SUPREME COURT OF QUEENSLAND

CITATION:	*R v Bartorillo* [2006] QCA 283
PARTIES:	**R** **v** **BARTORILLO, Cherylynn Joy** (appellant/applicant)
FILE NO/S:	CA No 64 of 2006 CA No 128 of 2006 DC No 1860 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction Application for Extension (Sentence)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	4 August 2006
DELIVERED AT:	Brisbane
HEARING DATE:	8 June 2006
JUDGES:	Jerrard and Holmes JJA and Mackenzie J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal against conviction allowed** **2. Set aside guilty verdict** **3. New trial ordered**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – police unlawfully searched appellant's bag and found stolen property – appellant's bag was in the possession of another person at the time of the unlawful search – trial judge ruled that illegality arose from a non-reckless mistake by police – illegal search evidence was admitted at trial – inconsistent descriptions of police search – whether trial judge should have resolved the issue of whether police had asked the appellant's colleague if they could search the bag or were invited to search the bag – whether the illegal search evidence was wrongfully admitted at trial CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – MISDIRECTION AND NON-DIRECTION – GENERAL MATTERS – PRESENTATION OF DEFENCE

CASE AND CROWN CASE AND REVIEW OF EVIDENCE – appellant did not give evidence at trial – whether trial judge's direction to the jury unnecessarily emphasised the consequences that follow from appellant's choice not to give evidence at trial

Corrective Services Act 2000 (Qld), s 150, s 151, s 152, s 153, s 154
Criminal Code 1899 (Qld), s 433(1), s 590AA
Penalties and Sentences Act 1992 (Qld), s 156, s 156A, s 9(2)(m)

Bunning v Cross (1978) 141 CLR 54, considered
Psaila v Department of Corrective Services [2005] QCA 16; Appeal No 11059 of 2004, 11 February 2005, considered
R v Chard; ex parte A-G (Qld) [2004] QCA 372; CA No 277 of 2004, 8 October 2004, considered
R v Moore; ex parte A-G [2002] QCA 116; CA No 320 of 2001, 26 March 2002, considered
R v Waters [1998] 2 Qd R 442, cited

COUNSEL: The appellant/applicant appeared for herself
B G Campbell for the respondent

SOLICITORS: The appellant/applicant appeared for herself
Director of Public Prosecutions (Queensland) for the respondent

[1] **JERRARD JA:** On 15 February 2006 Ms Bartorillo was convicted by a jury of receiving property obtained by crime and which she had reason to believe had been so obtained.[1] She was sentenced to nine months imprisonment, which the learned trial judge directed to be cumulative upon a period of about 11 months imprisonment, which the learned trial judge expected Ms Bartorillo would be required to serve, by reason of cancellation of a parole order in her favour. She has appealed the conviction on a number of grounds, and likewise the sentence. Regarding the latter, she argues that the learned judge could not activate the unserved portion of the sentence for which Ms Bartorillo had been on parole, and that the judge accordingly could not make the nine months for receiving cumulative upon an 11 month sentence that the judge could neither impose nor activate.

Burglary at the Windsor's

[2] The indictment charged that on a date unknown between 14 May 2004 and 23 May 2004 at Brisbane Ms Bartorillo received a mobile phone, which had been fraudulently obtained, and that she had reason to believe the property had been so obtained; and that the offence for which the thing was obtained was a crime. The evidence led in support of that charge was as follows. Shane Windsor swore that on 7 May 2004 he and his wife went to Fraser Island for a 10 day holiday. They had arranged for Mrs Windsor's mother, Beryl Gardiner, to keep an eye on their home in their absence, and feed the cat. Late on the night of 9 May 2004 they were told there had been a break-in at the home, and that it had been ransacked. They remained on holiday and returned on 16 May 2004, when they prepared a list of the stolen property. That

1 Contrary to s 433(1)(3) of the *Criminal Code* 1899 (Qld).

stolen property included Mr Windsor's passport, which had in it his photograph and his date of birth, 21 October 1968.

Getting mobile phones

[3] On 14 May 2004 two people, a male and a female, entered the premises trading as Crazy John's at Carindale in Brisbane, inquiring about the purchase of mobile phones. The woman introduced the male as her brother, "Shane", and between them the two potential customers said they wanted a plan for the purchase of mobile phones, one for Shane's daughter, one for his wife, and one for himself. The salesman, Mr Khalil, described the available phones and "deals", but because of the time – 5.30 pm, closing time - was unable to complete any transaction that evening. His evidence to the jury was that the female was well dressed, with a lot of what he described as "gold" jewellery, aged in her mid to late 30's, and of "fairly skinny" build. He recalled that she said that she had previously bought phones from the Crazy John's store at Mt Gravatt, and was happy with the telephones, but unhappy with the services at that branch. She also told Mr Khalil that she imported and exported jewellery. The prosecution contended that, although Mr Khalil did not identify Ms Bartorillo as the woman with "Shane", the rest of the evidence did.

[4] The next day the male returned at about midday, and bought mobile phones on credit, using for identification the passport stolen from Shane Windsor, a bank statement, and a Telstra bill. That male person provided an address which matched Shane Windsor's (the burgled home), and a date of birth matching the one shown on the passport. That passport now had that male person's photograph on it, not Shane Windsor's. The male bought three mobile phones, of which one was a Samsung X600. The male, who purchased the telephones, also left a business card with Shane Windsor's name on it, and Mr Khalil swore that the credit sale of the three telephones could not have happened had the person purporting to be Shane Windsor not produced the passport as identification.

[5] After the real Shane Windsor had returned from his holiday and complained that his passport was stolen, the police began to receive complaints of property being purchased by a male person relying on that passport. As it happened Mr Khalil also conducted an investigation of his own, in which he succeeded in identifying an occasion in February 2004 in which Ms Bartorillo, the appellant, had bought mobile phones in her own name through the Crazy John's store at Mt Gravatt, providing identification which included her drivers' license with her photograph. The prosecution led that evidence – of those purchases in February 2004 at the store by Ms Bartorillo – at the trial.

The police went to the motel

[6] On 22 May 2004 Shane Windsor and his wife went to the upper Mt Gravatt Criminal Investigation Office, in relation to the burglary of their home on or about 9 May 2004. It appears – from evidence given at the committal hearing, but not before the jury[2] - that one of the two police officers investigating the complaint, a Constable Celebicanin, was told by either Mr or Mrs Windsor that Ms Bartorillo was a friend of Beryl Gardiner. That officer also knew – and this evidence was given on a voir dire, not before the jury – that Ms Bartorillo had a criminal history. Due, apparently, to that criminal history and of knowledge of the friendship between Beryl Gardiner and

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2 The transcript of police officer Celebicanin's evidence was supplied to this Court on the appeal.

Ms Bartorillo, that officer suggested that the two investigating police ask Ms Gardiner and Ms Bartorillo if they knew anything about the burglary. The evidence does not reveal how those police learnt of the address, but the two police officers went to where Ms Gardiner and Ms Bartorillo were residing, a motel at Annerley, at about 7.40 pm on 22 May 2004. They had with them a photograph of Ms Bartorillo, a photograph of the male person, who had purported to purchase the mobile phones when identifying himself as Shane Windsor, and a description of at least some of the property alleged to have been stolen from the Windsor's, and a list of some of the property obtained by using Mr Windsor's passport. The appeal record does not really explain why those apparently unconnected offences were both being investigated when the police went to the motel, although it is obvious from what they took there that both were being investigated. It is possible the police had by then the results of Mr Khalil's searches.

Relationships, true and false

[7] When the police arrived at the motel they spoke with the Manageress, a Marguerite Douglas, and showed her a photograph of Ms Bartorillo, and Ms Douglas told the police that Ms Bartorillo was one of the current occupants of unit 50 at the motel. The police also showed Ms Douglas a photograph of the male person who had represented himself to Mr Khalil as Shane Windsor when obtaining the three mobile phones, and Ms Douglas identified him too, as a person who had been in and about unit 50 and visiting Ms Bartorillo, and whom Ms Bartorillo had told Ms Douglas was Ms Bartorillo's son.

[8] Ms Douglas swore in evidence that she had returned to her employment on 16 May 2004 after some days off, and that Ms Bartorillo was then staying at the motel. On that day Ms Bartorillo asked Ms Douglas to look after a silver bag, saying it contained jewellery, and that Ms Bartorillo did not trust her son's girlfriend. Ms Bartorillo collected that silver bag from Ms Douglas on 18 May, and on 20 May had asked Ms Douglas to look after a plastic shopping bag containing something wrapped in a white T-shirt, and a jewel-box. Ms Bartorillo told Ms Douglas that the jewel-box had some jewellery in it, and that there was a mobile phone belonging to her son which was switched off. Ms Douglas said that Ms Bartorillo had introduced her son as "Brian", and that Ms Bartorillo had described Beryl Gardiner to Ms Douglas as Ms Bartorillo's stepmother (Ms Bartorillo also told the police in a recorded interview that Beryl Gardiner was her stepmother).

[9] The male Ms Bartorillo identified as her son to Ms Douglas, who fraudulently obtained the three telephones, was established by evidence from the police to be a Benedict Monagle, whom the jury learnt had pleaded guilty on 30 September 2004 to the burglary of the Windsor's home on 8 May 2004, and to stealing property from that home, and also to fraudulently obtaining a quantity of mobile telephones on 15 May 2004. Ms Bartorillo told the investigating police on 22 May 2004 in a recorded interview that she only knew that male as "Brad", and had been introduced to Brad by Beryl Gardiner. That evidence made it plain that that offender was not her son, as she had told Ms Douglas.

Searching the plastic bag

[10] In that interview she also said that "Brad" had stayed over on, she thought, one or two nights[3], and that he had "slept over" at "my stepmother's place, too",[4] but she said

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3 At AR 311.

4 At AR 311.

she had "not really" ever spoken to that person. She thought he had slept in the "other spare bed" when he stayed overnight,[5] and although she could not remember "really speaking much to him other than knowing his name was Brad", she could recall once going to Carindale just to "grab some like just things", and that Brad had come for a drive in the cab. At Carindale Brad "went one way and I went the other",[6] and then she found him finally at the "phone place in the like corner at Carindale". Further questioning established that she had moved into the motel on 14 May, but was not sure the visit to Carindale was that same day. The learned trial judge reminded the jury in summing-up of the contention by the Crown that Ms Bartorillo matched Mr Khalil's general description of the woman, who introduced the male as her brother "Shane", and commented on the co-incidence that Ms Bartorillo admitted being near Crazy John's store at Carindale with the young man who got the mobile phones.

[11] Returning to the narrative, after Ms Douglas identified the two photographs, she produced to the police the plastic bag Ms Bartorillo had previously left in her care, and the police examined its content. The jewel-box contained jewellery, and there was a mobile phone in the bag, wrapped in a T-shirt. An identifying number on that mobile phone matched the Samsung X600 fraudulently obtained from Crazy John's at Carindale on 15 May 2004. The first ground of appeal complains that the learned judge who presided over a pre-trial hearing in this matter – not the judge at the later trial – erred in failing to exclude the evidence of that search of the bag.

[12] Counsel for Ms Bartorillo had objected to the admission of the evidence in a pre-trial hearing conducted pursuant to s 590AA of the *Criminal Code* 1899 (Qld). Counsel submitted, and I think correctly, that Ms Douglas had been given the plastic bag by Ms Bartorillo as a bailee, and, putting aside emergencies and the like, Ms Douglas had no authority or right herself to search through Ms Bartorillo's bag and examine its contents. She was simply authorised and required to take care to preserve the bag (and its contents, whatever they were) and to return the bag to Ms Bartorillo in the condition in which it was handed over. Likewise, Ms Douglas has no authority to let anyone else search the bag.

[13] The learned judge conducting that pre-trial hearing did not hear any oral evidence, and judged the matter on the papers. The prosecutor had proposed to call one of the investigating officers (Constable Celebicanin), and to ask him why he had not obtained Ms Bartorillo's permission to look in the plastic bag. But counsel for Ms Bartorillo was unwilling to cross-examine that potential witness without a statement of the evidence to be given, and expressly agreed that it was sufficient for the learned judge to consider the application without hearing oral evidence.

Evidence given at the committal

[14] There had been cross-examination in the committal hearing on the circumstances of the search, and Ms Bartorillo's counsel would have had the transcript of that, and the statements of the relevant witnesses. Constable Celebicanin simply said in his statement that Ms Douglas "told me something and subsequently handed over to me a white plastic shopping bag", and his statement then described the contents. In cross-examination at the committal hearing he said that Ms Douglas had called him into a back room, and said to him words to this effect, when giving him the bag:

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5 At AR 312.

6 At AR 312.

> "Let's have a look at this. I don't want to be part of this, you can have this."[7]

[15] Constable Celebicanin had then said to the other officer "Let's have a look what's in it", turned on a tape recorder, and searched the bag, recording its contents on tape. He thought it likely that Ms Douglas had said around that time that Ms Bartorillo was in her room, and for that reason Constable Celebicanin hastened back to the Upper Mt Gravatt Police Station to obtain a search warrant for the motel room itself. When at the Upper Mt Gravatt Police Station he caused Mr and Mrs Windsor to come there, and Mrs Windsor claimed ownership of some of the jewellery which was in the jewel-box in the plastic bag. That too encouraged Constable Celebicanin to obtain a search warrant for the motel room. As it transpired the jewellery, which Mrs Windsor claimed to own, was not on the list of property the Windsor's had previously supplied to the police, as stolen from their home; and the prosecution later withdrew a charge originally laid against Ms Bartorillo, of having received stolen jewellery. Ms Bartorillo had at all relevant times maintained that she was the lawful owner of that jewellery.

[16] Constable Celebicanin agreed in cross-examination that he knew that the property in the bag did not belong to Ms Douglas, when Ms Douglas handed him the bag. Cross-examination of Constable Celebicanin at the committal did not establish whether he learnt that Ms Bartorillo was in the motel room before he searched the bag, and he was not directly asked why he searched the bag without her permission.

[17] The other police officer, Constable Trezise, gave evidence at the committal to the effect that Ms Douglas had told the police that Ms Bartorillo had asked the motel managers to hold some property for her, and that "we" (the police) had asked if they could "see" it. That description differed from somewhat from that of Constable Celebicanin, whose evidence rather implied that Ms Douglas was anxious to relieve herself of possession of the bag and responsibility for it. Ms Douglas agreed in cross-examination that she knew the bag did not belong to her when she gave it to the police, and said that she had been asked for it by the police, so she handed it over.

[18] None of that evidence quite described the authority by which the police officers searched Ms Bartorillo's bag in her absence, perhaps already knowing then that she was in a room at the motel, and knowing that they did not have her permission. But Ms Bartorillo's counsel at the trial had the opportunity to pursue those matters and did not, when the prosecutor was prepared to call at least Constable Celebicanin to give evidence about that. Counsel argued to the learned judge that the police had been reckless about their powers of search, but accepted there was no evidence (on the papers) on which the judge could conclude that the police were aware they had no authority to search.

The ruling on the search

[19] The learned judge expressly assumed in Ms Bartorillo's favour, in the ruling given, that the police had expressed interest in having a look in Ms Bartorillo's bag, and that Ms Douglas had allowed them to do so, and that the authority Ms Douglas had been given by Ms Bartorillo when the bag was left with her did not extend to allowing any other people to search through it, including the police. The judge further assumed that the police were not entitled to conduct that search without Ms Bartorillo's

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[7] At page 5 of the transcript of the committal, supplied to the Court by counsel for the respondent during the appeal.

authority, which they did not have. Because there was no evidence that the police knew they were doing something which they were not entitled to do when examining the bag, the judge concluded that the police had simply failed to appreciate that Ms Douglas' possession and authority was qualified and did not extend to authorising them to look in the bag. The judge thought that was a quite understandable error, and concluded that the unlawful search could fairly be said to have arisen from mistake, and that the police had not been attempting to cut corners; after all, they had gone away and gotten a warrant to search the motel room.

[20] In those circumstances, after referring to the principles enunciated in *Bunning v Cross* (1978) 141 CLR 54, the judge concluded that the evidence that resulted from the search was cogent, the illegality arose from simple mistake, the police had otherwise endeavoured to comply with the law, the mistake was not a reckless one, and the result of the search should not be excluded from evidence.

Argument on appeal about the search

[21] The point was made in argument on the appeal that it may have been wiser for the learned judge hearing that application to let the Crown call the evidence from Constable Celebicanin which it wanted to call, rather than dissuade the prosecution from doing so, as the judge had tended to do. The judge concluded when admitting the evidence that the very likely inference was that the police officers thought they were entitled to look in that bag, because they had been given the bag by the person who was lawfully in possession of it. The judge exercised the discretion on a further assumption, and this time one that favoured the prosecution, namely that Ms Douglas – the person in possession of the bag – had allowed the police to search it. That assumption was explicitly made[8], but it was not sufficiently supported by the conflicting evidence of the circumstances in which the police got possession of the bag.

[22] The statements of the witnesses, and their answers in cross-examination at the committal, conflicted. Constable Trezise swore that the police had asked if they could "see" the property Ms Douglas was holding for Ms Bartorillo; Constable Celebicanin swore that Ms Douglas had invited the police to "have a look at this", referring to that property; and Ms Douglas simply described giving the bag over to possession of the police, without any invitation from her to look in it, or any request from the police for permission to do that. The unresolved inconsistency between her description of the search happening in her presence but without express permission, and the account of the police officers of express invitation or express permission, was a matter the learned judge hearing the s 590AA application should have resolved before concluding that Ms Douglas, as the person in possession of the bag, had allowed the police to search it.

[23] The statement by Ms Douglas and her evidence at the committal hearing described only, and by inference, that she had not opposed the police doing that. It is important on this appeal to appreciate that the assumption the learned judge made, that Ms Douglas had allowed the police to search, was not made because Ms Bartorillo's counsel, like the learned judge, had discouraged the prosecutor from calling evidence. The inconsistency was apparent in the statements. It is possible those inconsistent descriptions would not have been resolved by further evidence and cross-examination before the learned judge on the s 590AA hearing, but the judgment does not acknowledge the inconsistency.

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8 It appears at page 19 of the transcript of the pre-trial hearing, at page IV of the appeal record.

[24] The evidence that Ms Bartorillo had possession of the mobile phone was central to the prosecution case of receiving. The subsequent search of the motel room disclosed nothing which had been stolen from the Windsor's or obtained by the use of the false passport. Ms Bartorillo was interviewed by the police later on 22 May at about 11.30 pm that evening, and said that the mobile was not hers, and that she had found it in her motel unit. If the proper exercise of a discretion would have been to exclude the results of the search, the same would have applied to questions about her possession of the phone. It was an error to rule on the application without resolving the issue of whether the police asked Ms Douglas if they could search the bag, or were invited by her to do that. The judge might properly have exercised discretion to exclude the evidence if cross-examination had satisfied the judge that no permission was sought from Ms Douglas to search the bag, and that that omission was because both officers knew Ms Douglas could not give it.

[25] Because the result of the search was admitted without resolving the issue of why the police searched the bag without Ms Bartorillo's permission, and whose permission – if anyone's - they had or believed they had, and because that evidence was crucial to the case, I would uphold the ground of appeal complaining about wrongful admission of the search of the bag, and set aside the conviction. There was no suggestion that the investigating police thought that when searching the bag they were exercising powers under the *Police Powers and Responsibilities Act* 2000 (Qld); they were either searching with Ms Douglas' permission, or with no permission.

Two other matters

[26] That makes it unnecessary to say anything about the other grounds of appeal, although two deserve comment. The learned trial judge did somewhat unnecessarily stress the consequences that followed from the choice Ms Bartorillo made at the trial not to give evidence, in the following passage:

> "In this trial the accused elected not to give or call evidence. She's perfectly entitled to adopt such a course and no inference adverse to her may be drawn. She is perfectly entitled to remain in the dock and submit to you on that evidence, 'You could not be satisfied beyond reasonable doubt of my guilt.' The course she has chosen to follow is to leave the evidence in the Crown case unchallenged by sworn evidence. She has elected to leave the evidence in the state that it is at the end of the Crown case. She has chosen to leave the evidence in the state that it is at the end of the Crown case in relation to how she says she came into possession of the property, or any explanation thereon. She's perfectly entitled to adopt that course and no inference adverse to her may be drawn. But she has chosen to leave the evidence in the state that it was, including in relation to her state of mind."[9]

It would be preferable if trial judges followed the draft direction suggested in the *Queensland Supreme and District Courts Benchbook*, because over explaining the consequences of not giving evidence runs the risk of conveying the subliminal message that there is no answer a defendant could give.

[27] The other matter is that Ms Bartorillo's answers to the police in her interview late on 22 May 2004 included a number of statements by her to the effect that she had

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9 At AR 220.

intended to give the mobile phone to her parole officer, or was "handing the phone in" as soon as she saw that officer. That evidence did contain the implicit acknowledgment described by the learned trial judge, namely that Ms Bartorillo was concerned as to the lawfulness of possession of the phone, but I consider that she experienced a degree of prejudice greater than the probative force of that evidence, the prejudice being the fact that the jurors learnt that she was on parole. If there is a re-trial in this matter a fairer trial might result from restricting the description of her answers on that point to ones to the effect that she was allegedly in the process of "handing the phone in", and not just to Ms Douglas, which conveys sufficient of the probative force.

Sentence

[28] Because I would set aside the conviction, it is unnecessary to consider the sentence application. It does raise an important matter, and for that reason I will express an opinion. Ms Bartorillo was sentenced to what was an effective four year prison term on 20 April 2001, consisting of a sentence of two and a half years imprisonment on seven counts of supplying dangerous drugs, and a cumulative 18 month term of an activated suspended sentence previously imposed on 3 October 1997 for misappropriation of property. On the date she received that effective four year head term, 20 April 2001, the learned sentencing judge recommended that she be eligible for release on parole after serving 12 months. I remark in passing that in *R v Waters* [1998] 2 Qd R 442 this Court described an inability to make a recommendation for parole when activating a previously partly suspended sentence, and in *R v Chard; ex parte A-G (Qld)* [2004] QCA 372[10] held that for that reason where an activated suspended sentence was to be ordered to be served cumulatively with another term or terms of imprisonment being imposed, the order should require the offender to serve the whole (or the activated part) of the suspended sentence first, to be then followed by service of the sentence imposed for the offence (or offences), which constituted the breach of the suspended sentence. Ms Bartorillo was released on parole on 3 December 2003, and was on parole when the May 2004 offence was committed, with a full-time discharge date of 18 April 2005 on the four year head sentence imposed on 20 April 2001.

[29] Counsel for the prosecution told the learned judge that there were accordingly some 328 days between the last alleged date of commission of the offence in May 2004 and the discharge date in April 2005, and that the effect of s 151(1) of the *Corrective Services Act* 2000 (Qld) was that Ms Bartorillo's post-prison community based release ("parole") order was automatically cancelled if she was sentenced to another term of imprisonment for that offence committed during that parole term. That submission was accurate; s 151(2) provides that a parole order is cancelled in those circumstances, even if the term of the order has expired. The learned judge accordingly sentenced Ms Bartorillo on the assumption that she would be required to serve that approximately 11 months, and the judge imposed a nine month cumulative term on that for the commission of the receiving offence.

[30] The difficulty with an order in those terms is as follows. Section 152(1) and s 152(2) of the *Corrective Services Act* 2000 have the effect that only the period at large between 3 December 2003, (the date when Ms Bartorillo was released under the parole order), and 22 May 2004 (the last date in the change of the offence of receiving) would count as time served for that four year term of imprisonment. But despite the automatic cancellation of the parole order by reason of her being sentenced to another

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[10] CA No 277 of 2004, 8 October 2004.

term of imprisonment for the offence committed during the term of the order, the *Corrective Services Act* 2000 does not provide for the automatic imprisonment of a person in Ms Bartorillo's position for that remaining unserved period of the four years imprisonment. Instead, s 151(4) provides that if the parole order is cancelled in the circumstances described, a Corrections Board may issue a warrant for the prisoner's arrest, or a Magistrate, on the application of a Corrections Board or a member thereof, may issue a warrant for the prisoner's arrest. Sections 151(5) and (6) have the effect that such a warrant may be executed by any Corrective Services officer or police officer, and that when arrested the prisoner must be taken to prison to serve the unexpired portion of the period of imprisonment to which the prisoner was sentenced.

[31] Section 151 thus imposes an act by a Corrections Board, between the cancellation of a parole order and imprisonment to serve the remainder of the sentence. The learned sentencing judge was not told in this matter whether or not Ms Bartorillo's parole had already been cancelled, as it might have been under to s 150 of the *Corrective Services Act* 2000, with a warrant already issued pursuant to s 150(2) and requiring Ms Bartorillo to be arrested under that warrant to serve the unexpired portion of the period of imprisonment; nor was the judge told whether a relevant Corrections Board had determined that a warrant would issue on Ms Bartorillo's conviction and imprisonment for this offence.

Cumulative sentences

[32] Section 156 of the *Penalties and Sentences Act* 1992 (Qld) provides for cumulative orders of imprisonment in these terms:

> "(1) If –
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> (a) an offender is serving, or has been sentenced to serve, imprisonment for an offence; and
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> (b) is sentenced to serve imprisonment for another offence;
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> the imprisonment for the offence may be directed to start from the end of the period of imprisonment the offender is serving, or has been sentenced to serve."

Ms Bartorillo has been sentenced to serve four years imprisonment for various offences and was sentenced to serve nine months imprisonment for another offence. She has potentially eleven months still to serve of the four years, but until a warrant is issued by a Community Corrections Board or a Magistrate, and executed, she will not be required to serve that 11 months, and s 152 of the Act also allows the Queensland Community Corrections Board to direct that she serve only part of that 11 months. At the time she was sentenced on 15 February 2006, there being no evidence of a warrant having an already issued upon an earlier cancellation of her parole, it is difficult to say that in reality she was then serving that four year term of imprisonment.

[33] The effect of s 153 and s 154 of the *Corrective Services Act* 2000 are that her four year term had expired in April 2005. Section 153 provides:

> "A prisoner on post-prison community based release is taken to be still serving the sentence imposed on the prisoner."

and s 154 provides:

> "A prisoner is taken to have served the prisoner's period of imprisonment if the prisoner's post-prison community based release order has expired without the order being cancelled –
>
> (a) by a corrections board;
>
> (b) under section 151."

[34] That provision in s 154 for expiry is explicitly overridden by s 151(2) of the *Corrective Services Act* 2000; that makes it no easier to apply s 156 of the *Penalties and Sentences Act* to Ms Bartorillo. When she was sentenced in February 2006 she was neither in reality, nor deemed to be, serving the four year term. She had been sentenced to serve it, and on the respondent's submission in argument the learned sentencing judge could order that the nine months could start at the end of that period of four years imprisonment she had been sentenced to serve. That argument relied in part on s 156A of the *Penalties and Sentences Act*, which relevantly provides that if an offender is convicted of a serious violent offence committed while released on post-prison community based release, that sentence must be ordered to be served cumulatively "with any other term of imprisonment the offender is liable to serve." But even s 156A and the reference to a term an offender is "liable" to serve does not resolve the difficulty for a sentencing judge caused by the requirement in s 151(4) of the *Corrective Services Act* 2000 that a Corrections Board or a Magistrate issue a warrant which then authorises imprisonment for the unexpired portion of the term.

[35] In *Psaila v Department of Corrective Services* [2005] QCA 16[11] de Jersey CJ wrote of corresponding provisions in the *Corrective Services Act 1988*, (now repealed) that:

> "It was, however, the warrant itself, not the cancellation order, which authorised the apprehension and reincarceration of the respondent, whether issued by a board (s 188(2)) or a Magistrate (s 189(2)). The lawful basis for the respondent's detention...was the original sentencing order, and the warrants issued for the respondent's apprehension. The warrants could not have been issued had parole not been cancelled, of course, but that does not mean that the cancellation order is to be regarded as in force and operating..."[12]

That reasoning applies to the present Act.

[36] Section 9(2)(m) of the *Penalties and Sentences Act* requires a court when sentencing an offender to have regard to "sentences that the offender is liable to serve because of the revocation of orders made under this or another Act for contraventions of conditions by the offender". This Court construed that provision in *R v Moore; ex parte A-G* [2002] QCA 116[13] as requiring a sentencing court to have regard to the potential consequences of loss of parole. It follows that "liable" in s 9(2)(m) and s 156A describe imprisonment which may not happen, but which a person is liable to undergo if a warrant is issued. Accordingly, although it is an entirely unsatisfactory result, a court sentencing under s 156A can comply with the command in 156A(2) and expressly order that the sentence for the serious violence committed whilst on parole be served cumulatively with any other term of imprisonment that the offender is then liable to serve; even though inaction by a Community Correction Board may result in there never being any other term of imprisonment actually served upon which the freshly imposed sentence is cumulative.

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11 Appeal No 11059 of 2004, 11 February 2005.

12 *Psaila v Department of Corrective Services* [2005] QCA 16, at paragraph [20].

13 CA No 320 of 2001, 26 March 2002.

[37] The wording of 156A differs from s 156. The latter section refers to imprisonment an offender is "serving" or has been "sentenced to serve", not imprisonment an offender is "liable" to serve, and there is no authority given by s 156 to make cumulative terms on imprisonment to which an offender is only "liable". As at February 2006 Ms Bartorillo had been sentenced to serve the four years, but that term of imprisonment had expired, and cancellation of the parole order after expiry left the 11 months as period of imprisonment Ms Bartorillo was "liable" to serve, as suggested by s 9(2) of the *Penalties and Sentences Act* and this Court's decision in *R v Moore; ex parte A-G (Qld)*, but that cancellation will not automatically result in further imprisonment and is not lawful authority for keeping Ms Bartorillo in prison. In my respectful opinion the learned sentencing judge was accordingly unable to order that the nine months be cumulative upon the sentence of four years imprisonment, or as the judge expressed it, the period of imprisonment for Ms Bartorillo's cancelled parole. The order that was made would not provide lawful authority for holding Ms Bartorillo in custody for 11 months (absent a warrant) while waiting for the cancelled parole period to expire and the sentence of nine months to commence.

[38] Ms Bartorillo has a lengthy criminal history, and a nine month sentence imposed on her was well justified, but it may be that the Director considers that the imprisonment already served by the time this judgment is published makes it unnecessary in the public interest that there be a re-trial. I would allow the appeal against conviction, set aside the verdict, and order a re-trial.

[39] **HOLMES JA:** I agree with Jerrard JA's reasons for concluding that the evidence and findings made on the voir dire were insufficient for a proper exercise of the *Bunning v Cross* discretion. Because the evidence of the search of the bag was fundamental to the Crown case, I agree also that the conviction should be set aside and a re-trial ordered.

[40] **MACKENZIE J:** The facts and issues in this appeal are analysed in Jerrard JA's reasons. It is sufficient, for the purpose of reaching a conclusion that the appeal be allowed to focus on the exercise of discretion to admit evidence obtained by searching the bag left in the custody of the motel manager.

[41] For the reasons given by Jerrard JA, in relation to that issue, I agree that the appeal against conviction should be allowed and a new trial ordered.