

NEW SOUTH WALES LOCAL COURT

FILE NUMBER(S): Z4004 537/03 ACS-H1

JUDGMENT DATE: Thursday, 1 May 2003

JUDGMENT OF: Magistrate Ellis

COURT JURISDICTION: Local Court, Downing Centre, Sydney

COUNSEL: K. Horler, Q.C. (Jackson & Funnell)

SOLICITORS: S. Blanks & Assoc. (Jackson & Funnell)

CATCHWORDS:

LEGISLATION CITED:

Evidence Act 1995 (NSW) s 138

Crimes Act 1900 (NSW) s

CASES CITED:

Bunning v Cross (1978) 141 CLR 54

Olsen v Jones [1991] 53 ACR 136

Garney v Jones

Levine v O'Keefe [1930] VLR 30

Street v Bower (NSWSC, unreported)

DPP v Derby (NSWSC, unreported)

R v Rondo [2001] NSWCCA 540

CHARGES:

enter enclosed lands

maliciously destroying property

DECISION:

Charges dismissed

JUDGMENT:

IN THE NEW SOUTH WALES LOCAL COURT, DOWNING CENTRE

Thursday, 1 May 2003

POLICE v THOMAS BARNABY JACKSON

POLICE v NEAL DAVID FUNNELL

JUDGMENT

>>> extract begins on page 31 <<<

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BENCH: The question before me is an objection as to
admissibility in relation to evidence taken by police on
20 November 2002. The objection is threefold, firstly by
15 the defence on the basis that the evidence was improperly
or illegally obtained. Secondly, by the prosecution, is
the fact that if that evidence was determined to be
improperly or illegally obtained that the evidence is
still admissible under the discretion in section 138 of
20 the Evidence Act. Thirdly, the objection by the defence is
that in any event the evidence sought to be brought in by
the prosecution is not relevant.

Dealing first as to whether the evidence was illegally or
25 improperly obtained. There is the statement of the two
police officers involved, constable Long and constable
Gouge. It was in the evidence of constable Gouge that the
objection was taken at length, although it had been
foreshadowed in some of the evidence of constable Long.
30 The evidence of Long was that in the early hours of 20
November, due to a police call investigations were
undertaken that drew her and her partner to the
intersection of Baker Street—

35 HORLER: And Todman Avenue I think.

BENCH: Thank you, Todman Avenue in the vicinity of
Zetland. In any event, when they arrived they saw two men
that had been identified as each of the defendants,
40 Funnell and Jackson. In addition the evidence of Long was
that resting against a wall to a nearby store was an 8.9
metre extension ladder and a bamboo stick with a roller
attached. There was also evidence as to the dress of both
gentlemen. Questioning occurred which led to constable
45 Long stating that their explanations were not accepted,
and that from various aspects of their demeanour and other
aspects that there was a possible implication in relation
to a break enter and steal or graffiti-ing. There was
further questioning and a bag was seen, and Jackson was
50 asked "what's in your bag?" He replied "not much."
Constable Long started to look further into the backpack,
saw various items in the backpack, the most important one
being a digital camera, and it was pictures from that
digital camera that formed part of the objection as to
55 whether that evidence should be admitted before me.

I look firstly to the common law position as to powers of
police to search persons and things in the absence of

arrest. In the common law there is no power for police to stop and search a person prior to arrest. Any evidence found as a result of an unlawful pre-arrest search may be excluded. That was as expounded in the case of *Bunning v Cross*. In the case of *Olson v Jones* [1991] 53 ACR 136 there was further exploration of this point. In essence, there is no power at common law to search a person in order to see if there is any evidence of a possible offence. In *Garney v Jones*, Lord Denning stated "the common law does not permit police officers or anyone else to ransack anyone's house or to search for papers or articles therein, or to search his person simply to see if he may have committed some crime or other. If police officers should do so they will be guilty of a trespass."

In the common law, goods can't be seized from a person where there has been no arrest and the seizure has not occurred during the execution of a search warrant. *Levine v O'Keefe* [1930] VLR 30 at 72 states "considerations of public convenience are altogether insufficient to justify so important an extension of the criminal law as we are now asked to sanction. There are two ways in which the seizure of goods in circumstances can be justified. One is by showing that they were seized being in the possession of a person at the time of his arrest" - the rest of that paragraph is not relevant.

I look to the meaning of reasonable suspicion in statutory powers to stop and search. In essence, section 357E of the Crimes Act allows police to stop and search persons and vehicles. 357E states "a member of the police force may stop, search and detain (a) any person whom he or she reasonably suspects of having or conveying anything stolen or otherwise unlawfully obtained or anything used or intended to be used in the commission of an indictable offence, or (b) any vehicle." (b) of course is not relevant for the current discussion.

Looking at a reasonable suspicion, an officer must have a reasonable suspicion prior to having authority to conduct a pre-arrest search in relation to a person where the police officer reasonably suspects of having anything stolen. That was looked at extensively in the case of *Street v Bower*, an unreported decision of the New South Wales Supreme Court. If an officer exercises search powers under section 357E of the Crimes Act, there is an objective element that the suspicion must be held on grounds that are reasonable. The tribunal of fact may be satisfied that the test of reasonable suspicion has been met if there is some evidence on which within reason there could be a finding that the suspicion was held on grounds which are reasonable.

In *Olsen v Jones*, where a vehicle was searched, the magistrate concluded and the Supreme Court agreed that the following circumstances were sufficient evidence upon which to base a reasonable suspicion. At 138 it was stated "the time, the early hours of the morning. The

presence of two persons in a vehicle and the fact the vehicle was registered in relation to an address which was not the locality but a considerable distance away."

5 I also look before returning to that particular point to a further section I have taken from the case of *Street* that refers to had reason to suspect. Smart J states in *Street* "in the first place the precise force of the word "suspect" needs to be noted. A suspicion that something
10 exists is more than a mere idle wondering whether it exists or not, it is a positive feeling of actual apprehension or mistrust amounting to a slight opinion but without sufficient evidence. Consequently a reason to suspect that a fact exists is more than a reason to
15 consider or look into the possibility."

In relation to section 357E of the Crimes Act, it is also important to view the case of the *DPP v Derby*, again an unreported decision of the New South Wales Supreme Court.
20 The power under section 357E was considered in the *Crown v Rondo* in which the following propositions were stated in respect of reasonable grounds to suspect:

(a) a reasonable suspicion involves less than a reasonable
25 belief but more than a possibility. There must be something which would create in the mind of a reasonable person an apprehension or fear of one the state of the affairs covers in section 357E. A reason to suspect that a fact exists is more than a reason to consider or look
30 into the possibility of its existence;

(b) reasonable suspicion is not arbitrary. Some factual basis for the suspicion must be shown. A suspicion may be based on hearsay material which may be inadmissible in
35 evidence. The materials must have some probative value;

(c) what is important is the information in the mind of the police officer stopping the person or the vehicle or making the arrest at the time he did so.
40

Having ascertained that information, the question is whether that information afforded reasonable grounds for the suspicion which the police officer formed. In answering that question, regard must be had to the sources
45 of the information and its content seen in the light of the whole of the surrounding circumstances.

I return to the evidence that I quoted from constable Long. It is that that is before me, it is that to the
50 extent that I can look at it as to whether she had a reasonable suspicion. In essence, what constable Long is saying is that in her observations that there were other materials, namely the extension ladder and the bamboo stick, but there is no evidence before me as to where that
55 is in proximity to either Funnell or Jackson. There is also no evidence before me as to whether there were any other people around, whether they were the sole people around, whether there was any other activity. Bearing in

mind it was 4.20am, it may be construed that it is something of which I could take notice, but I think that is extending far too much judicial notice into what otherwise must be evidence before this Court. There is in
5 essence an absence of evidence for me to draw the appropriate conclusions in relation to that information being such as to raise the suspicion because of those points that I have said are missing.

10 There is also the conversation as to Funnell and Jackson possibly being with a ladder that might lead to a suspicion of a break enter and steal. There is also a possible suspicion because of their outfits that they were
15 involved in graffiti-ing, if there is such a word. There is again an absence of evidence from which I can join the dots so to speak between what is observed in the statement of constable Long and what may have formed a suspicion in
20 her mind. I bear in mind the decision and the quote that I made from *Olsen v Jones* in relation to the time, the early hours of the morning. However, even bearing that in mind, what we end up with is some observations, some indication by constable Long as to what the law may be as to a charge, and then a camera miraculously appearing
25 without the necessary nexus between all of them, and the photos that were allegedly on the camera.

I will return to the aspect of the backpack, but at this stage I form the opinion on the evidence before me that there was not a reasonable suspicion such that a search
30 should have been conducted and that the information from that search was illegally obtained. On that basis, in the normal course of events, I would not allow that evidence to be admitted. However, because the prosecution has drawn my attention to section 138 of the Evidence Act, I
35 must look at whether I use my discretion to exclude improperly or illegally obtained evidence or to allow it to be admitted.

The important part of section 138 of the Evidence Act is subsections (1) and (3). In essence, I must consider the
40 matters set out in subsection (3) before determining whether subsection (1) comes into play. (1) Is as follows, evidence that was obtained improperly or in contravention of an Australian law is not to be admitted
45 unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in a way in which the evidence was obtained.

50 In relation to subsection (1) I refer to the decision of *Bunning v Cross* where the High Court indicated that a court must weigh competing requirements of public policy. The desirable role of bringing to conviction the wrongdoer on the one hand and on the other the avoidance of the
55 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 formulation cannot displace the balancing test articulated in section

138(1), it is a useful articulation of the principal public interests which must be balanced.

5 Looking first as to the desirability of admitting the evidence, there is a public interest that reliable evidence of an accused person's guilt be admitted into the trial and considered by the tribunal of fact. As to the undesirability of admitting evidence that has been
10 obtained in the way in which the evidence was obtained, undesirability refers to a public interest in minimising the extent to which law enforcement agencies act outside the scope of their lawful authority. As indicated, I must consider the matters stated in subsection (3). The considerations listed in section 138(3) must be taken into
15 account in applying the discretion, even if not relied upon by the parties to the proceedings.

138(3)A refers to the probative value of the evidence. Probative value of evidence means the extent to which the
20 evidence could rationally affect the assessment of the probability of the existence of the fact in issue. Subsection B refers to the importance of the evidence in the proceeding. It is without doubt that the photos, if admitted, are the crux one way or the other of not
25 necessarily whether guilt would be found but of whether it is the crux of the case. Therefore the evidence is of a highly important nature and also comes under subsection C which is the nature of the relevant offence, cause of action or defence in the nature of the subject matter of
30 the proceeding. It is what could be stated matters of the lower end of criminality or importance in relation to the Crimes Act compared to more serious matters. However, it is one where there is a great burden on society when material of a public nature are defaced, and I have heard
35 evidence as to the loss that has been suffered by people unconnected with either of the defendants.

However, weighing the material up under section 138, I look particularly to the following. As indicated, there
40 was no nexus between an extension ladder and bamboo stick sufficient in my mind to raise a reasonable suspicion. What I have most difficulty with in this particular instance is the backpack. The evidence of constable Long is reasonably clear. I quote, "I walked over to Funnell
45 on the side of the road. I said "what you guys are telling us doesn't add up. With the ladder we could think you're doing break and enters which is a serious offence, or I look at your pants to see the paint and think you could be graffiti which is a summary offence. What have
50 you been up to?" Funnell said nothing to me. I walked back to the middle of the road. I saw Jackson's backpack on the ground was open. I saw what appeared to be a camera cover. I said to Jackson "what's in your bag?" Jackson said "not much." I started to look further into
55 the backpack. I saw a large glue pump action stick, a headband with an attached light, the cover to a digital camera and other items." I said to Jackson "can you show me what photos you have on the camera?" He said "I don't

know how to work it."

All of that raises grave concerns as to the way in which the police have conducted this inquiry and the way in which the evidence has been presented to this Court.
5 There are more questions in my mind than answers in going through that material. Where is the evidence that it was Jackson's backpack? Where is the evidence that Jackson had been the one that had taken the photos? Where is the evidence that the backpack was within close enough
10 proximity to either Jackson or Funnell to sufficiently not only raise a suspicion but point to the fact that it was owned by one or both of the defendants? There is in my mind so many holes in that evidence that I am unable to
15 make a determination that it is anything but prejudicial over and above any probative value that it might have. Therefore, on the basis of section 138(1), not only was the evidence improperly obtained but it is not to be admitted because there is no desirability of admitting it
20 that outweighs the undesirability of admitting it.

On that basis I should also indicate I have looked at the photos themselves. There is no evidence before me that it is in fact Jackson's camera. Leaving aside the
25 difficulties with the backpack, the camera as I indicated earlier miraculously appeared. In the quote that I have just gone through from constable Long's statement, there is evidence as to what's in the backpack but not the camera. Lo and behold we have photos produced from the
30 miraculously appeared camera that show people that may be dressed in a similar nature as described by the police as the defendants, and photos from exhibit photo 7 through to 23 as to various phases the billboard has gone through from one of the intended message to the one of "Villawood,
35 Sydney's new centre of detention." However, not only is there no evidence as to it belonging to Jackson, there's no evidence as to whether the people depicted in these photos are either Jackson or Funnell, whether they have taken the photos themselves, and to my mind it is
40 undesirable to admit such evidence because of those flaws. I therefore exclude the evidence under my discretion in section 138 of the Evidence Act.

HORLER: Your Worship, the case of *Derby* which you started and didn't advert to, is that Mary Jerram's case? Sniffer dog?
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PROSECUTOR: It is. It's still before the Court of Appeal as far as I know, the Supreme Court.

50 BENCH: Was it Mary Jerram or—

PROSECUTOR: It started with Ms Jerram.

55 BENCH: Haskett?

HORLER: No, I think it's Ms Jerram.

BENCH: I know it's not finished.

PROSECUTOR: At that point your Worship I think we'll stop our case.

5

BENCH: Are you offering no evidence?

PROSECUTOR: I think in the circumstances because without that - I have other evidence from other police who spoke to them at another point in time, but I think we'll probably reach even less with them.

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HORLER: Withdrawn and dismissed might be the formal words.

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PROSECUTOR: I don't think we'll offer any more evidence.

BENCH: THE MATTERS AGAINST THOMAS JACKSON AND NEAL FUNNELL ARE DISMISSED.

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HORLER: Your Worship, there is no application for costs.

BENCH: Thank you for your assistance, gentlemen. Mr Scanlon, what do you want to have happen with the exhibits?

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PROSECUTOR: If we can just have those returned to the informant.

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