SUPREME COURT OF QUEENSLAND

CITATION:	*R v Barbaro & Anor* [2015] QSC 346
PARTIES:	**THE QUEEN** (respondent) **v** **ROSSARIO DOM BARBARO** (first applicant) and **CHRISTOS PANAGAKOS** (second applicant)
FILE NO:	679 of 2015
DIVISION:	Trial Division
PROCEEDING:	Section 590AA Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	4 December 2015
DELIVERED AT:	Brisbane
HEARING DATE:	23 November 2015
JUDGE:	Daubney J
ORDERS:	**The evidence obtained against the first applicant and second applicant in the search of a blue Hyundai motor vehicle, registration number 912 SUF, on 27 June 2014 is to be excluded**.
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – ILLEGALLY OBTAINED EVIDENCE – GENERALLY – where the first applicant and second applicant were charged with possession of a dangerous drug in excess of 2.0 grams – where police officers conducted an unlawful search of the subject vehicle – where there was no consent to the search of the subject vehicle – where the police officers conducting the search of the subject vehicle believed they were entitled to search the subject vehicle pursuant to section 31 and section 32 of the Police Powers and Responsibilities Act 2000 (Qld) – where no warrant was obtained by police officers – where no post-search approval was obtained by police officers – whether the unlawful search of the subject vehicle by police officers was within the parameters of the Police Powers and Responsibilities Act 2000 (Qld) – whether the court's discretion should be exercised to exclude the evidence

Police Powers and Responsibilities Act 2000 (Qld) ss 31 and 32

Bunning v Cross (1978) 141 CLR 54
R v Keen [2015] QSC 7
R v Pohl [2014] QSC 173
The Queen v Ireland (1970) 126 CLR 321
R v Toon [2015] QSC 117
R v Versac [2013] QSC 46

COUNSEL: S Lynch for the first applicant
R Frigo for the second applicant
C Wallis for the respondent

SOLICITORS: Moloney MacCallum Lawyers for the first applicant
Potts Lawyers for the second applicant
Director of Public Prosecutions (Qld) for the respondent

[1] The first applicant, Rossario Dom Barbaro ("Barbaro"), and the second applicant, Christos Panagakos ("Panagakos") have been jointly charged with possessing the dangerous drug methylamphetamine in a quantity in excess of two grams. Panagakos has also been charged with other counts, which are not relevant for present purposes.

[2] Each applicant has now applied for an order that evidence obtained as a result of the search by police on 27 June 2014 of the vehicle in which the methylamphetamine was allegedly found be excluded from the case against them.

[3] On 27 June 2014, Barbaro was under surveillance by Queensland Police. He was wanted by police in connection with three outstanding warrants in Queensland. It was known by Queensland Police that he was to attend at the Tweed Heads Police Station in New South Wales in relation to other matters on that day.

[4] As a consequence, Detective Senior Constable Foster ("Foster") of the Queensland Police went to the Tweed Heads Police Station on that day to wait and see whether Barbaro appeared there. Barbaro arrived at the Tweed Heads Police Station at about 7.20 pm, and was identified by Foster. Barbaro left the Tweed Heads Police Station, driving a blue Hyundai motor vehicle. This vehicle had earlier been under police surveillance in Queensland at a particular address in Highland Park.

[5] Barbaro drove the vehicle back across the border from New South Wales to Queensland. Panagakos was with him. Barbaro drove the vehicle to a car park on Marine Parade, Coolangatta. Barbaro and Panagakos got out of the vehicle, locked it and went to a local fast food restaurant. Barbaro and Panagakos were then apprehended by police at that restaurant and were restrained. Barbaro was taken to the Southport Watch House. Panagakos had been in possession of a set of car keys. A number of police officers then accompanied Panagakos back to the subject vehicle.

[6] Police officers then used the keys to open the vehicle, and proceeded to conduct a search. In the course of that search, police located a small black bag which, in turn, held four smaller bags containing a total of 27.909 grams (pure) of a substance alleged to be methylamphetamine.

[7] Evidence was put before me in the form of statements and affidavits by Foster and by Detective Senior Constable Sherrie ("Sherrie"). These were the police officers who conducted the search of the vehicle.

[8] It is clear from the evidence of Foster and Sherrie that Panagakos had not consented to the search of the vehicle.

[9] Both Foster and Sherrie deposed to believing that they were entitled to search the vehicle pursuant to the provisions of ss 31 and 32 of the *Police Powers and Responsibilities Act* 2000 (Qld) ("*PPRA*"). They deposed to a number of matters on which they said they relied in having that belief, including information they said they possessed at the time about Barbaro's and Panagakos' involvement in a criminal organisation and in drug trafficking. Each of Foster and Sherrie also said that they did not believe it was necessary for them to seek a post-search approval for their search of the vehicle.

[10] In truth, the search of the vehicle was clearly not within the parameters of s 31 of the *PPRA*, and no argument was advanced by the respondent before me to justify or legitimise the search in reliance on those statutory provisions.

[11] Indeed, it was expressly conceded by counsel for the respondent that the search of the vehicle was unlawful.

[12] The only question before me, then, went to the exercise of the discretion to allow or exclude unlawfully procured evidence on public policy grounds. In *R v Pohl*,[1] I summarised the principles relating to the exercise of that discretion,[2] including by adopting the apposite observations by Applegarth J in *R v Versac*.[3] It is unnecessary for me to repeat those matters of principle here. It is sufficient, rather, for me to turn directly to deal with the matters identified in those judgments as relevant considerations for the exercise of the discretion.

[13] The first question to ask is whether there was a deliberate or reckless disregard of the law by the police.

[14] As I have already noted, it has been conceded that the search was unlawful. Any belief held by Foster and Sherrie that the search was justified by reference to s 31 of the *PPRA* was erroneous.

[15] This was not a case of an "emergent" search. Nor was it a case in which there was any risk of interference with the vehicle while a warrant for its search was obtained. Foster expressly confirmed in his affidavit that the vehicle could have been guarded while a search warrant was sought from an appropriate issuing authority. The only reason, it would seem, for this not happening was Foster's erroneous belief that the search was authorised under s 31 of the *PPRA*.

[16] In *R v Keen*,[4] Jackson J had to consider s 31 and s 32 of the *PPRA* for the purpose of determining whether persons who were standing outside, but near the rear of, a vehicle which police then searched were "occupants" of the vehicle for the purposes of s 31. His Honour observed:

> "[33] **In my view, s 31 is plainly intended to alter the law in a way that would interfere with the right of a person to possession of a motor vehicle free from search**. The answer to the question as to the extent of the interference with that right conferred by s 31 is not advanced by resort to the principle of legality. The greatest assistance lies in the context in which s 31 appears in the PP&RA.

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1 [2014] QSC 173.
2 At [14] – [17].
3 [2013] QSC 46 at [5] – [7].
4 [2015] QSC 7.

> [34] **One important contextual factor is that the power to search a vehicle, where the vehicle and the occupants are detained, is an exception to the requirement that in general a search warrant must be obtained to search a place**. A police officer may apply for a search warrant of a place under s 150 of the PP&RA. A vehicle is a 'place' as defined in the dictionary in Sch 6 for the purposes of that section. So, the PP&RA clearly provides for a search warrant to be obtained to search a vehicle as an alternative power of search to a search empowered under s 31.
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> [35] **Second, s 31 operates in circumstances where the exercise of the power to obtain a search warrant may be inapt because there is not enough time to do so before the vehicle and the things suspected to be in it may be moved. This may explain why the power to search is predicated on exercise of the power to detain the vehicle and occupants. That is, it is a power to facilitate search where the vehicle and its occupants might otherwise decamp**.
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> [36] Third, s 31 is the only section of the PP&RA which refers to an occupant or occupants of a vehicle. Other sections refer to a 'person in control of a vehicle' or similar.[5] A person who is not inside a vehicle may be in control of the vehicle.[6]
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> [37] Fourth, if a person outside a vehicle when it is stopped or detained by police is an occupant, the limits of the operation of the section are difficult to identify.
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> [38] There may be difficulties within cases where occupants get out of a vehicle, before the vehicle and occupants are detained, when the vehicle is being approached by a police officer, but they are not this case. This case was one where the persons detained were not in the vehicle when SC Cameron arrived at the scene.
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> [39] In my view, the applicant and Mr Hetet were not 'occupants' because they were not inside the vehicle when SC Cameron approached it before the power to detain the vehicle and them was exercised." (Emphasis added)

[17] In oral evidence before me, Foster confirmed that it was his, and only his decision to search the vehicle, and that he had not been instructed to conduct the search by a superior officer.[7]

[18] Neither Panagakos, nor Barbaro was an occupant of the vehicle when the search was undertaken, and s 31 was clearly not available. There was no consent to the search of the vehicle. There was no reason why a search warrant could not have been obtained. Foster obviously knew of the search warrant procedure, but decided not to seek a warrant because of his erroneous belief in the applicability of s 31 of the *PPRA*. The

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5 Sections 41(k), 56(2), 58(5), 60, 61(2), 62(1), 67(1), 67(2), 68(1), 68(2), 124(2), 124(3), 125(1)(a), 125(1)(b), 125(1)(d), 125(2)(b) and 125A(2).

6 PP&RA, Sch 6; *Road Use Management Act* 1995 (Qld), Sch 4.

7 T 1-11.

circumstances, in my view, are closely analogous to those I considered in *R v Pohl* at [26]. As I did in that case, I consider that the unlawful search of the vehicle in this case, which was deliberately undertaken, amounted to a "reckless disregard" for the law, and this is a factor which carries significant weight in the exercise of the discretion.

[19] As to the cogency of the evidence, it is clear in this case, as I observed in *R v Pohl* at [27], and for the reasons set out there, that this factor should bear some weight towards the admittance of the evidence.

[20] In relation to the importance of the evidence, it seems that the evidence obtained in the unlawful search of the subject vehicle is the only evidence for the index offence. This supports the public policy principle of "the desirable goal of bringing to conviction the wrongdoer…",[8] and this factor needs to be given some weight towards the admission of the evidence.

[21] It is also clear that the seriousness of the alleged offence, namely the possession of a significant amount of methylamphetamine, also supports the admission of the evidence.

[22] In terms of the nature of the conduct which led to the unlawful search, it appears from the evidence of Foster that, in truth, there was simply no thought given to the necessity to obtain a search warrant for the vehicle. As I have said, the statements and affidavits by Foster and Sherrie repeatedly point to external matters which they said justified in their minds reliance on s 31. As the evidence emerged from Foster, however, it became more than tolerably clear that what actually happened on the day was that Foster came into possession of the car keys as a consequence of Panagakos being restrained at the restaurant, and then decided to undertake a search of the vehicle. That characterisation of the course of events was not seriously challenged by counsel for the respondent in the course of argument.[9]

[23] There was no evidence to suggest that this search was encouraged or tolerated by those in higher authority in the police force. Foster confirmed in evidence that he was the one who unilaterally made the decision to search the vehicle.

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8 *Bunning v Cross* (1978) 141 CLR 54 at 74.
9 T 1-18.30-35.

[24] It is also obvious that the law could easily have been complied with in this case. Foster's evidence was that the vehicle could have been secured intact while a search warrant was obtained.[10]

[25] Counsel for the respondent sought to rely on *R v Keen* to persuade me that the discretion ought be exercised in favour of allowing admission of the evidence. That case, however was quite different from the present, because it was at least well arguable in that case that the relevant persons were "occupants" of the vehicle for the purposes of the invocation of s 31. Jackson J found that the unlawful search of the vehicle in that case did not involve the "deliberate or reckless disregard for the law",[11] saying:[12]

> "The unlawfulness is based on the proper construction of the meaning of s 31, having regard to the particular facts of the case. As far as I am aware, it is not a question which has previously been decided."

[26] In my view, the present case is far closer to the situations considered by Applegarth J in *R v Versac*,[13] by Henry J in *R v Toon*,[14] and by me in *R v Pohl*.[15] To adapt my concluding observations in that case to the present, this was not a case where an emergent search was required to prevent the disappearance of the evidence. A warrant could easily have been obtained and the law complied with. There is a clear public interest in protecting individuals from "unlawful and unfair treatment".[16] Whilst I acknowledge the weight of the cogency and importance of the evidence and the seriousness of the alleged offence as factors which tend to support the admission of the evidence, these are not, in my opinion, sufficient to displace that public interest in the particular circumstances of this case.

[27] Accordingly, it will be ordered that the evidence obtained against the first applicant and second applicant in the search of a blue Hyundai motor vehicle, registration number 912 SUF, on 27 June 2014 is to be excluded.

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10 Affidavit of Aaron Foster (sworn 11 September 2015), 3.
11 At [65].
12 Ibid.
13 [2013] QSC 46.
14 [2015] QSC 117.
15 [2014] QSC 173.
16 *The Queen v Ireland* (1970) 126 CLR 321 at 335.