POLICE v EDWARDS [2007] SASC 289 (3 August 2007)

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SUPREME COURT OF SOUTH AUSTRALIA
(Magistrates Appeals: Criminal)

POLICE v EDWARDS

[2007] SASC 289

Judgment of The Honourable Justice Anderson

3 August 2007

MAGISTRATES - JURISDICTION AND PROCEDURE GENERALLY - PROCEDURE - THE HEARING - EVIDENCE AND COURSE OF TRIAL - QUESTIONS OF ADMISSIBILITY

CRIMINAL LAW - EVIDENCE - JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE - ILLEGALLY OBTAINED EVIDENCE - GENERALLY

Prosecution appeal against finding of no case to answer by a magistrate - this followed a ruling excluding evidence - police stopped respondent in course of investigating attempted robbery - police searched respondent and seized various items - respondent charged with possessing articles with which he intended to commit offence and carrying offensive weapon - magistrate ruled police did not have requisite reasonable suspicion to stop respondent therefore evidence inadmissible - prosecutor continued to argue case - magistrate found no case to answer - whether magistrate erred in finding evidence obtained illegally - whether magistrate erred in not exercising public policy discretion to admit evidence - whether magistrate erred in finding no case to answer.
Held: police officer did have requisite reasonable suspicion to stop respondent - magistrate erred in finding evidence obtained illegally - magistrate erred in not exercising public policy discretion - magistrate erred in finding no case to answer. Appeal allowed.
Summary Offences Act 1953 (SA) s 68; *Magistrates Court Act 1991* (SA) s 42, referred to.

Holder & Ors v Lewis (2003) 231 LSJS 431; *Bunning v Cross [1978] HCA 22;* (1978) 141 CLR 54; *R v Frantzis* (1996) 87 A Crim R 295, applied.
R v Dorizzi & Ors [2002] SASC 356; (2002) 84 SASR 416, distinguished.

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Magistrates Appeal: Criminal

ANDERSON J.

Introduction

1 The appellant is appealing pursuant to s 42 of the *Magistrates Court Act 1991* (SA) on the ground that the magistrate erred in law in excluding the evidence of the police officers as to the items they found following their stopping of the respondent.

2 The respondent had been charged with carrying items that he intended to use in committing an offence and with carrying an offensive weapon. The items were a screwdriver, torch, gloves, monocular, hacksaw handle and a knife.

3 After hearing submissions from both parties I called the matter back on for further submissions. This was because no submissions had been made on the issue of the appellant's standing relating to the decision of the Court of Criminal Appeal in *R v Dorizzi and Others [2002] SASC 356;* (2002) 84 SASR 416, which in turn led to an amendment to s 42 of the *Magistrates Court Act 1991* (SA).

4 The magistrate ruled that evidence obtained from searching the respondent was inadmissible, as it had been obtained unlawfully. The magistrate ruled that s 68 of the *Summary Offences Act 1953* (SA), which gives a police officer the power to stop and search a person, had not been complied with because the police officer had not formed any reasonable suspicion.

5 The respondent was questioned by the police officer, Constable Ellen, in the Rosewater area after Constable Ellen and his partner on patrol, Constable Harris, had earlier been alerted to a crime having been committed in that area. In the course of this questioning, the police officers discovered the various items referred to at [2] on the respondent's person. The magistrate ruled that at the time that Constable Ellen stopped the respondent, he had insufficient grounds to form a reasonable suspicion that the respondent may have committed an offence.

6 Section 68 of the *Summary Offences Act 1953* (SA) states that:

(1) A police officer may do any or all of the following things, namely, stop, search and detain,

(a) a vehicle or vessel in or upon which there is reasonable cause to suspect that,

(i) there are stolen goods; or

(ii) there is an object, possession of which constitutes an offence; or

(iii) there is evidence of the commission of an indictable offence;

(b) a person who is reasonably suspected of having, on or about his or her person,

(i) stolen goods; or

(ii) an object, possession of which constitutes an offence; or

(iii) evidence of the commission of an indictable offence;

....

7 After hearing evidence the magistrate made an ex tempore ruling excluding the evidence because there were insufficient grounds to form the requisite reasonable suspicion. In relation to the remaining evidence the magistrate then made a further ex tempore ruling that there was no evidence before her which established that the respondent had the specified items in his possession and therefore Her Honour found that there was no case to answer.

Background

8 On the night of 5 June 2006, police were called to a residence in Rosewater in relation to an attempted break-in. The police officer attending the residence put a call out on the police radio for assistance and for other officers to be on the lookout for the offender and also, gave a description of the offender. Constable Ellen said that the description was "either Caucasian or Aboriginal, I think it was maybe tanned skin, between 25 and 35 years, possible moustache and short shaved hair".

9 Constable Harris said that they were looking for a possible offender and someone who matched the description they heard over the police radio.

10 Constable Dawson, who was in another vehicle nearby, also heard the description on the radio. He said that the description was of a male in his thirties, possibly with a moustache.

11 Upon hearing the call on the radio, Constable Harris proceeded to the residence to offer assistance, while Constable Ellen began to search on foot for the offender in the area.

12 During the course of this search, Constable Ellen noticed the respondent cycling towards him. The respondent did not have any lights on his bike. Constable Ellen flashed his torch at the respondent who responded by flashing a torch back at Constable Ellen. As the respondent was riding past him, Constable Ellen said, "What are you doing?" at which point the respondent stopped his bike. Constable Ellen then said, "Just come over here".

13 The call over the radio came at about 1.30 am. When sighted by Constable Ellen the respondent was wearing a beanie. He was carrying the torch in a sling over his shoulder. The torch was not illuminated when Constable Ellen first saw the respondent. Constable Ellen said, "I remember thinking that it vaguely matched the description that was given over the radio – that he had an unshaven look, the moustache was quite prominent ... it looked like he had quite a round face and I thought he was worth talking to".

14 This general area was a "directed patrol tasking area" because of the number of recent break-ins in the vicinity. The point where Constable Ellen stopped the respondent was about 400 metres from the scene of the break-in. Constable Dawson said it was "a hot spot" where the patrols were directed to spend time during the night. Constables Davies, Ellen and Harris were searching the area because of the police radio communication.

The hearing in the Magistrates Court

15 At the hearing before the magistrate, Mr Slade, for the respondent, submitted that Constable Ellen had not formed the requisite reasonable suspicion required to allow him to legally stop the respondent pursuant to s 68. Mr Slade submitted that according to the examination and cross examination of Constable Ellen it was clear that Constable Ellen

flashed his torch at the respondent with the intention of causing him to stop, and that it was not until after the respondent had stopped that Mr Ellen noticed that the respondent matched the description provided to him over the radio.

16 Mr Slade also submitted that the facts that there had been multiple break-ins in the area at the time and that the respondent was the only person in the streets at 1.30 am were not capable of founding a reasonable suspicion.

17 The magistrate agreed with these submissions. In her ruling on the admissibility of the evidence obtained from searching the respondent, the magistrate agreed with the view that Constable Ellen did not take note of the respondent's appearance until after he had "formed the intention to stop" the respondent. She found that at the time of forming the intention to stop the respondent, the only information available to Constable Ellen to form the requisite degree of suspicion was that "it was 1.30 in the morning, the defendant was present and there had been a break in somewhere in the vicinity". According to the magistrate, Constable Ellen was not capable of forming a reasonable suspicion based on this limited information.

18 As a result, the magistrate found that the evidence of the items obtained from searching the respondent was inadmissible because the search only occurred after the respondent had been illegally stopped. The magistrate made a final ruling of no case to answer.

Submissions

19 Mr Lesses, for the appellant, has submitted to me that the magistrate erred in law in excluding the evidence of the objects seized from the respondent.

20 He submitted that Constable Ellen had reasonable cause to stop and search. He further submitted that once Constable Ellen formed the view that the respondent matched the description of the offender, he was authorised to stop the respondent.

21 Mr Lesses submitted that once having stopped the respondent and having made observations of the respondent and his torch and gloves, he had the necessary suspicion to search pursuant to s 68.

22 Mr Slade effectively repeated the submissions that he had made before the magistrate. I have set these out earlier. He submitted on the question of discretion that citizens should not be unduly interfered with on the whim of a police officer, even if the officer was acting in a bona fide manner. He also submitted that the offence charged was not the offence being investigated.

Whether a reasonable suspicion existed

23 Constable Ellen was on patrol in an area where he knew that an attempted break-in had recently occurred and was on the lookout for the perpetrator. While I can accept the argument that this in itself does not necessarily allow a reasonable suspicion to be formed in order to stop every vehicle in the area in this case the following is also relevant:

- a crime had been recently committed in the area and that it was likely that the perpetrator was still in the area;
- the respondent was the only person that Constable Ellen encountered in the area;
- it was 1.30 am;
- there had been a high frequency of break-ins committed in the area at this time;
- the respondent was only about 400 metres from where the attempted break-in took place;
- the respondent was on a bicycle without a headlight;
- the respondent had a torch with him on this bicycle but was not operating this torch while

riding his bicycle; and

- he fitted a general description of the offender.

24 It is my view that the magistrate erred in ruling that Constable Ellen did not have the reasonable suspicion necessary to stop the respondent. It was therefore reasonable to stop, question and search the respondent. The magistrate was wrong in rejecting the evidence as to the items found in the possession of the respondent.

Whether magistrate should have exercised discretion to admit the evidence

25 In the event that I am wrong in concluding that the magistrate erred in finding that Constable Ellen did not have a reasonable suspicion, I will now discuss whether the magistrate should have in any case exercised her discretion to admit the evidence.

26 The appellant has submitted that the magistrate did not sufficiently turn her mind to the public policy factors relevant to the exercise of her public policy discretion.

27 The learned magistrate does not give any basis for her refusal to exercise the discretion to allow the evidence on a public policy basis.

28 Her reasons are limited to what she said at [9]:

[9] The powers in s 68 limit the right of individuals, and it is important in my view that the section is complied with, unless some good reason exists not to. In the circumstances I rule that the evidence that follows the stopping of the defendant is excluded.

29 In *Bunning v Cross [1978] HCA 22;* (1978) 141 CLR 54 the High Court was asked to review a decision by a magistrate to not allow evidence obtained through a breathalyser because the police had not followed the exact procedure required by the relevant legislation in relation to obtaining the reading. The High Court found by majority that the evidence was admissible. In their joint judgment, Stephen and Aikin JJ found that the magistrate had not appeared to have considered the public policy factors in relation to admitting the evidence despite it being illegally obtained. In doing so their Honours undertook a thorough evaluation of these factors and concluded that in the circumstances the magistrate should have exercised his public policy discretion to admit the evidence. Some of the factors evaluated by their Honours that are also relevant to this matter are:

- the fact that there was "no suggestion that the unlawfulness was other than the result of a mistaken belief on the part of police officers";
- whether "the nature of the illegality...affect[s] the cogency of the evidence so obtained";
- "the ease with which the law might have been complied with in procuring the evidence in question";
- "the nature of the offence charged", including not only the seriousness of the offence but also an objective analysis of the public perception of the offence and the level in which such an offence may impact on other members of the public; and
- whether "there was a quite deliberate intent on the part of the legislature narrowly to restrict the police in their power".

30 In *R v Frantzis* (1996) 87 A Crim R 295 at 318-9 Lander J, with whom Cox and Nyland JJ agreed, endorsed the public policy discretion approach from *Bunning v Cross*. After finding that the police officers had the requisite level of suspicion to stop a vehicle under s 68, His Honour said:

... even if the search of the vehicle was attended by illegality ... [t]he police officers were acting reasonably and sensibly. If there was any illegality, it could only have been of a technical and not of a wilful or malicious nature. Such illegality would not have affected the cogency of the evidence obtained. Further, the evidence obtained was evidence which it was

important that the fact-finder have in its inquiry into the truth of a serious criminal charge.

31 It is my view that, in the event that Constable Ellen did not have a reasonable suspicion, both of these authorities can be and should have been applied in this case. I agree with the appellant's argument that the magistrate did not give sufficient regard to the public policy reasons for allowing the evidence.

32 In this matter, Constable Ellen's failure to comply with s 68 was not malicious in nature. Counsel for the respondent in fact submitted before the magistrate that Constable Ellen's failure to fully comply with s 68 could have resulted from the fact that he was a reasonably inexperienced police officer at the time.

33 While the charge in this matter may not necessarily be classed as a "serious" one, it is relevant that it occurred shortly after a related offence had been committed in the vicinity and during a period of time where there had been a spate of robberies in the area. On a public policy level it is my view that the evidence should be admitted because it is in the safety interests of the residents of that area that persons involved in theft related crimes are apprehended.

34 For the reasons given, the magistrate should have exercised her public policy discretion to admit the evidence.

Appellant's standing under s 42 of the Magistrates Court Act

35 I referred earlier in these reasons at [3] to the question of the appellant's standing. Section 42 was amended following the decision in *Dorizzi*. This is clear from the second reading speech.

36 Section 42 as amended reads:

...

(1a) An appeal does not, however, lie against an interlocutory judgment unless--

(a) the judgment stays the proceedings; or

(b) the judgment destroys or substantially weakens the basis of the prosecution case a case and, if correct, is likely to lead to abandonment of the prosecution; or

(c) the Court or the appellate court is satisfied that there are special reasons why it would be in the interests of the administration of justice to have the appeal determined before commencement or completion of the trial and grants its permission for an appeal.

...

37 In *Dorizzi*, a magistrate made a ruling during a trial excluding certain evidence. The prosecutor was then left in a position where there were still numerous witnesses to be called but because of the inadmissibility of the evidence, there was little chance of success. The prosecutor chose to close the prosecution case on the basis that there was insufficient evidence for a conviction.

38 Duggan J, with whom Debelle and Williams JJ agreed, held that the DPP did not have standing to appeal the magistrate's ruling to not admit the evidence because it amounted to an interlocutory decision, and at that time s 42(1a) of the *Magistrates Court Act 1991* (SA) stated that "[a]n appeal does not, however, lie against an interlocutory judgment given in summary proceedings".

39 In *Holder and Ors v Lewis* (2003) 231 LSJS 431, Doyle CJ considered the judgment in

Dorizzi.

40 *Holder v Lewis* was a prosecution under the *Fisheries Act 1982* (SA). There was a challenge to the admissibility of evidence of admissions made by the defendants to a Fisheries officer. After hearing the evidence, the magistrate ruled that it should not be admitted. Upon an application by defence counsel that there was no case to answer, the magistrate dismissed the complaint.

41 In his reasons Doyle CJ, with whom Prior and Perry JJ agreed, distinguished *Dorizzi* on the basis that in that case there would not have been a case to answer even if the evidence had been admitted, whereas in *Holder v Lewis*, "if the excluded evidence was admitted, [the respondent] had a case to answer".

42 Mr Lesses submitted that there were two alternatives upon which it could be found that the appellant had standing in this matter:

- first, that this matter was akin to the situation in *Holder v Lewis* rather than *Dorizzi*, in that the appellant had standing to appeal against the final judgment of the magistrate on the basis that it was incorrect as it is founded upon the erroneous ruling; and
- secondly, even if this was not the case, the appellant had standing to appeal under s 42 (1a)(b) as in this situation it was clear that the decision by the magistrate to not include the evidence severely weakened or destroyed the prosecution case.

43 Mr Slade did not challenge the appellant's standing. He accepted that the facts were similar to those in *Holder v Lewis* and that in any case it was clear that the amendment to s 42 had been enacted to allow appeals in matters such as this.

44 It seems to me that the decision in *Holder v Lewis* should be applied in this case. I refer to par [27] of that judgment where Doyle CJ distinguished the matter from *Dorizzi* in saying:

> The present case is quite different. As I have pointed out, if the excluded evidence was admitted, Mr Holder had a case to answer. The complaint against him should not have been dismissed. ... Accordingly, the decision to dismiss the charges against them was shown to be wrong.

45 For relevant purposes the facts are similar. It is my view that the appellant has standing to appeal the final decision of no case to answer made by the magistrate on the basis that is was based upon an incorrect ruling to not admit prosecution evidence. If that evidence had been admitted there would have been a case to answer.

46 In the event that I am incorrect on this point, it is my view that the appellant does have standing pursuant to s 42(1a) to appeal against the magistrate's decision to not admit the evidence.

Conclusion

47 For the reasons given it is my view that the magistrate erred in ruling that the evidence obtained from searching the respondent was inadmissible. As a result, her final judgment, which found no case to answer, was incorrect. As I have indicated, I believe that Constable Ellen had formed the requisite reasonable suspicion when he stopped the respondent. In any event the evidence should have been admitted on a public policy basis in the exercise of the broad discretion.

48 I would therefore allow the appeal and order that the matter be remitted to the magistrate for re-hearing in accordance with these reasons.
