Forrester v Mattson [2016] NTSC 16

PARTIES:	FORRESTER, Tristram v MATTSON, Roger
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 28 of 2015 (21453547)
DELIVERED:	31 March 2016
HEARING DATE:	9 December 2015
JUDGMENT OF:	BARR J
APPEAL FROM:	COURT OF SUMMARY JURISDICTION

CATCHWORDS:

CRIMINAL LAW – Appeal – Criminal Code (NT) s 102 – destroying evidence – appeal against conviction – appellant swallowed small quantity of methamphetamine seized by police –whether accused had knowledge that drug may be required in evidence in a judicial proceeding – meaning of "knowing" – awareness of the possibility of court proceedings – inference as to appellant's intent in destroying evidence where no reasonable hypothesis of innocence to explain destruction – appeal dismissed

CRIMINAL LAW – Appeal – *Police Administration Act* s 120C(c) – appeal against admission of evidence said to have been unlawfully obtained – whether search by police member authorised under Act – whether police had reasonable grounds to suspect that appellant was in possession of a

dangerous drug – where suspicion based on time and location of apprehension – where suspicion also based on defendant's intoxication, evasive behaviour and attempts to conceal property – reasonable grounds for suspicion made out – appeal dismissed

Police Administration Act s 120C

Criminal Code (NT) s 102

George v Rockett (1990) 170 CLR 104; *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266; applied

R v Ensbey; ex parte Attorney-General (Qld) [2004] QCA 335; (2005) 1 Qd R 159; referred to

Giorgianni v The Queen (1985) 156 CLR 473; *Pereira v Director of Public Prosecutions* [1988] HCA 57; (1988) 35 A Crim R; *Anderson v Lynch* (1982) 17 NTR 21; distinguished

REPRESENTATION:

Counsel:

Appellant:	T Jackson
Respondent:	M Chalmers

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Forrester v Mattson [2016] NTSC 16
No. JA 28 of 2015 (21453547)

BETWEEN:

TRISTRAM FORRESTER
Appellant

AND:

ROGER MATTSON
Respondent

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 31 March 2016)

[1] The appellant appeals the findings of guilt and convictions imposed by the Chief Magistrate in the Court of Summary Jurisdiction on 5 June 2015.

[2] The appellant pleaded not guilty to three charges arising out of alleged offending on 20 November 2014:

1. Unlawful possession of a methamphetamine pipe for use in the administration of a dangerous drug, contrary to s 12(1) *Misuse of Drugs Act*.

2. Unlawful possession of methamphetamine with the alleged circumstance of aggravation that the appellant was in possession of the drug in a public place, contrary to s 9(1) and (2)(c)(i) *Misuse of Drugs Act*.

3. Knowing that a thing, namely a plastic bag containing a white substance, may be required as evidence in a judicial proceeding destroyed the said plastic bag containing a white substance with intent thereby to prevent it being used in evidence, contrary to s 102 of the Criminal Code.

[3] When the hearing commenced on 1 June 2015, counsel for the appellant challenged the legality of the search conducted by the arresting police officer in purported pursuance of s 120C *Police Administration Act* and contested the admissibility of the evidence obtained as a result of that search. Counsel for the appellant argued that the evidence had been improperly or illegally obtained. The court embarked on a *voir dire*. After submissions were made, the matter was adjourned to 5 June 2015 for decision. On 5 June 2015 the Chief Magistrate ruled on the *voir dire* and admitted evidence of the search. Thereafter no evidence was called by the appellant. The Chief Magistrate found all offences proven beyond reasonable doubt and convicted the appellant.

[4] A notice of appeal was filed on 28 June 2015. The grounds of the appeal were as follows:

1. That the findings of guilt are unsafe and unsatisfactory on all of the evidence.

2. That the learned magistrate erred in the finding that the police search was lawful and proper.

3. That the learned magistrate erred in finding that there was actual knowledge of the accused in the destruction of evidence when it was not open on the evidence to be so satisfied beyond reasonable doubt.

Facts in evidence

[5] Before considering the grounds of appeal, I will briefly summarise the facts in evidence.

[6] In the evening of Wednesday 19 November extending into the early hours of Thursday 20 November 2014, police officers Melhuish and Hogan were at Malak Park, in the Darwin suburb of Malak, in response to a report unrelated to the charges against the appellant. The officers were in plain clothes.

[7] While patrolling the park on foot, Constable Melhuish saw a male (who turned out to be the appellant) walking in the shadows about 50 metres from where he was standing. The appellant appeared to be hiding as he walked from tree to tree, constantly looking behind him. Constable Melhuish pointed the appellant out to Constable Hogan and they both waited for him to approach closer. When the appellant came within about ten metres, Constable Melhuish shone his torch, told the appellant to stop where he was and showed him his police badge. The appellant complied. He was carrying a black leather bum bag. Constable Melhuish asked the appellant his name and the appellant identified himself. Constable Melhuish asked the appellant if he had identification whereupon he took out his wallet from the front of the bum bag. He removed a NAB card with his name on it and another card which also contained his name.

[8] During the interaction with Constable Melhuish described in [7], the appellant appeared to be unsteady on his feet and had slightly slurred speech. He also appeared to be attempting to conceal his wallet behind his back. Constable Melhuish formed the suspicion that the appellant was concealing a dangerous drug on his person and told the appellant that he was going to conduct a search under s 120C of the *Police Administration Act* on the basis that he had grounds to suspect that the appellant was in possession of a dangerous drug.[1] He asked the appellant to hand him the bum bag and the appellant complied. When Constable Melhuish searched the bum bag he found a broken glass pipe. A glass pipe is an implement normally used to smoke methamphetamine. There was a white substance still inside the pipe. Constable Melhuish then took possession of the glass pipe. He asked the appellant to hand him his wallet. The appellant asked why and Constable Melhuish told him again that he was conducting a search under s 120C of the *Police Administration Act* and that he required to search the appellant's wallet. The wallet was handed over. Constable Melhuish looked inside and found a small clip seal bag, rolled up inside a cut down plastic straw. Inside the clip seal bag was a white crystallized substance that appeared to be

[1] *Police Administration Act* s 120C(c) reads as follows:

> **120C Searching without warrant**
>
> A member of the Police Force may, without warrant, stop, detain and search the following:
>
> (a) [*not here relevant*]
>
> (b) [*not here relevant*]
>
> (c) a person in a public place if the member has reasonable grounds to suspect that the person has in his or her possession, or is in any way conveying, a dangerous drug, precursor or drug manufacturing equipment.

methamphetamine. Constable Melhuish took possession of the clip seal bag and its contents.

[9] Police officers then escorted the appellant to a nearby bus stop. The appellant was reluctant to sit at the bus stop but Constable Melhuish told him that he was in police custody as a result of the s 120C search and that he required him to sit down for his safety and that of police. The appellant complied. Constable Melhuish placed the seized pipe and clip seal bag on the bus stop seat, just out of the appellant's reach. He told the appellant that he was seizing those items as part of the search. The appellant stood up and turned his body towards the police officers. Constable Melhuish asked him to sit down and the appellant eventually complied. He was handcuffed. Police called for assistance from other police members on duty. The appellant stood up again at this stage and said that he did not want to sit down. There was some further discussion and the appellant sat down. A short while later,[2] other police officers arrived at the location. The appellant then stood up again, said that he wanted to have a smoke and leant down to his bum bag. Without warning, the appellant took hold of the small clip seal bag containing the crystallized substance and put it in his mouth. Constable Hogan alerted Constable Melhuish to what had happened. The appellant began to move towards the side of the bus stop, as though he were going to run away. Constable Melhuish then grabbed hold of him and laid him on his side. He put pressure against the appellant's neck to inhibit his swallowing

[2] Transcript 1 June 2015 p 23 reads: "About 50 minutes later …".

in order to prevent ingestion of the clip seal bag and its contents. However, police efforts to prevent the appellant from swallowing were to no avail and the appellant successfully swallowed the clip seal bag and its contents.

[10] At that stage Constable Melhuish told the appellant that he was under arrest for destruction of evidence, possession of methamphetamine and possession of a thing to administer a dangerous drug. The appellant replied, "I didn't swallow anything and it wasn't drugs anyway".

[11] Constable Melhuish gave a very detailed description of the appellant's suspicious conduct when police first observed him:

> As we were walking through, I could see Forrester, his silhouette walking from tree to tree. The reason I could see this was that there was light behind him that was creating the silhouette. So he would sort of go from one tree, stop for a bit, but I could see that he was looking around and then he would quickly move to the next tree, stop for a bit, look around and he did that until he got to us. When he moved slightly away from the trees, he continued to look over his shoulders until we presented ourselves.[3]

[12] Constable Melhuish was asked to inform the court as to the objective factors which led him to suspect that the appellant had in his possession a dangerous drug, and gave the following answer:

> … to start with, in my experience as a police officer, especially working in Casuarina, I know Malak to be an area with a high incidence of drug use and drug related crime. I wasn't thinking of that at the time, but when I saw Mr Forrester walking towards me, acting as if he was trying to hide in a way that aroused my suspicion to begin with. When I started to speak to him, I noticed that he appeared to be under the influence of an intoxicating substance. And when I asked him for some identification, when I saw that he was

[3] Transcript 1 June 2015 p 25.1.

> starting to hide his wallet behind him, then that made me think that he may still have – or be in possession of that intoxicating substance.

[13] When asked how the appellant was trying to hide his wallet, Constable Melhuish gave the following answer:

> … after he got the cards out, he just seemed to kind of keep it out of my view, so that he had it kind of behind his back a little bit, not like right behind his back, but just out of sight. So that made me start to suspect that he was carrying something in his wallet.[4]

[14] At a slightly later point in his evidence, he gave this answer:

> As you recall, I had formed the belief that he was under the influence of an intoxicating substance. And once he started to hide his wallet that made me suspect that he was still in possession of it.[5]

[15] Constable Melhuish was not cross-examined in relation to the basis for his suspicion. The appellant did not give evidence. The evidence of Constable Melhuish was supported by the evidence of Constable Hogan.[6] The Chief Magistrate found Constable Melhuish to be a truthful witness, and determined that he had reasonable grounds to suspect that the appellant had in his possession a dangerous drug. His Honour's reasons are set out below:

> … In my view, he did have reasonable grounds to form the relevant suspicion. He was observing somebody who was acting suspiciously. That person appeared to be under the influence of an intoxicating substance. There were some indicia of that strange behaviour: the unsteadiness on ones feet, the slightly slurred speech and of course the behaviour involving the concealment or half concealment of the wallet, and coupled with the fact that the area being searched at the time is notorious for drug use and drug related crime. I am satisfied

[4] Transcript 1 June 2015 p 25.7.
[5] Transcript 1 June 2015 p 27.9.
[6] Transcript 1 June 2015 p 6 – p 7.

to the requisite standard that the officer did have reasonable grounds to suspect the presence of a dangerous drug.[7]

Arguments on appeal – ground 2

[16] The appellant's counsel did not press ground 1 of the appeal. I therefore turn to consider the arguments in relation to grounds 2 and 3.

[17] Ground 2 asserts that the Chief Magistrate "erred in the finding that the police search was lawful and proper". The appellant contends that "nothing in the evidence of Officer Melhuish reaches the standard required for 'reasonable grounds' to search without warrant". Counsel contends that, as a result, the search was unlawful and the evidence obtained as a result of the search was obtained unlawfully.[8]

[18] Section 120C(c) *Police Administration Act* authorises a member of the Police Force, without warrant, to stop, detain and search a person in a public place if the member has reasonable grounds to suspect that the person has in his possession, relevantly, a dangerous drug.

[19] The appellant referred to a number of decisions[9] in relation to s 120C *Police Administration Act* and similar legislation interstate to support the submission that the search of the appellant "was not the culmination of an investigation in which he was being targeted", and that "there was no contemporaneous evidence relating to the defendant having involvement in

[7] Transcript 4 June 2015 p 85.
[8] Appellant's Outline of Submissions par 34 and par 35.
[9] *Henwood v Balchin* [2011] NTSC 84; *R v Grosvenor* [2014] NTSC 49; *O'Connor v R*, unreported NSW District Court, 12 August 2010, per Charteris DCJ.

any offence".[10] In my opinion, however, the submission was misconceived. There is no requirement that the search of a person be "the culmination of an investigation in which the person was being targeted" for the search to be authorized under s 120C(c), for which the key words are "reasonable cause to suspect". Moreover, none of the decisions relied upon was sufficiently similar to the facts of the within appellant's case to be of much assistance.

[20] In *George v Rockett*,[11] the High Court considered the conditions precedent to the issue of a search warrant under Queensland legislation, which contained the expressions "reasonable grounds for suspecting" and "reasonable grounds for believing". After noting that 'suspicion' and 'belief' are different states of mind, the Court explained the meaning of suspicion as follows:

> Suspicion, as Lord Devlin said in *Hussien v Choong Fook Kam* … "in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove." The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown.

[21] The Court in *George v Rockett* referred with approval to the statement made by Kitto J in *Queensland Bacon Pty Ltd v Rees*[12] that a suspicion that something exists is a "positive feeling of actual apprehension or mistrust, amounting to a slight opinion, but without sufficient evidence".

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[10] Appellant's Outline of Submissions, par 27.
[11] *George v Rockett* (1990) 170 CLR 104 at 115.8.
[12] (1966) 115 CLR 266 at 303.

[22] Counsel for the respondent argues on this appeal that the following factors accumulated so as to give Constable Melhuish reasonable grounds to suspect that the appellant had in his possession a dangerous drug. The appellant was stopped by police at 2.00 am walking in a suburban park in an area where there was a high incidence of drug use and drug-related crime. His behaviour was decidedly odd. He was apparently intoxicated with a substance, evidenced by slurred speech and some unsteadiness. Finally, he attempted to conceal his wallet or at least to keep police attention away from his wallet. Counsel for the respondent contends that these matters, in combination, gave the member reasonable grounds within s 120C(c) *Police Administration Act*.

[23] I accept the respondent's submission. The evidence was sufficient to establish reasonable grounds to suspect that the appellant had in his possession a dangerous drug. There was a genuine basis in fact for the officer's suspicion. The appellant has thus failed to prove that the stop, detention and search without warrant were not authorized by s 120C(c) *Police Administration Act*.

[24] Ground 2 should be dismissed.

Arguments on appeal – ground 3

[25] This ground asserts that the Chief Magistrate erred in being satisfied beyond reasonable doubt that there was "actual knowledge of the accused in the destruction of evidence".[13]

[26] Section 102 of the Criminal Code is as follows:

> Destroying Evidence
>
> Any person who, knowing that any book, document, tape recording, photograph or other thing of any kind is or may be required in evidence in a judicial proceeding, destroys it or renders it illegible or undecipherable or incapable of identification with intent thereby to prevent it from being used in evidence, is guilty of a crime and is liable to imprisonment for 3 years.

[27] The expression "judicial proceeding" means "any proceeding had or taken in or before a court, tribunal or person in which evidence may be taken on oath."[14]

[28] The Chief Magistrate made the following observations in relation to the meaning of 'knowing' in s 102:[15]

> … the concept of knowing in the context of s 102 is not defined under the Code, but I believe that in the context of the way this charge has been couched, that is, that the thing may be required as evidence, what 'knowledge' requires is a reasonable contemplation that there is a possibility of court proceedings being initiated in the future.
>
> The case is a circumstantial one and I think in order to prove a charge like charge 3, I think almost invariably the prosecution would

[13] The full ground is set out in [4] above.
[14] Definitions, s 1 Criminal Code.
[15] Transcript 5 June 2015 p 91.9 – p 92.

> have to rely upon circumstantial evidence unless the defendant articulated what he was doing at the time and even that might well be circumstantial, but it seems to me that it is quite clear on all the evidence before the Court that the defendant took hold of the item in question, put it in his mouth, attempts were made to preserve the item to stop him swallowing it, however those attempts were aborted and I have no doubt at all that the item was swallowed and thereby destroyed.
>
> … And so I think that one can infer from the actions of the defendant that he knew that the item may be required as evidence in a judicial proceeding.
>
> I think that could be inferred from his actions, it can be inferred in particular from the act of destruction. I think that the fact that he has swallowed the item and thereby destroyed it, I think the only rational inference that can be drawn from that is that he knew that the item may be required as evidence in a judicial proceeding, and the intent to prevent the item from being used in evidence, in my view, can be rationally inferred from the act of destruction and also from his state of knowledge that it may be used in a judicial proceeding.

[29] Counsel for the appellant contends that "knowledge" is an element of the offence charged as count 3, and relies on *Giorgianni v The Queen*[16] and *Pereira v Director of Public Prosecutions*[17] to argue that the Chief Magistrate erred in his interpretation of the word "knowing" in s 102 Criminal Code.

[30] In *Giorgianni*, it was held that the prosecution had to prove that the accused truck owner knew that the truck's brakes were defective before he could be convicted as a secondary party for procuring the driver to drive the truck in its defective condition (and hence in a manner dangerous to the public).

[16] (1985) 156 CLR 473 at 506 – 507, per Wilson, Deane and Dawson JJ.
[17] [1988] HCA 57; (1988) 35 A Crim R 382 at 385.

Proof of negligence or even recklessness as to the condition of the brakes was not sufficient.

[31] In *Pereira*, the accused was charged with one charge of being knowingly concerned in the importation of a prohibited import (cannabis resin) and a second charge of having in her possession a quantity of cannabis resin which had been imported into Australia in contravention of the *Customs Act* (Cth). The two charges related to the same quantity of cannabis resin, which had been secreted in cricket balls and a jewellery case contained in a parcel posted from Bombay to the accused's Sydney address. Each of the charges required proof of knowledge that cannabis resin was or was likely to be secreted in the parcel.[18] Actual knowledge was a specified element of the offence the subject of the first charge, and, in relation to the second charge, actual knowledge was a necessary element of the *mens rea* required for proof of the offence.

[32] It can be seen that both *Giorgianni* and *Pereira* were concerned with the need for the prosecution to establish knowledge on the part of the accused persons of a past or present matter of fact. In another case relied on by the appellant, *Anderson v Lynch*,[19] the accused was charged with receiving goods "knowing the same to have been stolen".[20] The issue was knowledge of a past matter of fact: that the goods received had been stolen. Nader J

[18] *Pereira v Director of Public Prosecutions* (1988) 35 A Crim R 384, referring to *He Kaw Te* (1985) 157 CLR 523.
[19] (1982) 17 NTR 21.
[20] *Criminal Law Consolidation Act* (now repealed) s 216.

held that 'knowing' is not merely 'suspecting', and that even a firm belief that property had been stolen was insufficient.[21]

[33] I do not consider that the principles to be derived from the authorities discussed in [29] – [32] should be applied to the interpretation of s 102 Criminal Code in the facts of the present appeal. The relevant 'knowledge' element of the offence charged as count 3 was knowledge of a possibility: that the "plastic bag containing a white substance *may be* required as evidence in a judicial proceeding". It was not knowledge on the part of the appellant of a past or present matter of fact.[22] In my opinion, the Chief Magistrate was substantially correct in his analysis of the 'knowledge' element of the offence, set out in [28] above. I understand that his Honour's use of the word "contemplation" meant, in effect, awareness that there may be court proceedings as a result of the appellant's possession of the white crystallized substance combined with awareness that the substance itself may be evidence in such court proceedings.

[34] The analysis of the Chief Magistrate is supported by a decision of the Supreme Court of Queensland in *R v Ensbey*; *ex parte Attorney-General (Qld)*[23]. In that case, a church pastor had been given the diary of a 14 year old girl who had been sexually interfered with by a 29 year old man. Both the victim and the perpetrator were parishioners of the Baptist church at

[21] (1982) 17 NTR 21 at 29 – 30.
[22] The position would be different, for example, if a person had destroyed a document or some other item after being served with a subpoena to produce it in court. The charge would then allege: "… knowing that [the item] <u>was</u> required in evidence", rather than "… <u>may be</u> (or might be) required in evidence".
[23] [2004] QCA 335; (2005) 1 Qd R 159.

which the accused was a pastor. The diary documented the girl's sexual activities with the adult male. For reasons which are not presently relevant, the pastor shredded the diary. He was charged under the Queensland Code equivalent of the Northern Territory s 102. Senior Counsel for the appellant conceded in the course of argument that "knowing" in the context meant "believing", because of the word "may". Davies JA summarised the position as follows:[24]

> Mr Hanson QC who appeared … for the appellant conceded in the course of argument that "knowing" in this context meant "believing" because of the word "may". It was incongruous, he conceded, to talk about knowing that something may happen. In my opinion his concession was correctly made. It was not necessary that the appellant knew that the diary notes would be used in a legal proceeding or that a legal proceeding be in existence or even a likely occurrence at the time the offence was committed. It was sufficient that the appellant believed that the diary notes might be required in evidence in a possible future proceeding against B, that he wilfully rendered them illegible or indecipherable and that his intent was to prevent them being used for that purpose.

[35] Although Davies JA was unable to find any authority directly on point, he reasoned by analogy with the offence of attempting to pervert the course of justice, both at common law and under statutory provisions, which may be committed notwithstanding that "curial proceedings are no more than a possibility". His Honour cited *R v Rogerson*.[25]

[36] Additional support for the proposition in [33], that the relevant 'knowledge' element of the offence charged as count 3 is knowledge of a possibility, can

[24] [2004] QCA 335; (2005) 1 Qd R 159 at [15].
[25] *R v Rogerson* (1992) 174 CLR 268 at 277.

be found in the following extract from the judgment of Jerrard JA in *R v Ensbey*:[26]

> … there is no need for the prosecution to establish more than the possibility, known to or believed in by the accused on reasonable grounds, that a judicial proceeding would occur, those reasonable grounds being matters shown to exist to the knowledge of the accused.

[37] For reasons explained in [33] – [36], the appellant has failed to establish that the Chief Magistrate erred in his interpretation of s 102 Criminal Code and its application to the facts of the prosecution case. In relation to the appellant's swallowing the plastic bag and its white powder contents, there has been no argument on appeal that the appellant's intent was other than to prevent the plastic bag and its contents being used in evidence, as found by the Chief Magistrate. No reasonable alternative hypothesis has been advanced.

[38] Ground 3 should be dismissed.

Conclusion

[39] The appellant was properly convicted. The appeal is dismissed.

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[26] [2004] QCA 335; (2005) 1 Qd R 159 at 54].