SUPREME COURT OF QUEENSLAND

CITATION:	*R v Sear* [2019] QCA 210
PARTIES:	**R** **v** **SEAR, Bernadette Tamara** (appellant)
FILE NO/S:	CA No 285 of 2018 DC No 55 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Toowoomba – Date of Conviction: 19 October 2018 (Muir DCJ)
DELIVERED ON:	11 October 2019
DELIVERED AT:	Brisbane
HEARING DATE:	7 May 2019
JUDGES:	Sofronoff P and Fraser JA and Mullins J
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the appellant was convicted of one count of producing a dangerous drug – where distilling equipment used to produce pseudoephedrine, a precursor to methylamphetamine, was found on the property where the appellant lived – where the appellant admits to operating the equipment believing it to be an alcohol still – where the issue at trial was the appellant's knowledge about the purpose of the distilling equipment – whether it was open to the jury to conclude that the appellant was knowingly using the equipment to produce a dangerous drug – whether the verdict of guilty was unreasonable having regard to the evidence APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – POINTS AND OBJECTIONS NOT TAKEN BELOW – where the appellant was convicted of one count of producing a dangerous drug – where the appellant submits that the search warrant executed on the property was obtained by false information – where the appellant submits that the prosecution's witness was not qualified to give expert evidence about the quantity of drug that the equipment found on the property was capable of producing – where the appellant submits that the jury should have been discharged because two of the jurors had family members who had

socialised with one of the defence witnesses – where no objections were taken by the appellant's counsel at trial in respect of the admissibility of the evidence obtained by the search warrant, the expertise of the prosecution's witness and the impartiality of the jurors – whether there was a miscarriage of justice

COUNSEL: The appellant appeared on her own behalf
P J McCarthy for the respondent

SOLICITORS: The appellant appeared on her own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** The appellant lived at an address in Toowoomba with three other people. One of these three, Ms Vikukas, occupied a shed at the address. On the afternoon of 19 December 2016 police executed a search warrant on the property at a time when the appellant and a man called Beveridge were present. Police searched the house and shed. Inside the shed they found a device like a keg with a flame burning beneath it. The keg had hoses and other paraphernalia attached to it. Zip ties had been used to make connections between parts of the equipment. A gas cylinder provided the fuel for the flame. There was a chemical smell around this equipment. Nearby police found two buckets containing liquids and a container of caustic soda. There was a receipt from a hardware store dated the previous day and which recorded the purchase of some items used in the shed as part of the production process.

[2] In the kitchen police found an open bottle of hydrochloric acid, a wooden spoon, a plastic bowl, a spatula, a Pyrex jug and a device for testing the pH of liquids and the case that held it.

[3] Outside police found a barbecue cart that held a wok.

[4] The liquid contents of the keg had a pH level of 14 and contained traces of pseudoephedrine. A pH level of the order of 14 is required in such a liquid to extract pseudoephedrine as part of the process of distillation to produce methylamphetamine. Part of the equipment found in the shed was a condenser, which is used to distil a liquid. Both tripolodine and pseudoephedrine were found inside the condenser. The two buckets contained distillate of pseudoephedrine. Pseudoephedrine was detected on the bowl, the jug and the spoon. Pseudoephedrine and methylamphetamine were detected on the spatula. The wok showed traces of pseudoephedrine.

[5] Police located Beveridge's car nearby. A search revealed an empty box for the pH tester, a bag of zip ties of the kind used in the shed, a gas cylinder and several receipts recording the purchase of items commonly used in the production of the drug, namely acetone, methylated spirits and hydrochloric acid.

[6] Pseudoephedrine, caustic soda, hydrochloric acid and tripolodine are all substances used in the production of methylamphetamine. A device to test the pH of liquids is necessary for that process. The uncontroverted evidence at the trial was that when police entered the shed the equipment was actually being used as part of a process to produce methylamphetamine by producing the precursor pseudoephedrine.

[7] The appellant's fingerprints were found on the condenser, on one of the buckets in the shed and on the pH tester case in the kitchen.

[8] The appellant and Beveridge were charged on the same indictment with one count of producing a dangerous drug. A jury found them both guilty and the appellant now appeals against her conviction on the grounds that the verdict was unreasonable or that it cannot be supported by the evidence.[1]

[9] Section 8 of the *Drugs Misuse Act* 1986 (Qld) makes it an offence to unlawfully produce a dangerous drug. Section 4 defines "produce" to mean, relevantly, to manufacture or to produce, or to do any act preparatory to, in furtherance of or for the purpose of such manufacture or production.

[10] The appellant and Beveridge both gave evidence. Beveridge gave evidence first. The appellant had been away to attend a funeral in Melbourne. She returned home on the afternoon of Sunday, 18 December 2016. Beveridge said that he had been looking after the appellant's dog and had come to her home to return it. The appellant told him that some of her property had been taken from her shed. They both looked in the shed and saw equipment which Beveridge thought was a still to make alcohol. There was evidence from a prosecution witness that the device was of a kind that could be used for that purpose. The appellant told him that she had some alcohol flavourings. Beveridge noticed that the gas cylinder was empty. On the following day, Monday, he came back with a fresh cylinder and connected it and made the system function. He explained his purchases of acetone, hydrochloric acid and methylated spirits. He said that he used these substances in relation to boats that he owned.

[11] The appellant's evidence was that the shed was the place in which Ms Vikukas lived and its contents were her responsibility. A man named McDonald had been a regular visitor of hers. The appellant said that she had left for Melbourne to attend a funeral on Wednesday, 14 December 2016 and had returned home on the following Sunday after lunchtime. She noticed that her water tank was empty and that there was a hose running from it to the shed. The appellant and Beveridge saw the distilling equipment in the shed and she recognised the gas cylinder attached to the equipment as the one from her barbecue. Beveridge told her that it was an alcohol still. On the following day the appellant and Beveridge handled some of the equipment to make it work, thinking that they were handling an alcohol still. She said that neither the wok nor the pH meter were hers. She said that she had touched the pH meter case as she thought that she might use it to test the safety of the "stuff".

[12] The appellant's case was, therefore, that somebody else had erected the equipment and that she had merely discovered it and, believing that it was an alcohol still, had handled some of its components while trying to make it work as such, thereby leaving her fingerprints on some items. It was, therefore, common ground that the appellant had operated the equipment. The issue concerned her knowledge about the purpose of the equipment. Having rejected that the appellant was operating it in the belief that she was producing alcohol, it was a short step for the jury to conclude that the appellant was knowingly using the equipment for the purpose for which it was actually functioning, namely, to produce a dangerous drug.

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1 The appellant abandoned an application for leave to appeal against her sentence.

[13] Although the appellant appealed on the grounds that I have set out, her written submissions raised other grounds of challenge. She also sought leave to adduce further evidence. The respondent did not oppose the admission of that evidence and, accordingly, I will consider it as part of the appeal.

[14] It is convenient to deal first with the matters that the appellant has raised in her written outlines.[2] The appellant's first submission is that the warrant that was executed at her home had been obtained on the basis of false information. The appellant says that she, or her legal representatives, obtained a copy of the application for the warrant and the warrant itself on the first day of the trial. The application states that police were given information by an unidentified informant to the effect that there was equipment in the shed that was being used to make methylamphetamine. There was also information that directly implicated the appellant in the production of that drug. Otherwise, information already in the hands of police was said to show that the appellant had once been stopped while driving and a test that was then administered to her returned a positive result for methylamphetamine.

[15] The appellant asserts the following in her outline:

1. The informant was the man called McDonald, a man known adversely to police and who had a history of violence.
2. The information provided by McDonald was false and, in fact, the distilling equipment had been erected by McDonald himself during the appellant's absence in Melbourne.
3. Other information relied upon by police and which concerned the appellant was false.
4. The warrant was therefore invalid.
5. In any event, there was no warrant that authorised a search of the car.

[16] The short answer to these points is that the appellant's legal representatives at the trial knew the content of the application for the warrant. Indeed, the appellant's counsel asked some questions about the application in her cross-examination of one of the police officers. No objection was taken to the admissibility of any of the evidence that was obtained as a result of the execution of the warrant. Had objection been taken on the ground of illegal search, such an objection would certainly have been overruled. Nothing in the appellant's evidence tendered in the appeal would justify a conclusion that the warrant was invalid. She asserts that McDonald was the informant and that he had erected the equipment. A jury having necessarily concluded that she was involved in the operation of the still, an assertion that it belonged to McDonald is immaterial.

[17] Even if the warrant was invalid, it would not follow that the evidence would have been excluded for, in order to exclude evidence illegally obtained, a great deal more has to be shown than the illegality of the search itself. What has to be shown is something in the nature of wilful and knowing illegal acts by the authorities who obtained the evidence and also that the misbehaviour of these authorities was so serious that the need to bring to conviction a person who has committed an offence is outweighed by the public interest in protecting an individual from unlawful

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2 There were two outlines: a handwritten outline and a typewritten one.

treatment.[3] It is understandable why no objection was taken at the trial to the admission of the evidence; there was no basis upon which to take it. In any case, it has not been submitted that any of the new factual assertions were neither known at the trial nor reasonably capable of being known.

[18] As to the absence of a warrant to search the car, evidence was given at the trial that police had a warrant to search the car. That evidence was not challenged. In any case, even if police had no warrant to search the car and the search was unlawful, for the reasons given above, it would not follow that the evidence was inadmissible. The complaint, therefore, goes nowhere.

[19] The appellant submits that an expert who was called by the prosecutor, Mr Miller, could not give evidence about the quantity of drug that the equipment was capable of producing. The witness was an expert chemist and his expertise was not challenged. The subject of the evidence was plainly within his expertise.

[20] The appellant submits that Mr Miller failed to explain the absence of tripolodine on various items. She also points to various findings of his about the presence or absence of particular chemicals on or within items of equipment. The appellant submits also that her counsel did not ask Mr Miller any questions about the presence, and in some cases the absence, of chemicals and fingerprints. None of those matters are material. The Crown case was that the equipment was being used as part of the process to make methylamphetamine. Whether particular pieces of that equipment, such as spatulas and woks did or did not contain traces of particular chemicals in the way submitted does not affect that case.

[21] The appellant submits that the jury should have been discharged because two of the jurors had family members who had socialised with one of the defence witnesses. According to the appellant's written submission, this fact was known to her and to her lawyers at the trial. No point was taken and the panel of jurors had been given the usual warning by the learned trial judge before the jury was selected. This contention goes nowhere.

[22] As part of her tender of evidence on this appeal, the appellant put forward a certificate by a firm whose business it is to test premises for the presence of chemicals. According to the certificate, on 28 April 2017 the bedrooms and the kitchen at the appellant's former address exhibited what appear to be, in some cases, infinitesimally small amounts of methylamphetamine and pseudoephedrine and, in other cases, detectable amounts of methylamphetamine. The significance of these results has not been explained and the evidence goes nowhere.

[23] The appellant submits that the prosecutor asked leading questions and that, from time to time, she engaged in demonstrative behaviour such as rolling her eyes and other such acts. No objection was taken to any such behaviour at the trial. No objections were taken to any leading questions and none of these matters amount to anything that can give rise to a ground of appeal.

[24] The appellant contends that the learned trial judge erred in the directions that she gave about mistake of fact. However, she does not identify the error and her Honour's direction about s 24 of the *Criminal Code* (Qld) as modified by s 129(1)(d) of the *Drugs Misuse Act* 1986 (Qld) was unexceptional.

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3 *R v Ireland* (1970) 126 CLR 321, at 334-5 per Barwick CJ.

[25] The appellant makes some other complaints but their significance is impossible to understand and, accordingly, they must be put aside.[4]

[26] As to the appellant's grounds that the verdict of guilty was either unreasonable or that it could not be supported having regard to the evidence, a consideration of the evidence that was adduced, to which I have referred, demonstrates that there is nothing in this ground. There was ample evidence that implicated the appellant in the offence. Not only were the appellant's fingerprints on some of the equipment, which was in use when police arrived, but the jury had the appellant's own evidence that she and Beveridge were operating the equipment. It is true that the appellant said that her use of the equipment was done under a mistaken belief. The jury must have rejected that part of the evidence but it was still entitled to act upon the appellant's admission of use.

[27] That admission together with the other prosecution evidence proved the Crown case.

[28] For these reasons the appeal should be dismissed.

[29] **FRASER JA:** I agree with the reasons for judgment of Sofronoff P and the order proposed by his Honour.

[30] **MULLINS J:** I agree with the President.

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4 handwritten outline, at paras [7], [9], [10], [14]-[17]; typewritten outline, at paras [27]-[48], [50]-[60].