SUPREME COURT OF QUEENSLAND

CITATION:	*R v Day & Anor* [2008] QSC 358
PARTIES:	**R** (respondent) **v** **TERRANCE MICHAEL DAY and CRAIG CAMPBELL DAVIS** (applicants/defendants)
FILE NO/S:	SC No 210 of 2008
DIVISION:	Trial Division
PROCEEDING:	590AA Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	20 August 2008
DELIVERED AT:	Brisbane
HEARING DATE:	15 August 2008
JUDGE:	A Lyons J
ORDER:	**The evidence obtained against the applicants in the search of Unit 2, 31 Teemangum Street, Currumbin Beach on 24 February 2007 is to be excluded.**
COUNSEL:	M Aylward for the respondent Crown S Lewis for the applicant/defendant Davis A J Kimmins for the applicant/defendant Day
SOLICITORS:	Director of Public Prosecutions (Qld) for the respondent Crown Ryan & Bosscher for the applicant/defendant Davis Price & Roobottom for the applicant/defendant Day

[1] **LYONS J:** This is an application pursuant to s 590AA of the *Criminal Code* 1899 (Qld) for an order excluding, from the trial of the accused, evidence of a search and seizure of drugs obtained at a unit complex at Teemangum Street, Currumbin on 24 February 2007. The basis of the application is that a search warrant was not issued pursuant to s 150 of the *Police Powers and Responsibilities Act* 2000 ("the Act").

The charges

[2] The applicants are currently both charged on a five Count indictment that:

(1) On 23 February 2007 they both had possession of the dangerous drug cannabis sativa;

(2) On 24 February 2007 they both had possession of cocaine in a quantity in excess of 200 grams;

(3) On 24 February 2007 they both had possession of the drug 3, 4 MDMA;

(4) On 24 February 2007 they both possessed a sum of money obtained from supplying a dangerous drug; and

(5) On 24 February 2007 they both had in their possession a quantity of mobile telephones, clip seal bags, a set of scales for use in connection with the supplying of dangerous drugs.

The facts

[3] On Thursday 22 February 2007, the applicants, Terrance Michael Day and his co-accused, Craig Campbell Davis, arrived at a unit complex at Currumbin and were allocated unit number 23. The following day, Friday 23 February, they were relocated to unit number 2. Whilst cleaning unit number 23 later that morning the manager found a bag containing approximately 29 grams of cannabis, an extendable baton, a black bag containing a gold pipe and a small set of electronic scales. These items were taken to the Palm Beach Police Station at 2.30 pm on 23 February 2007.

[4] At approximately 2.55 pm on that date, two police officers attended at the units and spoke with the manager and then knocked on the door of unit 2 several times. There was no one in attendance and the police left. At approximately 5.40 pm on the same day police again attended at the units and spoke with the manager and, once again, they knocked on the door of unit 2 but there was no reply. The manager opened the front door of the unit with his key and the police officers called out through the door but did not enter. As there was no reply the police left.

[5] At 9.10 am on the following day, Saturday 24 February 2007, constables Alley and Collins attended at the unit and the manager advised them that he believed that the applicants were in the unit and that their car was still in the complex. The police were provided with a key by the manager.

[6] Constable Alley states that he knocked on the door and no one came to the door. However, he observed puddles of water, similar to footprints, on the floor inside leading to the rear glass sliding door, which was open and he observed that a curtain was blowing in the breeze. He stated that he thought the suspects were fleeing and he immediately opened the front door using the key and went inside. However, the glass mesh door at the back was locked from the inside so no one could have been fleeing out that door. Constable Alley indicated that as he thought the suspects may still have been in the unit he commenced a search, entering the main bedroom of the unit as well as the walk-in robes. In the walk-in robe in the main bedroom he located several items, including a clear bag containing a white powdery substance in an open backpack, as well as money and a money counter. Constable Alley contacted the Criminal Investigation Branch ("CIB") and as a result Detectives Buchanan and Harriss arrived at approximately 9.50 am. However, prior to their arrival he conducted a further search during which he found a yellow bag next to the

backpack containing a number of empty clip seal plastic bags, a laptop computer bag with cash tied up in bundles, a pencil case, as well as Davis's NSW drivers licence in the main bedroom. He also located two mobile phones and a digital camera on the bedside table. In the other room he found three mobile phones and paperwork addressed to Day. At the hearing Constable Alley indicated[1] that the purpose of his search was to "try and locate more drugs" and that he actually physically searched through the yellow bag and that he looked though the pencil case. At the hearing Constable Alley accepted that at the committal hearing in July 2007 he had been unable to give a reason as to why he had not obtained the warrant. When the CIB arrived Constable Alley indicated to them what he had found.

[7] When Davis and Day arrived at the unit at 10.00 am they were interviewed by CIB and an extensive search subsequently located:

- 469.699 grams of cocaine with a pure weight of 140.992 grams and a purity of between 28 per cent and 32 per cent;
- 18 MDMA tablets;
- $10,955 cash;
- six mobile phones;
- one laptop;
- an electronic money counter;
- smoking utensils; and
- a 2006 Ford vehicle.

[8] Two post-search approval orders were obtained on 26 February 2007 and 6 March 2007. The first order was obtained pursuant to an application by Detective Buchanan and the second pursuant to an application by Detective Harriss.

[9] The basis of this application is that the search of the unit was illegal because the provisions of the Act were not followed. The applicants also submit that there was no reason for the police to search the unit without a warrant.

The law

[10] It is not disputed that the police did not apply for a warrant pursuant to s 150 of the Act which requires that the application must be sworn, and s 151 which requires that the issuer of the warrant must be satisfied there are reasonable grounds for suspecting evidence of the commission of an offence or confiscation related evidence is either at the place or is likely to be taken to the place within 72 hours.

[11] Section 150 of the Act states that:

> "…
> (1) A police officer may apply for a warrant to enter and search a place (a *search warrant*)—
> (a) to obtain evidence of the commission of an offence; or
> (b) to obtain evidence that may be confiscation related evidence in relation to a confiscation related activity; or
> (c) to find a vehicle that is or is to be impounded under chapter 4 or 22.

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1 Transcript of Proceedings, p 30.

(2) The application may be made to any justice, unless the application must be made to a magistrate or Supreme Court judge under subsection (3) or (4).

(3) Unless the application must be made to a Supreme Court judge under subsection (4), the application must be made to a magistrate if the thing to be sought under the proposed warrant is—

(a) evidence of the commission of an offence only because—

(i) it is a thing that may be liable to forfeiture or is forfeited; or

(ii) it may be used in evidence for a forfeiture proceeding; or

(iii) it is a property-tracking document; or

(b) evidence of the commission of an indictable offence committed in another State that, if it were committed in Queensland, would be an indictable offence in Queensland; or

(c) confiscation related evidence.

Example for paragraph (a)(ii)—

The search may be for evidence for which an application for a restraining order may be made under chapter 2 or chapter 3 of the Confiscation Act.

(4) The application must be made to a Supreme Court judge if, when entering and searching the place, it is intended to do anything that may cause structural damage to a building.

(5) An application under this section must—

(a) be sworn and state the grounds on which the warrant is sought; and

(b) include information required under the responsibilities code about any search warrants issued within the previous year in relation to—

(i) the place or a person suspected of being involved in the commission of the offence or suspected offence to which the application relates; or

(ii) the confiscation related activity to which the application relates.

(6) Subsection (5)(b) applies only to—

(a) information kept in a register that the police officer may inspect; and

(b) information the officer otherwise actually knows.

(7) The justice, magistrate or judge (the *issuer*) may refuse to consider the application until the police officer gives the issuer all the information the issuer requires about the application in the way the issuer requires.

Example—

The issuer may require additional information supporting the application to be given by statutory declaration. s 151 167 s 154 *Police Powers and Responsibilities Act 2000.*"

[12] Further, s 151 of the Act states that:

"…

> The issuer may issue a search warrant only if satisfied there are reasonable grounds for suspecting evidence of the commission of an offence or confiscation related evidence—
>
> (a) is at the place; or
> (b) is likely to be taken to the place within the next 72 hours."

[13] In *George v Rockett*[2] the High Court of Australia stated:

> "It needs to be kept in mind that they authorize the invasion of interests which the common law has always valued highly and which, through the writ of trespass, it went to great lengths to protect. Against that background, the enactment of conditions which must be fulfilled before a search warrant can be lawfully issued and executed is to be seen as a reflection of the legislator's concern to give a measure of protection to these interests. To insist on strict compliance with the statutory conditions governing the issue of search warrants is simply to give effect to the purpose of the legislation."

[14] The Court further stated:[3]

> "When a statute prescribes that there must be 'reasonable grounds' for a state of mind - including suspicion and belief - it requires the existence of facts which are sufficient to induce that state of mind in a reasonable person."

[15] It is clear that current authorities such as *R v Christensen*[4] support strict adherence to the legislation. As Holmes J stated in that case:

> "The importance of strict adherence to statutory requirements in the context of search warrants has repeatedly been emphasised. This was not some mere technical defect in the warrant; the entire basis on which it was sought and issued was misconceived and wrong. The offences, if made out, are undoubtedly serious. Assuming that the tablets seized are proved to be ecstasy, a large quantity is involved. However, the purported use of a power which entailed the invasion of the privacy of citizens to such an extent, with so little regard for what was actually permitted by the statutory provisions, is an error of such proportions as to tilt the balance of public interest against the receipt of evidence so obtained."

[16] The importance of adhering to the statutory requirements was recently referred to in the High Court decision of *New South Wales v Corbett*[5] where it was held:

> "Obviously each statutory requirement or condition needs to be construed on its own terms and by reference to the statute in which it is to be found. However, common requirements for "reasonable grounds for believing" (or suspecting) imposed on an applicant (as here under s 5(1)(b)), or upon an issuing justice (as in *Rockett* or

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2 (1990) 170 CLR 104, 110-111.
3 (1990) 170 CLR 104, 112.
4 [2005] QSC 279, [12].
5 2007 172 A Crim R 555.

Beneficial Finance) have a common derivation. The concern of the common law courts to avoid general warrants and to strictly confine any exception to the principle that a person's home was inviolable is the original source of common, although differently expressed, statutory requirements. These requirements have as their purpose the proper identification of the object of a search by reference to a particular offence. This in turn limits the scope of the search authorised by the search warrant. As stated in the judgment of this Court in *Rockett*:

> [T]he description of the object of the search is a reference point for delimiting the scope of the warrant…[T]he requirement of "reasonable grounds for believing"…performs the important function of preventing the authority to search and seize which a warrant confers from being worded in unjustifiably wide terms.

Section 5(1)(b) should be construed by reference to the principle that the applicant is required to state reasonable grounds for believing in a particular offence so as to ensure that the issuing justice knows the specific object of the search warrant and accordingly limits its scope. Strict compliance, in the sense described in *Rockett*, is achieved when that purpose is fulfilled."

[17] There is also a further provision in the Act which relates to the search of places to prevent the loss of evidence. Section 160 provides:

"**160 Search to prevent loss of evidence**

(1) This section applies if a police officer reasonably suspects—
   (a) a thing at or about a place, or in the possession of a person at or about a place is evidence of the commission of a part 2 offence; and
   (b) the evidence may be concealed or destroyed unless the place is immediately entered and searched.

(2) This section also applies if a police officer reasonably suspects a part 2 offence has been, is being, or may be committed in, on or in relation to a transport vehicle and involves the safety of the vehicle or anyone who may be in or on it.

(3) A police officer may enter the place and exercise search warrant powers, other than power to do something that may cause structural damage to a building, at the place as if they were conferred under a search warrant."

[18] Accordingly, s 160 allows a police officer to exercise search warrant powers without a search warrant if the police officer "…reasonably suspects that the evidence may be concealed or destroyed unless the place is immediately entered and searched".

[19] In order for there to have been a lawful search it must have been conducted in accordance with the relevant provisions in the Act. It is clear that a search warrant may be issued only if there are reasonable grounds for suspecting evidence of the commission of an offence or confiscation related evidence is at a place or is likely to be taken to the place within the next 72 hours. Such a warrant did not issue.

[20] It would appear that the Crown is, therefore, relying on the provisions of s 160 and s 161 of the Act to argue that the search was not unlawful. The basis of this would appear to be that the police had attempted to attend on three separate occasions in order to arrest and question the occupants. It was also believed that the occupants were deliberately evading police and that the occupants were attempting to flee because a billowing curtain was observed as well as wet prints on the floor. The Crown submits that this was sufficient evidence for the police to enter to try and find the elusive occupants who they were seeking to arrest in relation to the possession of a personal quantity amount of marijuana, a baton and a utensil. The Crown submits that the entry was reasonable.

[21] The Crown also submits that as it was reasonable that Alley entered the room and because the white powder and the money counter were in plain sight, clearly Alley believed that there were things in the room that constituted evidence of offences under the *Drugs Misuse Act* 1986 (Qld). The Crown also submits that if police left the premises and the occupants returned, then there was a risk that the evidence would be lost. The occupants did return a short time later whilst police were still in attendance.

[22] In any event the Crown submits that a post-search approval warrant was obtained the next business day.

[23] The question to be determined is whether the search was in accordance with the provisions of the Act. Whilst the Crown submitted that the manager of the units, Brian Stephens, was in possession and control of the units and, as such, a search warrant was not required, no authority has been provided for this submission. It would seem clear that, on the basis of *R v Halloran*,[6] both applicants were the occupiers of the unit and were in possession and control of the unit at the time of the search.

Was the search lawful?

[24] I do not consider that there is any evidence to support the Crown's submission that the circumstances were such that it was necessary to search the premises without the requisite warrant. The police had ample time to obtain a warrant and a warrant could have been obtained by the CIB whilst Constables Alley and Collins secured the scene. There was ample time to both obtain the warrant and secure the scene, particularly as it was then clear that there were no suspects in attendance who could destroy or conceal potential evidence. The officers satisfied themselves that there was no one present in the unit.[7] Furthermore given there were two armed police officers in attendance the two known occupants could have been easily prevented from re-entering the unit.

[25] The evidence of Constable Alley at the hearing was that he did not consider it "practical" to get the warrant.[8] I do not consider there is evidence to support the proposition that Constable Alley reasonably suspected that evidence could be concealed or destroyed unless he immediately entered the unit. The Crown does not refer to any evidence that there was a risk of concealment or destruction. At the hearing Constable Alley agreed that "…there was no possibility of another offence

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6 [1967] QWN 34.

7 Transcript of Proceedings, p 28, l 32.

8 Transcript of Proceedings, p 21, l 41.

being committed in the unit" whilst he was in attendance and that "…[t]here was no possibility of evidence being tampered with or destroyed or removed or anything of that nature."[9]

[26] The Crown does not refer to any evidence as to why the provisions of the Act could not have been complied with. In particular, the option of a telephone warrant was not explored.[10] Furthermore, the police in attendance failed to even consider or attempt to obtain a search warrant by alternative methods, as discussed in *R v Koning*,[11] and the time required for doing so did not put at risk the evidence in the unit.

[27] The Crown also submits that the fact that there were post-search approvals obtained pursuant to s 161 corrects any illegality. However, I note s 161 provides as follows:

> "**161 Post-search approval**
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> (1) As soon as reasonably practicable after exercising powers under section 160, the police officer must apply to a magistrate in writing for an order approving the search (***post-search approval order***).
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> (2) The application must be sworn and state the grounds on which it is sought.
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> (3) The applicant need not appear at the consideration of the application, unless the magistrate otherwise requires.
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> (4) The magistrate may refuse to consider the application until the police officer gives the magistrate all the information the magistrate requires about the application in the way the magistrate requires."

[28] Section 161, therefore, explicitly provides that it is the police officer who has exercised the powers under s 160 who must apply for the order approving the search he had conducted pursuant to the belief he held in accordance with the section. The Post-search Approval Order dated 26 February 2007 is Exhibit 9 in this application. The Order indicates that the applicant was Detective Mark Buchanan, however, there is no application in support of that application in evidence. There are alternate grounds for granting such an application. The Order on the face of it, however, does not indicate which ground the Magistrate has relied upon in making the Order. Furthermore, it is not clear that such an Order has been made because the Magistrate needed to indicate that he either refused to make the Order or he made an Order "…that the police officer retain the thing seized." Neither option was ticked on the form and it is therefore not clear whether the Magistrate did or did not make the Order. Clearly, such an Order cannot be relied upon to correct the unlawful search.

[29] There is a further Post-search Approval Order in evidence as Exhibit 10 and this Order was made on 6 March 2007. That Order indicates that the basis of the Order is the sworn application by Detective Michael Harriss and that the Magistrate has granted the Post-search Approval Order on the basis that the police officer, before

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9 Transcript of Proceedings, p 30, ll 7-10.

10 See also *Wright v Queensland Police Service* [2002] QSC 046.

11 [2001] QSC 131.

exercising the powers under the Act, had a reasonable suspicion for exercising those powers and there was a reasonable likelihood that the evidence could be concealed or destroyed. It would appear that Detective Harriss, in a sworn application, satisfied the Magistrate as to his reasonable suspicion about evidence being destroyed. However, this Order approving his search cannot excuse the search of Constable Alley which occurred prior to the attendance of Detective Harriss who did not arrive until 9.50 am. Furthermore, s 161 requires that "…[a]s soon as reasonably practicable…the police officer must apply…" for the Order. Clearly, an application which is made ten days after the search cannot be said to be as soon as reasonably practicable.

[30] I do not consider that the post-approval search Orders dated 26 February 2007 and 6 March 2007 validate the unlawful search.

The exercise of the discretion

[31] I consider that the search was unlawful. The second question that then arises is whether the evidence obtained in the unlawful search should be excluded in an exercise of the court's discretion.

[32] There is discretion to exclude the evidence which stems from both the common law and statute law. Section 130 of the *Evidence Act* 1977 (Qld) states:

> "**130 Rejection of evidence in criminal proceedings**
> Nothing in this Act derogates from the power of the court in a criminal proceeding to exclude evidence if the court is satisfied that it would be unfair to the person charged to admit that evidence."

[33] The question in this particular application is whether the evidence obtained as a result of the search should be excluded because there was no search warrant. The principles involved in a consideration of the discretion were outlined in *R v Ireland*[12] and *Bunning v Cross*,[13] where it was held that, even if the evidence was obtained unlawfully, it is not for that reason alone inadmissible and that, in the exercise of the discretion, competing public interests must be weighed against each other. One such interest was the protection of the individual from the unlawful and unfair treatment. The competing public interests are often summarised in the following terms:[14]

> "…the desirable goal of bringing to conviction the wrongdoer and the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law."

[34] There are five factors involved in a consideration of the discretion to exclude the evidence and they were outlined in *Bunning v Cross*[15] and can be summarised as follows:

1. Whether the unlawfulness was a deliberate or reckless disregard of the law;
2. Where the illegality was a result of a mistake;
3. The cogency of the contested evidence;
4. How easy would it have been to comply with the law;

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12 (1970) 126 CLR 321.
13 (1978) 141 CLR 54.
14 *Bunning v Cross* (1978) 141 CLR 54, 74.
15 (1978) 141 CLR 54.

5. The nature of the offence; and
6. The relevant legislation.

Conclusion

[35] It is clear that there was no emergency pertaining to this search. The fact that two other police units had attended and left when they could not gain entry indicates that there was no emergency. The constables in attendance on 24 February were attending 24 hours after the initial items had been located. The police were in attendance in relation to the discovery of a small quantity of cannabis and items used in relation to the ingestion of it. There is no suggestion that there was not ample time for police to obtain a search warrant.

[36] In the circumstances of this case, the law could easily have been complied with. It would not have been difficult to have produced a valid search warrant.

[37] There can be no question of a mistake, in the present circumstances it was most likely a case of reckless disregard for the law.

[38] The offences are serious ones, but I do not consider that for that reason alone the conduct should be excused. As Barwick CJ stated in *Re Ireland*:[16]

> "Evidence of relevant facts or things ascertained or procured by means of unlawful or unfair acts is not, for that reason alone, inadmissible. …On the other hand evidence of facts or things so ascertained or procured is not necessarily to be admitted, ignoring the unlawful or unfair quality of the acts by which the facts sought to be evidenced were ascertained or procured. Whenever such unlawfulness or unfairness appears, the judge has a discretion to reject the evidence. He must consider its exercise. In the exercise of it, the competing public requirements must be considered and weighed against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand there is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion."

[39] Having weighed up the factors I am required to consider I am satisfied that in the present case the important public interest in the protection of the individual from unfair treatment should prevail because to do otherwise could give encouragement to flaunt the law to those officers whose task it is to uphold the law. Accordingly the evidence obtained against the applicants in the search of Unit 2, 31 Teemangum Street, Currumbin Beach on 24 February 2007, is excluded.

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16 (1970) 126 CLR 321 at 334-335.