it.

Evidence of former Agent Hale

18. He was in a state of doubt whether the interview on 27 May could be used against Dunn. He did not on that night think about it in those terms, despite the passage at the beginning of the interview where it was said it could not be used against Dunn.

19. As at 28 May 2009, he was treating Dunn as a protected suspect. Dunn was warned that he didn't have to make the phone calls and that the evidence could be used against him. That was in contradiction of Wilson's evidence.

20. Hale conducted the interview on 2 June where Dunn adopted the statement. He accepted that it had an unusual format where he read out Dunn's statement to him. It was a way of getting the information in the statement onto tape and getting his agreement to its accuracy. When he did that interview it was the only evidence police had that could be used against Dunn.

21. He had discussions with Wilson to the effect that Dunn was going to continue to assist them despite the fact he would not be receiving an indemnity. He did not record everything from then on, even though he understood Dunn to be making confessions and admissions. At some stage he told Dunn that the inducement no longer applied. He could not recall when and made no note or recording. He could offer no explanation as to why something as important as a protected suspect saying he understood he was no longer acting under an inducement was not captured in the running log or otherwise recorded.

22. Former Agent Hale gave evidence, in contradiction of Wilson's evidence, that he was not present when Agent Wilson diverted the phone on 28 May. He had never in his career as a police officer sought to divert one phone to another intercepted number. He had not done it because he had not thought of doing it and he did not know about its lawfulness. At committal he had given evidence he thought it would be inappropriate."

The alleged illegalities and improprieties

[17] At the hearing of the pre-trial application, counsel for the appellant criticised the evidence given by Federal Agent Wilson as flawed in a number of respects. Further, it was submitted that the evidence overall was indicative of the following illegalities or improprieties on the part of the investigating police officers:

- There was a failure to warn Dunn on 28 May 2009 about making and receiving recorded calls.

- At an unknown point, Wilson removed the indemnifying paragraph from the statement of his own initiative and without Dunn's consent or authority.
- There was a failure after that time to caution Dunn that he was incriminating himself and to record the caution in circumstances where, thereafter, the police officers treated the statement as admissible against him.
- The police officers did not allow free and confidential access by Dunn to a lawyer.
- Federal Agent Wilson must have misled Mr Tully by telling him on 29 May 2009 that Dunn was going to be charged.
- The interview on 1 June 2009 contained an inducement that Dunn would get a reduced sentence if he cooperated.
- The diversion of the telephone service contravened s 7(1) of the TIAA.[8]

[18] As to alleged illegalities, defence counsel submitted that the failures to warn Dunn at various stages contravened s 23F of the *Crimes Act* 1914 (Cth) and that failures to record certain warnings that were given and certain steps that were taken contravened ss 23U and 23V thereof respectively.

The ruling on the pre-trial application

[19] The pre-trial application judge stated, as a matter of principle, that an adverse finding against police of improper investigative conduct does not, of itself, engage the public policy discretion and that, as with illegal conduct, the discretion will be engaged only if the conduct itself procures either the commission, or evidence, of the offence with which the accused is charged.[9]

[20] With this principle in mind, his Honour then made the following observations and findings of fact:

> "[37] Dunn was probably induced to turn police informer and agent by hope of advantage, promise of reward, and, to a degree, fear of the consequences of not doing so. To that extent the induced statement was 'involuntary'. However, that does not of itself make it evidence illegally or improperly *procured* by police so as to engage the policy discretion. As Brennan J pointed out in *Collins v R*[10] in relation to involuntariness:
>
> > '[M]otives to confess, like motives for many human actions, may be mixed and if there be a congeries of motives it is necessary to determine whether the confession would not have been made (at all) but for pressure...or some fear of prejudice or hope of advantage induced by a person in authority, or whether the making of the confession is really to be accounted for by motives...not referable to such pressure, fear or hope.'
>
> This is a matter of fact and degree to be determined by assessing the practical effect of the particular circumstances on the will.

---

8 Appellant's Outline of Argument para 23.

9 At [36]: AB210.

10 (1980) 31 ALR 257 at 309, a decision of the Full Federal Court on appeal from the Supreme Court of the Northern Territory.

> [38] Dunn was a willing, if not enthusiastic, police informer and undercover agent, activated by his own legal advice, self interest and, to a lesser extent, feelings of remorse. To my mind the evidence thus obtained is, as Mr Rice QC put it in submissions, the product of Dunn's 'willingness to give it'. This was manifested from the time he was detained through to when the statement was signed on 23 June [2009], and included his guilty plea and appearance as a prosecution witness at the applicant's committal hearing. That willingness appears undiminished even now.
>
> [39] In my opinion, Dunn's testimony is admissible against the applicant because, unlike the situation in [*R v Falzon (No 2)*],[11] it was the product of a free choice to assist police in the hope or expectation of a personal benefit. It was not bullied out of him. It is corroborated and is detailed, not vague.
>
> …
>
> [49] As Mr Rice QC points out, the evidence clearly shows that, with the encouragement and support of his own lawyer, and so long as he was maximizing his chances of a lesser charge or lighter sentence, Dunn was prepared to fully and freely cooperate with police. This was regardless of whether or not he was going to be indemnified, charged, cautioned or recorded."[12]

[21] These findings of fact having been made, the pre-trial application judge concluded that this discretion had not been engaged. That was because the challenged evidence was not produced or procured by investigative misconduct.[13]

[22] His Honour gave consideration to the alleged illegalities and improprieties.[14] At paragraph [54] of his reasons, he said that he was not satisfied that the investigative methods employed by the police in relation to Dunn "crossed 'the line of forbidden conduct' in the *Swaffield and Pavic*[15] sense".[16]

[23] With regard to the diversion of the telephone service, his Honour stated that, in his view, it was immaterial that calls made by the appellant to the one service were diverted to the other without his knowledge.[17] He found that there was no contravention of the TIAA, observing:

> "[33] …The warrant authorised police to intercept and record 'communications made to or from' service 280. The means by which such a communication was made - that is, via service 029 - is irrelevant. Each of the relevant conversations was a communication 'made to or from' service 280 within the terms of both s 46 of the [TIAA] and the warrant. It follows that, contrary to the applicant's contention, the intercepted conversations were not improperly obtained and are admissible, despite any infringement of the applicant's privacy rights."[18]

---

11 [1993] 1 Qd R 618.
12 AB211, 213.
13 At [12]; AB204.
14 At [41]-[53]; AB211-214.
15 *R v Swaffield*; *Pavic v The Queen* [1998] HCA 1; (1998) 192 CLR 159.
16 AB214.
17 At [32]; AB209.
18 AB210.

Grounds of appeal

[24] The appellant relies on the following grounds of appeal:

> "1. The learned primary judge erred in law in ruling that the evidence of telephone interceptions was admissible at the trial.
>
> 2. That the learned primary judge erred in law in ruling that the evidence of the witness Brett Neville Dunn was admissible in the appellant's trial."
>
> (In these grounds of appeal, the term "the learned primary judge" is an evidence reference to the pre-trial application judge).

[25] In advancing Ground 1, the appellant relied on both the allegations of contravention of the TIAA and the allegations of illegalities and improprieties, as had been relied on before the pre-trial application judge. Since the latter category of allegations also underpin Ground 2, it is convenient to consider that ground first.

Ground 2

[26] The appellant accepted that as the appeal is against the discretionary refusal to exclude evidence, it is necessary for the appellant to show that the exercise of the discretion was vitiated by error in the *House v The King*[19] sense. The appellant also needs to show that any such error had caused a miscarriage of justice.[20]

[27] **Appellant's submissions**: The appellant's arguments on this ground of appeal contain several themes. It was argued that by a combination of failing to undertake a real analysis of the alleged improprieties and a failure to make findings as to key matters concerning them, the pre-trial application judge "failed to engage properly with the real arguments and issues in the case".[21]

[28] Secondly, it was argued that his Honour failed to consider whether the legal advice given to Dunn was "infected by police impropriety" and the impact of that for the procurement of Dunn's evidence.[22] Thirdly, it was submitted that his Honour erred in principle by introducing a threshold of exceptionality where exercise of the discretion is sought to exclude evidence induced by impropriety or illegality.[23]

[29] **Respondent's submissions**: The respondent submitted that there was no challenge to the factual findings made by his Honour which I have set out. On those findings, Dunn's conduct, including the giving of the statement, was not **procured** by any misconduct on the part of the police. Consistently with established principle, his Honour was justified in concluding that the discretion to exclude this evidence, which was otherwise admissible, was not engaged.[24]

[30] The respondent also submitted that once his Honour had reached the conclusion about Dunn's motive, it became unnecessary for him to make detailed findings concerning the alleged illegalities and improprieties.[25]

---

19 (1936) 55 CLR 499 per Dixon, Evatt and McTiernan JJ at 505.
20 *R v Playford* [2013] QCA 109; [2013] 2 Qd R 567 at [101].
21 Appellant's Outline of Argument paragraphs 33-37.
22 *Ibid* paragraphs 38-40.
23 *Ibid* paragraphs 28-32.
24 Respondent's Outline of Argument paragraphs 4-7; 11.
25 *Ibid* paragraphs 10, 12.

[31] Further, the respondent argued that the improprieties of which the appellant complained were, for the most part at least, matters that might have given rise to argument about admissibility against Dunn in a criminal proceeding in which he was the accused. Dunn waived any such argument by pleading guilty, as he said he would do, from the outset.[26]

[32] **Discussion**: It is, in my view, of critical importance to the consideration of this ground of appeal that the appellant has not challenged the factual findings at paragraphs 37 to 39 and 49 of the ruling by the pre-trial application judge. It was not contended for the appellant that those findings were to any degree legally flawed. These finding were to the effect that Dunn cooperated and provided his statement of his own free choice and in the hope or expectation of a personal benefit to him.

[33] It follows, then, that if the legal principle on which his Honour proceeded was correct, as I consider it was, it was strictly unnecessary for him to have made conclusive findings with respect to the alleged illegalities and improprieties. Thus, a failure to make such findings with respect to them could not avail the appellant in his appeal. That is not to say that his Honour did not, in fact, make findings with respect to some, if not all, of them at paragraphs 41 to 55 of the ruling. The findings that he did make were relied on by him for the conclusion as to his satisfaction expressed at paragraph 54 of the ruling.

[34] It may be accepted that the independent legal advice that Dunn was given was instrumental in his decision-making. He had a solicitor from the time that he was apprehended. The solicitor attended the first session with police at which the statement-taking process began. That solicitor was soon replaced by Mr Tully who advised Dunn that it was in his interests to cooperate with the police and to provide a statement to them.

[35] The second theme in the appellant's arguments on this ground seeks to impugn the respondent's reliance on the independent legal advice as fracturing any causative link between alleged police impropriety on the one hand, and Dunn's cooperation and the provision of the statement on the other. It attempts to do so by suggesting that the giving of the advice was infected by the impropriety.

[36] The impropriety towards the lawyers suggested to the pre-trial application judge was, as his Honour described it, that the police had "exaggerated and misinformed" them about the strength of the evidence against Dunn.[27] However, as particularised for his Honour,[28] the complaint was that the police misled Mr Tully into thinking that Dunn had already made an admissible confession.

[37] The telephone communications between Dunn and Mr Tully were recorded via the interception. It is clear from two conversations between them on 29 and 30 May 2009 respectively, that Mr Tully knew from what Dunn then told him, that the statement that he had given to police and in which he admitted "doing the three kilogram", was an induced statement. Mr Tully understood, correctly, that there was only one statement. He commented to Dunn that the statement would "effectively be [Dunn's] evidence".[29] In response to a specific question from Dunn, Mr Tully advised him that this statement could not be used against him in court.[30] He clearly appreciated that the statement

---

26 *Ibid* paragraphs 8, 9.
27 At [42]; AB212.
28 Applicant's Outline of Submissions filed 11 December 2013 paragraphs 32-35; Appeal Transcript 1-16 ll21-23.
29 AB1121-1122; 1134.
30 AB1135-1136.

had evidential, but not confessional, value. In these circumstances, the complaint of impropriety towards Dunn's lawyers is without factual foundation.

[38] I now turn to the legal principle on which his Honour proceeded. It is one that is well supported by authority. A comprehensive exposition of it was given by Doyle CJ in *Question of Law Reserved (No 1 of 1998)*.[31] His Honour said:

> "The discretion is a broad one. It is founded upon the need to preserve the integrity of the administration of justice and the need to protect the processes of the courts of justice: *Ridgeway*[32] (at 30-32) per Mason CJ, Deane and Dawson JJ. An object of the exercise of the discretion is to discourage illegal or improper conduct by the law enforcement authorities; see *Ridgeway* (at 32), *R v Swaffield* (at 22) Brennan CJ.
>
> But the foundation of the discretion, and its object, do not give the courts a roving commission to search for illegality or impropriety by those responsible for the enforcement of the law. The discretion does not give a power to exclude evidence whenever there is some association between that evidence and illegal or improper conduct, or whenever an attempt is made to bolster prosecution evidence by resort to illegal or improper conduct. To exercise the discretion in that fashion would be to use the exclusion of evidence as a means of punishing wrongdoing by those responsible for the enforcement of the law. That is not the responsibility of the courts. Or, to be more precise, the exclusion of evidence is not the means by which wrongdoing is to be punished by the courts. As the majority said in *Ridgeway* (at 37) with reference to improper conduct by law enforcement officers in the course of investigating criminal activity:
>
> > 'A finding that law enforcement officers have engaged in such clearly improper conduct will not, of course, suffice of itself to give rise to the discretion to exclude evidence of the alleged offences or of an element of it. As with the case of illegal conduct, the discretion will only arise if the conduct has procured the commission of an offence with which the accused is charged.'
>
> In other words, the discretion arises when the improper or illegal conduct has procured the commission of an offence or has enabled the prosecution to obtain the relevant evidence.
>
> As I have already said, it is when the illegality or impropriety is the means by which the evidence is procured that the discretion arises for consideration. It arises then because allowing the use of the evidence, obtained in this fashion, may appear to condone illegal or improper conduct, and may compromise the court's commitment to the upholding of the law."

[39] This statement of principle serves to highlight the requirement that for the public policy discretion to exclude evidence to be engaged, investigative misconduct must have **procured** the conduct, evidence of which is sought to be excluded. So understood, the principle provided ample justification for the statement by the pre-trial application judge at paragraph 12 of the ruling that the public policy discretion was not engaged

---

31 (1998) 100 A Crim R 281; (1998) 70 SASR 281 at 288.

32 *Ridgeway v The Queen* [1995] HCA 66; (1995) 184 CLR 19.

because the challenged evidence was not produced or procured by investigative misconduct.

[40] It remains to consider the third theme to the appellant's arguments on this ground. This theme is referenced to the following observation by the pre-trial application judge at paragraph 19 of the ruling:

> "…Inducement alone might lead to the rejection of the voluntary admissions and incriminating statements implicating co-offenders because of the unacceptable risk of unreliability and unfairness, but only exceptionally for impropriety or illegality."[33]

[41] The appellant submitted that his Honour had elaborated the principle on which the public policy discretion is to be exercised by adding a qualification that the impropriety or illegality need be exceptional. I do not understand his Honour to have done that.

[42] To my mind, his Honour's observation is to be understood as meaning, in ordinary parlance, that it is the exception rather than the rule, that impropriety or illegality will ground an exercise of the discretion against the admission into evidence of voluntarily-made admissions. That is the meaning conveyed by Howie J's use of the term "exceptional course" in comparable circumstances[34] to which his Honour was referred. It also reflects the singularity of the one instance of an exercise of the discretion to exclude evidence of an indemnified witness that was cited to his Honour.[35]

[43] In any event, his Honour did not refuse to exclude this evidence in circumstances where, despite finding illegality or impropriety, he considered that it was not sufficiently exceptional to warrant exclusion. His Honour refused to exclude because any illegality or impropriety that there might have been, did not procure Dunn's cooperation or the giving of his statement.

[44] For these reasons, I consider that this ground of appeal has not been established.

Ground 1

[45] At the hearing of the appeal, counsel for the appellant confirmed that this ground is confined to four mobile telephone calls between the appellant and Dunn on 29 and 30 May 2009. They were made by the appellant to Dunn on the 029 service but were diverted to the 280 service. The appellant's counsel conceded "that the content of those discussions were quite devastating in terms of the appellant's prospects at trial".[36]

[46] **Appellant's submissions**: Counsel for the appellant referred to the warrant issued on 26 May 2009[37] and noted that it was issued under s 46 TIAA; that it was specific to the named service (280) and that the person named in the warrant was a Robert Clarke. He submitted that the diverted calls were illegally intercepted for the following reason.

[47] Section 7(1)(a) TIAA states that a person shall not intercept a communication passing over a telephone system. Of the exceptions to this in s 7(2), paragraph (b) thereof relevantly applies to the interception of a communication under a warrant. The appellant accepted that a communication as defined in s 5 TIAA includes a conversation.

---

33 AB206.

34 *R v Lawrence (No 3)* [2003] NSWSC 655 at [28].

35 *R v Falzon* [1990] 2 Qd R 436 per de Jersey J, where the witness was subjected to strong inducement to ingratiate himself with the prosecution.

36 Appeal Transcript 1-3 ll5-6.

37 AB1003-1004.

[48] However, it was submitted, any communication initiated by the appellant on his mobile phone and made to the 029 service terminated at the point when it was received by that service. That is so because at that point, it became accessible to the intended recipient of the communication within the meaning of TIAA. Consistently with s 5F thereof, it thereupon ceased to be a communication capable of being intercepted under a warrant. Interception after that point, and consequent upon a diversion to the 280 service, was not authorised by the warrant. Further, the discretion under s 75(1) TIAA was not available because what was intercepted was not a communication.

[49] **Respondent's submissions**: Counsel for the respondent noted that the uncontested evidence of Federal Agent Wilson was that the diversion to the 280 service of calls made to the 029 service was effected by arrangement with Dunn some two days prior to the challenged calls.[38] He also noted that, as a matter of fact, when the appellant spoke to Dunn in those calls, the communication was to and from the 280 service. Thus, as a matter of fact, it was communication with that service that was being intercepted.

[50] The respondent submitted that the warrant, and s 46 TIAA, authorised interception of any conversation made by a communication with that service without regard for the pathway taken by the communication to and from it. The provisions of ss 5F, 5G and 5H TIAA are consistent with that view.

[51] The respondent also submitted that the diversion was lawful in the eyes of the common law, having been done with the consent of the true owner of the 029 service, Dunn. As well, insofar as the diversion might possibly be characterised as an act enabling an interception within the meaning of s 7(1)(c) TIAA, it was protected by the warrant exception in s 7(2)(b) and therefore was not unlawful by statute.

[52] **Discussion**: The warrant issued on 26 May 2009 authorised the interception of communications made to or from the 280 service. The interception of a communication passing over a telecommunications system, as defined in s 6(1) TIAA, consists of listening to or recording it in its passage over the system without the knowledge of the person making the communication.

[53] Under s 5F(1)(b) TIAA, a communication is taken to continue to pass over the system until it becomes accessible to the intended recipient. Section 5H(1) provides that a communication is accessible to its intended recipient "if it:

> (a) has been received by the telecommunications service provided to the intended recipient; or
>
> (b) is under the control of the intended recipient; or
>
> (c) has been delivered to the telecommunications service provided to the intended recipient."

[54] As noted, the word "communication", as defined in s 5 TIAA, includes conversation in whatever form it takes. The word "conversation" is not defined for the purposes of the TIAA. Given its meaning in ordinary speech, the word, in this context, connotes "an informal interchange of thoughts;[39] "an exchange of ideas".[40] The connotation is one of transmission of thoughts or ideas from person to person.

---

38 AB1187.

39 *Macquarie Dictionary*.

40 *Concise Oxford Dictionary*.

[55] Here, the communication between the appellant and Dunn in the four telephone calls was by conversation. It was essential for there to have been a conversation, and hence a communication, between them that there had been a completed transmission of thoughts or ideas from the one to the other. Consistently with this notion, s 5F(1)(b) looks to when the communication becomes accessible to the intended recipient.

[56] It follows that in s 5H, the expression "the telecommunication service provided to the intended recipient" means the service at which the recipient participates in the communication, that is to say, the conversation. Here, for Dunn, that was the 280 service. Further, the communication became under his control when he became able to participate in it. That occurred at the 280 service.

[57] I reject the appellant's contention that the communication ceased or began at the 029 service. Such a contention is confronting to the notion that, relevantly, the communications were conversations between Dunn and the appellant. The transmission of the appellant's thoughts and ideas to Dunn had not been completed at the 029 service. Likewise, the transmission of Dunn's thoughts and ideas to the appellant had begun at the 280 service anterior to the passage of them by the 029 service to the appellant.

[58] I would add that I accept the respondent's submission that the diversion was lawful. In particular, if it was an act within the scope of s 7(1)(c) TIAA, it was accorded the protection of the warrant exception in s 7(2)(b) thereof.

[59] In my view, this ground of appeal cannot succeed.

Disposition

[60] Since both grounds of appeal have failed, this appeal must be dismissed.

Order

[61] I would propose the following order:

1. Appeal dismissed.

[62] **PHILIP McMURDO JA:** I agree with Gotterson JA.

[63] **DOUGLAS J:** I agree with Gotterson JA's reasons and the order proposed by his Honour.