

DISTRICT COURT OF SOUTH AUSTRALIA
(Criminal)

R v [REDACTED]

Reasons for Ruling of His Honour Judge Soulio (*ex tempore*)

7 May 2015

**CRIMINAL LAW – PROCEDURE – WARRANTS, ARREST, SEARCH,
SEIZURE AND INCIDENTAL POWERS – ARREST AND DETENTION –
EFFECTING ARREST – REASONABLE CAUSE**

Accused charged with trafficking in methylamphetamine – police officers had observed accused's vehicle parked at the home of a suspected drug dealer and ascertained registration had expired and owner disqualified from driving – whether grounds for reasonable suspicion justifying search pursuant to s 52(9) Controlled Substances Act – whether evidence should be excluded.

Held – 1. Search unlawful.
2. Evidence excluded in exercise of discretion.

Controlled Substances Act 1984 (SA) s 52, referred to.
R v Le [2013] SADC 82, *Bunning v Cross* (1977-78) 141 CLR 54, *R v Davidson* [1991] SASC 2704, *Pressler v Holzberger* (1989) 44 A Crim R 261, *R v Cavallaro* [2011] SADC 15, *R v Chapman* (2001) 79 SASR 342, *R v Nguyen* [2013] SASCFC 91, *R v Nguyen* [2015] SASCFC 7, *R v Rockford* [2015] SASCFC 51, *R v Rockford* [2014] SADC 199, considered.

Prosecution: R Counsel: MS J HOLT - Solicitor: DIRECTOR OF PUBLIC PROSECUTIONS
Defendant: [REDACTED] Counsel: MR S HENCHLIFFE Solicitor
BARBARO THILTHORPE LAWYERS

Hearing Date/s: 07/05/2015

File No/s: [REDACTED]

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The accused is charged with the offence of trafficking in a controlled drug, namely methylamphetamine, said to have been committed on 15 August 2013 at Taperoo. She brought an application seeking to have excluded, certain evidence against her, resulting from a search of her motor vehicle after she was stopped by police.

Police officers investigating a traffic infringement had stopped the accused's vehicle and, on the prosecution case, a police officer had observed, a glass pipe on the back seat of the vehicle, and formed the view that that was an implement used for smoking methylamphetamine which, in turn, caused him to form a reasonable suspicion that an offence contrary to the provisions of the *Controlled Substances Act 1984* was being committed. He thereafter exercised the power said to be available to him pursuant to s 52(9) of that Act, to conduct the search.

On the hearing of the application, evidence was given by the police officer, Senior Constable Bellinger, and certain documents were tendered by both prosecution and defence. Senior Constable Bellinger's partner did not give evidence, nor did the accused.

Senior Constable Bellinger said that on the night the search was conducted, he and his partner had been tasked to a job near to where the accused was apprehended, and thereafter, as part of ongoing tasking, they attended at an address known to them, which was believed to be associated with drug offending. Whilst driving past that address, Senior Constable Bellinger observed,

parked in the driveway of the house in which they were interested, a four-wheel drive motor vehicle which, as it turned out, belonged to the accused.

Details of the registration number of that vehicle were taken and inquiries made. It transpired that the registration of that vehicle had expired and that the registered owner was disqualified from driving at the time.

The police officers determined to park their vehicle in an adjacent street, presumably to observe the departure of the accused's vehicle either across the mouth of that street or driving down the street in which they were parked.

The accused indeed drove down the street in which the police were parked, whereupon the police officers followed the accused's vehicle for a short distance and then activated police lights causing the accused to bring her vehicle to a stop.

Senior Constable Bellinger approached the accused's vehicle. It was about 9.30pm. It was dark. In accordance with usual safety practices, he shone a torch into the rear compartment of the vehicle, and into the rear seat, in order to ensure that there were no passengers who might surprise him and no weapons present. Having satisfied himself of those matters, he commenced speaking to the driver. The precise content of the initial conversation was not recorded.

Senior Constable Bellinger gave evidence that whilst he was speaking to the driver he observed, without the aid of torch light, a handbag on the rear seat of the vehicle and in the open mouth of that handbag observed a glass pipe which he

believed to be an ice pipe. Seeing that ice pipe, he said, enlivened his reasonable suspicion that a *Controlled Substances Act* offence may have been committed.

Senior Constable Bellinger said that he then requested that the accused exit the driver's seat and a conversation ensued which was then recorded because he activated his body camera. That conversation commenced with questioning of the accused as follows:

Q. Do you use any drugs, Christie?

A. I have, yeah.

Q. You have. When was the last time you used.

A. Yesterday.

Q. What are you using.

A. Like, meth.

Q. Yep, all right, so - just so you understand why I'm conducting a search of your vehicle, all right, is because I could see this in plain view through the open, through the window, okay. So I will ask you again, all right, just wait for me to say something, all right, I'm going to ask you some further questions. You're not obliged to answer them but anything you do say may be given in evidence. Is there anything in this car that shouldn't be there.

A. Yeah.

Q. What's in there.

A. A pipe.

Q. A pipe.

A. And some gear in there, too.

The central issue for determination upon the hearing of the application was whether or not the glass pipe was indeed in open view in the handbag on the back seat of the vehicle. It is common ground that the onus of establishing the basis of the formation of a reasonable suspicion rested upon the prosecution. Accordingly, I must be satisfied, on the balance of probabilities that the glass pipe was indeed visible in the way described by Senior Constable Bellinger.

The body camera recording of the search and the exchange between the police officer and the accused was tendered, and shown as part of the prosecution case, and relied upon in various respects as part of the defence case.

During the exchange depicted on the video, Senior Constable Bellinger, it appears, approaches the vehicle. The scene is dark and, for a period of what appears to be between three and four seconds, he is shown standing in the vicinity of the rear passenger area of the vehicle, before emerging to take the accused's handbag to the bonnet of the police vehicle. Upon doing so he is shown to open the handbag, open a sunglasses case within the handbag and to remove from the sunglasses case a bundle of plastic bags, a green container

which was ultimately found to contain an amount of material containing methylamphetamine, and a glass pipe.

In giving evidence, Senior Constable Bellinger said that he had seen the glass pipe at the top of the handbag through the rear window of the darkened vehicle, and thereafter, while holding a torch in his left hand, he opened the glasses case, saw inside it a small green container, placed the glass pipe within the sunglasses case, and placed that back into the handbag, and then placed the handbag onto the police vehicle bonnet where he proceeded to open the handbag and the sunglasses case in the manner I have described.

He was cross-examined on the basis of a police apprehension report he had prepared in the days shortly following the apprehension of the accused. In that, he said, in a narrative description of events of the night:

That vehicle was stopped as it turned onto Marmora Terrace. Bellinger activated a personal video camera system and approached the vehicle. As a result of a brief conversation, Bellinger asked the driver, the accused, [REDACTED] to exit the vehicle. While speaking with the accused, Bellinger saw in plain sight through the back window items of drug paraphernalia in the handbag of the accused (deal bags and pipe).

Senior Constable Bellinger said of the apparent inconsistency between that account, and his evidence: that the narrative was not necessarily in chronological order; that by virtue of the constraints of space, he could not go into detail as to the formation of a suspicion to conduct the search; that he did not in fact, as was said in the police apprehension report, activate a personal video camera system and then approach the vehicle but, rather, as he had said in evidence, had

approached the vehicle, spoken to the driver and only activated the personal video camera upon seeing the ice pipe.

He said in evidence that he did not recall seeing the deal bags at all. They were discovered, as I have said, in the sunglasses case.

It was put to the police officer that he had deleted the earlier part of video footage which, it was put to him, contained an exchange relating to a direct inquiry as to what activity the accused engaged in at the house suspected of being involved in drug trade. I do not consider that the evidence goes anywhere near establishing that the police officer deleted part of the evidence which might not be favourable to the prosecution case. I reject that contention.

It is true that Senior Constable Bellinger did not, in the police apprehension report, nor in his declaration, nor as it transpires, during the course of his discussions with counsel in preparation for the voir dire hearing, disclose that he had opened the sunglasses case in the back of the car and inserted the glass pipe into that case.

In considering the legality of the search, I accept that the initial interest in the accused's vehicle was the fact that it was parked in the driveway of the house to which I have referred. The inquiry subsequently established that traffic offences had been committed by virtue of the lapsed registration and may well have been committed by virtue of the owner driving whilst disqualified from driving. It was part of Senior Constable Bellinger's duties to detect traffic offences and apprehend offenders. He frankly conceded that his interest was also

in the issue of whether the accused was involved in some drug-related activity but said that at the time the vehicle was stopped, it was stopped in relation to traffic offences.

In making submissions, counsel for the accused did not suggest that the search of the vehicle was illegal on the basis that the vehicle was stopped for traffic offences as a subterfuge to enable a search to be carried out. The central issue again was whether or not the police officer had formed a reasonable suspicion on the basis of information available to him, observed in the way he described.

Having regard to the fact that the onus of establishing that a reasonable suspicion was properly formed rests upon the prosecution, in view of the inconsistencies between Senior Constable Bellinger's evidence and the police apprehension report; and in view of the absence from both the report and, more importantly, from the declaration, as to the steps he took in relation to the very item which was said to have formed the entire basis of his suspicion; together with observations made in court of the video footage; I cannot be satisfied to the requisite degree that the glass pipe was visible on top of the handbag through the rear window of the unlighted car without the assistance of torchlight, nor that it was on top of the handbag at all. It follows that I regard the search as being unlawful.

That is, of course, not the end of the matter. The issue of the discretion to exclude evidence in properly obtained has been considered in recent times on a

number of occasions. In *R v Le*,¹ I considered an application to exclude evidence based on an apparent misapprehension of the power to stop a vehicle to make inquiries of the driver. There, as here, it was necessary, having found that the search was unlawful, to determine whether to exclude the evidence pursuant to the public policy discretion referred to in *Bunning v Cross*.² In *Bunning v Cross* the balancing exercise was described by Stephen and Aicken JJ in the following terms:³

What *Ireland* involves is no simple question of ensuring fairness to an accused but instead the weighing against each other of two competing requirements of public policy, thereby seeking to resolve the apparent conflict between the desirable goal of bringing to conviction the wrongdoer and the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law. This being the aim of the discretionary process called for by *Ireland* it follows that it by no means takes as its central point the question of unfairness to the accused. It is, on the contrary, concerned with broader questions of high public policy, unfairness to the accused being only one factor which, if present, will play its part in the whole process of consideration.

The starting point perhaps in considering the exercise of the discretion to exclude evidence, the product of an unlawful search is to be found in the following remarks in *Bunning v Cross*:⁴

The liberty of the subject is in increasing need of protection as governments, in response to the demand for more active regulatory intervention in the affairs of their citizens, enact a continuing flood of measures affecting day-to-day conduct, much of it hedged about with safeguards for the individual. These safeguard the executive, and, of course, the police forces, should not be free to disregard. Were there to occur wholesale and deliberate disregard of these safeguards its toleration by the courts would result in the effective abrogation of the legislature's safeguards of individual liberties, subordinating it to the executive arm. This would not be excusable however desirable might be the immediate end in view, that of convicting the guilty. In appropriate cases it may be "a less evil that some criminals should escape than that the Government should play an ignoble part" - per Holmes J in *Olmstead v United States*. Moreover the courts should not be seen to be acquiescent in the face of the unlawful conduct of those whose task it is to enforce

¹ *R v Le* [2013] SADC 82.

² *Bunning v Cross* (1977-78) 141 CLR 54.

³ *Bunning v Cross* (1977-78) 141 CLR 54 p 74.

⁴ *Bunning v Cross* (1977-78) 141 CLR 54 p 77-78.

the law. On the other hand it may be quite inappropriate to treat isolated and merely accidental non-compliance with statutory safeguards as leading to inadmissibility of the resultant evidence when of their very nature they involve no overt defiance of the will of the legislature or calculated disregard of the common law and when the reception of the evidence thus provided does not demean the court as a tribunal whose concern is in upholding the law.

In the present case there is no suggestion that the cogency of the evidence discovered as a result of the search had been affected by any legality or impropriety. It is apparent that the evidence sought to be impugned is of significance to the prosecution case. The evidence included resealable plastic bags, described as deal bags; a small electronic scale; 0.82gm of material containing methylamphetamine; a sum of \$300 in cash; and a telephone with text messages strongly indicative of previous sales.

As was said in *Bunning v Cross*, however:⁵

To treat cogency of evidence as a factor favouring admission, where the illegality in obtaining it has been either deliberate or reckless, may serve to foster the erroneous view that if such evidence is damning enough that will of itself atone for the illegality involved in procuring it.

I bear in mind that unauthorised searches that gather no evidence will rarely be the subject of scrutiny; it is only those that reveal cogent evidence which are the subject of consideration by the Court and that accordingly, if every unauthorised search that reveals cogent evidence were to be excused, that would effectively render the statutory pre-requisites for a search redundant.

⁵ *Bunning v Cross* (1977-78) 141 CLR 54 p 79.

There have been various pronouncements by the courts as to the approach to be taken in relation to the fruits of an illegal search. In *R v Davidson*, Legoe J said:⁶

Consequently the wide powers which have been given to police by statute over and above the basic common law restrictions in this regard must be exercised with appropriate caution and supervision from the courts.

The observations of Spender J in *Pressler v Holzberger* are also apposite:⁷

Where the legislature has defined the circumstances in which a person's liberties might be infringed or their rights curtailed, it should not readily be concluded that conduct outside the defined authorisation should be tolerated or excused. Judges ought not, by a wink or a nod, weaken the protection which the law gives to the rights and liberties of citizens.

I bear in mind, in relation to offending of this type, that it is relevant to consider the fact that whilst the offending is serious, the offence is of a category which can be described as a victimless offence, although only in the sense that the "offence is not one where there is a personal victim who might feel aggrieved that the crime against him received no redress because it lacks police investigative work."⁸

Williams J in *R v Chapman* referred to earlier authorities, and in the course of his judgment referred to *R v Armstrong*, saying:⁹

King CJ roundly criticised the arrogation by police officers to themselves of such high-handed purported authority. Whilst the circumstances of that case differed in some respects from those of the instant case, the key principle is identical. If police officers deliberately exceed their authority by embarking on unlawful and unauthorised conduct which impinges upon the normal rights of a citizen then they cannot be heard to complain if the courts, in conformity with the approach enunciated in *Bunning v Cross* (1978) 141 CLR 54 and *R v Ireland* (1970) 126 CLR 321, exclude evidence obtained in the course of such activity.

⁶ *R v Davidson* [1991] SAS 2704.

⁷ *Pressler v Holzberger* (1989) 44 A Crim R 261 at 272.

⁸ See *R v Cavallaro* [2011] SADC 15 at [56].

⁹ *R v Chapman* (2001) 79 SASR 342.

The factors which may be taken into account in considering the exercise of the discretion include: whether the unlawfulness was not deliberate; whether the police did not act upon trite information; whether a police officer's actions were wilful or malicious; whether the cogency of the evidence was not effected, and whether the evidence is of considerable probative value.

Some of the factors in the present case would militate against exclusion of the evidence. However my finding that I am not satisfied to the requisite degree as to the presence of the glass pipe in the position described, is of itself an important factor weighing in favour of exclusion.

In more recent times and since the delivery of the decision in *R v Le* to which I have referred, the Court of Criminal Appeal has delivered decisions in *R v Nguyen* [2013] SASCF 91 delivered 11 September 2013, *R v Nguyen* [2015] SASCF 7 delivered 6 February 2015, and more recently *R v Rockford* [2015] SASCF 51, delivered 22 April 2015, the latter being a successful appeal against a ruling I made in *Rockford* [2014] SADC 199 delivered 22 November 2014. There I had found that a police search consequent upon illegal entry onto private property was unlawful but refused to exercise a discretion to exclude the evidence.

In the Court of Criminal Appeal decision, Stanley J set out a number of factors considered in the first instance decision as relevant to the exercise of the

discretion which weighed in favour of the admission of the evidence obtained as a result of the unlawful search and entry. He went on to say:¹⁰

However, in my view, the judge failed to have regard to what Deane J describes in *Pollard* as the principal considerations of “high public policy” which favour exclusion of evidence procured by unlawful conduct on the part of investigating police, namely, the threat which disregard of the law by those empowered to enforce it represents to the legal structure of our society and the integrity of the administration of criminal justice. As his Honour observed, it is the duty of the court to be vigilant to ensure that unlawful conduct on the part of police is not encouraged by an appearance of judicial acquiescence. The exclusion of evidence obtained in this way is in the public interest because it is necessary to prevent statements of judicial disapproval appearing hollow and insincere in a context where curial advantage is seen to be obtained from the unlawful conduct and to ensure that the courts are not themselves demeaned by the uncontrolled use of the fruits of illegality in the judicial process.

In the present matter, the evidence given in court, which evidence had the flavour of a reconstruction, albeit, no doubt, an honest reconstruction, based on viewing the video footage and an attempt to recollect the events of the night, simply cannot sit with the other evidence to which I have referred.

In all the circumstances, it seems to me that the search, being unlawful, as I have found, has produced evidence which, having regard to the matters of public policy to which I have referred, should be excluded in the exercise of my discretion.

¹⁰ *R v Rockford* [2015] SASCF 51 at [39].