SUPREME COURT OF QUEENSLAND

CITATION:	*The Queen v Kairouz* [2017] QSCPR 1; [2017] QSC 270
PARTIES:	**THE QUEEN** (Respondent) **v** **JON PIERRE KAIROUZ** (Applicant)
FILE NO/S:	SC No 755 of 2017
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	21 November 2017
DELIVERED AT:	Brisbane
HEARING DATE:	6 November 2017
JUDGE:	Bowskill J
ORDER:	**Application dismissed.**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – EVIDENCE UNFAIR TO ADMIT OR IMPROPERLY OBTAINED – application under s 590AA of the *Criminal Code* to exclude evidence obtained from a search – where the applicant is charged with possession of the dangerous drugs cocaine and diazepam – where the applicant was stopped by police for the purposes of a random breath test, and then a drivers licence check – where the applicant was asked to get out of his car, while the drivers licence was being checked, and asked questions by police, prior to being searched – whether the applicant was unlawfully detained prior to the search – whether the subsequent search of the applicant was conducted with lawful authority *Criminal Code* s 590AA *Police Powers and Responsibilities Act* 2000 (Qld) ss 29, 30, 60 *Bain v Police* (2011) 112 SASR 10; [2011] SASC 228 *Lewis v Norman* [1982] 2 NSWLR 649 *Mbuzi v Commissioner of Queensland Police Service* [2015] QSC 30 *O'Brien v O'Brien* (1991) 15 MVR 6 *R v Awang* [2004] 2 Qd R 672 *R v Bossley* [2015] 2 Qd R 102; [2012] QSC 292 *R v Fuentes* (2012) 230 A Crim R 379; [2012] QSC 288 *R v Inwood* [1973] 2 All ER 645; [1973] 1 WLR 647

R v Lavery (1978) 19 SASR 515
R v Tracey [1983] 1 Qd R 82
Tasmania v Hall (2013) 238 A Crim R 42; [2013] TASSC 75

COUNSEL: D Balic for the respondent
A Edwards for the applicant

SOLICITORS: Office of the Director of Public Prosecutions for the respondent
Alibi Criminal Defence for the applicant

Introduction

[1] The applicant is charged on indictment with unlawful possession of the dangerous drug cocaine in a quantity exceeding 2.0 grams (count 1) and unlawful possession of the dangerous drug diazepam (count 2). He applies under s 590AA of the *Criminal Code* for a ruling that the search conducted of him on 30 June 2016, on which occasion the drugs the subject of both counts were found, was unlawful and therefore, in the exercise of the court's discretion, that the evidence obtained in the search be excluded as evidence in any trial of the charges.

[2] The argument as to unlawfulness of the search turns on whether or not, at the point at which the applicant was asked by police to, and did, get out of his car during his interaction with the police on the night of 30 June 2016 (prior to being searched) he was unlawfully detained. The applicant submits that he was unlawfully detained at that point, because the police officer had not then formed a reasonable suspicion for the purposes of s 29 of the *Police Powers and Responsibilities Act* 2000 (Qld). It follows, the applicant submits, that everything that happened after that was unlawful (including the subsequent search).

[3] The Crown accepted that, at the point at which the applicant was asked to get out of his car, the police had not yet formed a reasonable suspicion for the purposes of s 29 of the PPRA. However, the Crown submitted the applicant was not detained at that point, because the police had simply asked him to get out of the car, whilst their enquiries about his licence etc were ongoing, and in order to have a conversation with him, away from the passenger in the car. When the search subsequently occurred, the police officer had, on the evidence, formed a reasonable suspicion that the applicant had something that may be an unlawful dangerous drug; consequently the search was lawful.

Factual context

[4] The first part of the applicant's interaction with police was not recorded. On the basis of the searching officer's statement and oral evidence, I accept that at about 9.40pm on 30 June 2016 police were operating a random breath testing line in front of the Surfers Paradise Police Station. Then Senior Constable (now Sergeant) David Dixon was part

of that operation. He saw the applicant's car approaching the random breath test line, and observed that the passenger was not wearing a seatbelt. He indicated for the vehicle to stop and, once the car stopped, Dixon went to the passenger side, and had a conversation with the passenger, about the fact that she was not wearing a seatbelt. He described the applicant, who was the driver of the car, as leaning over the passenger, apologising repeatedly, and said he "seemed very animated" and "appeared very nervous in his mannerisms".[1] He directed the applicant to the testing line.

[5] Another police officer breath tested the applicant in the testing line. As this was occurring, Dixon approached the applicant's car, activating his body worn camera as he did so. In his oral evidence, Dixon said that prior to actually speaking to the applicant, he had done a "query vehicle" on the iPad that he had with him, based on the car's registration number. All that he could recall was that this "query" had linked the car to the applicant.[2]

[6] It is apparent from the camera footage (exhibit 2) that, at the point in time at which the breath test is completed by the other officer, Dixon approaches the car and asks the applicant for his driver's licence (00.28). The applicant hands it to him through the window. In an exchange with the applicant, the other officer confirms that the breath test is "all good" (00.39).

[7] In his oral evidence, both at the committal and on the hearing of this application, Dixon said that he looked into the vehicle at this time and could see there was a bulge in the applicant's pants "that didn't appear normal to me".[3] In his written statement Dixon said he observed the "strange bulge in the front of his pants" only after the applicant was out of the car.[4] I accept that Dixon was doing his best to give truthful evidence. Accordingly, I accept that he had seen a bulge in the applicant's pants while he was in the car. But it is clear from Dixon's evidence that, at that point, he did not regard it as particularly suspicious, as it "could have been part of the fly part or the genital part of the pants". Dixon accepted that the bulge in the pants was not something that, at that point, would have caused him to carry out a drug search. It was not until the applicant was out of the car that Dixon became particularly suspicious that the bulge was not explained by either of those things, and may have been because the applicant was hiding something.[5]

[8] It was submitted for the applicant, and the Crown accepted, that Dixon's evidence supported a finding that, prior to the applicant getting out of the car, Dixon had not formed a reasonable suspicion for the purposes of s 29. I proceed on that basis.

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1 Statement of Dixon (exhibit 3) at [4]-[12].
2 Transcript of this application (T) at 1-7 to 1-8.
3 Transcript of the committal (TC) at 1-8 to 1-9; T 1-9 and 1-16.
4 Exhibit 3 at [16] and [18].
5 TC 1-9; T 1-20.

[9] Equally, by the time the applicant is out of the car, and Dixon tells the applicant he is going to be searched, it is not in issue that Dixon had formed a reasonable suspicion. As articulated in Dixon's statement this was on the basis of a combination of "the information I had to hand [which I take to be a reference to the information obtained from the "query vehicle" and the licence check, including the fact that the applicant was on bail for drug possession charges], the entertainment precinct I was in, the nervous mannerisms which manifested in his speech and appearance of sweating, the over compensation of [the applicant] to apologise for his actions, which were of no issue for the initial reason of my speaking with him and particularly the strange bulge in the front of his pants", as a result of which he formed the reasonable suspicion that a search of the applicant was necessary to locate evidence of dangerous drugs.[6]

[10] The controversial question in this case is whether, when the applicant was asked to get out of the car, he was "detained", and whether such detention was unlawful in the circumstances.

[11] The camera footage shows that, after the other officer confirms the breath test is "all good", and the applicant has handed his licence to Dixon, the applicant waits (in the car), presumably whilst Dixon is checking his licence. Dixon then asks him "who's the young lady with you mate?" (01.01), and the applicant says "Angela". Dixon then says "can you just turn the engine off and hop out for a second mate?", and then says "actually, before you do that, can you just drive up here to that driveway" and "we'll talk to you up here in private".[7]

[12] Dixon directs him where to park (in the driveway), which he explained in his oral evidence was to get him out of the way of the RBT line. Once the applicant has stopped his car in the driveway, he undoes his seatbelt and gets out of the car (1.35) (there being no repeat of the request to "hop out" before this occurs).

[13] Dixon's evidence was that, when he checked the applicant's licence on his iPad, "some flags and some warnings" came up, including that the applicant was on bail for an offence of possession of dangerous drugs, and also that he had an "identifying particulars" file, which Dixon said is an indication a person has been charged with "serious offences that require their various identifying particulars be taken".[8]

[14] As soon as the applicant is out of the car, Dixon's voice is lower (quieter) on the recording than it was before. There is an exchange between Dixon and the applicant, which is difficult to hear, but it is uncontroversial that it was about how the applicant knows the passenger, with the applicant explaining he has not known her very long. Dixon starts to ask the applicant about whether he is still on bail at the moment, and where he is living. The applicant answers "Chevron", then corrects himself (as it seems

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6 Exhibit 3 at [17]; T 1-10 and 1-13.

7 My findings of what can be seen, and heard to be said, is based on my review of the camera footage, to some extent assisted by an aid prepared by defence counsel (MFI "A").

8 T 1-11.

that is not his bail address). It is clear that Dixon still has the applicant's licence in his hand (see at 2.15).

[15] Dixon asks the applicant to wait there, and the applicant says "yeah, sure" (2.26). Dixon speaks to the passenger and asks her for "ID", and also asks how she knows the applicant. It is uncontroversial she gives the same explanation as the applicant (although it is also difficult to hear). He then returns to the applicant on the pavement (3.34). The applicant starts apologising to Dixon, saying "I didn't mean to upset you" (by reference to the seatbelt issue). Dixon asks the applicant some questions about the previous drug charge (3.54), and asks him whether he has any drugs on him at the moment (3.56), which the applicant denies. At one point Dixon says "I've just got to check this mate" (4.14), consistent with him continuing his checks on the iPad. They have a conversation about the earlier issue with the seatbelt, with the applicant again effectively apologising, saying "I feel bad that I've peeved you off", by reference to the seatbelt issue.

[16] There is a further pause before (4.53) Dixon tells the applicant "I'm going to search you", but says he wants to do it "really low key", not in front of the passenger. He tells the applicant to get his wallet from the car, and as the applicant is doing this, it appears that Dixon still has the licence in his hand (5.30). After Dixon retrieves the applicant's bag from the passenger side footwell of the car (6.01), Dixon says to the applicant they will go inside the police station, and that he is being detained for a drug search (6.37). The search then takes place inside the police station, during which, after Dixon says to the applicant "what's that there" (7.58), which I infer is a reference to the bulge in his pants, the search proceeds with the applicant ultimately retrieving a packet of "white something" from his underpants, which the applicant admits is "coke" and is his.

[17] Dixon said the reason that he asked the applicant to get out of the car was because there were a number of things he wanted to speak to the applicant about, including his licence and his bail matters, and that he did not want to ask the applicant about those things in front of the passenger, who was a person the applicant had only recently met. Dixon said he did not want to embarrass the applicant, or breach his privacy, by asking him questions about his bail in front of the passenger. There are a number of aspects of the recording which are consistent with this, for example, lowering his voice once the applicant is out of the car and he starts to ask about his bail; at the point at which he tells the applicant he is going to search him, saying that he will do this in a "low key" way, not in front of the passenger; and when he is taking the applicant into the police station for the search, Dixon says to another officer "he doesn't really know the young lady", "so if you can just watch the car there and make sure she doesn't drive off".

[18] Dixon's evidence was that, as the applicant got out of the car, he could see a "misshape in his groin area", and as he was standing there, throughout the conversation they had

on the pavement, Dixon could see a bulge in his pants, and the applicant was "fidgeting" (with his hand(s) in his pocket(s)).[9]

[19] The applicant did not give any evidence on this application.

Was the applicant unlawfully detained?

[20] After he had requested, and been given, the applicant's licence, for the purpose of checking it, Dixon asked the applicant to "hop out" of the car. The applicant complied, voluntarily and without compulsion from Dixon. This is apparent from the camera footage. All that Dixon said to him was "can you just turn the engine off and hop out for a second mate?" Dixon then asked the applicant to move his car up to the driveway (to get it out of the way of the RBT line) and, having done that, without any further request from Dixon, the applicant hopped out of the car. He then had a conversation with Dixon on the pavement, whilst Dixon was continuing to check information on his iPad. I accept that Dixon asked him to get out of the car because he wanted to ask him about his bail and his licence, and did not want to do that in front of the passenger.

[21] Dixon did not regard himself as having "detained" the applicant at this point;[10] although noted that as Dixon still had his driver's licence, and was in the process of checking it whilst he was speaking to the applicant, the applicant could not have simply driven off.[11] If the applicant had tried to leave, Dixon said he would not have let him leave,[12] until he had completed the licence check and clarified the issues around his bail.[13]

[22] Dixon acknowledged that he could not identify a specific power under the PPRA that he was exercising to ask the applicant to get out of the car; nor did the Crown on this application. What Dixon said he was doing was making general inquiries, in the course of his job as a police officer; and that he asked the applicant to get out of the car so that he could talk to him, and not embarrass him in front of his passenger.[14]

[23] The applicant acknowledges that he was lawfully stopped, in relation to the random breath testing and the licence check. But the applicant submits that, at the point at which he was asked by Dixon to hop out of the car, "that had finished". As a matter of fact, I do not accept that as correct, having regard to the camera footage. Dixon had only just taken his licence, and started his check, when he asked the applicant to hop out of the car. His checks were continuing, in relation to that and in relation to the bail issue, well after the applicant had hopped out of the car. In the language of White J in *Bain v Police* (2011) 112 SASR 10, Dixon's enquiries, in relation to the applicant's licence, and then the bail issue, were not exhausted at the point at which he asked the applicant to hop out of the car.

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9 T 1-10 and 1-12.
10 TC 1-5, 1-6 and 1-17; T 1-25.
11 TC 1-7.
12 TC 1-17; T 1-25.
13 T 1-26.
14 T 1-27 to 1-29.

[24] The applicant submits "there simply was no lawful basis for that officer to direct [the applicant] out of the vehicle. He had no reasonable suspicion. He accepts himself he had no reason for suspicion until he saw the bulge outside of the vehicle… it is a clear breach of the law".[15]

[25] Section 29(1) of the PPRA provides:

> "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 –
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> (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."

[26] The prescribed circumstances for searching a person without a warrant include that the person has something that may be an unlawful dangerous drug (s 30(a)(ii)). The term "reasonably suspects" is defined in schedule 6 to the Act to mean "suspects on grounds that are reasonable in the circumstances".[16]

[27] There is no definition of "detain" in the PPRA. The term is to be given its ordinary and natural meaning.[17] The apposite meanings of "detain" in the Oxford English Dictionary Online include "to keep in confinement or under restraint" and "to keep from proceeding or going on".[18] The separate (and in some cases alternate) use of the word "arrest" in the PPRA indicates that the words have a different (although overlapping) meaning: a person may be detained, without being arrested; but a person who is arrested is also, in a practical sense, detained.[19]

[28] It was uncontroversial that it was entirely lawful for the police to stop the applicant in his car for the purpose of conducting a breath test and for the purpose of checking his licence. This is clear having regard to s 60 of the PPRA.[20]

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15 T 1-32.

16 See also *R v Fuentes* (2012) 230 A Crim R 379 at [21] per Dalton J and *R v Bossley* [2015] 2 Qd R 102 at [14] also per Dalton J.

17 Cf *R v Awang* [2004] 2 Qd R 672 at 677.

18 See *R v Tracey* [1983] 1 Qd R 82 at 84, in which the Court of Criminal Appeal (Matthews, Dunn and Shepherdson JJ) accepted that "detain", in the analogous context of s 130M of the *Health Act* 1937-1980 (conferring a power on police to detain any person whom the police officer reasonably suspects to have in their possession a dangerous drug, and search the person so detained) meant "to keep in confinement or custody". See also *O'Brien v O'Brien* (1991) 15 MVR 6 in which Kearney J, of the Supreme Court of the Northern Territory, held that "lawfully detained" (in the context of a provision making it an offence to escape from lawful detention, and whether a person stopped for a roadside breath test was being lawfully detained) was a word of wide scope, embracing but extending beyond situations where the person detained is physically restrained or in custody, and including "lawfully kept from proceeding on" or "lawfully stopped".

19 As to the meaning of "arrest", see *Lewis v Norman* [1982] 2 NSWLR 649 at 655.

20 See also *R v Fuentes* (2012) 230 A Crim R 379 at [15].

[29] Whether the applicant was then, as he stood on the pavement next to the car, "detained" within the meaning of s 29 of the PPRA is a question of fact, which depends on the particular circumstances.[21]

[30] In my view, having regard to the ordinary meaning of the word, including as that does "to keep from proceeding on", the applicant was detained as he stood on the pavement, speaking to Dixon.

[31] However, I am not persuaded that was unlawful, in the circumstances of this case.

[32] Section 29 is a statutory power to "stop and detain" a person, and then to search them. It is accepted in this case that, at the point at which Dixon asked the applicant to get out of the car, he did not have a reasonable suspicion for the purposes of s 29. But the absence of statutory authority to ask the applicant to get out of the car, or to have a conversation with him, does not mean those actions were unlawful, in circumstances where the applicant voluntarily and without compulsion complied with the request to "hop out" of the car, and voluntarily answered Dixon's questions.

[33] In *Bain v Police* (2011) 112 SASR 10 the police pulled over a car after observing that its registration was expired. A breath test was performed on the driver, and he was asked to produce his driver's licence. A check of the licence revealed that it had expired, and that the driver was "drug user dependent". One of the police officers instructed the other to prepare a traffic infringement notice in relation to the expired licence, and then proceeded to ask the driver questions, including about his drug use, which he answered. Following that conversation, she asked him to get out of the car so that she could have a "quick look", as a result of which drug paraphernalia was found. The application to exclude that evidence, on the basis that the police officer was not entitled to ask him questions about his drug use (not then having formed a reasonable suspicion) was dismissed. White J found that the police officers had not yet exhausted the exercise of their powers to stop the vehicle for the purpose of exercising other powers under a road law, or for the purpose of obtaining information as to the identification of the driver of the vehicle, because the infringement notice was still being completed (at [15]). His Honour then said:

> "[16] It is true that there is no statutory provision which expressly authorised Constable Brown to ask the questions which she did about the appellant's drug use, nor is there any statutory provision which obliged the appellant to answer those questions.
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> [17] However, the absence of statutory authority for Constable Brown's questions concerning the appellant's drug use did not make those questions unlawful. Constable Brown did not require statutory authority to ask the

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[21] *R v Inwood* [1973] 2 All ER 645 at 649; [1973] 1 WLR 647 at 652; *Tasmania v Hall* (2013) 238 A Crim R 42 at [16] per Blow CJ; *Mbuzi v Commissioner of Queensland Police Service* [2015] QSC 30 at [34] per Mullins J.

> questions which she did. She was as free to ask those questions as any other member of the community. The fact that the appellant was not obliged to answer Constable Brown's questions did not make the questioning unlawful…
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> [18] A police officer is not of course entitled to mislead a person who is the subject of the exercise of police powers as to the nature or extent of those powers or as to the person's obligations in relation to such powers. Conduct of that kind would be reprehensible and may give rise to an occasion for the exercise of the *Bunning v Cross* discretion.
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> [19] However, in the present case, there is no suggestion of misleading conduct by Constable Brown. She did not say anything to the appellant to indicate that he was bound to answer her questions regarding his drug use. The appellant had not previously asked any question of Constable Brown as to the extent of his obligations to answer questions. The circumstances were not such that it was appropriate for Constable Brown to correct an apprehension in the appellant's mind which may have arisen from an interchange between them as to the extent of his obligations in responding to police questions.
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> [20] It is true that Constable Brown asked the questions concerning the appellant's drug use at a time when the traffic infringement notice was being completed, so that he was in a sense subject to police direction. It is possible that this created the impression in the appellant's mind that he was obliged to answer Constable Brown's questions. However, as the appellant did not give evidence on the voir dire there is no evidence to that effect. Further, there is no suggestion that the police officers were deliberately extending the time necessary for the completion of the traffic infringement notice so as to prolong the opportunity for questioning of the appellant."

[34] *Bain* was cited with approval by Dalton J in *R v Bossley* [2015] 2 Qd R 102. In that case, a young man charged with trafficking and possession of MDMA applied to exclude evidence obtained from a search of a bag he was carrying, in which the MDMA pills were found. In circumstances where the effect of the evidence was that the police 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" (at [13]) Dalton J did not accept that the police officer had formed a reasonable suspicion, for the purposes of s 29, prior to searching the man's bag (at [15]). The evidence was that the police officer asked the man if he had any drugs on him, to which he said no; then asked if he could look in his bag and the man handed the bag over (at [5]-[9]). In addressing the lawfulness of the search of the bag, notwithstanding the finding of no reasonable suspicion at that stage, Dalton J said:

"[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*.[22] 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 Metropolitan Police Commissioner; Halliday v Nevill & Anor; Kuru v State of New South Wales; Coco v R.*[23] 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.[24]

[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*.[25]

[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*:[26]

> '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

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22 (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.

23 References omitted.

24 *Police v Moukachar* [2010] SASC 199; *Bain v Police* [2011] SASC 228; (2011) 112 SASR 10.

25 [2001] NSWSC 797; reported in (2001) 53 NSWLR 227.

26 (1991) 56 A Crim R 414, 419-420.

> 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.
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> 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*[27] 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 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.
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> [22] This same view of the law was taken in *Werner v Police* and *Wineberg v Stafford*. 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.*"[28]

[35] Having considered the evidence of the initial interaction between the police and Mr Bossley, as well as his (still cooperative) attitude once he was warned, and knew the tape recorder was on, Dalton J found that he gave proper consent to the questioning and the search of his bag which occurred before he was warned (at [29]). Her Honour did 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 initially asked if the police could look in his bag, and did not regard his lack of knowledge as to the law about consent searches as meaning he did not in fact consent. She found that his will was not overborne; that he decided to be co-operative (at [30]).[29]

[36] Another example of the application of this principle can be found in *R v Lavery* (1978) 19 SASR 515, a case involving an allegation that a man confessed to an armed robbery

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27 (1986) 60 ALR 537, 550-551.

28 References omitted.

29 See also *R v Nguyen* [2016] QSC 207, in which one of three persons subsequently detained and searched had, immediately before this, voluntarily complied with a request from police to empty his pockets, and in doing so dropped a bag containing crystal substance. That, taken with other matters, was accepted as forming the basis for the reasonable suspicion to then detain and search the men.

whilst illegally detained by police officers. In that case, King J (as his Honour then was) said at 516:

> "A suspect may, voluntarily and without constraint, accede to a police officer's request to accompany him and, if he does so, there is of course no interference with his liberty. This is so even if he goes reluctantly out of respect for authority or fear that a refusal will be construed as an indication of guilt or some other similar motive. The suspect's liberty is not under restraint simply because the police officer would or might arrest him if he were to exercise his right to depart or to refuse to accompany the police officer. If, however, the circumstances are such as to convey, notwithstanding the use of words of invitation or request, that the suspect has no real choice, his freedom is under restraint and he cannot be regarded as accompanying the police officer voluntarily."

[37] By reference to this decision, in *Tasmania v Hall* (2013) 238 A Crim R 42, in circumstances where two police officers went to the accused's home, and said they would like him to come down to the police station; neither told him he was under arrest nor told him that he had the option of not accompanying them; and he agreed, saying that "he had been raised to have respect for the law, so that if a police officer knocked on the door he would not sit there, look at them, turn around and walk away"; and when he travelled to the police station the accused sat by himself in the back of the car, Blow CJ found that:

> "[19] … A person under compulsion would not have been left alone in the back seat.
>
> [20] … whilst the accused might well have been very reluctant to go with the police, and might not have understood his rights, he went with them out of a respect for their authority, and not as a result of compulsion. I was not satisfied that what happened amounted to an arrest."[30]

[38] On the evidence in this case, I find that the applicant voluntarily and without compulsion from Dixon "hopped out" of the car when asked to do so. He gives the clear impression in the camera footage of willingly cooperating with the police (by the way in which he gets out of the car, and what he says to Dixon, including his repeated comments about being sorry, effectively, about the seat belt issue). I am not able to comment on what the applicant's knowledge of his legal rights may or may not have been, or why he did as Dixon asked him to do, as I did not hear evidence from him. But the relevant inquiry is as to his will, rather than his state of knowledge. There is no

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[30] Cf *Mbuzi v Commissioner of Queensland Police Service* [2015] QSC 30 where, in different factual circumstances, Mullins J reached the conclusion that Mr Mbuzi "clearly did not wish to accompany [the police officers] voluntarily, and was not given the option of attending at a police station at another time to sort the matter out. Even though he was in the back seat of the police car as instructed, he did so under compulsion and was therefore detained" (at [34]).

evidence of any coercive or misleading conduct on the part of the police officers involved, including Dixon. Having regard to the camera footage, there is no sense in which it appears the applicant's will was overborne; he was voluntarily cooperating with the police.

[39] The applicant submitted that, when Dixon asked him to get out of the car, either he was unlawfully detaining him, which renders what followed unlawful, or he was already intent on exercising a search on the applicant in circumstances where he did not have a reasonable suspicion at that time: either way, it was unlawful. As to the first, for the reasons given I do not accept that the applicant was unlawfully detained when he was asked to get out of the car and voluntarily did so. As to the second, I am not persuaded that Dixon was "intent on exercising a search" prior to asking the applicant to get out of the car. The sequence of events which is apparent from the camera footage shows that Dixon asks for the applicant's licence just as the breath test is being completed; he checks his iPad; then he asks the applicant to hop out of the car, as I have accepted, so that he could speak to him out of earshot of the passenger. Dixon's checks, and then his enquiries with the applicant about his bail address, are continuing after the applicant has hopped out of the car and is on the pavement.

Was the subsequent search lawful?

[40] I accept Dixon's evidence that, once the applicant had stepped out of the car, the bulge in his pants that Dixon had earlier noted took on a different significance which, taken with the information he had obtained upon checking the car registration, and then the applicant's licence (including that he was on bail for drug possession charges), and his observations of the applicant's behaviour and mannerisms, resulted in him having a reasonable suspicion that the applicant may have drugs on him. Having found that it was not unlawful to ask the applicant to get out of the car, and then to speak to him, in circumstances where the applicant voluntarily and without coercion cooperated with the police in doing that, I find that the later search of the applicant was lawfully conducted in accordance with s 29 of the PPRA.

[41] The application is therefore dismissed.