IN THE COURT OF APPEAL [1993] QCA 551

SUPREME COURT OF QUEENSLAND

C.A. No. 134 of 1993

Brisbane

[Irving & Ors v. Heferen]

MARK PATRICK IRVING,
LAURENCE BRETT PAUL and
STEVEN JOHN BUTLER
(Respondents)

v.

STEPHEN PATRICK HEFEREN
(Appellant)

The Chief Justice
Pincus JA.
Lee J.

Judgment delivered 16/12/1993

All members of the Court delivering separate reasons. All agreeing as to the orders to be made.

APPEAL AGAINST CONVICTION DISMISSED

CATCHWORDS: **Innkeepers lien - whether motel manager a common innkeeper - extent of lien at common law - whether lien attached to outstanding telephone bill - whether innkeeper entitled to seize baggage from guests room - whether innkeeper entitled to search baggage and remove money.**

Criminal law - evidence - whether innkeeper removing baggage peaceably from guests room in exercise of lien acted illegally - whether innkeeper entitled to search baggage and remove money - whether evidence of drugs discovered in search of baggage should be excluded.

Counsel: Mr Rafter for appellant.
Mr Bullock for respondent.

Solicitors: Legal Aid Office for appellant.
Director of Prosecutions for respondent.

Hearing date: 22nd July, 1993

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Before The Chief Justice
Mr Justice Pincus
Mr Justice Lee

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MARK PATRICK IRVING,
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STEVEN JOHN BUTLER

v.

STEPHEN PATRICK HEFEREN
(Appellant)

REASONS FOR JUDGMENT - THE CHIEF JUSTICE

Judgment delivered 17/12/93

I have read the reasons prepared by Lee J. and agree with his conclusion that this appeal should be dismissed. I acknowledge the value of his researches and am indebted to him for the views he has expressed on a number of issues related to the rights of a motel proprietor or an innkeeper, vis-à-vis his guests, especially the right to a lien on a guest's property in

certain circumstances.

I find, however, that my decision in this case does not depend upon a precise application of the doctrines which Lee J. has explored. This is because I think that the magistrate exercised his discretion on the admissibility of the evidence in a way which should be accepted. I am conscious also that the questions of the relevant rights of the motel proprietor were not fully argued either before us or below.

So far as concerns the arrangement which can be assumed to have operated between the proprietor and the appellant guest, I can detect no breach of its terms or implied terms arising out of the original entry made by the proprietor into the appellant's room. Having entered, the proprietor made the guest aware of his presence and the guest did not then direct him to leave. The proprietor proceeded to take possession of certain of the guest's property doing this for reasons which, so far as emerged, seem to have amounted to justification in the eyes of the proprietor. The proprietor later went further in dealing with some of the guest's money but this I would regard as collateral conduct having no particular bearing upon the earlier taking of the property which was found to include the cannabis.

In his own mind, the proprietor was not shown to have been acting wrongly. He was not a police officer in respect of whose behaviour especially strict standards might have to be applied for reasons of policy.

In the eventuality that some aspects of the proprietor's

actions in the present case might have been illegal, with the consequence that there arose a judicial discretion to exclude the evidence obtained, there was not a detectable error in the conclusion which the magistrate expressed. A significant quantity of drug and the presence of a wrongdoer had been discovered. If then, any illegality had been involved in the act of discovery of the drug, strong reasons could be regarded as supporting the decision not to exclude the evidence. For this reason I would dismiss the appeal.

IN THE COURT OF APPEAL

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Before The Chief Justice
Pincus J.A.
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MARK PATRICK IRVING, LAURENCE BRETT PAUL and STEVEN JOHN BUTLER

v.

STEPHEN PATRICK HEFEREN
(Appellant)

REASONS FOR JUDGMENT - PINCUS J.A.

Judgment delivered 16/12/93

I have read the reasons for judgment of Lee J. I agree with His Honour's view that Mr Power had a right to a lien in respect of moneys due to him by the appellant at the time when he entered the appellant's room. I also agree that Mr Power had no right to search through the appellant's belongings, nor to remove money from his wallet. As was argued on behalf of the appellant, the discovery of the incriminating evidence resulted from an unlawful search. It is, however, clear enough that in the circumstances explained in the reasons of Lee J. the

Magistrate's decision to let in the evidence obtained by the unlawful search was correct. I am of opinion that the appeal should be dismissed.

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

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Before: The Chief Justice

Pincus JA.

Lee J.

[Irving & Ors v. Heferen]

MARK PATRICK IRVING,
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(Respondents)

v.

STEPHEN PATRICK HEFEREN

(Appellant)

REASONS FOR JUDGMENT - W.C. LEE J.

Judgment delivered 16/12/1993

This is an appeal against conviction on 30th March 1993 following a trial before a Stipendiary Magistrate at Townsville on a charge of supplying a dangerous drug, viz. cannabis sativa, at Townsville on or about 1st July 1992. The appellant was also convicted on one count of possession of a dangerous drug consisting of a cigarette containing cannabis sativa but acquitted of two other charges, one of possession of scales used in connection with the commission of a crime defined in s. 6 of the Drugs Misuse Act 1986 and one of possession of a spoon used

in the administration of a dangerous drug. The appellant was imprisoned for three months which was suspended after expiration of one month for a further period of twelve months pursuant to s. 144 of the Penalties and Sentencing Act 1992 ("the Act"). The record does not show whether any order was made formally recording a conviction but it follows from s. 143 of the Act that an order could only be made under s. 144 if a conviction is recorded. There is no appeal with respect to the conviction for possession.

There are various grounds of appeal but only Ground 2 was relied upon as follows:

> "The trial Magistrate erred as a matter of law in the exercise of his discretion by failing to exclude the evidence of Powers and/or the items seized by Powers when such search and subsequent seizure was improper and/or illegal."

The prosecution relied not on evidence of actual supply to others as referred to in para. (a) of the definition of supply in s. 4 of the Drugs Misuse Act 1986, but on that part of the definition in para. (c) which refers to the "doing or offering to do any act preparatory to, in furtherance of, or for the purpose of, any act specified in paragraph (a);".

The sole evidence against the appellant on the supply charge resulted from an entry by one Desmond Francis Power, motel manager of the Aitkenvale Motel, Townsville, into the motel room at the motel then occupied by the appellant early on the morning of 1st July 1992. Power, whose evidence the Stipendiary Magistrate accepted, said that he seized gear

belonging to the appellant and other articles from the room occupied by the appellant and later handed those articles to the police. The bag contained a large number of packages of cannabis sativa which had been weighed, packaged, and labelled with weight, quality and price. From the nature and quantity of the substance discovered in the appellant's carry bag in the room occupied only by him, and packaged as it was, the Stipendiary Magistrate inferred that the appellant was guilty of preliminary acts so as to bring the matter within sub-para. (c) of the definition of supply. Apart from the question of the admissibility of this evidence, the validity of the conviction was not otherwise challenged. Without such evidence, no conviction was possible.

The appellant checked into the motel between 4.00 p.m. and 5.00 p.m. on 30th June 1992. He paid for his accommodation in advance which was in accordance with the motel's practice and requirement. During the night he made telephone calls resulting in a telephone account in the sum of $72.40 (ex. 3). The first call was made at 5.13 p.m. on 30th June 1992 involving a charge of $0.40, followed by numerous calls totalling 41 in all progressively throughout the evening up to 10.53 p.m., involving a total charge of $59.60. Thereafter, from 4.09 a.m. to 5.32 a.m. on 1st July 1992, a further 11 calls were made involving charges of $12.80. There were several "0055" information calls. The appellant had several visitors to the room throughout the evening, including call girls. At about

6.15 a.m. on 1st July 1992, Power made a read out of the appellant's telephone account and was disturbed about its amount and doubtless about the large number of calls made - 52 in all. He had been suspicious of the appellant since his check in on the previous afternoon and this caused him to become even more suspicious. He thought that the appellant might leave without paying the account.

He telephoned the appellant's room and got no reply which caused him to suspect that the appellant had already vacated the room without paying for the telephone charges. He went to the room with the master key. The Stipendiary Magistrate said that Power first knocked, "gleaned the impression that the defendant may have vacated, and so entered the room where he found the defendant apparently asleep". Power shook him by the toe, woke him up and demanded immediate payment of the telephone account. The appellant said, "Too bad", and went back to sleep.

Power was running the motel on his own. The evidence does not disclose whether he had kitchen or other staff available. His office was in the front block of the motel and the room occupied by the appellant was in the back block, out of sight of the office. He feared that the appellant would leave without paying and that he would not be in a position to see him leaving, so he wanted some security for the telephone account. He promptly proceeded to take certain gear of the appellant which the appellant would need to use if he was going to leave. This consisted of a red carry bag with contents, and also the

accused's boots. He also removed scales which had been on a shelf near the telephone and a syringe which was on the table near the bed.

Power later opened and searched the carry bag. He saw that it contained a plastic shopping bag. On examining its contents, he formed the opinion that it contained cannabis sativa. Also inside the carry bag was the appellant's wallet. There was $40 in the wallet which Power removed, issued a receipt for in part payment of the telephone account and then put the receipt back into the wallet (exs. 2, 3). He locked all of the confiscated gear in the motel strong room. He was the only person with a key to it. He called the police who, with a search warrant, searched the appellant's room while the appellant was still there. During this search they discovered the cigarette containing cannabis which was the subject of the charge of possession. The police took possession of the bag, its contents, the scales and the syringe.

No doubt Power felt an obligation to call the police and indeed he probably wished to divest himself of the cannabis as early as possible. He did not attempt to return the gear to the appellant's room which might have caused difficulties having regard to his knowledge of its contents. It was not contended that the police had other than a duty to act on the information supplied by Power and on the cannabis sativa contained in the appellant's bag which had been handed over to them. Power had acted on his own volition and in no way at the behest of the police.

After Power had given evidence, the solicitor for the appellant submitted that the evidence of Power was unlawfully obtained. It was simply said that Power's conduct in invading the privacy of a guest's room, and taking and going through his belongings was unlawful, and that the discovered evidence should have been excluded as a matter of discretion pursuant to the principles in Bunning v. Cross (1978) 141 C.L.R. 54. His Worship referred to Bunning v. Cross (supra); Cleland v. R. (1983) 57 A.L.J.R. 15; R. v. Killick (1979) 21 S.A.S.R. 321 at 327; R. v. Ireland (1970) 126 C.L.R. 321, and concluded:

> "To me, it appears the effects of Bunning, Ireland and Cleland, it appears the questions to be asked and deciding whether or not to reject the evidence seized as a result of the - of - may or may not be an illegal entry, is:
>
> i) The public need to bring to conviction those who commit criminal offences;

ii) Public interest in the protection of the individual from unlawful and unfair treatment;

iii) Curial approval or even discouragement being given to the unlawful conduct of those who task it is to enforce the law.

In this case, the items were taken by Mr. Power, who is an ordinary citizen who is not a member of the police or a person charged with the bringing to justice of people who commit the types of offences which are alleged against the defendant. There is definitely a discretion to exclude this evidence today. Mr. - I've looked at Mr. Power's actions. It is debateable whether he did or did not have lawful authority to remove the items that he removed from the defendant's motel room, without the defendant's approval.

However, taking into account those cases and bearing in mind my summary of what I believe those cases to - to reflect - although it might be unfair to the defendant to have the evidence admitted, I must bear in mind the competing interests I have to balance, which I have stated previously, and I decline to exercise my discretion to exclude the evidence. I intend to admit the evidence.

Yes - I would point out, if it had have been a police officer or an undercover agent by the police, I would have excluded the evidence, but that is not the case alleged here today."

It was conceded by counsel for the appellant that the Stipendiary Magistrate correctly considered all relevant principles and the test to be applied. He also conceded that the fact that the Stipendiary Magistrate said that he would have ruled the evidence inadmissible had the entry into the room and seizure been conducted by a police officer, might tend to indicate that the Stipendiary Magistrate exercised his discretion correctly in this case. It was said however, that whilst Power had a legal right to enter the room which he believed was vacated and to inquire about the telephone bill, his actions in seizing the goods then going through them and

extracting money from the appellant's wallet, were not justified, and that the court should express its disapproval of that action by ruling that the evidence should have been excluded, whether or not it could be said that Power had a common law lien over the goods he seized. He relied upon Lawrie v. Muir (1950) S.L.T. 37, in which it was held that evidence unlawfully obtained was inadmissible.

Whilst initially taking the view that Power may have had an innkeeper's lien, the final position of counsel for the appellant was that it might be arguable whether he did or not. No authorities were cited. He submitted that it was not altogether clear that he had an entitlement to remove the property and that even if he did, the discretion still arose in circumstances such as these to exclude evidence where a hotel or motel owner or manager invades a person's room to exercise a lien over property in exchange for a telephone debt, and particularly where the appellant's property is then gone through and money extracted from his wallet in part payment of the telephone account.

Counsel for the Crown submitted that Power did not act in a high-handed way. Rather, he entered the room lawfully because he thought the appellant had gone. After asking the appellant for payment of the telephone account and receiving a negative response, he took the property as security. It was said that the act of entering and taking possession of the goods was lawful and in pursuance of the valid exercise of an innkeeper's

lien.

It was further submitted that it was for the defence to prove that the conduct of Power was unlawful in order to invoke a favourable exercise of discretion by the court to exclude relevant evidence. It was not enough merely to assert that his conduct was unlawful. This proposition was not challenged.

It was also said by counsel for the Crown that before it could be properly suggested that Power stole the money from the wallet, s. 22 of the Criminal Code (honest claim of right) would have had to be considered and that there was no proper evidence before the Stipendiary Magistrate to rule upon that question. In any event, it was argued that whether Power had the right to do what he did, the Stipendiary Magistrate correctly applied the relevant principles before declining to exercise his discretion to exclude the evidence.

The question of whether a lien existed was not fully argued. It was not referred to before the Stipendiary Magistrate, the only submissions by the prosecutor being that Power "had a common law right to ensure he receives payment for goods and services". The existence of a lien depends upon several questions of fact. It was conceded by counsel for the appellant that Power had the lawful right in the circumstances to enter the room and indeed to inquire about the telephone account. What was in dispute was whether he was entitled to demand immediate payment of the telephone account and to seize the goods, and even if he had such a right, whether he was

entitled to go through the gear and take the money from the wallet in the carry bag.

Counsel for the Crown submitted that at common law, an innkeeper had a lien over the goods of a traveller, that Power was such an innkeeper, that the telephone account was due and payable, and that accordingly seizure of the appellant's goods was lawful. The only authorities relied upon were Hanson v. Barwise [1930-31] St.R.Qd. 285 and R. v. Hough and Drew (1894) 15 N.S.W.R. 204, which applied to licensed premises. It was not conceded, as it was in Turner v. Queensland Motels Pty. Ltd. [1968] Qd.R. 189 at 191, (a case involving a motel), that Power was a common innkeeper who kept a common inn.

At common law, an innkeeper is a person who receives travellers and provides lodgings, if required, and necessaries for them, and who employs people for that purpose and for the protection of travellers lodging in their inn and their goods: Halsbury's Laws of England 4th ed. Vol. 24 para. 1206. An inn is a house, the owner of which holds out that he will receive all travellers and sojourners who are willing to pay a price adequate to the sort of accommodation provided: Orchard v. Bush & Co. [1898] 2 Q.B. 284 per Kennedy J. at 288, if accommodation is available and the traveller is in a fit state to be received. These are questions of fact.

It is probably the case that Power who carried on the business of providing lodgings and probably food to any traveller (now commonly referred to as a guest: Turner v.

Queensland Motels Pty. Ltd. (supra) at 192), was a common innkeeper who kept a common inn. It appears that no distinction is drawn between the situation where the innkeeper provides not only lodgings and food but also liquor: Cunningham v. Philp (1896) 12 T.L.R. 352. A person may be an innkeeper, apart altogether from the sale of intoxicating liquor: Webster v. Opitz [1917] V.L.R. 107 per Hood J. at 110, so that a common inn may include both licensed and unlicensed premises.

This appears to have been recognised following the decision of the Full Court in Turner v. Queensland Motels Pty. Ltd. (supra) on 17th November 1967. Section 92 of the Liquor Act 1912 was amended by Act No. 3 of 1970 by including a new s. 92(2). See per Hart J. with whom Hanger J. agreed at 201. This amended section until its repeal on 1st July 1992 by the Liquor Act 1992, provided for equal limitation of liability of lessees, owners or occupiers of licensed and unlicensed premises constructed and primarily used for accommodation of and service to the travelling public, with respect to loss of or injury to the goods or property of a guest or lodger. No provision in place of the former s. 92 has been located which gives similar limitation of liability.

At common law, an innkeeper is under an obligation to receive travellers and lodge them in his inn if requested and if accommodation is available, and/or to entertain them and provide food for them, unless he has some reasonable ground for refusal. From earliest times a traveller as a guest of an inn was a

person who, without prior or special contract, arrived at premises and demanded food or sleeping accommodation and was received on reasonable terms. A lodger on the other hand was one who arrived and was received on the terms of his contract which governed their legal relationship, whereas in the case of traveller, the obligations were created under the general law: Ex parte Coulson; re Jones (1947) 48 S.R.(N.S.W.) 178. Whether or not a person is a traveller is a question of fact: Turner v Queensland Motels Pty. Ltd. (supra) 192.

It was not contended that the appellant was other than a casual traveller or guest as opposed to a boarder. The evidence by Power shows that he operated the usual type of motel, that the appellant checked in late in the afternoon of 30th June 1992 and signed a normal registration form. No special arrangement was entered into. It may be inferred that, on checking into the motel, and paying for only one night's accommodation in advance in accordance with Power's requirement (which Power was entitled to require: Halsbury's Laws of England, 4th ed. Vol 24. para 1245), the appellant was in truth a "traveller" or "guest" and not a "lodger". An innkeeper's lien is capable of arising on the goods of a "traveller", but not on those of a "lodger": Hanson v. Barwise (supra).

Whether or not a lien exists over the goods of a traveller and the extent of it, depends upon the obligations imposed on innkeepers. In addition to the obligation to receive a traveller, an innkeeper is bound to receive, stable and feed a

traveller's horse, receive his carriage (now his car, if facilities are available: Williams v. Linnitt [1951] 1 K.B. 565) and also the goods with which a person usually travels including his luggage: Gordon v. Silber [1890] 25 Q.B. 491. His obligation with respect to the goods of a traveller is strict. At common law, he is virtually an insurer of those goods. He must keep the goods situated in the inn safely so that by his default or by that of his servants, no damage may come in any manner to the guest: Shacklock v. Elthorpe Ltd. [1939] 3 All E.R. 372 (H.L.). The limitations to this strict common law obligation previously provided by s. 92 of the Liquor Act 1912-1985 to midnight on 30th June 1992, no longer exist.

Liability does not depend upon bailment or pledge or contract or on any other head of law but on the custom of the realm with respect to innkeepers: Shacklock v. Elthorpe Ltd. (supra). Their rights and liabilities are dependent upon that and that alone: Robins and Co. v. Gray [1895] 2 Q.B. 501 per Lord Esher at 503-4. The goods need not be in the special keeping of the innkeeper in order to render him liable or in order to give rise to a lien. They do not have to be specially "deposited" with the innkeeper as that expression is used in R. v. Hough and Drew (supra). It is sufficient that they are in the inn: Bennett v. Mellor (1793) 5 Term Rep. 273; 101 E.R. 154, approved in Williams v. Linnitt (supra) at 572, 579 and in Turner v. Queensland Motels Pty. Ltd. (supra) at 198-9, and even though the goods are usually not exclusively in the possession

of the innkeeper because the person who brings them to the inn may deal with them: Robins & Co. v Gray (supra) at 505 per Lord Esher. The obligation extends to goods within the hospitium of the inn which includes goods in the room occupied by the guest: Halsbury's Laws of England, 4th ed. para. 1226; Cayle's Case 8 Co. Rep. 32a; 77 E.R. 520 at 522-3. In this case, the appellant's goods were, at the time, in his custody in the motel room which he apparently had a licence to occupy, subject to whatever rights or obligations Power may have had to enter to provide services.

The innkeeper is also liable for goods specifically placed in his care: Armistead v. Wilde [1851] 17 Q.B. 464; 117 E.R. 1280. The responsibility of an innkeeper for the safety of a traveller's property begins at the moment when the relation of guest and host arises, and that relation arises as soon as the traveller enters the inn with the intention of using it as an inn, and is so received by the host. It is sufficient if the circumstances show an intention on the one hand to provide and on the other hand to accept such accommodation: Wright v. Anderton [1909] 1 K.B. 209 per Bingham J. at 213.

In view of this strict obligation, a reciprocal right is conferred on the innkeeper. His right to a lien at common law arises as a compensation for the strict obligations imposed upon him by receiving travellers at his inn, as well as their goods: Gordon v. Silber (supra); Robins & Co. v. Gray (supra) per Lord Esher at 504; Hanson v. Barwise (supra) per E.A. Douglas J. at

290. The authorities make it clear that the lien arises over the goods of the guest whether or not the guest receives lodgings which are available, or just meals or entertainment, which the inn ordinarily provides: Williams v. Linnitt (supra).

Whilst the goods of a traveller become liable to a lien immediately the circumstances show an intention on the one hand to provide and on the other hand to accept such accommodation or services offered by the inn, the lien does not attach until a debt is incurred: Wright v. Anderton (supra) per Bingham J. at 123. The right to a lien arises upon the goods of a guest where they are situated in the inn, whether or not they are specifically deposited with the innkeeper for safe keeping and when the guest incurs a debt to the innkeeper: R. v. Hough and Drew (supra).

The lien does not extend to the clothes on the person of a traveller: Sunbolf v. Alford (1838) 3 M. & W. 248; 150 E.R. 1135, but apparently extends to any property brought by the guest into the inn and accepted by the innkeeper: Halsbury's Laws of England 4th ed. Vol. 24 para. 1245, whether or not the property is owned by the guest: Park v. Berkery (1930) 25 Tas.Lr 67. The lien upon the goods is for the expense of keeping the guest in the inn where he has lodgings as well as for the cost of food and entertainment: Mulliner v. Florence (1877-8) 3 Q.B.D. 484; Gordon v. Silber [1890] 25 Q.B. 491 per Lopes L.J. at 492.

It has been held that the lien does not extend to a charge

for damage caused by a guest to the mirror of a wardrobe in the room occupied by the guest: Ferguson v. Peterkin (1953) S.L.T.(Sh.CT) 91, nor with respect to sums lent by the innkeeper to the guest or sums disbursed on his behalf or on any account other than for expenses incurred by the guest in respect of food and accommodation and the cost of keeping his goods (and his horse): Matsuda v. Waldorf Hotel Company (Limited) (1910) 27 T.L.R. 153; Chesham Automobile Supply (Limited) v. Beresford Hotel (Birchington) (Limited) (1912-13) 29 T.L.R. 584 (Lush J.); Park v. Berkery (supra).

In Matsuda v. Waldorf Hotel Company (Limited) (supra), Bankes J. held that an innkeeper's lien did not attach with respect to moneys lent by an innkeeper to the guest on articles brought into the inn by the guest, it being no part of the business of an innkeeper to lend money on property of his guests. In Ferguson v. Peterkin (supra), Sheriff-Substitute William Garrett Q.C. said that the lien was a special lien and not a general lien in the sense that it provided a right in security covering debts or claims unconnected with the original contract. He said that it extended only to the account for board and lodgings, and nothing else. Lush J. in Chesham Automobile Supply (Limited) v. Beresford Hotel (Birchington) (Limited) (supra) took the same view.

However, in Mulliner v. Florence (supra), Bramwell L.J. held that the lien was a general lien to cover all the things the innkeeper found for the guest that the guest required. In a

case such as the present, it would be implied in the original contract that where a traveller enters a modern motel a telephone would be available for private use by him in his room if required and that it would be provided by the innkeeper. As it appears that this type of service is ordinarily provided by the Aitkenvale Motel, it falls into a different category from other types of dispositions referred to above in respect of which a lien does not attach. There appears to be no reason why a lien is not capable of extension to cover the cost of services ordinarily provided as part of the business of an innkeeper, including a telephone service which a traveller normally expects to be provided and which is available.

Therefore, whilst the right to a lien had not at the outset attached over the goods of the appellant because no debt was owing with respect to the room, it having been paid in advance, those goods, having been brought into the inn, became liable to a lien, the right to which attached when a debt was incurred. The first charge for a telephone call was incurred at 5.13 p.m. on 30th June 1992, very shortly after the appellant checked into the room, and this substantially increased throughout that evening and in the early hours of the next day.

In R. v. Hough and Drew (supra), it was held that it was not necessary for an innkeeper to do anything to assert his right of lien, because that right automatically arose when goods were deposited in the inn and the debt was incurred. The question then is when was the debt for the telephone account

incurred and when was Power entitled to assert his lien.

Counsel for the Crown submitted that the debt had been incurred progressively throughout the night and that payment of it was due at the time of the demand by Power shortly after 6.15 a.m. at which time the appellant was still in bed. Against this is the question of whether or not the debt was incurred and was due and payable only on check out which, in the ordinary course, would have occurred later that day. Ordinarily, the total telephone account could not be finally determined until the appellant vacated the room. In my opinion, however, the submission for the Crown on this point is correct. The debts were incurred as the telephone was utilised by the appellant and the total telephone debt of $72.40 had been incurred prior to 6.15 a.m. on 1st July 1992.

In view of the reciprocal nature of an innkeeper's rights to a lien and his obligation to ensure that no loss or injury occurs with respect to the goods of a guest, the remarks of Lush J. in Chesham Automobile Supply (Limited) v. Beresford Hotel (Birchington) (Limited) (supra) at 585 are apposite:

> "In the absence of an express or an implied arrangement under which a visitor at an hotel resides at the hotel in some different capacity from that of other and ordinary visitors, an hotel keeper cannot set up against such visitor that he has ceased to be responsible as an innkeeper for the loss of the guest's goods, and equally the guest or visitor cannot set up against the innkeeper that the latter has ceased to have a corresponding right of lien, ...".

A right to assert a lien therefore existed at the time of

the demand. The principal objection appears to be the manner of enforcement of the lien, viz. that immediate payment was demanded at 6.15 a.m. of the appellant whilst he was still in bed resulting in no satisfactory response and in the seizure of the goods, in addition to the dealings with them. When a guest stays for more than a day, progressively incurring debts to the innkeeper, there seems to be no reason (in the absence of a special arrangement) why the innkeeper if he wished could not demand progress payments from the guest. He is not bound to trust his guest for payment, unless the circumstances are such that the question of credit is not a matter weighing with the innkeeper. Halsbury's Law of England, 4th ed. vol 24, para 1215. If the appellant had planned to stay a second day, there appears to have been no reason why Power could not have demanded payment of the telephone account later during the first day. It is difficult to see why he might have been justified in demanding payment of the telephone account at say 7.30 a.m. or 9.00 a.m. rather than at 6.15 a.m., in the absence of some special arrangement excluding his right to enter the room before a certain time, of which there is no evidence. Rather, it was conceded that Power had the right to enter the room when he did at the time and to inquire about the telephone account.

When a guest refuses to pay his bill which is due, the innkeeper is entitled to detain the goods of the guest. This involves the taking of the goods into his exclusive possession, presumably by peaceful means. The right to a lien does not

apply only to the case where a guest vacates the inn and leaves his goods behind, or where they were previously left in the sole custody of the innkeeper. They were peaceably taken in this case.

However it should be said that whilst it was conceded that Power had the lawful right to enter the room at the time, his attempt to wake the appellant and demand immediate payment from him involved an unwarranted invasion of the appellant's privacy in the circumstances. This conduct, and his actions in removing and going through the goods were high-handed. The appellant might well have intended to honour his obligations on departure. Having seen the appellant still in the room and asleep when he first entered, Power should have taken other steps or waited for the appellant's departure. He could have returned to the room later, or left a note under his door, or sought other administrative help. The demand for immediate payment and the seizure of the goods of the appellant who was still in bed and asleep at 6.15 a.m., even if strictly lawful, were most unwise. Such conduct would be warranted only in exceptional circumstances.

From the foregoing, the submission of behalf of the Crown is correct namely that the appellant has not discharged the onus of showing that Power did not have a lien on the appellant's goods at the time, or that he did not have the right to demand payment then and there, or that he did not have the right to take possession of and detain the goods of the appellant as

security for the debt.

But that is not the end of the matter. Even if a lien existed at 6.15 a.m., this lien, in the absence of any special arrangement, gave a right to Power only to retain in his possession, goods belonging to the appellant until the claims of Power were satisfied. It is a passive right to detain the goods until the debt is paid, and the person enforcing the lien must put up with any inconvenience which the retention might entail: Halsbury's Laws of England 4th ed. Vol. 28 paras. 502, 542, 544, 545. It is a mere possessory lien. This is subject to the court's discretion to order the sale of perishable goods pursuant to O. 58 r.6, or to order their detention, preservation or inspection etc, pursuant to O. 58 rr. 1, 2. Section 93 of the Liquor Act 1912-1985, until its repeal on 1st July 1992, conferred a right only to a licensed victualler to sell the goods left by a lodger or guest who on departure did not pay the amount legally due for accommodation and refreshment. No provision has been located similar to the power of sale conferred on innkeepers by the Innkeeper's Act 1878 (U.K.).

Therefore Power had no right to go through the belongings of the appellant and certainly not to appropriate any part of them by removal of money from his wallet, whether or not he may have had an honest claim of right pursuant to s. 22 of the Criminal Code, such as would exculpate him from criminal responsibility on a charge of stealing, had such a charge been brought. That is an entirely different matter. The searching

of the appellant's belongings and the removal of the $40 from the wallet were acts contrary to the rights which a common law lien may have conferred upon Power and were unlawful. The appellant therefore, has discharged the onus of showing that even if a lien existed, the discovery of the incriminating evidence was as a result of an unlawful search of the appellant's bag.

In the decision of Lawrie v. Muir (supra) relied upon by counsel for the appellant, it was held that evidence unlawfully obtained by milk inspectors who conducted a search of premises in good faith was held to be inadmissible because of the illegality. That decision must now be read in the light of the High Court authorities mentioned above which make it clear that mere unlawfulness does not of itself justify the exclusion of relevant evidence. Some additional factor must be found. That case was referred to in the joint judgment of Stephen, Aickin JJ. in Bunning v. Cross (supra) at 73 where their Honours referred to the marked contrast between the approach in R. v. Ireland (supra) and in cases decided in the Irish and Scottish Courts. Their Honours also pointed out that the law in Australia now differed somewhat from that in England.

Quite apart from the question of whether a lien existed, there is no evidence that Power knew that he had no right to enter or that he knew he had no right to make the demand or to take the goods, or to go through them and extract the money as he did. Nor is there evidence that he knew that he was acting

in purported reliance upon an innkeeper's lien. His actions support the view that he believed that he had the rights which he exercised. He acted on his own volition in pursuance of what he believed to be the genuine interest of the motel in ensuring that guests duly paid all charges owing before they left.

In any case, Power was not a law enforcement officer, nor was he acting at the behest of any such person in authority. Nor was he a mere busy-body looking around in case he discovered evidence of a criminal offence. In a broad sense, he had a legitimate interest to protect and the discovery of the incriminating evidence against the appellant was incidental to his asserting what he believed to be his rights. He did not act in deliberate or reckless disregard of the law or of the legal rights of the appellant, however unwise his actions were.

Counsel for the appellant also conceded that the discretion might depend on the nature of the evidence discovered. For example, if a murdered person was discovered in a room or if other evidence of a serious crime was discovered, it would not be possible to suggest that such evidence should not subsequently be held admissible in a court. Here there was a substantial quantity of pre-packaged cannabis sativa ready for sale as the Stipendiary Magistrate found. This constituted a very serious offence under s. 6 of the Drugs Misuse Act which attracted a penalty of 15 years' maximum imprisonment. This indicates how serious the Parliament on behalf of the community views such offences.

In Foster v. The Queen (1993) 67 A.L.J.R. 550, the High Court dealt specifically with the exclusion of confessional evidence on the grounds of unfairness and also public policy. Insofar as unfairness to an accused person is concerned with respect to the admission into evidence of confessional statements, there is a special sensitivity of the law in that area: ibid. 553-4. Forster had been unlawfully arrested and detained for the sole purpose of questioning him. There was a serious and reckless infringement by police of his rights. There was a real risk that the confessional statement was unreliable. Unfairness to the accused was of itself sufficient to justify the exercise of the discretion to exclude that evidence. However, the court also held that the deliberate and reckless disregard of the law by those whose duty it was to enforce it, was an added reason why the statement should be rejected on public policy grounds. None of these circumstances are present in the instant case. It was submitted by counsel for the appellant that nothing in Forster v. The Queen (supra) would appear to qualify in any way the various matters which it was conceded the Stipendiary Magistrate properly took into account as set out above.

In the present case, there was real evidence discovered. There was a large quantity of packaged and labelled cannabis sativa incidentally discovered as a result of an unlawful search of the appellant's luggage. That illegality does not affect the cogency of the evidence so obtained and if admitted it is in

this case central to establishing the guilt of the appellant. As pointed out in the joint judgment of Stephen, Aickin JJ. in Bunning v. Cross (supra) at 79, where illegality arises only from mistake and is not deliberate or reckless, the cogency of the evidence so obtained is one of the factors to which regard should be had, although it is not necessarily determinative of the issue of whether or not the evidence will be excluded. On the other hand, where the court is called upon to exclude evidence on the ground that its reception would be unfair to the accused, it seems that the likelihood of the unfairness to produce unreliable evidence is the court's principal focus: R v Hart, Court of Appeal, 2 November 1993 and R v Cornwall, Court of Appeal, 23 November 1993. It cannot be said, therefore, that public policy considerations or considerations of unfairness to the appellant required that this evidence should have been excluded. On the contrary, it points strongly in favour of the decision to admit it into evidence.

In my opinion, the appeal should be dismissed.