DISTRICT COURT OF QUEENSLAND

CITATION:	*R v Kirby* [2013] QDC 103
PARTIES:	**THE QUEEN**
	v
	SHAUN KENNETH KIRBY
FILE NO/S:	Indictment No 54 of 2013
DIVISION:	Criminal
PROCEEDING:	590AA Pre-Trial Hearing
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	9 May 2013
DELIVERED AT:	Brisbane
HEARING DATE:	8 May 2013
JUDGE:	Rackemann DCJ
ORDER:	**Application dismissed**
CATCHWORDS:	CRIMINAL LAW – Record of interview – Whether non-compliance with s 418 or s 420 of PPRA – Discretion
COUNSEL:	Merrin, B for the Crown
	Noud, J for the defendant
SOLICITORS:	ATSILS for the defendant

[1] The applicant/defendant is one of three co-accused on a charge of armed robbery in company. The evidence against him includes a confession in an electronic record of interview conducted on 29 September 2012. By this application he seeks to exclude that record of interview from any trial.

[2] The application is made on the basis that:

1. The police did not comply with ss 418 or 420 of the *Police Powers and Responsibilities Act (Qld)* 2000 (PPRA); and
2. As a consequence the record of interview should be excluded in the exercise of judicial discretion.

[3] Section 418 of the PPRA provides, relevantly, as follows:

> "**418 Right to communicate with friend, relative or lawyer**
>
> (1) Before a police officer starts to question a relevant person for an indictable offence, the police officer must inform the person he or she may—
>
> (a) telephone or speak to a friend or relative to inform the person of his or her whereabouts and ask the person to be present during questioning; and
>
> (b) telephone or speak to a lawyer of the person's choice and arrange, or attempt to arrange, for the lawyer to be present during the questioning.
>
> (2) The police officer must delay the questioning for a reasonable time to allow the person to telephone or speak to a person mentioned in subsection (1).
>
> (3) If the person arranges for someone to be present, the police officer must delay the questioning for a reasonable time to allow the other person to arrive."

The words used in informing the person of their rights must substantially comply with what is set out in s 34 of the Regulation.

[4] The complaint relates to the failure to delay the interview to allow the applicant/defendant to speak to a lawyer and/or arrange or attempt to arrange for a lawyer to be present during the questioning. The police officer gave evidence that he did not do so because, after "rather a lot of debate between himself and his mother", the applicant/defendant decided to continue with the interview without speaking with a lawyer or arranging for one to be present.

[5] It is evident, from the record of interview, that the applicant/defendant was advised of his rights under s 418. He was advised of his rights under s 418(1)(a) and, indeed, had his mother, Ms Veivers, present. Insofar as his right to communicate with a lawyer is concerned, the following conversation ensued:

> "SNR CONST McCORMACK: … also you have the right to telephone or speak to a solicitor of your choice.
>
> KIRBY: Yeah.
>
> SNR CONST McCORMACK: Okay, to inform that solicitor of where you are and arrange or attempt to arrange for that solicitor to be present during questioning.

> KIRBY: Yep.
>
> SNR CONST McCORMACK: Okay. Well, if you want to telephone or speak to any of these people, questioning can be delayed for a reasonable time for that purpose. Okay, is there anyone that you wish to telephone or speak to?"

[6] The applicant/defendant ultimately chose to continue with the interview without speaking to a lawyer and without a lawyer being present. In that regard, the following discussion ensued:

> "KIRBY: … well, I'm standing here, we'll do it, we'll do the interview now.
>
> SNR CONST McCORMACK: Okay, so you're happy to—
>
> KIRBY: Yep—
>
> SNR CONST McCORMACK: Do the interview without a solicitor present.
>
> KIRBY: Yep.
>
> SNR CONST McCORMACK: Okay, yeah, I just can't, I can't influence you in any way that's all—
>
> KIRBY: Yeah, yeah, I know. I'm just trying to figure out what like, it doesn't really matter either way, you know, you know what I mean, as far as I can see, I think, I don't know too much about it.
>
> SNR CONST McCORMACK: Okay, so you're happy to continue?
>
> KIRBY: Yeah, we'll continue—
>
> SNR CONST McCORMACK: Okay.
>
> KIRBY: I can end it whenever I want, can't I?
>
> SNR CONST McCORMACK: You can if you want—
>
> KIRBY: Yeah, sweet."

[7] In the period between when he was advised of his rights, under s 418, and when he chose to continue with the interview, there were a series of discussions between the applicant/defendant, the police officer and the applicant/defendant's mother. It was submitted, on behalf of the applicant/defendant, that in the course of those discussions he had indicated that he wanted a lawyer and that the interview should

have been delayed at that point. It should not have progressed to the point where the applicant/defendant ultimately agreed to continue without one.

[8] It is not suggested that the admissions which followed were made involuntarily. Rather, it was submitted that had he spoken to a lawyer, the applicant/defendant might have made a different decision as to whether to proceed.

[9] It was submitted on behalf of the respondent, that the preceding discussions did not reveal a decision to involve a lawyer. They simply evidenced the applicant/defendant weighing up whether to exercise his right to telephone or speak to a lawyer or to arrange for a lawyer to be present or to continue without one.

[10] The relevant parts of the record of interview, in this regard, are set out at pages 5 and 6 of the transcript. I found it helpful to view the DVD recording, rather than simply rely upon the transcript.

[11] Immediately after being informed of his rights under s 418, the applicant/defendant looked towards his mother who nodded and gestured in a way which suggested that she wanted him to tell the police officer that he did want to speak to a lawyer. The applicant/defendant then responded to the police officer as follows:

> "Um, yeah but ah, oh um, what's the, what's the process in there with that, because I've got a lawyer."

He added:

> "Oh well I can get a lawyer."

[12] Counsel for the applicant/defendant submitted that, by responding in those terms, the applicant/defendant should be interpreted to have made a decision to exercise his right. That is said to follow from the fact that he is asking about the process by which he could exercise that right. The former however, does not necessarily follow from the latter. The applicant/defendant may well have simply been seeking information about the process before making a decision as to whether to exercise his right. That is how the police officer interpreted it.

[13] The applicant/defendant then went on to say:

> "Um, what's that, what's the process, like what's going to happen if I want to do that, we don't interview now?"

The question as to what the process would be "if I want to do that" suggests that he had yet to make a decision as to whether or not to exercise his rights.

[14] In response to that question, he was informed, by the police officer, that he could speak to a solicitor and that arrangements could be made for him to speak with one at that stage. The applicant/defendant indicated a concern that it be a conversation with his own solicitor and was told:

> "Ah we can, we can attempt to call them for you, yeah."

[15] The applicant then said:

> "But I don't have his number. I want to get someone in here, um."

[16] At that point he turned to face his mother and had the following conversation with her:

> "KIRBY: … well just, it doesn't matter, because he doesn't need to be here now.
>
> VEIVERS: No, but you, just don't do anything until I speak to him.
>
> KIRBY: No, because he's still got to be, it would still be the same, um, it's still going to be the same."

[17] That discussion is indicative of the continuing encouragement of his support person, for him to exercise the rights of which he had been informed, but his continuing indecision as to whether to do so.

[18] The applicant/defendant then had a conversation with the police officer about whether he would go to court until such time as the questioning had been done. After that discussion the police officer said:

> "SNR CONST McCORMACK: It's, it's up to you, it's up to you, if you want a solicitor here and speak to him before you're questioned you can. If you want to do this interview without speaking to a solicitor that's fine as well, it's up to you, it's just your right um to speak to a solicitor.
>
> KIRBY: Well—

> SNR CONST McCORMACK: Beforehand, um, we can't influence in any way."

[19] The applicant/defendant then asked the police officer whether he thought it would be better for him to have a solicitor and the police officer repeated that he could not influence the applicant/defendant in any way. After some further discussion the applicant/defendant again turned to his mother and had the following conversation:

> "KIRBY: … I'd probably just do the interview, when you get, you can get hold of him[1] and whatnot, yeah? Huh?
>
> VEIVERS: No I don't think so.
>
> KIRBY: You don't think so.
>
> VEIVERS: Mmhmm.
>
> KIRBY: Well when are you going to be able to get a hold of him?
>
> VEIVERS: I'll go straight down and talk."

[20] That passage is consistent with the observation already made that his support person seemed to be in favour of him not proceeding until he spoke to his solicitor.

[21] At the end of that discussion the applicant/defendant initially said, "All right, yeah, we'll just do that then."[2] This suggests that he was about to follow his mother's suggestion. He then paused however and put his head in his hands before sitting upright again before saying, "… well I'm standing here, we'll do it, we'll do the interview now." The conversation previously extracted in these reasons then ensues and he proceeds with the interview without speaking with a solicitor.

[22] Having viewed the DVD, I am satisfied that:

1. The applicant/defendant's initial query about the process was not indicative of a decision to exercise his right to speak to a solicitor or to have a solicitor present;
2. What followed was a somewhat elongated consideration by the applicant/defendant as to whether to exercise his rights; and

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1 The transcript records [indistinct] rather than "a hold of him"

2 The transcript, which reads "All right, yeah we'll see what happened" is in error.

3. The applicant/defendant's decision was only made when he indicated that he was prepared to proceed without a solicitor.

[23] It might well be that the decision made by the applicant/defendant, apparently contrary to the urgings of his mother, was unfortunate for him, but the police officer had no obligation to ensure that the applicant/defendant made the wisest decision. His duty was to inform the applicant/defendant of his rights (which he did) and to delay the questioning for a reasonable time if the applicant/defendant chose to exercise those rights (which the applicant/defendant did not). The breach of s 418 has not been made out.

[24] Section 420 of the PPRA relates to the questioning of Aboriginal people and Torres Strait Islanders. It provides, relevantly, as follows:

> "**420 Questioning of Aboriginal people and Torres Strait Islanders**
>
> (1) This section applies if—
> (a) a police officer wants to question a relevant person; and
> (b) the police officer reasonably suspects the person is an adult Aborigine or Torres Strait Islander.
>
> (2) Unless the police officer is aware that the person has arranged for a lawyer to be present during questioning, the police officer must—
> (a) inform the person that a representative of a legal aid organisation will be notified that the person is in custody for the offence; and
> (b) as soon as reasonably practicable, notify or attempt to notify a representative of the organisation.
>
> (3) Subsection (2) does not apply if, having regard to the person's level of education and understanding, a police officer reasonably suspects the person is not at a disadvantage in comparison with members of the Australian community generally."

[25] The applicant/defendant informed the police officer that he was of Aboriginal descent. The police officer did not do the things referred to in s 420(2). The question is whether, having regard to the applicant/defendant's level of education and understanding, the police officer reasonably suspected that the

applicant/defendant was not at a disadvantage in comparison with members of the Australian community generally.

[26] The police officer gave evidence to the effect that he did not believe the applicant/defendant was at such a disadvantage. The question is not whether the applicant/defendant was indeed at such a disadvantage, but whether the police officer had a reasonable suspicion that he was not relevantly disadvantaged.

[27] The applicant/defendant does not have an appearance which immediately identifies him as being of Aboriginal or Torres Strait Islander descent and he was not aware of his Aboriginal descent until relatively shortly before the interview. When asked whether he considered himself to be of Aboriginal or Torres Strait Islander descent he said:

> "Oh no I wasn't, I didn't know that I was, but apparently I am."

He went on to say that he found out about two months ago, through family, that he was of that descent.

Since he had previously been unaware of that descent, it may reasonably be suspected that he was not subject to some of the cultural traits, such as suggestibility and a tendency to concurrence, which marks some members of the Aboriginal or Torres Strait Islander community. The way that he answered questions suggests that he did not suffer from that relative disadvantage.

[28] The police officer questioned the applicant/defendant about his level of education and understanding. He established that he had gone to year 10 at school, but not obtained a leaving certificate. He also established that he could read and write english and was able to read a newspaper. He described the applicant/defendant as "a person that you would converse with quite easily". His interaction with the applicant/defendant earlier in the day (when he arrested him) and at the interview led him to conclude that the applicant/defendant understood what was happening, the warnings he was given and the questions he was being asked and had the intelligence to do so.

[29] While it was submitted, on the behalf of the applicant/defendant, that the police officer could have done more, I am satisfied that he had done enough to have a reasonable basis for suspecting that the applicant/defendant was not at a disadvantage in comparison with members of the Australian community generally. The applicant/defendant has not made out a breach of s 420 of the PPRA.

[30] My conclusions mean that it is unnecessary to consider the issue as to whether I would have exercised my discretion to exclude the evidence in the event that there had been non-compliance. As the prosecution pointed out however, there are a number of considerations which would have weighed in favour of admitting the record of interview in any event. In that regard:

- Any unlawfulness was not the result of a deliberate breach or misuse of power. At worst it would have been a misinterpretation of what the applicant/defendant was saying (in the case of s 418) or a misjudgement (in the case of s 420).

- There is no suggestion that the applicant/defendant was not fully aware of his right to silence

- There is no suggestion that the confession to police was involuntary.

- The evidence obtained from the interview is cogent. It was electronically recorded and it was given in a free narrative by him.

[31] The application is dismissed.