SUPREME COURT OF QUEENSLAND

CITATION:	*The Commissioner of The Qld Police Service v Cornack, Magistrate & Anor* [2003] QCA 383
PARTIES:	**THE COMMISSIONER OF THE QUEENSLAND POLICE SERVICE** (applicant/appellant) **v** **SHERYL L CORNACK, MAGISTRATE** (first respondent) **MATTHEW JOSEPH DUNK** (second respondent)
FILE NO/S:	Appeal No 2393 of 2003 SC No 6507 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	5 September 2003
DELIVERED AT:	Brisbane
HEARING DATE:	12 August 2003
JUDGES:	Williams and Jerrard JJA and Muir J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Allow the appeal to the extent of setting aside both Order No. 1 made on 17 February 2003 and the direction by the Magistrate to answer the question** **2. The appellant to pay the second respondent's costs, to be assessed on the standard basis**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – PROSECUTION – COMMITTAL FOR TRIAL – POWERS AND DUTIES OF MAGISTRATE – where magistrate directed a witness to answer a question in cross-examination – where witness refused to answer the question on the basis that it would offend s 454 of the *Police Powers and Responsibilities Act* 2000 (Qld) – where witness was a plain clothes police officer – where witness had performed duty as a covert operative in an investigation resulting in the arrest of the second respondent for drug offences – where witness purchased drugs from the second respondent in that role – whether magistrate erred in directing the witness to answer the question

STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – PARTICULAR WORDS AND PHRASES – SPECIFIC INTERPRETATIONS – where witness in committal proceedings refused to answer a question on the basis that it might reveal the identity of an informer – where s 120 *Drugs Misuse Act* 1986 (Qld) prohibits disclosure of the identity or particulars of an "informer" – where term not defined in relevant legislation – where common law construes the term to mean a person who supplies information about another's behaviour in confidence to a police officer – where s 454 *Police Powers and Responsibilities Act* 2000 (Qld) confirms that communications must be in confidence to render a person an "informer" – whether this construction makes the question asked of the witness objectionable

Drugs Misuse Act 1986 (Qld), s 119, s 120
Judicial Review Act 1991 (Qld), Part 5
Police Powers and Responsibilities Act 2000 (Qld), s 454

D v National Society for the Prevention of Cruelty to Children [1978] AC 171, considered
Hot Holdings Pty Ltd v Creasy (1996) 185 CLR 149, referred to
R v A Stipendiary Magistrate at Brisbane, ex parte Kornhauser [1992] 2 Qd R 150, followed
R v Mason (2000) 77 SASR 105, followed
R v The Stipendiary Magistrate at Southport, ex parte Gibson [1993] 2 Qd R 687, followed
Ridgeway v R (1995) 184 CLR 19, referred to
Sankey v Whitlam (1978) 142 CLR 1, referred to

COUNSEL: M D Hinson SC, with S A McLeod, for the appellant
L K Mann (sol) for the first respondent
A J Kimmins for the second respondent

SOLICITORS: Queensland Police Service Solicitor for the appellant
Crown Solicitor, C H Lowe, for the first respondent
Price & Roobottom for the second respondent

[1] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of Jerrard JA and I agree with them; but as the question raised is of general importance it is desirable that I add some brief reasons indicating why I agree with his analysis.

[2] Given the effect of s 454 (3) of the *Police Powers and Responsibilities Act* 2000 sub-sections (1) and (2) thereof are not of direct relevance where the proceeding in question is brought pursuant to the *Drugs Misuse Act* 1986. Where the offence alleged is one against a provision of that latter Act, the governing provisions are s 119 and s 120 thereof. That was the case here.

[3] Neither statute contains a definition of an "informer", though disclosing particulars likely to lead to the identification of an informer constitutes a criminal offence. However, the "informer" has been known to the Common Law for centuries. In the

trial of *Hardy* in 1794 for treason (24 State Tr 199) Lord Chief Justice Eyre at 816 said the law did not enforce "discovery of the channels by which the disclosure was made to the officers of justice." In the same case Buller J at 818 said: "... discovery is necessary for the purpose of obtaining public justice, and if you call for the name of the informer in such a case no man will make discovery and public justice would be defeated." Lord Ellenborough stopped questioning which was likely to reveal the identity of an informer in the treason trial of *Watson* in 1817 (32 State Tr 1 at 100).

[4] Those cases were cited with approval by Lord Esher MR, Lindley LJ, and Bowen LJ in *Marks v Beyfus* (1890) 25 QBD 494. That decision has since been regarded as laying down the modern Common Law with respect to disclosure of information about informers. It was followed and applied by the House of Lords in *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171. The passage from the judgment therein of Lord Diplock at 218 was cited with approval by the Full Court in *R v The Stipendiary Magistrate at Southport, ex parte Gibson* [1993] 2 Qd R 687.

[5] In all of those cases the underlying factor rendering the giver of the information an "informer" was the confidentiality of the information provided which resulted in a public prosecution. It is that element of confidentiality which distinguishes the "informer" from other persons who provide information to police officers. It is not everyone who in some way provides a police officer with information which aids in the investigation of a crime who is an "informer" for purposes of statutory provisions such as those referred to above.

[6] That the real "informer" is a confidential source of information is confirmed by s 454 (2)(b) of the *Police Powers and Responsibilities Act* 2000.

[7] Section 120 of the *Drugs Misuse Act* makes it clear that the prohibition on disclosure covers much more than the name of the informer. It would clearly cover, and this is important for present purposes, a question designed to elicit the fact that a known person who provided information did so in the capacity of an "informer"; that is, the information was given to a known police officer in circumstances where confidentiality attached.

[8] The evidence in this case clearly indicates that the person Craig had association with persons involved in the drug trade. Evidence has been given that the undercover police operative received information from Craig to the effect that drugs could be obtained from the second respondent. That information could have been provided in a number of circumstances, including the following:

(i) Craig did not know he was dealing with an undercover police operative but believed he was speaking to another person involved in the drug trade;

(ii) because of events which occurred between Craig and the second respondent, Craig provided the information by way of complaint to the undercover police officer, knowing that was his status, so that a prosecution could be launched against the second respondent;

(iii) the information was provided by Craig confidentially to the undercover police operative, knowing that was his status.

[9] Any question likely to reveal that the information was provided in that third situation would be objectionable as being caught by s 120.

[10] Jerrard JA in his reasons has pointed out that the question as initially framed by the legal representative for the second respondent was objectionable on general evidentiary grounds, and the magistrate dealt with the objection based on the statutory ground on the basis that the question would be modified so that, s 120 aside, it would not be in objectionable form. In my view, notwithstanding the way in which the question was posed in the application pursuant to the *Judicial Review Act* 1991 this court should consider the broader issue on the merits.

[11] It is sufficient, in my view, for this court to state that any question designed to elicit Craig's knowledge of the true status of the person to whom he spoke would be likely to lead to the conclusion that information was received from an "informer", and therefore would be prohibited by s 120 of the *Drugs Misuse Act.*

[12] I agree with the reasons for judgment of Jerrard JA and with the orders he has proposed.

[13] **JERRARD JA:** This appeal is from a decision delivered 17 February 2003, in which a learned judge of this court dismissed an application filed 16 July 2002, in which the applicant Police Commissioner asked the court to make an order under Part 5 of the *Judicial Review Act* 1991 (Qld) in the nature of certiorari to quash a direction given by a magistrate (the first respondent) on 28 May 2002 to a witness, directing the witness to answer a question asked in cross-examination. The witness was a plain clothes senior constable giving evidence under the assumed name of Shane Harrison[1], in committal proceedings in which the second respondent Matthew Dunk was charged with offences under the *Drugs Misuse Act* 1986 (Qld), namely one count of carrying on the business of unlawfully trafficking in a dangerous drug, 12 counts of supply of a dangerous drug, and one count of possession of such a drug. The witness had performed duty as a covert operative in the investigation resulting in Mr Dunk's arrest on those charges, and in that role had allegedly purchased drugs on a number of occasions from Mr Dunk. The witness had been introduced to Mr Dunk by a person "Craig", who had apparently described Mr Dunk to the witness as a person able to supply dangerous drugs. The Commissioner's application says that the witness was wrongly directed to answer this question:

> "Was Craig at any time during this operation aware that you were a police officer?"

[14] Litigation over that question has significantly delayed those committal proceedings. They began on 23 November 2001, and when the particular question was asked (at AR 64 and repeated at AR 67), objection was taken by the witness to answering it, on the grounds that the question offended s 454(2) of the *Police Powers and Responsibilities Act* 2000.

[15] That section provides as follows:

"**454 Protection of methodologies**

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[1] AR 62; s 21F of the *Evidence Act* 1977 (Qld) permits the use of a name a police officer used in a covert operation.

(1) In a proceeding, a police officer can not be required to disclose information mentioned in subsection (2), unless the court is satisfied disclosure of the information is necessary–

(a) for the fair trial of the defendant; or

(b) to find out whether the scope of a law enforcement investigation has exceeded the limits imposed by law; or

(c) in the public interest

(2) The information is information that could, if disclosed, reasonably be expected–

(a) to prejudice the investigation of a contravention or possible contravention of the law; or

(b) to enable the existence or identity of a confidential source of information, in relation to the enforcement or administration of the law, to be ascertained; or

(c) to endanger a person's life or physical safety; or

(d) to prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law; or

(e) to prejudice the maintenance or enforcement of a lawful method or procedure for protecting public safety; or

(f) to facilitate a person's escape from lawful custody.

(3) Subsection (1) does not affect a provision of another Act under which a police officer can not be compelled to disclose information or make statements in relation to the information."

[16] The proceedings were adjourned to 23 January 2002, so that the then police prosecutor could obtain instructions; and resumed on 28 May 2002 with a different prosecutor and a different legal representative for the defendant Matthew Dunk. After argument, and following the direction complained of, those proceedings were adjourned to 14 November 2002, and the Commissioner filed his application. It was heard in mid November 2002 in this court. It appears that Mr Dunk has been on bail, and the part heard committal proceedings whenever resumed will have been interrupted for at least two years.

What was the question?

[17] For all that litigation and delay, it is not quite clear what the ultimate question was that was the subject of the direction. Constable "Harrison" had given evidence that the investigation resulting in Mr Dunk's arrest (code named "Operation Vapour") commenced on 21 August (2000) (AR 63), and the witness arrived on the Gold Coast in September that year in his capacity as a covert operative. He was introduced to Mr Dunk on 3 December, and the witness's evidence was that although he could not be certain, he was "pretty sure" that Mr Dunk was not one of the original targets of that operation. Mr Dunk and the witness had been introduced by Craig, who was "one of the people that I hung around with when I was down here in my role." (AR 64)

[18] The witness was asked:

"…was Craig aware that you were a covert operative?"

The witness claimed the privilege of s 454(2), and the magistrate intervened to ask how the witness would know whether Craig knew that the witness was a covert operative. This led to the response from Mr Dunk's legal representative, a Mr Godbolt, that Craig had arranged the initial meeting and Mr Godbolt wanted to know what Craig's role was. It was common ground at that time that "Craig" was not an assumed name, and Mr Godbolt's submission was that answering the question would not disclose Craig's identity, since he had already been referred to by name by the police witness.

[19] The witness explained his objection to answering on the grounds that the question might lead to the "disclosure of the informant" because it "narrows down certain people and certain aspects of the operation, those sort of questions." (AR 66) In answer to further questions from the bench, Mr Godbolt confirmed that he wanted to know whether Craig was a covert police operative or a police officer, or potentially acting at the behest of the Queensland Police. This led the magistrate to ask:

> "So, you're asking if there was any sort of entrapment; is that where you're going?"

Mr Godbolt replied:

> "Essentially, yes."

Mr Godbolt then restated his question as being:

> "It was whether Craig was aware that this witness was a covert operative for the Queensland Police Force."

The Magistrate then established from the prosecutor and Mr Godbolt that Craig was not one of the witnesses the prosecution proposed to call; and the prosecutor, when asked why he was not calling Craig, advised that he would need instructions. This led to the first adjournment.

[20] When the matter resumed in May 2002 with different representation all round at the bar table, Mr Dunk's new legal representative Mr Guest reminded the court that the witness had already agreed (at AR 64) that Craig was not a police officer. Mr Guest advised the court (at AR 79) that:

> "The question I wanted to ask him is whether what his – the information that he supplied would lead Craig to believe that he was a police officer."

Mr Guest also advised that he would put to the witness that Craig knew the witness was a police officer at the time that the witness was speaking with Craig during the period of the operation. He then asked:

> "Was Craig at any time during this operation aware that you were a police officer?"

Once again the witness took objection pursuant to s 454(2)(b) of the *Police Powers and Responsibilities Act*.

[21] The police prosecutor then appearing also objected pursuant to the (as then numbered) provisions in s 46 and s 47 of the *Drugs Misuse Act* 1986 (Qld), which provisions are now renumbered as s 119 and s 120.

These provide:

"**119 Protection of informers**

(1) Where an informer supplies information to a police officer in respect of the commission of an offence defined in part 2 the informer's identity at all times shall be kept confidential.

(2) A person who discloses the name of an informer, or any other particular that may be likely to lead to the informer's identification, is guilty of a crime.

Maximum penalty – 5 years imprisonment.

(3) A person is not criminally responsible for an offence defined in subsection (2) if the person proves that the disclosure was made in good faith for the protection of the interests of the informer or for the public good.

120 Source of information not to be disclosed

(1) Where an informer supplies information to a police officer in respect of the commission of an offence defined in part 2 then in any proceedings whether under this Act or otherwise–

(a) the prosecutor; or

(b) a person who appears as a witness for the prosecution; or

(c) where a police officer appears as a witness for the defence, that police officer;

shall not be asked and if asked shall not be compelled to disclose the name of an informer, or other particular that may be likely to lead to the informer's identification, or the fact that in respect of the offence he or she received information from an informer or he or she furnished information to an informer or the nature of the information.

(2) In any proceedings arising out of a charge of having committed an offence defined in part 2 a police officer appearing as a prosecutor or witness shall not be compelled to produce any reports or documents, made or received by the police officer in the police officer's official capacity or containing confidential information in relation to such offence, or to make any statement in relation to such reports, documents or information."

[22] Discussion followed in which the magistrate repeated the view expressed in November 2001, that the witness would not know what knowledge Craig possessed, since some person other than the witness may have told Craig something about the witness. The magistrate then reformulated the question (at AR 81) to be:

> "Did he say – did this witness say anything to Craig about him being a police officer, did he give any information by any other means to Craig or did Craig say anything to him to indicate he knew he was a police officer…?"

The learned magistrate and Mr Guest then agreed that the claim of privilege by the witness meant the witness did "know the answer", because, as the magistrate observed:

"Yeah. Well, otherwise he would just say no, he doesn't know."

[23] The bench then pressed the witness as to what claims for privilege were actually being made, and the witness repeated that he relied on s 454(2)(b) "of the PPRA"; and the magistrate then asked:

"On what basis? You're not using the Drugs Misuse Act".

The witness replied to this that if he answered the question, he would commit an offence under the *Drugs Misuse Act*; that his main basis for claiming privilege was "454", and that "answering the question either affirmatively or negatively may identify the identity of an informant."

[24] Discussion then ensued between the bench and Mr Guest as to how finding out whether Craig knew that that witness was a police officer would help Mr Guest "determine whether the scope of law enforcement investigation has exceeded the limits imposed by law or be in the public interest?", by which comment the magistrate undoubtedly referred to those matters identified by the High Court in *Ridgeway v R* (1995) 184 CLR 19 as relevant to the exercise of a discretion to exclude evidence, albeit there is no defence per se of entrapment[2]. The submissions made by Mr Guest were that regardless of whether the evidence would show that law enforcement investigators had exceeded proper limits, this court had recognised that there was "a difference between if my client is approaching people or is he – if he is being approached and being coerced by the police to provide something."

A fishing expedition

[25] It is worth observing at this point that nothing had prevented Mr Godbolt asking any questions reflecting instructions about any coercion in November 2001, or Mr Guest asking questions to which honest answers would tend to establish or suggest coercion. Craig's knowledge of the covert operative's true position is not obviously relevant to the presence or absence of any coercion by the covert operative. So far, no questions have been asked in the committal proceedings suggesting any actual coercion of any kind upon Mr Dunk to supply the covert operative with dangerous drugs.

[26] It is also worth noting that so far the course of those proceedings has implied that the fact of supply of those drugs is not challenged. That would be consistent with the evidence or exhibits so far tendered by the prosecution, which include transcripts of an interview said to be between Mr Dunk and a police officer, two video surveillance tapes for the dates 18 January, 23 March, and 11 April 2001, the transcripts of what were described as 22 field tapes, statements from police witnesses conducting covert surveillance of incidents occurring on 8 February and 22 February 2001, six audio tapes said to contain conversations between the covert operative and Mr Dunk recorded on 4, 11, and 18 January 2001, six further tapes said to contain conversations between those two men recorded on 8 and 22 February 2001, and two further tapes said to record conversations between them on 5 March 2001. Additionally, there are photographs said to be of "buys 11 right through to buy 18" (AR 76), those apparently being photographs taken on the occasions that the covert operative made alleged purchases of drugs from Mr Dunk.

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[2] See the judgments in *Ridgeway* at CLR 28, 29, 30, Mason CJ, Deane, and Dawson JJ at 45; Brennan J at 56; Toohey J agreeing with Gaudron J, at 73; and McHugh J at 81.

[27] That description of the exhibits placed before the learned magistrate suggests that recordings exist of conversations which would demonstrate far more accurately any degree of coercion of Mr Dunk than would the answer to the question the subject of so much litigation. The question appears to be one simply fishing for information of no demonstrated relevance to an apparently strong case.

[28] The extent to which it is fishing is further suggested by matters further revealed on 28 May 2002, namely that the witness had given evidence in other proceedings in which he had identified Craig as being one Craig Lane. That fact led the magistrate to rule (at AR 87) that there was therefore no proper basis for any claim of privilege under s 46 of the *Drugs Misuse Act*. The magistrate then considered the provisions of the *Police Powers and Responsibilities Act*, and held that the legislative protection of the "methodologies" of the police in relation to how police conducted operations needed to be balanced against the need of Mr Dunk to find out "accurate and reliable information for which to properly defend himself." (at AR 87) The magistrate was satisfied that the disclosure of that information was necessary pursuant to the provisions of s 454(1)(a) and (b) of that Act, and ruled that:

> "I believe the defendant is entitled to know whether at the relevant time Craig knew that this witness was a police officer."

A direction was then given that the officer answer the question, without indicating whether it was the question last asked by Mr Guest, or one of those formulated by the bench.

Jurisdiction to intervene in committal proceedings

[29] In addition to some degree of uncertainty as to the actual question the witness was required to answer, a good deal more uncertainty exists as to the availability of judicial review to the applicant Commissioner in respect of the direction given. The learned judge who heard the application made a careful examination of the availability of certiorari to quash either an order committing a person for trial (or sentence) or a decision, order, or direction, made in such proceedings. After referring inter alia to *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 159, (as to those decisions susceptible to certiorari), and to a number of decisions of the Full Court of Queensland and to decisions of the New South Wales and Victorian Courts of Appeal, the learned judge expressed the view that even if certiorari did lie in respect of committal proceedings, an applicant must show that any error was jurisdictional in character, and that the particular decision affected rights.

[30] The learned judge then considered the decision in *Craig v South Australia* (1995) 184 CLR 163 and the distinction drawn by the High Court therein between jurisdictional error by an inferior court and by an administrative tribunal. The judge ultimately considered that given the administrative character of committal proceedings, and the absence of a right of appeal from a decision to commit, that probably the "wider" interpretation of jurisdictional error applicable to administrative tribunals was the appropriate one to apply to a preliminary procedure; and therefore that error in the interpretation of s 454 of the *Police Powers and Responsibilities Act* or of s 119 and s 120 of the *Drugs Misuse Act* would be jurisdictional in character for the purpose of the *Judicial Review Act*. The judge was still concerned as to jurisdiction, and as to the standing of the Commissioner to seek an order in the nature of certiorari, and expressed a strong preference for making instead a declaratory order (referring to *Sankey v Whitlam*

(1978) 142 CLR 1 at 25-26) as the appropriate form of an order, should the judge be satisfied that the magistrate's decision was wrong, and that the case was one of those exceptional ones discussed by Gibbs J (as he then was) in *Sankey v Whitlam* (supra).

[31] In *R v The Stipendiary Magistrate at Southport, ex parte Gibson*[3], Williams J (as he then was) referred (at pages 693-694) to his own earlier judgment in *R v A Stipendiary Magistrate at Brisbane, ex parte Kornhauser* [1992] 2 Qd R 150, in which he considered the extent to which this court could or should interfere in committal proceedings, and repeated his conclusion that the prerogative writs might be used other than where jurisdiction was strictly involved, provided that there "be an error which vitiates the decision and cries out for the intervention of the superior court for correction in the interests of justice". Ambrose J in *Gibson* (at 703) clearly held that there is a class of exceptional cases where this court will intervene in committal proceedings by way of prerogative writ. This appeal has proceeded on the apparent assumption that this is such a case.

[32] The respondent took no point on the appeal as to the availability of judicial review, (or a declaration) or the nature or form of any order this court should make if the court considers the learned judge erred in upholding the magistrate's decision. The only submission made by Mr Kimmins for the second respondent was that if the appeal succeeded, the second respondent should nevertheless have his costs, because of the general and wider public interest in this court determining the issues raised by the applicant Commissioner. Mr Kimmins submitted that the question upon which the Commissioner sought a ruling was always objectionable on at least two separate grounds, one being that it invited the witness to speculate as to Craig's knowledge, and the other that it was not confined to the apparently relevant time, namely prior to Craig saying anything about Mr Dunk. Even so, Mr Kimmins accepted that it was appropriate for the Court to express its view on the wider issues that a more carefully worded question would have raised. I consider that the appropriate course.

The reasons below

[33] As it happened the learned judge accepted the submissions on Mr Dunk's behalf, that an answer to the question would be relevant to the issue of entrapment. The judge agreed that entrapment would be relevant to any sentence to be imposed upon Mr Dunk, although observing that entrapment would not afford a defence to any of the charges against him. The learned judge accepted the submission on Mr Dunk's behalf that sentence proceedings are a part of a criminal trial, and that the right to a fair trial extended to the right to a fair sentencing procedure. On that basis the judge considered that s 454(1)(a) applied, since disclosure of the information sought was necessary to ensure fair sentencing proceedings in the event of conviction.

[34] The learned judge also held that the link between possible answers to the question referred to the judge, and the potential for identification of an informer or of the fact that someone was an informer against Mr Dunk or of the fact that information in relation to the charges against him was obtained from an informer, was too tenuous to meet the test in s 454 of the *Police Powers and Responsibilities Act,* or that in s 119 and s 120 of the *Drugs Misuse Act.* With great respect to the learned judge, and

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3 [1993] 2 Qd R 687

with due respect to the learned magistrate, the grounds do seem sparse indeed upon which to find that it was necessary for a fair sentencing proceeding, whether after a plea of guilty or a trial, for Mr Dunk to know whether Mr Lane knew that Mr "Harrison" was a police officer at the time that Mr Lane apparently told Mr Harrison that Mr Dunk could supply Mr Harrison with drugs. Likewise, the grounds seem equally sparse upon which the learned magistrate could have considered that Mr Dunk, to properly defend himself at the committal and in a later trial, needed to find out with accuracy and reliability, whether or not Mr Lane knew Mr Harrison's occupation.

[35] The matters discussed so far demonstrate that the question asked was objectionable in its form in any event, and without a great deal more other evidence would not make one iota of difference to whether or not Mr Dunk could defend the charges against him or had grounds for mitigation of penalty. However, to uphold the appeal on the narrow ground of the otherwise objectionable form of the question would be to avoid this court's responsibility in a matter which has already involved delay and public expense, and in which the appellant's ground of appeal raises matters of public importance in the administration of justice. The respondent did press in both November 2001 and May 2002 for information on oath about Mr Lane's knowledge of the covert operative's true position, and has defended the decisions judicially endorsing that insistence. In those circumstances this court should provide its construction of the relevant provisions.

Who is "an informer"?

[36] Mr Hinson SC for the appellant acknowledges that the term "informer" is not defined in the *Drugs Misuse Act*, but generally adopted as appropriate that definition given by Ambrose J in *R v The Stipendiary Magistrate at Southport; ex parte Gibson*[4] where his Honour wrote:

> "…it is a term that has long been used in the criminal law to describe a person who is not a member of the police force who informs police officers of facts relating to the proposed commission of offences and the criminals involved or of the identity of persons involved in the commission of criminal offences already committed."

The essence of the appellant's argument was that reference to an informer in s 119 and s 120 of that Act should be understood to describe a person who supplied information to a police officer in respect of the commission of an offence, when knowing or believing that the person so supplied was a police officer. As against that, Mr Kimmins submits that the expression while including the "knowing" informer, includes a person who inadvertently supplies information to a police officer when not aware of the latter's occupation, or ability to receive the information. Thus, two persons overheard by a police officer at a football match, and who were discussing in detail the operations and livelihood of a third person who was a drug dealer, would each have thereby supplied information as "an informer" to a police officer, albeit unknowingly, in accordance with s 119 and s 120. Mr Kimmins submitted that once it was established that Mr Lane had told the covert police that Mr Dunk could supply dangerous drugs, that conduct of Mr Lane's relevantly made him an informer who supplied information to a police

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4 [1993] 2 Qd R 687 at 696

officer, even if Mr Lane then believed that the covert operative was simply a private citizen wishing to buy unprescribed dangerous drugs.

[37] Those submissions by Mr Kimmins face difficulties. One is that if accurate, the witness "Harrison" actually committed the offence provided for in s 119(2) when giving evidence that Mr Lane had told him that Mr Dunk was able to supply dangerous drugs. Mr Kimmins submitted that subsection 119(3) might save Mr Harrison.

[38] On Mr Kimmins' construction, people working in the same or other police services, or in government departments, and who without any desire for confidentiality and as part of their duty supplied information in respect of the (past) commission of offences against the *Drugs Misuse Act*, (such as the criminal history of an offender, or details as to the circumstances of an offence which were required for the assistance of a court obliged to pass sentence for later offences), and who gave their relevant information to a police officer, would each be an informer. This would impose quite extraordinary and pointless restrictions on disclosing the source of relevant information in response to questions from the Bench; and considerably hamper the preparation of the documents, by reason of s 119(1) and (2).

[39] Likewise, as Mr Hinson submitted, construing "informer" without the stipulation that the term describes a person imparting information in confidence about another and only on that basis of confidence, would mean that s 119 and s 120 both apply to an offender who confesses his or her role in, for example, the extensive manufacture of drugs, and who shows a police officer through that offender's laboratory, with the intention that the police officer will make a lawful arrest and reveal the confessions made and assistance given. Section 120 would make it difficult for the police officer to give evidence of that confession and assistance, other than in the form of a volunteered monologue. Once again, preparation of the documents for a prosecution brief which revealed the confession would risk conviction under s 119(2).

[40] These examples and arguments demonstrate that it is proper to construe the expression "an informer" in s 119 and s 120 as describing a person who supplies information in confidence to a person known or believed to be a police officer, in respect of the commission of an offence by another. As Williams JA remarked during argument that appropriate concept is reasonably well expressed in s 454(2)(b) of the *Police Powers and Responsibilities Act*, in its description of a "confidential source of information, in relation to the enforcement or administration of the law…"

[41] In *Gibson*, Williams J referred (at 692) to the decision of the House of Lords in *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171 at 218 for a description of the common law rationale of the rule applied in those courts prohibiting the identification of police informants. Lord Diplock wrote:

> "if their identity were liable to be disclosed in a court of law, these sources of information would dry up and the police would be hindered in their duty of preventing and detecting crime. So the public interest in preserving the anonymity of police informers had to be weighed against the public interest that information which might assist a judicial tribunal to ascertain facts relevant to an issue upon which it is required to adjudicate should be withheld from that

> tribunal. By the uniform practice of the judges which by the time of *Marks* v. *Beyfus*, 25 Q.B.D. 494 had already hardened into a rule of law, the balance has fallen upon the side of non-disclosure except where upon the trial of a defendant for a criminal offence disclosure of the identity of the informer could help to show that the defendant was innocent of the offence."

[42] I respectfully observe that an informative and useful discussion of this topic appears in the judgment of Bleby J in *R v Mason* (2000) 77 SASR 105, and particularly at pages 110-116. After considering (at 111) the variety of circumstances in which information will be provided to the police, ranging from those who give a formal interview intending it to be the basis of their evidence given in court to those who anonymously provide information, his Honour expressed the view that given the rationale for the (common law) rule, namely the preservation of anonymity, there must be present an element of confidentiality in the identity of the informer; and that it is only the assurance of confidentiality of that identity that prevents the valuable sources of information from drying up. He went on (at 112) to observe that the community will only protect the identity of a person where the information is given upon condition that the confidence is honoured and that the person's identity will not be disclosed or upon an assurance by the recipient that that will be the case.

[43] That element of confidentiality in the identity of the informer would normally not exist where a person in Mr Lane's position told another intending purchaser of drugs that Mr Dunk could supply them, when not realising that presumed purchaser was a police officer. Drug dealers such as Mr Dunk is alleged to be might be expected to want to know who had referred a potential new purchaser to them. It is worth repeating another remark of Bleby J (at 113), that the illicit drug trade attracts large amounts of money and organised crime, such that harm can befall people who are known to, or threaten to, disclose the information about it to the police.

[44] To that concept of confidentiality of identity described in *R v Mason* and in s 454(2)(b) of the *Police Powers and Responsibilities Act*, which concept is an integral part of the definition of "an informer" in s 119 and s 120 of the *Drugs Misuse Act*, there can be added the allied concept of the circumstances necessarily giving rise to that confidentiality, and well described in a judgment of Fullagar J in *Signorotto v Nicholson* [1982] VR 413 at 417 (lines 27-31). This is that such an informer has given:

> "…the policeman information received in his character as a policeman and as part of his duties in upholding the law."

[45] Construing the expression "an informer" in s 119 and s 120 to mean one who supplies information about other people's behaviour in confidence to a police officer in the latter's character as a police officer and who receives the information in the exercise of the functions of the Police Service described in Part 2 of the *Police Service Administration Act* 1990 (Qld), gives those sections an effect consistent with the common law. The construction advanced by Mr Kimmins does not, and produces some quite bizarre results. In his submission Mr Lane became an informer when he told police officer Harrison about Mr Dunk's alleged activities, without realising that Harrison was a police officer, and that that had the result that the force of s 120 was spent once Mr Harrison described those events in the witness box. Accordingly there was no valid objection which could be taken under that

section if, on Mr Dunk's behalf, Mr Harrison was asked if Mr Lane had deliberately informed on him, knowing Mr Harrison **was** a police officer.

[46] That result is precisely the one that the common law and the drafting of the section obviously seeks to avoid. It demonstrates why the construction advanced by the appellant Commissioner, consistent with the common law, must be correct. Likewise the appellant's further argument must succeed that, in whatever form they were couched, questions seeking to establish whether or not Mr Lane was aware Mr Harrison was a police officer, when telling him that Mr Dunk supplied drugs unlawfully to others, **were** questions asking for particulars that might be likely to lead to a person's identification as an informer, or to the fact that "in respect of" Mr Dunk's alleged offences Mr Harrison had received information from an informer.

[47] All of this is predicated upon the proposition that **an** informer had supplied information to a police officer in respect of the (presumably past) commission of offences against the *Drugs Misuse Act* by Mr Dunk. That informer need not have been Mr Lane. It is an oddity of s 120 that its prohibitions only apply if there had been information supplied by an informer, with the consequence that objections taken under that section tend to confirm, whether rightly or wrongly, a suspicion which prompted the relevant question. That makes it important that magistrates and Judges are astute to intervene and stop questions being asked which are seeking any of the prohibited varieties of information.[5] It also explains why the section prohibits questions being asked and prohibits compelling answers to such questions concerning receipt of information from an informer, but does not prohibit a prosecutor, a witness for the prosecution, or a police officer, from volunteering that an informer had supplied information to a police officer in respect of an offence against the *Drugs Misuse Act*. Volunteering such information will bring the section into force and prohibit questioning as to the identity of the informer. Likewise, s 120 does not prohibit the volunteering of any other information.

[48] There is an obvious capacity for the misuse of those provisions to cause injustice. One example of that possibility is illustrated by the facts in *R v Mason* (supra) where the appellant in that case alleged that the police had conducted an unlawful "spot" search of him in a night club in which prohibited drugs were found in his possession, whereas the police officer conducting the search claimed that an unidentified person had supplied information to police outside the nightclub that that appellant possessed drugs. The appellant's case was that no such informant existed. The decision of the South Australian Court of Criminal Appeal in that case upheld the trial judge's refusal to direct one of those police officers to give a description of the alleged informer (this case is cited only as a possible example of circumstances where abuse might occur; in the actual case the trial judge accepted that the police officer who swore to receiving the confidential information was a credible witness). While the possibility of misuse of its provisions cannot affect the construction of the section, it makes it important that its operation be restricted to those circumstances where there still exists a sensible obligation to keep confidential the identity of an informer.

[49] In this appeal the appellant's argument on the construction of s 119 and s 120 must be upheld, and there is no particular need to consider the construction of s 454(1) of the *Police Powers and Responsibilities Act*. Since the question the subject of the

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5 On this point see the observations of Cooper J in *R v Demir* [1990] 2 Qd R 433 at 434 - 435

actual ground of appeal was otherwise objectionable, the order of this court ought to be simply that the appeal be allowed, and the direction by the magistrate to answer the question set aside. I consider it appropriate that the appellant pay the second respondent's costs, as the matter was brought before the court as one of general public importance, and the second respondent has filed by leave an affidavit deposing to his having very limited resources, and had satisfied thereby the relevant criteria in s 49 of the *Judicial Review Act* 1991.

[50] I would order that the appeal be allowed, to the extent of setting aside both Order No. 1 made on 17 February 2003 and the direction by the magistrate to answer the question; and further order that the appellant pay the second respondent's costs, to be assessed on the standard basis.

[51] **MUIR J:** I am in general agreement with the reasons of Williams and Jerrard JJA. I agree with the orders proposed by Jerrard JA.