

# SUPREME COURT OF QUEENSLAND

CITATION: *R v Hijazi* [2015] QSC 292

PARTIES: **R**  
**v**  
**HIJAZI, Mohammed Farouk**  
(applicant)

FILE NO: SC No 784 of 2015

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland at Brisbane

DELIVERED ON: 22 October 2015

DELIVERED AT: Brisbane

HEARING DATE: 12 October 2015

JUDGE: Flanagan J

ORDER: **Application dismissed.**

CATCHWORDS: CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – POLICE INTERROGATION – PROPRIETY OF POLICE QUESTIONING AND OTHER CONDUCT BY POLICE – CROSS-EXAMINATION AND INVITATIONS TO COMMENT ON OTHER STATEMENTS – where the applicant had been co-charged primarily in relation to producing and possessing dangerous drugs – where the applicant participated in an interview with two police officers – where the applicant submits he was unfairly questioned because one police officer expressed disbelief and scepticism in response to many of the applicant’s answers – where the applicant was cross-examined in relation to matters and impermissibly asked to explain a police officer’s suspicious state of mind – whether the questioning was in any way overbearing or improper – whether the record of interview ought to be excluded as evidence in the applicant’s trial

CATCHWORDS: CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – POLICE INTERROGATION – PROPRIETY OF POLICE QUESTIONING AND OTHER CONDUCT BY POLICE – GENERALLY – where the applicant had been co-charged primarily in relation to producing and possessing dangerous drugs – where the applicant participated in an interview with two police officers – where the applicant submits that the interview was attended by unfairness or impropriety in that he was never informed that he was being questioned in relation to the drug production offence – where the applicant submits that he was continued to be questioned after he had twice stated he did not wish to answer a question – where the applicant submits the police officers failed to comply with the *Police Responsibilities Code 2012 (Qld)* by failing to clarify the applicant’s intention to exercise his right to silence – whether the applicant was adequately informed as to the subject matter of the questioning, including the drug production offence – whether the police officers’ repeating of questions was improper or unfair – whether the applicant’s will was in any way overborne – whether the record of interview ought to be excluded as evidence in the applicant’s trial

CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – EVIDENCE UNFAIR TO ADMIT OR IMPROPERLY OBTAINED – GENERALLY – where the applicant had been co-charged primarily in relation to producing and possessing dangerous drugs – where the applicant participated in an interview with two police officers – where the applicant submits that the interview was attended by unfairness or impropriety in that he was never informed that he was being questioned in relation to the drug production offence – where the applicant submits that he was continued to be questioned after he had twice stated he did not wish to answer a question – where the applicant submits the police officers failed to comply with the *Police Responsibilities Code 2012 (Qld)* by failing to clarify the applicant’s intention to exercise his right to silence – where the applicant submits he was unfairly questioned because one police officer expressed disbelief and scepticism in response to many of the applicant’s answers – where the applicant was cross-examined in relation to matters and impermissibly asked to explain a police officer’s suspicious state of mind – whether the questioning was in any way overbearing or improper – whether the applicant was adequately informed as to the subject matter of the questioning, including the drug production offence – whether the police officers’ repeating of questions was improper or unfair – whether the applicant’s will

was in any way overborne – whether the record of interview ought to be excluded as evidence in the applicant’s trial

CRIMINAL LAW – EVIDENCE – CONFESSIONS AND ADMISSIONS – STATEMENTS – VOLUNTARY STATEMENTS – INDUCEMENT – GENERALLY – where the applicant had been co-charged primarily in relation to producing and possessing dangerous drugs – where the applicant’s co-accused was stated by the applicant to be a drug addict who needed help – where conversations occurred between the applicant and police officers about the co-accused’s previous attempts at drug rehabilitation – where the police officers stated the existence of the supportLink program – where the applicant subsequently participated in an interview with police officers – where the applicant submits that he was induced to participate in the interview in order for his co-accused to be referred to the supportLink program – whether the applicant was induced to participate in the interview

*Criminal Law Amendment Act 1894 (Qld)*, s 10

*Evidence Act 1977 (Qld)*, s 130

*Police Powers and Responsibilities Act 2000 (Qld)*, s 436

*Police Responsibilities Code 2012 (Qld)*, s 24

*Bunning v Cross* (1978) 141 CLR 54; [1978] HCA 22, cited  
*Cleland v The Queen* (1982) 151 CLR 1; [1982] HCA 67,  
cited

*Duke v The Queen* (1989) 180 CLR 508; [1989] HCA 1, cited  
*McDermott v The King* (1948) 76 CLR 501; [1948] HCA 23,  
cited

*R v Amad* [1962] VR 545; [1962] VicRp 75, cited

*R v Lee* (1950) 82 CLR 133; [1950] HCA 25, cited

*R v Pritchard* [1991] 1 VR 84; [1991] VicRp 8; (1990) 49 A  
Crim R 67, considered

*Tofilau v The Queen* (2007) 231 CLR 396; [2007] HCA 39,  
considered

COUNSEL: K M Hillard for the applicant  
C N Marco for the respondent

SOLICITORS: Kilroy & Callaghan Lawyers for the applicant  
Director of Public Prosecutions (Queensland) for the  
respondent

- [1] The defendant, Mohammed Hijazi, applies for a pre-trial ruling pursuant to s 590AA of the *Criminal Code* 1899 (Qld) seeking the exclusion of the whole of an electronically recorded interview between him and two police officers conducted on 30 May 2014.
- [2] The defendant, together with his co-accused Andrea Maricela Morales, has been indicted for 10 counts primarily in relation to producing and possessing dangerous drugs. The circumstances of the offences are that Morales and the defendant had for approximately

two to three weeks been staying at a booked room at Oaks Aurora Hotel, 420 Queen Street, Brisbane. Police executed a search warrant on this address on 30 April 2014. When police entered the room they located Morales in the doorway between the bedroom and the bathroom and the defendant asleep on the couch in the living room. A search of the room revealed \$12,580 cash, methylamphetamine, heroin, codeine, morphine, diazepam and alprazolam as well as drug utensils. Police also located six mobile phones. A number of the items were in clear view, including on a table in the lounge room directly in front of where the defendant was located. As to the production count, during the search police located a “F” clamp, a broken “G” clamp, a plastic cylinder and a metal cap in a box. The cylinder and cap matched round cylinders of a compressed brown substance (heroin) and cutting agents found in the hotel room. The defendant is alleged to have used the “G” clamp to compress the heroin. At the conclusion of the search Morales and the defendant were arrested. The defendant’s car was also searched but no items of interest were located. They were both separately transported to the Charlotte Street police station. Whilst in custody the defendant took part in an electronically recorded interview.

- [3] The defendant seeks to have the interview wholly excluded pursuant to s 10 of the *Criminal Law Amendment Act 1894* (Qld) and/or s 130 of the *Evidence Act 1977* (Qld). Section 10 of the *Criminal Law Amendment Act* provides:

“No confession which is tendered in evidence on any criminal proceeding shall be received which has been induced by any threat or promise by some person in authority, and every confession made after any such threat or promise shall be deemed to have been induced thereby unless the contrary be shown.”

- [4] The Court also has a general discretion to exclude the interview pursuant to s 130 of the *Evidence Act* on the grounds of unfairness, impropriety or where the prejudicial effect of the evidence is outweighed by its probative value. Section 130 provides:

“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.”

- [5] The defendant identifies four bases for the exclusion of the interview:

- (a) the defendant’s interview with police was involuntary because his participation had been induced by a promise that such participation would assist Morales;
- (b) the interviewing officer failed to inform the defendant that he was being questioned in relation to an offence of drug production;
- (c) the questioning of the defendant by the interviewing officers was unfair or improper in that it involved the cross-examination of the defendant and the expressions of disbelief or scepticism on the part of the interviewing officer; and
- (d) the interviewing officers continued to question the defendant about drug use in the apartment after the defendant had stated that he did not wish to answer those questions.

**(a) Inducement**

- [6] In support of the application the defendant gave oral evidence. He referred to three alleged conversations said to constitute the inducement for him to participate in the interview. The first was whilst his car was being searched:<sup>1</sup>

“... Can you remember any conversations that happened while the search of your car was being done?---Yes. I sort of do.

Yes. What do you remember about those conversations?---Basically, about getting some help for my then partner to support her – to help beat her drug habit.”

- [7] The reference to his “then partner” is to the co-accused Morales. He continued:<sup>2</sup>

“Basically I was – they were leading me to know that they can offer supportLink and that they can refer her to it.”

- [8] The defendant accepted that two of the three police officers who were present for the search of his car were Senior Constable Parker and Sergeant Johnson. Senior Constable Parker was the person who mainly conducted the interview in the presence of Sergeant Johnson.

- [9] The second conversation is alleged to have occurred whilst the defendant was being driven from the Aurora Hotel at 420 Queen Street to the police station at Charlotte Street:<sup>3</sup>

“And do you remember if there was any conversation in the car with the police officers on the way back?---Yes, there was. They were speaking with me to tell me to participate in a – in a recorded interview to help that that will – in order to help the situation where they understand so that they can refer Andrea to – for some time – for some help.

...

Did the police officers talk about supportLink in the car on the way to the station?---Yes, they did.

...

What was said about supportLink in the car?---Basically they said they can – that they can – an officer can refer an individual to supportLink if it’s going to help their situation in their whatever situation they’re in.

Okay. And how did that affect your decision to do a later recorded interview with the police?---Well, that – that made me – that made me – that led me to believe that, if I can help – help them into making a decision of referring her – referring Andrea to supportLink, it will be okay.

Sorry, so can I just ask you to clarify your answer there. What – how did what the police said to you make you want to do an interview?---Because they

<sup>1</sup> Transcript of proceedings 12 October 2015, 1-5, lines 16 - 20.

<sup>2</sup> Transcript of proceedings 12 October 2015, 1-5, lines 24 - 25.

<sup>3</sup> Transcript of proceedings 12 October 2015, 1-5, lines 32 – 46; 1-6, lines 6 - 18.

said, if you do the interview, we can refer Andrea to supportLink in order for her to get the help that she needs.”

- [10] The third conversation is said to have occurred at the Charlotte Street police station prior to the defendant being interviewed:<sup>4</sup>

“Do you remember what words they said to you?---Yeah. They basically said if they can understand the truth of what’s going on with their investigation, they can refer – they can – any one of those officers that was doing the investigation could refer Andrea to the supportLink in order for her to get help.

And do you remember which police officer said that to you?---There was – there was two of them. One of them was the main officer that was doing all the talking in the case and the other was one like his offsider, sort of thing.

The one officer who was doing main of the talking, is that the same officer who did most of the talking in the interview as well?---Yes. Yes.”

- [11] Two further passages from the defendant’s evidence-in-chief are relevant:<sup>5</sup>

“... And just in relation to this conversation that you had with the police officer at the Charlotte Street station, how did that affect your decision to do an interview?---Basically me believing that they can refer someone, or they can make a decision whether they want to refer somebody or not. I wanted – I wanted to help her in order for her to get the right assistance that she needs.

...

Now in relation to the interview itself, can you remember why it is that you continued with the interview when the police were talking to you? ---I was just – that is why I continued with the interview is because I was – I was told that they – they would be able to refer Andrea to supportLink, which was like rehab or something.”

- [12] In cross-examination it became evident that the defendant did not have a clear recollection of the content of these three alleged conversations. He does recall that one of the officers stated that if Morales needed help to address drug addiction she had to want such help.<sup>6</sup> The defendant had no knowledge as to whether or not Morales was ever referred to supportLink.<sup>7</sup>

- [13] The defendant had some recollection of raising with the police his concerns in relation to Morales and the fact that she had sought previous rehabilitation.<sup>8</sup> The defendant suggested that it was the police who first raised concerns regarding Morales’ drug problems.<sup>9</sup>

<sup>4</sup> Transcript of proceedings 12 October 2015, 1-6, lines 35 - 45.

<sup>5</sup> Transcript of proceedings 12 October 2015, 1-7, lines 12 - 16; 34 - 37.

<sup>6</sup> Transcript of proceedings 12 October 2015, 1-18, lines 11 - 40.

<sup>7</sup> Transcript of proceedings 12 October 2015, 1-21, line 41.

<sup>8</sup> Transcript of proceedings 12 October 2015, 1-8, lines 40 - 45; 1-9, lines 10 - 15.

<sup>9</sup> Transcript of proceedings 12 October 2015, 1-9, lines 17 - 22.

- [14] As to the conversation in the car the defendant in cross-examination gave the following recollection:<sup>10</sup>

“... So what was the conversation that you had in the car whilst you were being transported?---Basically, that they can refer people who are battling their addictions and whatnot to their services and that they believed that she was a likely candidate and that they – they need – they could refer her.

Okay?---Yeah.

So what – so they’re telling that they can refer her?---Yeah.

To Ms Morales – to supportLink – sorry. How does that relate to the interview?---Because they wanted to – they wanted to know the truth in order to refer her because if they believed it was – wasn’t the case, they can’t offer support for people who aren’t willing to – to use the service.

So they told you that they wanted the truth, did they? Is that what you’re saying?---They – no, not just that. No.

So what is it that they told you?---They wanted me to tell them the best that I knew in order for them to – for them to determine whether they believed that Andrea was a suitable candidate for their program.”

- [15] Both Senior Constable Parker and Sergeant Johnson gave evidence. They denied suggesting any link between the defendant participating in the interview and referring Morales to supportLink.

- [16] The audio of the search of the defendant’s car was recorded. The transcript of the recording of the car search does not support the defendant’s version of the alleged conversation. It may be accepted however that the transcript of the recording for the car search is incomplete in that portions of the recording are indistinct. It follows that whilst the transcript of the car search recording does not support the defendant’s version of the alleged conversation because the transcript is incomplete it cannot be used to discredit the defendant’s version. There is nothing however in the transcript of the car search recording which would suggest any link being made by the officers as to the defendant’s participation in the interview and assistance being given by police to Morales. To the contrary, the language used by Senior Constable Parker as to the defendant participating in a record of interview is unexceptional:<sup>11</sup>

“... We just need to speak to you about it. We’ll go back to the police station, we’ll give you the opportunity to take part in the interview.”

- [17] Whilst parts of the recording of the car search are indistinct, the transcript generally supports Senior Constable Parker’s version that it was the defendant who raised his concerns about Morales’ drug use and addiction.<sup>12</sup> Senior Constable Parker gave the following evidence in cross-examination as to who raised the question of assistance for Morales:<sup>13</sup>

<sup>10</sup> Transcript of proceedings, 1-10, lines 42 - 47; 1-11, lines 1 - 13.

<sup>11</sup> Transcript of police record of interview on 30 April 2014, page 2, lines 31 - 33.

<sup>12</sup> Transcript of police record of interview on 30 April 2014, page 6, lines 26 - 58.

<sup>13</sup> Transcript of proceedings 12 October 2015, 1-32, lines 32 - 40.

“Who asked who about supportLink?---He asked me about how he could help his friend and what he could do for her, and I explained that it’s not my job or I am not trained to assist people with illnesses or addictions. I am not a doctor. I am not medically trained. I’m not a psychiatrist or a psychologist or anything like that. And all I could do was ask her if she wanted to be referred to what we call a supportLink and that that would be something that she would have to agree to. It’s not up for him to – it’s not to him to accept – not for him to – how do I explain it – accept that on her behalf – that she would have to accept that and that my opinion was that she would need to want to get help for it to be of any use.”

- [18] There is no doubt that Morales’ drug addiction was discussed by the defendant and police. Nor is there any doubt that the police raised the fact that Morales could be referred by them to supportLink. Both officers however in cross-examination denied any conversation whereby any link was made to Morales being referred to supportLink and the participation of the defendant in the interview:<sup>14</sup>

“You had said to Mr Hijazi words to the effect that a referral could be made to supportLink if he did an interview?---Definitely not. I think if you read the – look at the next five minutes of the interview that was clearly explained.”

- [19] The conversation with the defendant whilst he was being transported from Queen Street to Charlotte Street police station was not recorded. Counsel for the defendant submitted that any conversation that occurs in police company must be recorded, otherwise any statement that is made is liable to be excluded.<sup>15</sup> The Crown however does not seek to rely on any conversation that occurred between the officers and the defendant whilst he was being transported to the Charlotte Street police station. As explained by Senior Constable Parker, he had concluded the search which was recorded and he had no intention of questioning the defendant in relation to any alleged offence whilst he was being transported to the police station.<sup>16</sup> The defendant’s complaint appears to be that had the conversation in the police motor vehicle been recorded it may have corroborated his version in respect to the alleged inducement.

- [20] On the whole of the evidence I do not accept that the police officers sought to induce the defendant to participate in the interview by suggesting that they could assist Morales by referring her to supportLink. It is more probable than not that it was the defendant who raised his concerns in relation to Morales’ drug addiction. These factual findings do not require any accompanying findings as to the defendant’s credit. From an examination of the interview it is clear that the defendant at least in his own mind had made some link between Morales being referred to supportLink and his participation in the interview:<sup>17</sup>

“SCON PARKER: Okay. And ah before we go any further, has there been any threat, promise, or inducement ah held out to you, to take part in this interview?”

<sup>14</sup> Transcript of proceedings 12 October 2015, 1-35, lines 16 - 19 (Senior Constable Parker’s evidence. For Sergeant Johnson’s evidence see transcript of proceedings 12 October 2015, 1-42, lines 34 - 35.

<sup>15</sup> Referring to s 436 of the *Police Powers and Responsibilities Act 2000* (Qld).

<sup>16</sup> Transcript of proceedings 12 October 2015, 1-32, lines 10 - 23.

<sup>17</sup> Transcript of police record of interview on 30 May 2014, page 6, lines 31 – 57; page 7, lines 1 – 17; page 8, lines 39 - 58; page 9, lines 1 - 58; page 10, lines 1 - 9.

HIJAZI: No. Youse [INDISTINCT] just basically trying to co-operate with ah, with youse just so I can get a better result for her.

SCON PARKER: Okay. Do you ah agree that upstairs um I asked you if you'd like to take part in the interview and I said you don't have to if you don't want to?

HIJAZI: Yeah.

SCON PARKER: There was no threats or anything--

HIJAZI: Yeah.

SCON PARKER: Um for you to come down here and talk to us?

HIJAZI: Yeah.

SCON PARKER: Okay. Alright. Um.

SCON JOHNSON: We also, did, did we, do you agree that we didn't say that by talking to us, it would make it better for her?

HIJAZI: Sorry?

SCON JOHNSON: Did we, do you understand that by talking to us it, it makes no difference to us about her? Like, you know, you say you just want to um.

HIJAZI: Oh so it doesn't, doesn't make any difference [INDISTINCT]?

SCON PARKER: Well we're here to interview you. Okay. Um I think you need to, for a moment, um don't be concerned about I'm doing this for her, or something. Ah do whatever's best for yourself and whatever you want to do.

HIJAZI: [INDISTINCT]

SCON PARKER: We can't make you do things [INDISTINCT].

...

HIJAZI: Yes. Ah just referrin' back to what you just said before, ah it's, in speaking with youse, ah participating in this interview, it's not, it, it, it is going to help youse send her to the right help that she requires? Or it's not?

SCON PARKER: I cannot make any promises either way. Okay.

HIJAZI: So.

SCON PARKER: I can't, I can't promise you anything and I can't influence um your decision to take part in this interview. Okay. I said earlier that--

HIJAZI: Yeah.

SCON PARKER: If you feel that she needs help we can refer her to support agencies. We have a thing called Supportlink where we can refer them to different people. Okay. But um that, mate it's very important that ah you understand that there's no um promise or inducement for you to take part in this interview. That's, that's why we have to ask you that question.

HIJAZI: Yeah.

SCON PARKER: Okay. I don't want to feel like you have to talk to me because you want to help your friend or that ah if you don't talk to us we're not going to help your friend. Okay.

HIJAZI: Yeah.

SCON PARKER: Is that a bit clearer?

HIJAZI: Yeah it, it is, sort of. Yeah.

SCON PARKER: Alright.

HIJAZI: Um I was under the impression that um, like on the way back in your car, when you said that um, you know, have you gone to seek the right help--

SCON PARKER: Yeah.

HIJAZI: Um we can--

SCON PARKER: Mate, that, that--

HIJAZI: Steer you in the right direction.

SCON PARKER: Conversation was 'cause you were saying you were trying to get ah--

HIJAZI: Yes that's right. I've--

SCON PARKER: Get her clean--

HIJAZI: I've received--

SCON PARKER: And stuff like that--

HIJAZI: I've, I've received--

SCON PARKER: And you were concerned about her--

HIJAZI: Yes. [INDISTINCT]

SCON PARKER: Her um current state of mind and current state of health and--

HIJAZI: Yes.

SCON PARKER: Her certain issues with d-, ah drug problems and stuff like that.

HIJAZI: Yes.

SCON PARKER: Okay. Mate, there's places you can go for help.

HIJAZI: Yes.

SCON PARKER: Okay. And that's what we were askin', have you sought those things out. And if you haven't--

HIJAZI: Um I have--

SCON PARKER: We can put you in the right direction.

HIJAZI: But someone has to want to.

SCON PARKER: Exactly, yeah.

HIJAZI: Um [INDISTINCT]

SCON PARKER: And I can't make someone do that.

HIJAZI: Is that with?

SCON PARKER: [INDISTINCT] um you know, you can try as much as you want. But end of the day, you can't force someone to do what they don't want to do.

HIJAZI: Yeah."

- [21] Having found that no inducement was made by the police, even if the defendant was under the mistaken impression that his participation in the interview would assist Morales such an impression was sufficiently dispelled by Senior Constable Parker in the exchange I have quoted above. Whilst there is no discretion to admit a statement of an accused if the statement was involuntary, there is a discretion to exclude evidence of a voluntary confession when it would be unfair, because of the circumstances in which the confession was made, to use it against a defendant.<sup>18</sup> There is nothing in the conduct of the police officers in generally discussing Morales being referred to supportLink which approaches impropriety. Any misunderstanding on the part of the defendant was sufficiently clarified so as not to cause any untrue admissions being made by him. Nor is there any evidence to support the defendant's submission that the defendant being under arrest at the time of the interview arguably fuelled his belief of a benefit to him or Morales if he participated in an interview. There is simply no evidence of such a belief on the part of the defendant nor that such a belief was brought about by the conduct of the police officers.
- [22] In conclusion on this issue I do not accept that any inducement was made by the officers to the defendant by linking his participation in an interview with any suggested referral of Morales to supportLink. The defendant's statement in the record of interview evidences the fact that he had mistakenly drawn a link between his participation and any referral of Morales to supportLink. Any confusion in this respect did not arise because of any impropriety, unfairness or illegality on the part of the police officers. To the extent that the defendant held this subjective but mistaken belief at the commencement of the interview, such a belief was sufficiently dispelled by Senior Constable Parker's explanation. The mere fact that Senior Constable Parker after this explanation did not clarify with the defendant whether he intended to continue to participate in the interview does not create any circumstance of unfairness. The defendant had been cautioned and informed that he had the right to remain silent and the right to telephone or speak to a friend or relative and to have that friend or relative or a lawyer present at his interview. Even though the defendant did not require any other person present, Senior Constable Parker made it clear to him that if at any time during the interview that changed then arrangements would be made for the defendant to make such a phone call.<sup>19</sup>

<sup>18</sup> *R v Lee* (1950) 82 CLR 133, 150 - 152 (Latham CJ, McTiernan, Webb, Fullager and Kitto JJ); *Duke v The Queen* (1989) 180 CLR 508, 512 (Brennan J).

<sup>19</sup> Transcript of police record of interview on 30 May 2014, page 4, lines 28 - 36.

**(b) The interviewing officer failed to inform the defendant that he was being questioned in relation to an offence of drug production**

- [23] Counsel for the defendant submitted that the interview was attended by other unfairness or impropriety in that Senior Constable Parker never informed the defendant that he was being questioned in relation to a drug production offence, rather it was said to him a number of times the police wished to speak with him about “items” or “exhibits” at the unit and later his “knowledge” of those things.
- [24] This submission should be rejected. I accept the Crown’s submission that the defendant was adequately informed as to the subject matter of the questioning. He was informed at the start of the interview that the search warrant related to the suspected production of a dangerous drug and that the items seized related to possessing dangerous drugs and property that they suspected may have been used in connection with a drug offence.<sup>20</sup>

**(c) The questioning of the defendant by the interviewing officer was unfair or improper in that it involved the cross-examination of the defendant and the expressions of disbelief or scepticism on the part of the interviewing officer**

- [25] To determine this aspect of the application it is necessary to set out the relevant parts of the record of interview. Whilst being questioned about the various items seized at the unit, the following exchange took place:

“HIJAZI: I don’t know what was goin’ on [INDISTINCT].

SCON PARKER: Stayin’ there. Okay.

HIJAZI: I don’t know what was goin’ on [INDISTINCT].

SCON PARKER: Well mate, [INDISTINCT] --

HIJAZI: I was asleep.

SCON PARKER: You have been asleep. I don’t think you’ve been asleep for two or three weeks since you’ve been there. Been asleep the whole time?

HIJAZI: Nobody said I was asleep for two or three [INDISTINCT]. That’s ridiculous [INDISTINCT].

SCON PARKER: That’s what I’m sayin’, mate. You’re sayin’ you’re asleep today but you don’t know what’s going on?

...

SCON PARKER: You do know what’s going on there.”<sup>21</sup>

“SCON PARKER: What can you tell me about these items here?

<sup>20</sup> Transcript of police record of interview on 30 May 2014, page 11, lines 30 - 39.

<sup>21</sup> Transcript of police record of interview on 30 May 2014, page 19, lines 14 - 40.

HIJAZI: Nothin'. Don't know nothin'. [INDISTINCT] like, you know, 'cause you're asking like, the, to me that questions is like ah what can you tell me about the ink inside of the pen, for example, you know, it's not really.

SCON PARKER: Well mate, this stuff here belongs to somebody.

HIJAZI: Yeah.

...

SCON PARKER: It was there when we got there. And you're tellin' us there's been two of you staying in that apartment. Okay. So--

HIJAZI: Yeah.

SCON PARKER: What I am trying to conclude--

HIJAZI: [INDISTINCT]

SCON PARKER: Do you anything about them? Okay.

...

SCON PARKER: Stuff in the apartment. That's why I'm asking you the question.

HIJAZI: Um.

SCON PARKER: I find it very hard to believe that a person could be stayin' there in that apartment with--

HIJAZI: Yeah.

SCON PARKER: Drugs in plain view--

HIJAZI: Yeah.

SCON PARKER: Clip-seal bags of cannabis on the table--

HIJAZI: Yeah.

SCON PARKER: Okay, um stuff in the cupboards--

HIJAZI: Yeah.

SCON PARKER: Utensils all over the place, bongs [INDISTINCT]--

HIJAZI: Yeah.

SCON PARKER: Coffee table.

HIJAZI: Yeah.

SCON PARKER: I find it very hard to believe that a person could be in that apartment and not know that there was dangerous drugs present.

HIJAZI: Mate, I, look, ah you saw with yourself when youse came in, that I was asleep. Um--

SCON PARKER: Like I said, mate--

HIJAZI: I've had a very, very long.

SCON PARKER: [INDISTINCT] been sleep for the past couple of weeks, have you? Are you say-, are you trying to say--

HIJAZI: No, I've been--

SCON PARKER: [INDISTINCT] all this stuff?

HIJAZI: Asleep from at least 3.00 PM.

SCON PARKER: Okay. So you're sayin' that all the stuff wasn't there before 3.00 PM?

HIJAZI: I'm not sayin' that [INDISTINCT] whatsoever. You're saying that. You're saying that. You're putting words in my mouth.

SCON PARKER: I'm trying to conclude, mate. You're not answering my question. I'm saying do you know there was drugs there? And you were sayin' I was asleep.

HIJAZI: I do not know. I can't say to you yes--.<sup>22</sup>

...

“HIJAZI: It's, it is what it is. It's cannabis, like what you said [INDISTINCT] you believe it is, you know.

SCON PARKER: Who's it belong to?

HIJAZI: Don't know. Never seen it before. Never seen that before either.

SCON PARKER: Okay. There is a.

HIJAZI: Don't know what it is. Don't know what's in it.

SCON PARKER: Is there any point--

HIJAZI: And I don't even want to know.

SCON PARKER: In continuing?

SCON JOHNSON: [INDISTINCT]

SCON PARKER: We might ah. Mate ah I might, I think we're going to go round in circles here. Okay.

HIJAZI: Okay.

SCON PARKER: You made it very clear that you don't want to claim any knowledge of any of the drug items.

HIJAZI: What do you mean by that?

SCON PARKER: You said I don't know about any of the drug items, I've never seen--

HIJAZI: Because you're putting me--

SCON PARKER: Drugs there before.

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<sup>22</sup> Transcript of police record of interview on 30 May 2014 , page 26, lines 17 - 57; page 27, lines 1 - 52.

HIJAZI: You're, you're putting me in a predicament where I don't know.  
And--

SCON PARKER: Okay.

HIJAZI: [INDISTINCT] I'm being as honest and helpful--

SCON PARKER: Okay.

HIJAZI: As I can with you guys.

SCON PARKER: Yeah.

HIJAZI: And youse are--

SCON PARKER: Alright. Well--

HIJAZI: Youse are puttin' it on me.

SCON PARKER: If you let me finish--

HIJAZI: I know you're just doin' your job--

SCON PARKER: Let me finish what I'm going to say.

HIJAZI: And these are standard questions and.

SCON PARKER: Um there's a lot more drug items here but I'm not going to ah, not going to question you about those because--

HIJAZI: Okay. 'Cause I don't want to waste--

SCON PARKER: You have said--

HIJAZI: Your time either, mate--

SCON PARKER: That you don't know.

HIJAZI: You know.

SCON PARKER: Um.

HIJAZI: [INDISTINCT] youse want to arrest me, youse can arrest me. But--

SCON PARKER: [INDISTINCT] um--

HIJAZI: I've done nothing wrong--

SCON PARKER: 22.

HIJAZI: You know. I just want my phone and my work phones. And that's it.

SCON PARKER: Alright, mate."<sup>23</sup>

...

"HIJAZI: Mmm how much do I have of it left? Um it shouldn't concern you. I don't know. 'Cause I don't even know [INDISTRINCT].

<sup>23</sup> Transcript of police record of interview on 30 May 2014, page 32, lines 8 - 58; page 33, lines 1 - 39.

SCON PARKER: You understand why a police officer may be suspicious--

HIJAZI: [INDISTINCT]

SCON PARKER: About twelve thousand dollars located in an apartment with um, with cannabis, with methylamphetamine, um with ecstasy possibly with heroin? You don't um, you don't think a, a police officer would be suspicious--

HIJAZI: I'm, I'm tryin'.

SCON PARKER: And ask you questions about that? There's clip-seal bags--  
-

HIJAZI: Yeah.

SCON PARKER: There, there's scales there, there's drug utensils, there's lots of drugs.

HIJAZI: Well that's fine. You, you, you [INDISTINCT] you're only doin' your job. And I can't blame you for doin' that because without you guys my fuckin', my daughter won't be safe. Simple.

SCON JOHNSON: [INDISTINCT]

HIJAZI: So just please don't get the wrong impression about me. I know you might find me a bit irritated or whatever."<sup>24</sup>

- [26] The defendant submits that he was unfairly questioned because Senior Constable Parker expressed disbelief and scepticism in response to many of the defendant's answers. Further, the defendant was cross-examined in relation to matters and impermissibly asked to explain Senior Constable Parker's suspicious state of mind on at least one occasion. More generally the defendant submits that he was pressed for answers on various topics by persistent questioning.
- [27] The defendant relies on *R v Pritchard*.<sup>25</sup> In *Pritchard*<sup>26</sup> the Victorian Court of Criminal Appeal referred with approval to the judgment of Dixon J in *McDermott v The King*<sup>27</sup> where his Honour said with respect to the exercise of a judicial discretion that:
- “... [a]ll that seems to be intended is that he should form a judgment upon the propriety of the means by which the statement was obtained by reviewing all the circumstances and considering the fairness of the use made by the police of their position in relation to the accused.”
- [28] The Court of Criminal Appeal also referred to the ruling of Smith J in *R v Amad*.<sup>28</sup> In that case Smith J ruled that it is improper, even after caution, to subject a person in custody to cross-examination tending to extort admissions or to overcome mental resistance to the making of admissions. His Honour particularly treated as cross-examination forbidden

<sup>24</sup> Transcript of police record of interview on 30 May 2014, page 35, lines 27 - 58.

<sup>25</sup> [1991] 1 VR 84.

<sup>26</sup> [1991] 1 VR 84, 90.

<sup>27</sup> (1948) 76 CLR 501, 513.

<sup>28</sup> [1962] VR 545.

by rules of fairness, inter alia, questions in which a disbelief is repeatedly expressed in the suspect's denials of complicity and questions designed to obtain damaging admissions. Smith J further observed:<sup>29</sup>

“Of course, a police interrogator is not bound to accept the first answer made, and questioning is not unfair merely because it may be described as persistent.”

[29] In the present case, the interview was video-taped. Having viewed the whole video recording, I accept the Crown's submission that it does not show that the questioning was in any way overbearing or improper. Nor was an “undesirable aggressive style”<sup>30</sup> adopted by Senior Constable Parker. Senior Constable Parker was entitled to question the applicant in relation to each item located separately. In circumstances where the defendant had been residing at the unit for two to three weeks, his constant reference to him being asleep on the afternoon that the search warrant was executed was entirely unresponsive to questions of his knowledge of the items seized. I accept that the questions may be viewed in the circumstances as seeking to afford the defendant every opportunity to explain himself given that the items were found in clear view. Further the defendant himself also acknowledged that on at least one occasion the questions he was being asked were straight forward and reasonable and that he understood that the police officers were just doing their job.<sup>31</sup>

[30] Even if the defendant's answers are viewed as being unfairly obtained I would otherwise exercise my discretion not to exclude the interview. In accordance with the principles in *Bunning v Cross*,<sup>32</sup> the exercise of my discretion involves weighing the competing interest of the public need to bring to conviction those who commit criminal offences and the public interest in the protection of the individual from unlawful and unfair treatment. Section 130 of the *Evidence Act 1977 (Qld)* gives to the court a discretion to exclude evidence if it would be unfair to the defendant to admit it. In circumstances where a defendant's answers are unresponsive to the questions it is not unfair for a police officer to persist in the questioning for the purposes of affording the defendant an opportunity to provide responsive answers.

**(d) The interviewing officer continued to question the defendant about drug use in the apartment after the defendant had twice stated that he did not wish to answer those questions**

[31] Counsel for the defendant relied on the following questions and answers from the interview in support of the submission that the interview was attended by unfairness or impropriety:<sup>33</sup>

“SCON PARKER: That there are drugs in the apartment which are illegal? Just, that's the microphone, mate. Just don't touch that. It will distort the sound. Are you aware there's drugs in that apartment which were illegal?

<sup>29</sup> [1991] 1 VR 84, 91.

<sup>30</sup> See Gibbs CJ in *Cleland v The Queen* (1982) 151 CLR 1.

<sup>31</sup> Transcript of police record of interview on 30 May 2014, pages 28 - 29, 35.

<sup>32</sup> (1978) 141 CLR 54.

<sup>33</sup> Transcript of police record of interview on 30 May 2014, page 25, lines 7 - 58.

Whether or not they belong to you or they belong to Andrea, the, I'm just askin' that one question. Do you know there was drugs there?

HIJAZI: I know she was using drugs, so.

SCON PARKER: Okay. Do you know there was drugs there, is the question I asked.

HIJAZI: [INDISTINCT] I didn't think. I know she was using drugs but I didn't know.

SCON JOHNSON: When you say you know you, she was using drugs, how you know that?

HIJAZI: I prefer not to answer that question 'cause that's a silly question to me.

SCON JOHNSON: Well can you explain to me how you know that she uses drugs?

HIJAZI: [INDISTINCT] I, I, I don't wish to answer that.

SCON PARKER: Mate, so are you saying?

HIJAZI: I'm saying I don't wish to answer---

SCON PARKER: No--

HIJAZI: That question.

SCON PARKER: About the drugs in the apartment, did you know there was drugs in the apartment?

HIJAZI: I would like, I would, I don't wish to answer that question.

SCON JOHNSON: Have you seen her use drugs?

HIJAZI: I don't wish to answer that question.

SCON PARKER: Alright. Um number 12, mate. This is all in that same box. There's some digital scales.

HIJAZI: It's her make-up, mate.

SCON PARKER: Pardon?

HIJAZI: That's her make-up box, her foundation."

[32] The above passage shows that the defendant felt free not to answer any particular question. He never states that he does not wish to answer any further questions but rather that he does not wish to answer a specific question. The above passage shows that the question for which Senior Constable Parker was seeking an answer was, "Do you know there was drugs there?" The defendant's response is that he knew Morales was using drugs. When asked the question again he responds by stating, "I know she was using drugs but I didn't know". The defendant is then asked how he knew that Morales was using drugs. He is also asked whether he has ever seen Morales use drugs. The substance of the questions were therefore quite different. In any event, when he indicated that he

did not wish to answer those specific questions, Senior Constable Parker moved on with the questioning to a different item, namely the digital scales seized from the unit.

- [33] Section 24 of the *Police Responsibilities Code* 2012 (Qld)<sup>34</sup> provides that where questioning has started and the person does not want to answer any further questions, the police officers must clarify the person's intention to exercise the person's right to silence by asking the person certain things stated in s 24(2)(a) and 24(2)(b) of the *Police Responsibilities Code*. In the present case the defendant at no stage indicated that he did not want to answer any further questions, rather that he did not wish to answer specific questions, in particular those concerning Morales' drug use and his knowledge of this. There was therefore no requirement for Senior Constable Parker to enquire of the defendant in terms of s 24(2)(a) and 24(2)(b).
- [34] Reading the interview as a whole, I accept the Crown's submission that the applicant was guarded in the answers he gave during the interview. He at times challenged the police as to why he was being asked certain questions and he exercised his right to silence.<sup>35</sup>
- [35] In *Tofilau v The Queen*<sup>36</sup> Gummow and Hayne JJ observed at 418 - 419 [54]:
- “To the extent to which questions of fairness are distinct from reliability, and to the extent to which questions of controlling police conduct and methods are relevant, they are best dealt with under the discretion. Questions of basal voluntariness are to be understood as informed only by considerations of reliability of the evidence concerned. Do the circumstances in which the evidence was obtained fall into the category of cases which the law classifies as so likely to produce unreliable evidence that the evidence should be excluded from consideration by the tribunal of fact?”
- [36] There is no question that the defendant's will was in any way overborne by Senior Constable Parker continuing to question the defendant in circumstances where he had stated he did not wish to answer specific questions. When the passage is considered as a whole, there is nothing in the questioning or the circumstances which would render it unfair for the interview to be tendered as evidence.

### **Disposition**

- [37] On the whole of the evidence, I accept that the answers given by the defendant in the interview were voluntary. I would not otherwise exclude the interview being tendered by the Crown at trial on the basis of unfairness.
- [38] The defendant's application for the exclusion of the electronically recorded interview between himself and police conducted on 30 May 2014 is dismissed.

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<sup>34</sup> The *Police Responsibilities Code* 2012 (Qld) is contained within schedule 9 of the *Police Powers and Responsibilities Regulation* 2012 (Qld).

<sup>35</sup> Respondent's outline of submissions dated 8 October 2015, [3.10].

<sup>36</sup> (2007) 231 CLR 396.