+SUPREME COURT OF QUEENSLAND

CITATION:	*R v Bossley* [2012] QSC 292
PARTIES:	**THE QUEEN** **v** **VICTOR BURDEKIN BOSSLEY** (applicant)
FILE NO/S:	SUP 471/12
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	27 September 2012
DELIVERED AT:	Brisbane
HEARING DATE:	24 July 2012
JUDGE:	Dalton J
ORDER:	**Application dismissed**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – EVIDENCE UNFAIR TO ADMIT OR IMPROPERLY OBTAINED – application pursuant to s 590AA of the *Criminal Code* to exclude evidence of a search – where the defendant is charged with trafficking and possessing MDMA – whether the search of the defendant was conducted with lawful authority – whether the police officers had reasonable grounds for suspicion pursuant to s 29 of the PPRA – whether the defendant consented to the search – the effect of consent on the legality of a search – whether the consent given was true consent – when the defendant should have been warned *Police Powers and Responsibilities Act* 2000 (Qld) *Bain v Police* [2011] SASC 228 *Bunning v Cross* (1978) 141 CLR 54 *Coco v R* (1994) 179 CLR 427 *Director of Public Prosecutions v Leonard* [2001] NSWSC 797 *George v Rockett* (1990) 170 CLR 104 *Ghani v Jones* [1970] 1 QB 693 *Halliday v Nevill & Anor* (1984) 155 CLR 1 *Kaldon Karout v Constable Mathew Stratton* [2007] NSWSC 1034 *Kuru v State of New South Wales* (2008) 236 CLR 1 *Malone v Metropolitan Police Commissioner* [1979] Ch 344

Pearce v Button (1986) 60 ALR 537
Police v Moukachar [2010] SASC 199
R v Azar (1991) 56 A Crim R 414
R v Rondo [2001] NSWCCA 540
Werner v Police High Court of New Zealand, Gallen J, 16 April 1986, unreported
Wineberg v Stafford White J, Supreme Court of Western Australia, 22 July 1997, BC 9703190

COUNSEL: Mr C Heaton for the applicant
Mr K Spinaze for the Crown

SOLICITORS: Mulcahy Ryan Lawyers for the applicant
Director of Public Prosecutions (Qld) for the Crown

[1] Mr Bossley faces two counts on indictment: trafficking and possessing a Schedule 1 drug, MDMA. This application is made under s 590AA of the *Criminal Code* to exclude certain evidence from his trial.

[2] On 1 October 2011 Mr Bossley, a man in his early 20s, was planning to attend a music festival in the botanic gardens in Brisbane. He travelled to Brisbane with his girlfriend and another friend, and met his younger sister and some of her friends in Brisbane at about 11.00 am on the morning of the festival. Mr Bossley is tall and lean, with an alert and enthusiastic appearance. His girlfriend described him as someone who fidgets a lot, and one of his other friends said he has trouble standing still in one spot. He was no doubt excited to go to the festival and pleased to see his younger sister when they met in Mary Street before the festival.

[3] Mr Bossley was observed by Detective Senior Constable Caulfield just as he was meeting his younger sister. DSC Caulfield was one of about 20 police in plain clothes tasked to detect people in possession of illicit drugs in the crowd at the music festival. On seeing Mr Bossley his thoughts were:

> "He appeared to be very excited, hyperactive almost. As in my statement, he sort of was quite talkative compared to other people. Seemed to have no sort of real inhibitions in acting--" – t1-8.
>
> "Well he was talking excitedly. There was females running up and approaching him that I thought were a bit younger than him, and just my overall impression was that that was slightly out of the ordinary for that particular morning, so my attention was drawn to him." – t 1-8.
>
> "He may have been in possession of dangerous drugs and possibly taken drugs himself … so I approached him and identified myself and asked him if he in fact had any drugs on him." – t1-8.

[4] DSC Caulfield said he noticed that Mr Bossley was carrying a bum-bag which he thought was a bit out of the ordinary and indicated to him that Mr Bossley might be in possession of something. He commented on the carrying of the bag to his partner for that morning, Senior Constable Ostapovitch – t1-36. SC Ostapovitch did not notice anything out of the usual about Mr Bossley.[1] Nonetheless, the two officers

[1] T35-39. No issue arises as to whether or not SC Ostapovitch ever formed a reasonable suspicion about Mr Bossley, he did not.

approached the group of young people of whom Mr Bossley was one. Their accounts differ as to the exact details of what transpired next. I prefer DSC Caulfield's account to that of SC Ostapovitch, because it is consistent with the recollection of Mr Bossley himself.

[5] DSC Caulfield asked Mr Bossley if he had any drugs on him. His evidence as to what happened next was:

> "He said no he didn't have any dangerous drugs on him. I said, 'Do you mind if I have a look?'
>
> …
>
> He said no.
>
> …
>
> He went to hand me his bum-bag.
>
> …
>
> I thought he was starting to play with it so I said I can have a look at that myself and then I opened the bum-bag, saw a clip seal bag with pills. I immediately detained him for a search." – t1-9.

[6] SC Ostapovitch thought that it was he who had asked all of the group together if they had anything they should not have, and that all of them said no. He thought it was he who then asked the group as a whole if they would mind if he and DSC Caulfield looked in their pockets. He then thought that everyone in the group "indicated" that there would be "no issues with that".

[7] Mr Bossley thought that it was DSC Caulfield who asked him whether he could look in his bag and that he did so with an outstretched hand towards Mr Bossley in response to which Mr Bossley passed DSC Caulfield his bag – t1-54. Mr Bossley's sister said that she heard police ask her brother whether he would consent to a search and heard him say that he would. – t1-64.

[8] Mr Bossley, in his evidence, thought that he did not verbally reply to the question asked by DSC Caulfield, but just handed over his bag in response. DSC Caulfield's evidence was that he did reply verbally, and that is what he said in his first statement on the matter. After pills were discovered in Mr Bossley's bag, events were recorded on a tape-recorder. The transcript includes the police reiteration of a version of what happened before the tape-recorder was turned on. On that version neither SC Ostapovitch nor DSC Caulfield says that Mr Bossley responded verbally to the request to search his bag. That might well be explained by the fact that right at the point of interest, SC Ostapovich hands the narration over to DSC Caulfield, who begins with the only point of contention between the police and Mr Bossley on the day – whether Mr Bossley tried to do something to the contents of his bag before he handed it over.

[9] I find that Mr Bossley probably did make an affirmative verbal response when DSC Caulfield asked if he could look in his bag. In any event, it does not matter, he was asked the question and handed over his bag in response; the response was plainly affirmative.

Reasonably Suspects

[10] Section 29 of the *Police Powers and Responsibilities Act* (Qld) (PPRA) provides as follows:

> "Searching persons without warrant
>
> 29(1) A police officer who reasonably suspects any of the prescribed circumstances for searching a person without a warrant exist may, without a warrant, do any of the following—
>
> (a) stop and detain a person;
>
> (b) search the person and anything in the person's possession for anything relevant to the circumstances for which the person is detained."

[11] Section 30 of the PPRA provides that the prescribed circumstances for searching persons without warrant include that the person has something that may be an unlawful dangerous drug (subparagraph 2).

[12] DSC Caulfield gave evidence that he had formed a reasonable suspicion within the meaning of s 29 of the PPRA by the time he had asked Mr Bossley whether he could look in his bum-bag – tt1-11-12. Nonetheless, he did not voice this reasonable suspicion, or expressly say he was acting under the PPRA. He gave evidence that, had Mr Bossley not consented to his searching his bag, he would have used his s 29 PPRA powers to search without consent. When DSC Caulfield first made a statement in relation to the events of the day (30 November 2011), he did not record anything about his suspicion of Mr Bossley, or the reasons for it. He stated that he asked for and obtained consent to search the bag. His evidence was that he thought that was sufficient.

[13] DSC Caulfield said in his evidence that he suspected that Mr Bossley had possession of a Schedule 1 drug – in particular he thought he might have a stimulant like amphetamine – t1-17. He said that he suspected from Mr Bossley's excited, talkative behaviour that he had taken some sort of stimulant, and that he might have possession of more stimulant, or that he might be carrying some stimulant in order to supply it. As outlined above, he relied upon the carrying of a bum-bag and his observation as to Mr Bossley's meeting some "younger females" as grounds for his reasonably suspecting within the meaning of s 29 of the PPRA. Mr Bossley had not taken any drug that morning, I accept, on his evidence. What DSC Caulfield observed was Mr Bossley's normal mien, in circumstances where he was excited to go to a music festival and pleased to see his younger sister. I cannot see that there is anything unusual about somebody attending a music festival carrying a bum-bag. I do not accept that Mr Bossley met more than one younger woman – his sister – on all the evidence before me. In effect then, DSC Caulfield saw a lean, lively young man, excited to be with his friends and family, and carrying a bum-bag, on his way to a music festival.

[14] The term "reasonably suspects" is defined in Schedule 6 to the PPRA as meaning, "suspects on grounds that are reasonable in the circumstances". There is also well-established common law authority in relation to both the concept of suspicion and the concept of reasonable suspicion. The meaning of suspicion in this context

is discussed by the High Court in *George v Rockett.*[2] A suspicion and a belief are different states of mind. A suspicion is a state of conjecture or surmise. It is more than idle wondering. It is positive feeling of apprehension or mistrust, but it is a slight opinion without sufficient evidence. Facts which reasonably ground a suspicion may be quite insufficient to reasonably ground a belief. Nonetheless, to have a reasonable suspicion some factual basis for the suspicion must exist. There must be sufficient factual grounds reasonably to induce the suspicion.[3] The facts must be sufficient to induce the suspicion in the mind of a reasonable person.[4] The suspicion must be reasonable, as opposed to arbitrary,[5] irrational or prejudiced. That a young man is driving a smart car with some panel damage is not sufficient to give rise to a reasonable suspicion.[6]

[15] In my view there were no reasonable grounds for a suspicion on the part of DSC Caulfield. In terms of the statutory definition, the "circumstances" here were that there was a music festival being held in the park. Young excited people, carrying some sort of bag in which to keep their possessions for the day, were exactly what one might have suspected. There were no facts sufficient to induce a suspicion about Mr Bossley in the mind of a reasonable person. The matter is analogous to the fact situation in *R v Rondo* (above) where the police claimed a reasonable suspicion because a young man was driving a smart car which bore some panel damage.

Warning

[16] I will add, though it is strictly unnecessary to this decision, that had DSC Caulfield formed a reasonable suspicion within the meaning of s 29 of the PPRA, my view is that it was necessary for him to have warned Mr Bossley in accordance with s 415 of the PPRA before he asked him questions. That this is the necessary corollary of a reasonable suspicion within s 29 of the PPRA became evident in cross-examination when the following exchange occurred: "And then when you approached him, the purpose of you asking him questions was to elicit evidence in support of any criminal offending?-- Correct … in relation to an indictable offence – yes" – t1-18. In fact, no warning was given to Mr Bossley at any time before the tablets were found in his bag.

Consent

[17] The consequence of there being no reasonable suspicion within the meaning of s 29 of the PPRA is that the search of Mr Bossley's bag was illegal, unless he consented to it. A search will be illegal if there is not power under some statute to perform it, unless the person searched consents. This is clear from obiter in the judgments in *Bunning v Cross.*[7] In general, if police have no statutory power to enter premises, search, or perform other acts, their doing so will be a trespass. But, as is always the case at common law, consent will be an answer to such a charge: *Malone v*

---

2 (1990) 170 CLR 104, 115-116.
3 Above p 113.
4 Above p 112.
5 Above p 112.
6 See the facts of *R v Rondo* [2001] NSWCCA 540.
7 (1978) 141 CLR 54, Barwick CJ at 63-64, Stephen J and Aickin J at p 67, Jacobs J at p 82 and Murphy J at p 84.

Metropolitan Police Commissioner;[8] *Halliday v Nevill & Anor;*[9] *Kuru v State of New South Wales*;[10] *Coco v R.*[11] Likewise, a police officer may ask a question of any person, just as any other member of the community may. The person questioned is not obliged to answer.[12]

[18] Difficult questions as to the reality of consent will arise when permission is sought by a police officer. James J very helpfully digests the relevant cases in *Director of Public Prosecutions v Leonard.*[13]

[19] Barwick CJ adverted to these difficulties in *Bunning v Cross:*

> "Of course, a fine line divides such a willingness from a willingness the product of coercive conduct: and in deciding whether the willingness was uncoerced, it is proper to remember the apparent authority of a patrolman and the situation of the motorist who has been 'taken' to the police station. But, in this case, there is no finding of any coercive conduct on the part of the patrolman or authorised person: nor, in my opinion, ought there to have been. Rather, the impression the magistrate's notes creates in my mind is that the applicant, confident of his own innocence of wrongdoing, was quite willing if not anxious to take the test which, it seems to me, it was likely that he believed would clear him." – p 64.

[20] It is not just that a police officer may appear to the defendant to have authority simply because they are a police officer. Questions as to a defendant's knowledge of his rights to refuse to answer questions or to submit to searches proposed by police will also arise. Of this Gleeson CJ said in *R v Azar*:[14]

> "It is also important to note that what is involved is an inquiry as to the accused's will, rather than as to the accused's state of knowledge, including knowledge of his legal rights. What a person does or does not know may be relevant, as an evidentiary fact, to the question whether the person's will has been overborne, but knowledge or belief, on the one hand, and will, on the other hand, are different concepts.
>
> There is no justification for the proposition that a statement is voluntary in the relevant sense only if the maker of the statement was aware, at the time it was made, that the law offered a choice between speaking or remaining silent."

[21] In *Pearce v Button*[15] Pincus J said:

> "It is not clear to me why it is necessary, in order that true consent may be held to exist, that one must be able to find that the person, the subject of the search, accurately understood the[ir] rights … in the absence of consent … That appears to be a test which would but seldom be satisfied. If, lacking such an understanding, a person

---

8 [1979] CH 344, 369. See also *Ghani v Jones* [1970] 1 QB 693, 705.
9 (1984) 155 CLR 1.
10 [2008] HCA 26, [43], [45].
11 (1994) 179 CLR 427, 435-6.
12 *Police v Moukachar* [2010] SASC 199; *Bain v Police* [2011] SASC 228.
13 [2001] NSWSC 797.
14 (1991) 56 A Crim R 414, 419-420.
15 (1986) 60 ALR 537, 550-551.

> whom it is proposed to search takes the warrant as read and displays anxiety to assist, not being overborne or bullied in any way, then I find it difficult to see why his consent should necessarily be disregarded."

[22] This same view of the law was taken in *Werner v Police*[16] and *Wineberg v Stafford*.[17] This was also the view taken by James J in *DPP v Leonard* (above). *Leonard* and *Pearce v Button* were approved and followed by Fullerton J in *Kaldon Karout v Constable Mathew Stratton.*[18]

[23] Mr Bossley said this as to his interaction with DSC Caulfield after that officer asked if he could see Mr Bossley's bag:

> "… and what did you do then when the police officer asked to search your bag and put his arm out?-- I gave him my bag. I thought I had—
>
> Why did you do that?-- I honestly thought I had no other choice with the outstretched hand in front of me …
>
> Alright. Now why did you feel that you had to give it to him?-- Basically because he's a police officer. He has a – I assume he has a power over me and he had an outstretched hand, I just thought I would have had to give it to him.
>
> You knew that there were drugs inside?-- I did.
>
> Did you want to hand over your bag with drugs in it?-- Not – no." – t1-54.

[24] Once the tape-recorder was on, Mr Bossley was warned and told he could have a lawyer present. Mr Bossley understood this. Notwithstanding this, he answered the policemen's questions, including questions as to supply of drugs not just on this day, but generally, which answers have given the foundation for the trafficking charge. In examination-in-chief Mr Bossley said:

> "… alright. Well, thereafter the police asked you a series of questions. You agree with that?-- Yes.
>
> And you provided answers to those questions?-- Yes.
>
> Why did you do that?-- Again, police, I thought they – they've gotten me. I provided honest answers.
>
> Okay. Do you remember the police explaining to you that you had the right to remain silent?-- I do.
>
> Do you remember the police explaining to you that you had the right to contact somebody, a lawyer, somebody----?-- I think so.
>
> --to be with you? Alright. And what did you understand those things to mean for you?-- I could have kept silent.
>
> Mmm-hmm?-- I could have called in a lawyer or something like that.

---

16 High Court of New Zealand, Gallen J, 16 April 1986, unreported.

17 White J, Supreme Court of Western Australia, 22 July 1997, BSC 9703190.

18 [2007] NSWSC 1034.

> Okay. But what did you do in response to those things--?--I--
>
> Being explained to you?-- I didn't call a lawyer.
>
> Mmm-hmm?-- I answered the police questions.
>
> Okay. And why was that? Why did you do that?-- Just because they're police and I was going to give them an honest answer." – t1-55.

[25] It was very clear in cross-examination that Mr Bossley had made a conscious decision, after having been warned, to be honest with the police, not just in relation to his possession of drugs that day, but as to his sale of drugs, not that day but generally:

> "They gave you the right to silence, though, didn't they?-- Yes. Yes.
>
> And after they gave you the right of silence you knew you could be silent?-- Yes.
>
> But you chose to be honest and you chose to tell them the truth?-- Yes.
>
> And that's because they had caught you fair and square?-- Yes." – t1-56.

[26] From the fact Mr Bossley is remarkably candid with the police and from the several light-hearted comments he makes during the tape-recorded interview, it is clear that he had absolutely no idea of the seriousness of the conduct which he admits to. The following exchange occurs during the course of the recorded interview:

> "Do you know it's an offence to be in possession of a dangerous drug?
>
> I do. I'm aware of that.
>
> Do you know it's also an offence to supply a person with a dangerous drug?
>
> Yes I do. I thought I could get away with it but I was wrong.
>
> Well at least you're straight up about it.
>
> Well I'm not going to lie to you guys. You got me fair and square."

[27] As to his decision to allow police to look in his bag, this exchange took place with Mr Bossley in cross-examination:

> "Now, the reason why the truth has changed for you now is because you realise now that if you traffic in a dangerous drug then you go to jail?-- Yes.
>
> And you didn't know that at the time you spoke to police, did you?-- No.
>
> And you didn't know that at the time that they searched you, did you?-- No.
>
> But at the time they did search you you wanted to be as co-operative as possible, didn't you?-- That's correct.
>
> You did, in fact, consent to that search, didn't you?-- Yes.

You did?-- Yes." – t1-57.

[28] The officers' conduct, so far as it is recorded in the 22 page transcript of the tape-recording made on 1 October 2011 with Mr Bossley, does not display that the officers were overbearing or heavy-handed in any way. I have listened to the recording. There is no hint of coercion on the part of the police officers. Fairly, before he was asked questions which related to his selling drugs, the applicant was reminded of his right to silence and responded to police, "Yeah sure, I'll answer a few, cool."

[29] I have carefully considered the initial interaction between the police and Mr Bossley. In particular that Mr Bossley was young, and considerably younger than DSC Caulfield. I have considered the evidence as to DSC Caulfield stretching out his hand to take Mr Bossley's bag at the same time the request was made. Nonetheless, having regard to all the evidence, including Mr Bossley's attitude once he was warned, and once he knew the tape-recorder was on, I have come to the conclusion that Mr Bossley gave proper consent to the questioning and the search of his bag which occurred before he was warned. It is evident that he did not understand the seriousness of his position. That continues to be the case after he is properly warned and advised that he may contact a lawyer. It is after that warning, and a reminder of it, that he makes extensive admissions to the police which go not just to a possession charge but to a trafficking charge. Relying on the passage set out from the judgment of Gleeson CJ in *Azar* (above), I cannot see that this lack of knowledge as to the law about dangerous drugs affects the fact of Mr Bossley's consent.

[30] Having regard to Mr Bossley's attitude after he was properly cautioned, I am sceptical that he would have behaved differently if he had initially been told that he did not have to consent to a search of his bag. He was not asked about what he would have done in this hypothetical circumstance. I suspect he would still have allowed police to search his bag. I do not regard his evidence that he assumed the police had a power to look in his bag as vitiating the apparent consent he gave when he was asked initially if the police could look in his bag. I do not regard his lack of knowledge as to the law about consent searches as meaning he did not in fact consent. His will was not overborne; he decided to be co-operative.

Failure to Warn

[31] I will add one further comment in relation to the commencement of the tape-recorded interview. Although, this was not raised as a separate point by the applicant, Mr Bossley. By the time the tape-recorder had been turned on, there can be no doubt that police were questioning Mr Bossley as a suspect within the meaning of s 415 of the PPRA. They should not have asked Mr Bossley any questions without warning him. Notwithstanding that, immediately after the tape-recorder was turned on Mr Bossley is asked, "Is everything in this bum-bag yours?" and instructed to verbalise his answers. He answers, "Yes, yes, sorry." He is then warned that he has the right to remain silent. This shows an extraordinary lack of appreciation that the point of warning against self-incrimination is that it occurs before somebody incriminates themself.

[32] I have given consideration to the effect of this unlawful questioning at the very commencement of the tape-recorded interview, and in particular to the effect that it

might have had on the admissions Mr Bossley made after he was warned. However, given my conclusion that what had occurred prior to this was lawful, and given that in the next 21 pages of transcript of interview Mr Bossley makes extensive admissions, not just as to possession but as to his history of drug use and his history of selling drugs, which is conceptually quite different from his possession of them that day, I cannot see that there is any sound basis to exclude either that small part of questioning, or what followed in the tape-recorded interview from evidence on *Bunning v Cross*[19] principles. I do not find that either DSC Caulfield or SC Ostapovitch deliberately asked this question before the warning was given. It was in my view a mistake. Still, I mention it because it is a fairly extraordinary mistake, of the type which simply should not happen.

Disposition

[33] I find the search of the applicant's bag was lawful because it was with consent, and the questioning which followed lawful (save for that small initial portion) because it was undertaken after warnings were given. I dismiss the application.

---

19 (1978) 141 CLR 54.