SUPREME COURT OF QUEENSLAND

CITATION:	*Commissioner of Police v ATH* [2012] QSC 344
PARTIES:	**COMMISSIONER OF POLICE** (applicant) **v** **ATH** (respondent)
FILE NO/S:	Indictment Nos XXX/11 and XXX/11
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	November 2012
DELIVERED AT:	Brisbane
HEARING DATE:	8 November 2012
JUDGE:	Jackson J
ORDER:	**1. that the applicant produce the documents identified in paragraphs 9 to 13 of the affidavit of John Lawrence Pointing filed on 17 September 2012 ("the affidavit") to the extent that they record conversations between the applicant and police officers by producing redacted copies (or an edited copy of any relevant tape) of those documents.** **2. that the applicant produce any letter of comfort referred to in paragraph 3 of the subpoena issued on 20 July 2012 to the applicant.** **3. that the subpoena otherwise be narrowed by excluding the documents identified in paragraphs 9 to 15 of the affidavit.** **4. that pursuant to s 121 of the Drugs Misuse Act 1986 publication of the application, the affidavit, the outlines of argument and the oral hearing of the application is prohibited until further order.** **5. that the application, the affidavit and the outlines of argument be placed on the file in a sealed envelope marked "not to be opened without the order of a Judge".**
	CRIMINAL LAW AND PROCEDURE – PROCEDURE – SUBPOENAS – APPLICATION TO NARROW SCOPE – where defendant who acted as informer later charged for

related drug offences – where defendant issued subpoena to applicant for records – where applicant argued that cannot be compelled to disclose documents relating to informer – where applicant further argued that disclosure would prejudice effectiveness of methodologies – where parties agreed that latter difficulty could be avoided by appropriate redactions – whether information about informant confidential as between informer and police – whether production could be compelled

STATUTES – ACTS OF PARLIAMENT — INTERPRETATION – OPERATION AND EFFECT OF STATUTORY PROVISIONS – where provision protected police officer from being compelled to disclose information "made or received by the police officer in the police officer's official capacity or containing confidential information" – whether literal interpretation produces absurd result – whether "or" should be read as "and"

Acts Interpretation Act 1954 (Qld), s 14A
Criminal Code, s 590AB
Criminal Practice Rules 1999 (Qld), r 33(1)(b)
Drugs Misuse Act 1986 (Qld), ss 119, 120, 121
Police Powers and Responsibilities Act 2000 (Qld), s 803

Adams v Lambert (2006) 228 CLR 409, considered
Australian Crime Commission v Stoddart (2011) 244 CLR 554, cited
Commissioner of the Police Service v Cornack [2004] 1 Qd R 627, considered
Potter v Minahan (1908) 7 CLR 277, cited
Project Blue Sky Inc v Australian Broadcasting Inc (1998) 194 CLR 355, considered
R v Demir [1990] 2 Qd R 433, considered
R v Spizziri [2001] 2 Qd R 686, considered
Ridgeway v R (1995) 184 CLR 19, cited

COUNSEL: B Kennedy for the applicant
A O'Brien for the respondent
D Nardone for the Crown

SOLICITORS: Queensland Police Service for the applicant
Boe Williams for the respondent
Director of Public Prosecutions for the Crown

[1] The present application is made to narrow the scope of a subpoena to produce documents to the court pursuant to r 33(1)(b) of the *Criminal Practice Rules* 1999 (Qld). The question of significance is whether the applicant Commissioner of Police (commissioner) is relieved of the obligation to produce relevant reports or documents received by him in his official capacity because of the operation of s 120(2) of the *Drugs Misuse Act* 1986 (Qld) (DMA).

[2] The context is that, with one exception, the relevant reports or documents record or evidence conversations between the respondent defendant (ATH) and the police

officers who were responsible for the charges brought against him, including conversations which occurred on the day before and the day on which he was charged.

[3] I propose to make an order under s 121 of the DMA prohibiting the publication of the application and associated documents and the oral argument on the application, and that the documents be placed in a sealed envelope, not to be opened without the order of a judge. It is appropriate in the circumstances to state the facts at a level of some generality.

[4] ATH is the defendant in a criminal proceeding in this court for various drug offences. At the time of the relevant offending he was a police informer, or as it is described in the language of the police officer responsible for the management of the relevant unit within the Queensland Police Service, a "human source".

[5] Within the period of approximately three months prior to the day of ATH's arrest, there were conversations which occurred between him and two identified police officers. On the day before the arrest there were further conversations between them. On the day of the arrest there were further conversations, one of which also involved an undercover police operative.

[6] ATH contends that on the day of the arrest he was interviewed by the two police officers and made extensive admissions against interest. He contends that his alleged offending conduct was procured by police and that he was induced to participate in the interview by an assurance that he would receive police protection and not face a charge. On those bases, he wishes to challenge the reception of evidence of the interview at his trial[1] and I was told that a pre-trial proceeding to determine that question has been set down for hearing in the near future. Hence there is some urgency attaching to my decision.

[7] For the purpose of the foreshadowed application, ATH issued a subpoena addressed to the commissioner which, *inter alia,* sought production of electronic files, audio or visual recordings, police notes, investigation logs, diary notes or physical documents that record, refer to or were created for the purpose of conversations, meetings, phone calls or arrangements between police officers and ATH, in particular:

> "(a) any conversation or contact in person or by telephone involving [police officer A] and [ATH] between [a day about 3 months before ATH's arrest] and [four days later];
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> (b) any conversations or contact in person or by telephone involving [police officer A], [police officer B] and [ATH] on [the day before ATH's arrest];
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> (c) any records of [ATH]'s attendance at Queensland Police Headquarters … on [the day before the arrest];
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> (d) any conversations or contact in person or by telephone involving [police officer A], [police officer B] and [ATH] on [the day of the arrest];

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1 Reference was made in written submissions to *Ridgeway v R* (1995) 184 CLR 19.

(e) any conversations or contact in person or by telephone involving [police officer A], an undercover police operative [C] and [ATH] at Roma Street Watch House and elsewhere between [the day of the arrest] and [the following day]."

[8] The subpoena further sought production of any letters of comfort which may have been prepared in respect of ATH.

[9] There are documents described as human source contact reports which answer each of the categories of document identified in paragraphs 7(a) to (e) above and an affidavit which falls within the scope of the requirement for the production of any letters of comfort.[2]

[10] Broadly speaking, the commissioner sought to narrow the scope of the subpoena on two bases: first, that as a matter of law, s 119 or s 120 of the DMA prohibited him from producing or protected him from being compelled to produce the documents; secondly, that he was by the common law limits of a defendant's right to production of documents by subpoena, or by s 803 of the *Police Powers and Responsibilities Act* 2000 (Qld) (PPRA), not required to disclose the information contained in the documents or entitled to claim "privilege" against their production on the ground of public interest immunity at common law.

[11] It is unnecessary to resolve the second bases of argument, because it became common ground between the parties that if any production were limited to parts of documents disclosing the identified relevant conversations between ATH and the police officers and the undercover police operative, with any other material redacted from the copies produced, it would be unnecessary for me to further explore resistance to production of the documents to the court under the subpoena on those grounds. That leaves the question of access to any documents produced to the court to be resolved at a future date, as that is not a matter before me.

[12] However, that does not resolve the commissioner's objection to any production of the relevant documents based on ss 119 and 120 of the DMA.

[13] Sections 119 and 120 provide as follows:

"**119 Protection of informers**

(1) Where an informer supplies information to a police officer in respect of the commission of an offence defined in part 2 the informer's identity at all times shall be kept confidential.

(2) A person who discloses the name of an informer, or any other particular that may be likely to lead to the informer's identification, is guilty of a crime.
Maximum penalty—5 years imprisonment.

(3) A person is not criminally responsible for an offence defined in subsection (2) if the person proves that the disclosure was made

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2 It was not explained how the affidavit could precisely respond to that description.

in good faith for the protection of the interests of the informer or for the public good.

120 Source of information not to be disclosed

(1) Where an informer supplies information to a police officer in respect of the commission of an offence defined in part 2 then in any proceedings whether under this Act or otherwise—

(a) the prosecutor; or

(b) a person who appears as a witness for the prosecution; or

(c) where a police officer appears as a witness for the defence, that police officer;

shall not be asked and if asked shall not be compelled to disclose the name of an informer, or other particular that may be likely to lead to the informer's identification, or the fact that in respect of the offence he or she received information from an informer or he or she furnished information to an informer or the nature of the information.

(2) In any proceedings arising out of a charge of having committed an offence defined in part 2 a police officer appearing as a prosecutor or witness shall not be compelled to produce any reports or documents, made or received by the police officer in the police officer's official capacity or containing confidential information in relation to such offence, or to make any statement in relation to such reports, documents or information."

[14] As to s 119, the commissioner's position was that the relevant human source contact reports and recording identified ATH as an informer and outlined the nature of the information provided by ATH as an informant.

[15] In my view, s 119 contains two distinct provisions. In subsection (1), the obligation is to keep confidential an informer's identity where the informer supplies information to a police officer in respect of the commission of a possible relevant offence. It is an obligation of confidentiality imposed upon the police officer which is owed to the informer, whether or not the circumstances which might otherwise be required for the imposition of an obligation of confidence under the general law exist. However, s 119(1) does not prohibit an informer from revealing his or her own identity. Nor are the communications made between the informer and the police officer confidential as between them. There is an absurd dimension to the contention that a police officer or the commissioner can resist production of a document recording a communication between an informer and the police officer on the ground that to produce the document to the court so that it might be accessed by the informer as a defendant will breach the obligation of confidentiality under s 119(1).

[16] Section 119(2) creates an offence. Under that subsection, a person who discloses the name of an informer or any other particular that may be likely to lead to the informer's identification is guilty of a crime. The disclosure in question must be disclosure to another person. Production of a document to the court which contains a record of a conversation between ATH and the police officers who were responsible for charging him is not the disclosure of the name of an informer. Nor is it a disclosure of a particular that may be likely to lead to his identification as an informer. In this context, "informer" refers to "a person who supplies information in confidence to a person known or believed to be a police officer, in respect of the commission of an offence by another".[3]

[17] Section 120 also contains two distinct provisions. The commissioner sought to rely on s 120(1) on the footing that he was a witness for the purposes of that subsection. Paragraph (b) applies to a person who appears as a witness for the prosecution, which is inapplicable here. Paragraph (c) applies where a police officer "appears" as a witness for the defence. For such a witness, s 120(1) operates to restrict the questions that may be asked. It does not relate to the production of documents.

[18] As to s 120(2), the proceeding in which the subpoena has been issued arises out of a charge of having committed an offence defined in Pt 2 of the DMA. The commissioner contended that he was relevantly a police officer "appearing as a … witness", with the consequence that he "shall not be compelled to produce any report or document … received by" him "in" his "official capacity". Alternatively, the commissioner contended that the documents were documents "containing confidential information in relation to such offence". On either basis, the contention was that the commissioner was not to be compelled to produce the reports or documents which answered the subpoena.

[19] As to the submission that the reports or documents contained confidential information in relation to ATH's offences, once it is accepted that the documents to be produced are to be limited to the conversations between ATH and the relevant police officers and the undercover police operative, there is no reason to think that they contain confidential information in relation to ATH's offences. The starting premise is that ATH was a party to each of the relevant conversations. As against him, they cannot have been confidential. In any event, there is no evidence as to what in the documents comprised confidential information. The restricted nature of the proposed order for production should clearly protect anything that is outside the scope of the conversations between the defendant and the police officers and the informer which might be of that character.

[20] That leaves for decision whether the commissioner is not to be compelled to produce the relevant reports or documents solely because he is appearing as a witness and received them in his official capacity.

[21] ATH submitted that s 120(2) should be read so that the disjunctive "or" between "official capacity" and "containing confidential information" means "and". The effect would be that it is not enough that the relevant report or document be received by the police officer in the police officer's official capacity. The relevant police officer is only prohibited or protected from being compelled to produce the report or document if it also contains confidential information.

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3 *Commissioner of the Police Service v Cornack* [2004] 1 Qd R 627 at [40].

[22] ATH supported that submission by two propositions: first, that in context s 120(2) was concerned with the protection of confidential information, not simply the protection of reports or documents received in an official capacity; and secondly, that a disjunctive operation which has a wider effect would be absurd, because it would relieve a police prosecutor in a relevant drug case from the obligation to produce reports or documents which would otherwise fall within the duty of disclosure under s 590AB of the *Criminal Code*.

[23] The commissioner contended that there was no inconsistency between the wider operation of s 120(2) and the duty of disclosure, because s 120(2) does not prohibit the police officer witness from producing a relevant document – it merely gives him the right to refuse production. To my mind, if s 120(2) is engaged in any case where the commissioner receives a relevant document in an official capacity, it is inconsistent with any obligation which might otherwise exist to produce the document. That much follows form the ordinary meaning of "shall not be compelled to produce".

[24] But, in any event, can the commissioner waive the immunity from production? In relation to s 120(1),[4] it was held in *R v Demir*[5] that the prohibition against a witness being asked the name of an informer or if asked being "compelled to disclose the name", operated so that it did "not require that the Crown or the witness claim the benefit of the section before it comes into operation. Nor can the operation of the section be waived by either of them." In other words, it operated as an absolute prohibition against the disclosure.

[25] Where s 590AB and the cognate provisions of Chapter Division 3 of Chapter 62 of the *Criminal Code* apply, they are expressly conditioned to operate by reference to the overriding concept "that it is a fundamental obligation of the prosecution to ensure criminal proceedings are conducted fairly with the single aim of determining and establishing the truth". The obligation to give an accused person "full and early disclosure of … all things … that would tend to help the case for the accused person", unless the disclosure "would be unlawful or contrary to public interest" is a subset of the overriding concept.[6]

[26] Strictly speaking, therefore, there is no inconsistency between the operation of s 590AB and a prohibition against producing a document under s 120(2) of the DMA. A production which contravened s 120(2) would be unlawful and within the exception to s 590AB.

[27] As context, it is to be recalled that s 120(2) has existed since enactment of the DMA in 1986 (although originally numbered s 47), and it formed part of the body of law against which Chapter Division 3 was introduced and later commenced in 2004. As well, s 116 of the DMA (formerly s 44) at all times provided that "the Criminal Code shall with all necessary adaptations be read and construed with this Act."

[28] Nevertheless, the context against which s 120 (as s 47) was introduced in 1986 was one in which the common law required disclosure by the prosecution subject to

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4 Then numbered s 47(1) of the DMA.

5 [1990] 2 Qd R 433 at 435, which was referred to with approval apparently on this point in *Commissioner of the Police Service v Cornack* [2004] 1 Qd R 627 at [47] and footnote 5.

6 The scope of the operation of s 590B was considered in *R v Rollason and Jenkins; ex parte Attorney-General* [2008] 1 Qd 85.

public interest immunity. A useful recent conspectus of the common law may be found in *R v Andrews*.[7]

[29] The common law also dealt with disclosure in a criminal proceeding of confidential information relating to investigations and informers. In *R v Demir*, Cooper J said that s 120 (then s 47) "restates the common law rule with one exception".[8]

[30] Lastly, by way of context against which s 120 was enacted, the inspection of documents produced on subpoena in criminal cases was also the subject of a well developed set of principles, which are dealt with in the Queensland context in *R v Spizziri*.[9]

[31] Against that background, the question of construction of s 120(2) is to be approached having regard to the relevant principles of statutory interpretation. Chief among the guiding statements of principle is *Project Blue Sky Inc v Australian Broadcasting Inc*,[10] where the High Court observed that:

> "The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning."

[32] Reference to the purpose of the statute is itself mandated by statute through the requirement of s 14A of the *Acts Interpretation Act* 1954 (Qld) that the "interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation".

[33] In my view, in a proceeding of the relevant kind, the purpose of s 120(2) is ascertainable in context as: to protect any document containing confidential information from production if the document relates to the Part 2 DMA drug offence. There is no discernible purpose, other than a wide reading of the text itself, which would justify the purpose as: to protect any document which does not contain confidential information from production if the document relates to the Part 2 DMA drug offence.

[34] As well, there is a difficulty with the operation of s 120(2) if the disjunctive "or" is given its usual meaning. If any document in relation to the relevant offence (or any document at all) is prohibited or protected from production, as a disjunctive alternative to any document which contains confidential information, there is no need for the confidential information alternative at all – it already fits within the category of a document made or received by the police officer in the police officer's official capacity.[11]

[35] The consequences of a literal interpretation include that a police prosecutor would not be required to produce (and according to *R v Demir* would be prohibited from

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7 [2010] SASFC 5 at [5] – [28].
8 [1990] 2 Qd R 433 at 435.
9 [2001] 2 Qd R 686.
10 (1998) 194 CLR 355 at [78].
11 Unless the confidential information category is intended to pick up documents made or received other than in the police officer's official capacity. In my view, that is not the intention behind the confidential information category.

producing) any of the documents usually provided to the defence in a proceeding under Part 2 of the DMA. Division 3 of Chapter 62 of the *Criminal Code* would be set at nought in that kind of proceeding. These would be unexpected consequences, in my view.

[36] In *Adams v Lambert*,[12] the High Court said:

> "… it is a well settled principle of construction that a written instrument must be construed as a whole, and that, as Dixon CJ and Fullagar J said in *Fitzgerald v Masters*, "[w]ords may generally be supplied, omitted or corrected, in an instrument, where it is clearly necessary in order to avoid absurdity or inconsistency". A striking example of the application of a cognate principle of statutory construction is to be found in *Cooper Brookes (Wollongong) Pty Ltd v FCT*." (citations omitted)

[37] As to the canons of construction, some more recent cases and commentators have sought to gather a number of the canons under the rubric of the "principle of legality", founding that principle to a significant degree on *Potter v Minahan*.[13] A recent statement of use in the High Court is contained in *Australian Crime Commission v Stoddart*:[14]

> "The principle of legality "governs the relations between Parliament, the executive and the courts". It is an aspect of the rule of law. The presumption to which it gives rise, that it is highly improbable that Parliament would act to depart from fundamental rights or principles without expressing itself with "irresistible clearness", has been described as a working hypothesis, known to both the Parliament and the courts, upon which statutory language will be interpreted. It would appear to accord with that principle and hypothesis that the fundamental right, freedom, immunity or other legal rule which is said to be the subject of the principle's protection, is one which is recognised by the courts and clearly so." (citations omitted)

[38] There should be no doubt, in my view, that the right of a defendant to a fair trial, as expressed through the procedural rights of the defendant to disclosure by the prosecution of appropriate documents and to obtain production on subpoena of other appropriate documents possessed by police officers, where no infringement of a relevant confidence is involved, is a fundamental right of that character.

[39] Accordingly, in my view, s 120(2) should be construed so that the prohibition against or protection from compulsion to produce a document under that section operates where the document contains confidential information in relation to the relevant offence under Part 2 of the DMA.

[40] As the proposed order for production in this case is to be limited to redacted copies which do not contain confidential information in relation to ATH's offences, because the parts of the documents to be produced are limited to the conversations

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12 (2006) 228 CLR 409 at [21].
13 (1908) 7 CLR 277 at 304.
14 (2011) 244 CLR 554 at [182].

between him and the police officers and the undercover police operative, it follows that s 120(2) does not prohibit or protect those documents from production under the subpoena.

[41] I will hear the parties on the form of order proposed and on any question of costs.