

**MELBOURNE MAGISTRATES'
COURT**

C11197047

Constable D. WATSON

Informant

Magnus KABA

Accused

RULING

The accused, Mr Magnus Kalba ('Kalba') has pleaded not guilty to a number of charges arising from his contact with police on 19 April 2012. Application has been made on behalf of the accused to have certain prosecution evidence upon which the charges are founded ruled inadmissible and excluded.

In essence, the basis for the application is that the charges arise from the alleged conduct of the accused said to be directly responsive to improper and unlawful conduct by police.

A 'voir dire' has been conducted, during which evidence was given, subject to cross examination, by two police officers who intercepted the motor vehicle in which Kalba was a passenger. Written submissions supported by oral submissions were made on behalf of the accused.

The police prosecutor filed written submissions, and submissions in reply have been received on behalf of the accused.

The police members who gave evidence on the 'voir dire' were Senior Constable Randall ('Randall') and Constable Andrews ('Andrews').

The substance of their evidence follows.

In the early afternoon of 19th April 2012, Randall and Andrews were in a police vehicle in the Moonee Valley area tasked with undertaking what were described as routine or random intercepts of motor vehicles. The vehicles were stopped primarily in order to check the drivers' licences and vehicles' registrations and, as stated by Randall, whether a driver or passenger is the subject of outstanding warrants. The police officers on this day were not equipped with a mobile data terminal, which can disclose information about a vehicle upon entering its registration number.

The Magna sedan in which the accused was a passenger was intercepted at about 1.50pm in Portal Street Moonee Valley.

Andrews approached the vehicle while his colleague remained in the police car. Andrews explained to the driver that the police were undertaking routine licence and vehicle checks and he requested his licence. The driver produced a current Victorian licence and Andrews asked if he could remain while a couple of checks were undertaken, to which the driver agreed.

Andrews stated that he walked to the front of the Magna to check the expiry date of the registration label on the windscreen. He then said that the accused, speaking to him through the open front passenger window, asked "... how long this was fucking going to take. I have somewhere to be."

Andrews stated that he proceeded towards the police car at the rear of the Magna, in order that checks could be conducted by radio through

D24. While doing so he observed a laptop computer protruding from underneath the rear of the driver's seat and a pair of orange handled scissors on the back seat.

The enquiry with D24 disclosed that sometime in the past marijuana had been found in the intercepted sedan or in the possession of a then occupant.

After returning to the police vehicle Andrews decided to ask the Magna driver for his consent to search the car. When he did so Andrews deposed that the driver agreed to the search and got out of his car.

At about this time Randall, who was still in the police vehicle, observed the accused leave the Magna and walk towards some residential units in Portal Street.

The other police officer, Andrews, asked Kaba for his name or identification to which he stated the response was '...fuck off'. Andrews again asked for identification.

Randall had got out of the police car and approached Kaba. He stated to him that he needed his name '...to say I spoke to you'.

Randall reported that the accused replied by saying '...go and get fucked cunt, I've done nothing wrong.'

Randall then informed Kaba that he had committed the offence of using offensive language.

Randall stated that the accused said '...that's fucking bullshit cunt, you are a racist'.

The police officer then asked the accused for his name and address. The accused did not comply with the request and stated '...I don't have to tell you anything, I've done nothing wrong'.

Randall then told Kaba that if he did not state his name and address, he would be placed under arrest '...until I can confirm who you are'.

The accused is said to have responded that ‘...this is fucking bullshit, you’re just harassing me because I am black’.

Randall then informed the accused that he was under arrest for failing to state his name and address. He was then requested to turn out his pockets. Randall stated that Kaba then removed his T-shirt, dropped his trousers and underpants, exposed and grabbed hold of his penis and said ‘...see I have got nothing on me.’

The accused pulled up his trousers at about which time Randall cautioned him reading from a card.

The accused then was handcuffed with his hands behind his back and both police walked him towards their police sedan.

As Kaba was about to be placed in the back seat Randall stated that the accused grabbed and squeezed his testicles. As a result Randall said that he felt immense pain for about 10 to 15 seconds.

Arising from this alleged conduct Kaba was charged with the both intentionally and recklessly causing injury to Randall, assaulting Randall in the execution of his duty as a police officer, indecent language, offensive behaviour, wilful and obscene exposure, refusing to state name and address in contravention of the provisions of s.456AA(3)(a) of the *Crimes Act 1958* and the indecent assault of Randall.

The substance of the accused’s submission is that pursuant to the provisions of s.138 of the *Evidence Act 2008 (Vic)* the evidence in support of these charges should not be admitted. That section states that evidence obtained in consequence of an impropriety or in contravention of Australian law must not be admitted unless the desirability of admitting the evidence outweighs the undesireability of admitting evidence that has been obtained in the way in which the evidence was obtained. In coming to its determination and without limiting the matters

that may be taken into account, the court has to consider a number of factors specified in the section.

Under this section there first has to be a determination whether the evidence was obtained as a consequence of impropriety or illegality. The onus of establishing this is upon the accused. Where illegality or impropriety is found to exist the burden is then on the prosecution to establish that the desirability of admission outweighs any undesirability. On behalf of the accused in endeavouring to satisfy the onus upon him it is submitted that illegality and impropriety arises, among other things, from the police having no common law or statutory power to detain a person without justification. As to the latter, it is contended that it does not arise from the provisions of s.59 of the *Road Safety Act 1986* ('the Act'). Further, it is submitted that the police in their dealings with the accused were in breach of the *Charter of Human Rights and Responsibilities Act 2006* ('the Charter') and acted in a way that was incompatible with Kaba's human rights.

That the alleged criminal conduct of the accused was directly responsive to and in consequence of the purported illegality or impropriety of police conduct, is submitted to constitute good grounds for ruling that the evidence of such conduct not be admitted.

The prosecution submits that the police action in stopping the vehicle in which the accused was a passenger was a lawful exercise of the power said to derive from s59 of the Act. It is submitted that it is consistent with giving effect to the purposes of the Act as set out in the legislation.

Alleged offences of indecent language and offensive behaviour having been committed by Kaba, it is contended that he was obliged to provide his name and address when requested by police pursuant to the provisions of s. 456AA of the *Crimes Act 1958*.

It is further contended that the arrest of Kaba was in accordance with the powers of arrest given by s. 458 *Crimes Act 1958*, following his alleged failure to provide identification details when requested.

The prosecution asserts that any actions of police that interfered with the accused's human rights were in accordance with Victorian legislation directed to the interception of vehicles and arrest without warrant. It is said that these actions were justified by reason of the provisions of s.7(2) of the Charter.

It is submitted by the prosecution that the provisions of s.138 of the *Evidence Act 2008* are not enlivened, as the actions of police were neither unlawful nor tainted by impropriety.

Having considered the authorities to which counsel for the accused has referred, I accept that there is no common law power vested in police giving them an unfettered right to stop or detain a person and seek identification details. Nor, in my opinion is s.59 of the Act a statutory source of such power.

In support of its contention that s 59 of the Act invests police with power to randomly stop motor vehicles, the prosecution cited the judgement of Bleby J of the South Australian Supreme Court in *Police v Prinse* (1998) 196 LSLJ 267. Speaking of the provisions of s.42 of the South Australian *Road Traffic Act 1961* His Honour stated that the exercise of the power under that provision to request the driver of a vehicle to stop and answer certain questions was an absolute power, not conditional upon the holding of a belief. He held that while it would be unlawful to stop a vehicle if the power was exercised capriciously or for a purpose not connected with legitimate policing of the law, otherwise there did not appear to be any implied restriction upon such power to stop a vehicle.

I accept the accused's submission that the South Australian legislative provision which was the subject of Bleby J's consideration is couched in terms that differ from s 59 of the Act.

Section 42 of the *S.A. Road Traffic Act 1961* is explicit in conferring power upon police to request a driver to stop and ask that driver questions going to identification. The driver must comply with the request to stop the vehicle and answer questions truthfully.

In contrast s. 59(1)(a) of the Act imposes obligations upon a driver, being the obligation to stop, produce a licence and state name and address if requested or signalled to do so by a police officer.

Section 59(5) of the Act permits police to give reasonable directions to a driver as are in the opinion of the police officer necessary for carrying into execution the provisions of the Act or regulations. It is provided that the driver of a vehicle must comply with any such lawful direction.

If the prosecution submission is that by reason of s59 of the Act the police have power to randomly stop vehicles, it would seem that it need be implied, as the provisions of the section do not expressly confer that power.

I agree with the construction of s59 of the Act as contended on behalf of the accused. It is consistent with the observations of French CJ in *Momcilovic v The Queen* (2011) 245 1,46 that there is a presumption that parliament does not intend to interfere with common law rights and freedoms except '...by clear and unequivocal language'. Statutes are to be construed '...to avoid or minimise their encroachment upon rights and freedoms at common law'.

In *Mastwyk v DPP* (2010) 27VR 92, 107 Redlich JA. stated that statutory authority to engage in conduct infringing a common law right must be expressed in unmistakable and unambiguous language. 'The common law insists upon the necessity for a clear and express statutory authorisation

of any abrogation or curtailment of such rights. In the absence of such words it is presumed the legislature did not intend such a consequence.’ Bleby J. in *Prinse* did not advert to the issue of interference with human rights.

French CJ in *Momcilovic* said that s32(1) of the Charter ‘... requires statutes to be construed against the background of human rights and freedoms set out in the Charter in the same way as the principle of legality requires the same statutes to be construed against the background of common law rights and freedoms. The human rights and freedoms set out in the Charter in significant measure incorporate or enhance rights and freedoms at common law. Section 32(1) applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application’.

Section 38(1) of the Charter provides that it is unlawful for a public authority to act in a way that is incompatible with a human right, or in making a decision, to fail to give proper consideration to a relevant human right.

‘Victoria Police’ is included in the definition of ‘public authority’ under s.4 of the Charter. Section 3 defines ‘Victoria Police’ as officers and other members of the police force.

The evidence of the police officers given during the voir dire was that they were required to make a number of random intercepts of vehicles. Before requesting drivers to stop the vehicles they had no information about the status of their registration, whether the registered owners had valid driving licences nor as to whether the vehicles and their occupants were associated with any alleged breach of the Act or regulations.

One of the randomly intercepted vehicles was that in which the accused was a passenger.

I accept the accused's submission that police in stopping the vehicle in the circumstances described, were acting unlawfully. I am satisfied they neither had common law nor statutory power to do so. Their conduct in my opinion, unjustifiably breached the right to freedom of movement of Kaba and the driver and subjected them to arbitrary detention, contrary to the provisions of s21(2) of the Charter.

As to the obligation of the police officers under s.38 of the Charter, that in making a decision, proper consideration should be given to a relevant human right the substance of the evidence was that their concentration was focussed on intercepting an adequate quota of vehicles during their shift.

While there was no issue with the vehicle's registration or the licence of the driver, he consented to a search of the vehicle instigated by Andrews, apparently on the tenuous basis that he had sighted the scissors and laptop in the vehicle and a 'field contact' had disclosed some undefined link between the vehicle and marijuana.

Kaba left the vehicle and proceeded to move off. He was twice asked by police for his identification. On neither occasion were police purporting to rely on the provisions of s.456AA of the *Crimes Act* 1958.

It is contended by the accused that there was no lawful power for the police to make those requests. It was submitted they were unlawful and improper and contravened Kaba's right, protected by the terms of s13(a) of the Charter, not to have his privacy interfered with. It is a submission with which I agree.

On the evidence which I have heard on the voir dire I do not conclude that the arrest of Kaba was unlawful. I am satisfied on that evidence that there was a further request by police of Kaba for his name and address. At that time the member who made the request believed on reasonable grounds that in the course of his agitated response to what had occurred,

the accused had committed a summary offence, the nature of which was conveyed to him by the police officer.

The accused's failure to comply with the request was the trigger for his arrest in accordance with s.458 of the *Crimes Act* 1958.

Concluding that the arrest of the accused was lawful, does not in my opinion mean that evidence of the accused's conduct post arrest cannot be the subject of a determination pursuant to s.138 of the *Evidence Act* 2008 as to whether such evidence should be admitted. (See *DPP v Carr* (2002) NSWSC 194 and *Robinett v Police* (2000) 116 A Crim R 492).

The issue is whether evidence of the accused's conduct both before and after arrest was obtained *in consequence* of an impropriety or of a contravention of an Australian law.

It appears from the evidence that Kaba was angry that the vehicle had been stopped and detained while checks were undertaken by police. The evidence discloses that his demeanour and attitude did not change when he moved away from the vehicle and was requested to provide identification details and it was maintained following his arrest.

I conclude that the accused's conduct, as described in evidence on the voir dire, and from which the charges arise, was directly responsive to and a consequence of that police conduct prior to his arrest, which I have considered to be unlawful.

In undertaking the balancing exercise required pursuant to s.138(1) of the *Evidence Act* 2008 the factors set out in s.138(3) need to be considered.

As stated by Whelan J. in *The Queen v Mokbel* (2012) VSC 86 the list '...is not exhaustive. Some of the factors in the list by their nature favour either admission or exclusion. Others are more ambiguous. Some factors may overlap. No hierarchy exists amongst the considerations. Each of them, if applicable, must be 'weighed in the balance' by the judge exercising the discretion.'

I am unaware if there are other prosecution witnesses to the alleged relevant conduct of the accused, however the evidence of Andrews and Randall has significant probative value and is important evidence in the proceeding.

While the alleged offending includes indictable offences, which can be heard summarily, it is in my opinion of modest seriousness.

I do not conclude that the conduct of the police officers, in the words of Stephen and Aickin JJ in *Bunning v Cross* (1978) 141 CLR 54 involved ‘...overt defiance of the will of the legislature or calculated disregard of the common law...’.

They did, however, by stopping the vehicle without, in my view, lawful justification, detaining the occupants and asking Kaba for his identification particulars breach rights recognised by the International Covenant on Civil and Political Rights. The police did so without giving proper consideration as to whether acting in the manner they did interfered with the relevant human rights of the accused.

In the exercise of my discretion I have determined that pursuant to the provisions of s.138 of the *Evidence Act* 2008 the evidence of the police officers Randall and Andrews is inadmissible.

Duncan Reynolds, Magistrate

20 June 2013