

CITATION: *Police v Holden and Schaffe* [2006] NTMC 092

PARTIES: ROBERT ROLAND BURGOYNE  
v  
SHANE LLOYD HOLDEN  
AND  
BARBETTE GRIFFEN @ SCHAFFE

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Summary Jurisdiction - Alice Springs

FILE NO(s): 20611738 / 20611742

DELIVERED ON: 30 November 2006

DELIVERED AT: Alice Springs

HEARING DATE(s): 8 - 9 November 2006

RULING OF: M Little SM

**CATCHWORDS:**

Admissibility of Search Warrant - Telephone application for search warrant pursuant to s.120B of the Police Administration Act (NT). Whether s.22 of the Oaths Act (NT) was complied with.

Whether a valid search warrant.

**REPRESENTATION:**

*Counsel:*

Prosecutions:	M Heffernan
Defendant Holden:	R Goldflam
Defendant Griffen	T Stevens

*Solicitors:*

Prosecutions:	ODPP
Defendants:	NLAC

Judgment category classification:

Judgment ID number: [2006] NTMC 092

Number of paragraphs: 45

IN THE COURT OF SUMMARY JURISDICTION  
AT ALICE SPRINGS IN THE NORTHERN  
TERRITORY OF AUSTRALIA

No. 20611738  
20611742

BETWEEN:

**ROBERT ROLAND BURGOYNE**  
Complainant

AND:

**SHANE LLOYD HOLDEN**  
Defendant

**BARBETTE GRIFFEN @ SCHAFFE**  
Defendant

REASONS FOR RULING

(Delivered 30 November 2006)

Ms LITTLE SM:

1. The two defendants have pleaded not guilty to charges of possession and supply of 17.448g of methamphetamine and possession of cannabis pursuant to the Misuse of Drugs Act all charges dated the 29<sup>th</sup> of April 2006. They are jointly charged on information. A voir dire was conducted after the pleas of not guilty were taken. Both defendants joined in the challenge on the voir dire. The voir dire question relates to the validity of a search warrant obtained by Detective Dole on the 29<sup>th</sup> of April by telephone at between 9.20 – 9.30pm. This is the ruling on the voir dire.
2. Prosecution called three police witnesses from the Drugs Intelligence Unit in Alice Springs and the Justice of the Peace who ordered the search warrant Mr Michael Bongiorno. Shane Holden gave evidence on his behalf and that evidence is admissible as against Ms Griffen. There was no evidence on behalf of or by Ms Griffen. The defendant Barbette Griffen has been charged as “also known as

Schaffe". No issue was taken with that and references to Barbette S are taken to be referring to the defendant Ms Barbette Griffen.

3. The evidence before me is all taken into account and summarised as follows.
4. Detective Senior Constable Dole from the Drug Intelligence Unit gave evidence first. On 29 April 2006 he approached Ms Griffen who was near the car adjacent to room 28 at Mount Nancy Hotel and she ran from him. He had told her he was a Police officer, he was there about drugs and to move away from the car. When he called "stop, police" she did not stop. He did not pursue her far. He saw Shane Holden coming out of room 28 and asked Shane Holden to wait. He could smell cannabis coming out of room 28 and he knew Shane Holden was the partner of Ms Griffen. He discussed with Officer Sims whether to get a telephone warrant and it was decided to obtain a warrant. Earlier in the day he had received information, which he regarded as reliable, that Barbette Griffen was in possession of a substantial quantity of amphetamines, she had fled when he had asked her to move away from the car and her partner had come out of a room where he had smelt cannabis. He had the belief there may have been drugs in the room and he wished to make further investigations. Superintendent Taylor was contacted and authorised a telephone application to a Justice of the Peace to obtain a warrant pursuant to s.120B of the Police Administration Act. His evidence was that he had the Bible in his hand, he gave an oath and then gave the information that he had to the Justice of Peace. The Justice authorised a search of the premises where Shane Holden had been located and the paperwork was to be finalised the next day. The warrant became exhibit P1.
5. In cross-examination he said that when he was speaking to Mr Bongiorno, the Justice of the Peace, he was ten to fifteen metres from the entrance to the hotel room. He said there was a strong smell of cannabis coming from the room. Prior to making the statement on the 23<sup>rd</sup> of June 2006 he had not documented any of the events on the night in question. He had his mobile phone in his left hand and the Bible in his right hand. The Bible had been obtained from the kit which was part of the Drug Enforcement Unit's kit which is held in that unit's motor vehicle. He restated that said to the Justice of the Peace that he had a Bible, that he said an

oath to the Justice of the Peace and then gave the information. It was put to him that he did not have a Bible and he had not sworn an oath. The officer denied that.

6. Michael Bongiorno gave evidence next. He is a Justice of the Peace and has been for 6 -7 years. He received a call from Officer Dole on the evening of the 29<sup>th</sup> of April 2006 and made notes as he was taking the call. The notes became exhibit P2. He refreshed his memory from those notes and then gave evidence of his recollection of what had been said to him. His recollection was largely in accordance with the notes as written although slightly more detailed. His said after the information was given he went through an oath and said the words to the effect of “is this the truth, the whole truth and nothing but the truth”. The officer said “it was the truth”. He asked the officer whether the officer had permission from his boss and he said yes. It was agreed that on the following day he would sign the warrant. He was shown P1 and he identified the signature on P1 as his signature. He said he had reasonable grounds to believe there may be drugs on the premises and that he would not have issued the warrant otherwise. He estimated that prior to this occasion he may have received two or three calls seeking warrants in these circumstances, but he was not really sure. He recalled the conversation from the previous night prior to signing the warrant the next day.
7. In cross-examination he said he had made his notes as Officer Dole was giving him the information. He had received the call and was advised that they were requesting a warrant. The information was given and he wrote down the information. He recalled he was given the information and then he gave the oath. He agreed he did not ask if the officer wished to swear or affirm. His recollection was that the officer said it was the truth. He could not recall if the officer himself said he wanted to swear or affirm. He was “pretty certain” that the officer did not say that he had a Bible in his hand. He agreed that the officer had not mentioned what types of drugs were involved. In answer to why he issued the warrant, he summarised the information he had been given and said that the person that the person they had been looking for had run away, that when the room was opened they could smell cannabis, that Officer Dole had suspected that there may have been drugs in the room and that there had been information about possible supple.

He recalled the telephone conversation was very short. He was unable to estimate the time but it was more than a couple of minutes.

8. Detective Senior Constable Joseph Carbone then gave evidence. On the 29<sup>th</sup> of April 2006 information was received and Sims, Dole and he went to locate the defendant Barbette Griffen. They located a silver X-Trail outside the Mount Nancy Hotel around room 28. He saw Ms Griffen standing near that car and as they approached he got out. Two males walked to the rear of the hotel rooms. He followed those two males and was able to identify them. Detective Sims was also behind him. As he was speaking to the two males he heard Dole yell out the word “stop” or a similar word and he and Sims ran to where Officer Dole was. He could not see the defendant Griffen after that time and he went back to where the two males were. At one stage he saw Officer Dole on the mobile phone but did not hear the conversation. Officer Dole was near the Police vehicle at that stage but the witness’s attention was primarily on the two males who he had asked to sit near the Hotel area. There was no cross-examination of this officer.
9. The next witness was Detective Sergeant Clinton Sims also from the Drug Enforcement Unit. He was called onto duty by Officer Dole on the 29<sup>th</sup> of April 2006 and they were attempting to locate Barbette Griffen and Shane Holden. They located a silver Nissan about 9.20pm outside Mount Nancy Hotel. They noticed Barbette Griffen packing the rear of the car and two males appeared to be walking away from that area. They identified themselves as Police and he and Carbone walked in pursuit of the two males. Officer Dole approached the defendant Griffen and he heard words called out like “stop” and he ran back to where Dole was. When he arrived Officer Dole was speaking to Shane Holden and the defendant Griffen was not around. Officer Dole was speaking to Shane Holden around the doorway of room 28 Mount Nancy Hotel. As he approached them he noticed an odour which he believed to be consistent with cannabis. Officer Dole told him the defendant Griffen had run off after he had identified himself.
10. They had a conversation about the prospects of obtaining a warrant and he phoned Superintendent Taylor to seek authorisation pursuant to the general orders of the Northern Territory Police. He ran through the grounds which they intended to rely on to obtain the warrant and in particular the information that they had, that Ms

Griffen had left the area as they arrived and that from the door of room 28 there was smell a cannabis. Approval was granted to apply for a search warrant. He advised Officer Dole of the authorisation and Officer Dole phoned the Justice of the Peace. He overheard part of that conversation and in particular where Officer Dole identified himself, said where they were and what they were doing. Officer Dole gave an oath and then outlined the grounds requesting the warrant pursuant to s.120B of the Police Administration Act. He thought it was somewhat unusual that an oath was given before the information was given as he usually did it the other way. He heard Officer Dole say there was information about drugs in possession of Ms Griffen, there were observations made at the door of the room and also the fact that Ms Griffen had taken flight. He had taken some photos and notes on that occasion and had put them into Officer Carbone's note book. He was then cross-examined. Copies of photographs that he had taken became exhibit P3. He drew a plan of the area around room 28 Mount Nancy Hotel which became exhibit P4. His evidence was that Officer Dole was speaking with the defendant Shane Holden and then the defendant went back inside and closed the door. At that stage he and Dole spoke about the prospect of a warrant and the fact that the defendant Barbette Griffen had run off. He called from his phone to obtain the Superintendent's authorisation. He was within ten metres of the room and did not want the defendant Shane Holden to hear his conversation. The priority was to get a warrant and he was listening in case he could hear the sound of a toilet flushing when the defendant Shane Holden was inside the room. The defendant then came out and was near an air conditioner unit outside the front of the room. The defendant had come out by the time Officer Dole had finished speaking to the Justice of the Peace. It is at that stage that Officer Dole approached Shane Holden and informed him about the warrant.

11. It was put to him that the defendant had not gone back to the room and this was denied. It was put to him that Officer Dole was much closer to the defendant Shane Holden and he had been to the Police car when the call was being made. Officer Sims said that Dole was behind the Police car and that he had a clear view of the front door area and the air conditioning unit the whole time the call was being made. The officers had gone to the boot of the car to get the kit which included the Bible and he could not recall exactly who took the kit out of the

boot. He agreed that this detail was not in his statement of the 18<sup>th</sup> of June 2006 and advised that this type of procedure would not usually be referred to in a statement. The kit contains items such as gloves, containers for sharps, a Bible and an exhibit sheet. He saw Officer Dole with a mobile phone ringing the Justice of the Peace. At one stage he saw Officer Dole holding the Bible and that he was holding the Bible when he swore the oath. It was put to him that Officer Dole was not holding the Bible and he did not swear an oath and that was denied.

12. During the search he located some cannabis and photographs were taken and they became exhibit P3. Those items showed small amounts of cannabis. He agreed he did not make reference to the smell of cannabis in his statutory declaration. It was put to him that there was not a strong smell of cannabis and he denied that.
13. That was the close of the prosecution case on the voir dire and the defendant Shane Holden gave evidence. He said he was inside room 28 and Barbette was putting bags into the motor vehicle when he heard a commotion which included yelling. He flew out of the door and was told he was under arrest on the suspicion of selling drugs. It was the officer who he referred to as “the first witness in this case” (Officer Dole) who told him he was under arrest. He was told to sit down on the air conditioning unit and he sat there. He said the detective then reached into his pocket for his mobile, said that he was ringing up for a warrant and did that. He could hear vaguely what was being said but not exactly and that he was about one metre from Officer Dole when the call was being made. Officer Dole asked to obtain a warrant for room 28 Mount Nancy Hotel for Shane Holden. No mention was made about Barbette. The officer was asking for a warrant on the basis of suspicion of selling drugs, or words to that effect. He disputed that the officer ever mentioned that there was smell of cannabis. The mobile was in the left hand of the officer and there was nothing in his other hand. No words such as “telling the truth and the whole truth” were said at all by Officer Dole.
14. He saw Officer Sims coming back from the front of the complex breathing heavily, he heard Officer Dole say to Officer Sims “did you get her” and he said “no”. Officer Dole did not go towards the vehicle when the call was being made and Officer Dole was keeping a close watch on him. He did not recall Officer Sims going to the Police Vehicle and Dole and Sims were talking for a while,

standing about four metres from him. The officers then went inside and started searching the rooms.

15. He was then cross-examined. He said as he walked out the door he heard a commotion and Officer Dole had a badge which he held in his face and said “are you Shane Holden?” and the witness replied “yes”. The officer said the him “you are under arrest for suspicion of selling drugs”. He said he was dumbfounded and shocked. He denied he had gone back into the house, and said he was under arrest. He was on his way to go to Adelaide for a birthday with friends. Officer Dole jumped straight on the phone, said his name and that he was at room 28 Mount Nancy trying to obtain a warrant. It was put to him he had not heard this phone call and he denied that. He said that the officer had simply said that he was at room 28 Mount Nancy, that he had a suspicion that there had been the selling of drugs and that was all the officer said. His evidence was then that was all that was said in front of him. He said the conversation was quick and there was nothing said about swearing on the Bible. It was put to him that Sims made a call before Dole made a call. He said he didn’t see him until ten minutes later and he had no idea what Sims did. He did not see Sims on the phone. He said the smell of cannabis was not mentioned by Officer Dole when he was speaking on the phone about the warrant.
16. That was the close of the case for Mr Holden. As previously stated there was no evidence by or on behalf of Ms Griffen.
17. Exhibits 1 – 4 were tendered on the voir dire and they are as follows:
  - P1: Search warrant pursuant to s.120B of the Police Administration Act together with endorsements on back of search warrant.
  - P2: Notes by Michael Bongiorno made on the 29<sup>th</sup> of April 2006 at 9.30pm on an Elders memorandum sheet.
  - P3: Photographs SH1 and SH2 taken by Officer Sims showing loose cannabis and cannabis in a clip seal bag.



P4: Plan of area around room 28 Mount Nancy Hotel Alice Springs  
drawn by Officer Sims.

18. Prosecution bears the onus of proof with respect to all matters on the voir dire and the burden of proof is beyond reasonable doubt.
19. Section 120B of the Police Administration Act (NT) sets out:

**120B. Search warrants**

(1) Where it is made to appear to a justice, by application on oath, that there are reasonable grounds for believing –

- (a) that there is at a place a dangerous drug, precursor or drug manufacturing equipment;
- (b) that a dangerous drug, precursor or drug manufacturing equipment may be concealed on a person or on or in property in the immediate control of a person; or
- (ba) that a dangerous drug, precursor or drug manufacturing equipment may, within the next following 72 hours –
  - (i) be brought on or into a place; or
  - (ii) be concealed on a person or on or in property in the immediate control of a person,

the justice may issue a warrant authorizing a member of the Police Force named in the warrant, with such assistance as the member thinks necessary, to search –

- (c) in a case referred to in paragraph (a) or (ba)(i) –
  - (i) the place;
  - (ii) any person found at the place; and

- (iii) any person who enters the place while the search is in progress; and
- (d) in a case referred to in paragraph (b) or (ba)(ii), or in respect of a person referred to in paragraph (c)(ii) or (iii) –
  - (i) the person;
  - (ii) the clothing worn by the person; or
  - (iii) the property in the immediate control of the person.

(2) A warrant issued under subsection (1)(a) or (ba)(i) authorizes the member to whom it is issued to direct a person referred to in subsection (1)(c)(ii) or (iii) to remain at the place for as long as is reasonably required for the purposes of the search of the place and of the person.

(3) Section 112(1) of the Criminal Code applies to and in relation to a person directed under subsection (2) as if the person were in the lawful custody of the member while so directed.

(4) Under this section –

- (a) an application for a warrant and a submission concerning an application may be made in whole or in part;
- (b) information concerning an application may be furnished in whole or in part; and
- (c) an oath may be administered,

by telephone, telex, radio or other similar means.

(5) A warrant issued under this section shall remain in force for such period as the justice issuing it specifies in the warrant.

(6) Where a warrant is issued as the result of an action taken under or in pursuance of subsection (4), the justice issuing it shall send it to the Commissioner within 7 days after it is issued.

(7) Where it is necessary for a member to satisfy a person that a warrant under this section was issued authorizing the member to conduct a search and, for reasonable cause, the member cannot, at the time of the search, produce the warrant, the member may produce a copy of the warrant completed and endorsed in accordance with subsection (8) and the production of the copy shall be deemed to be a production of the warrant.

(8) For the purposes of subsection (7), a member shall –

(a) complete a form of warrant substantially in the terms of the warrant issued; and

(b) write on that form of warrant a statement that a warrant in those terms was issued giving –

(i) the name of the justice who issued the warrant; and

(ii) the date, time and place on and at which it was issued.

20. Section 120B (4) of the Police Administration Act allows for an application to be made, information to be given and the oath to be administered by telephone when an application is being made pursuant to s.120B of the Police Administration Act. Officer Dole telephoned, by mobile phone, Mr Bongiorno a Justice of the Peace seeking the search warrant. At the time of the phone call Officer Dole was in the vicinity of the front door area of room 28 Mount Nancy Hotel and the defendant Shane Holden was at those premises. The defendant Griffen had run away upon the Police officers arriving. There is no evidence to suggest that she knew that the persons were police officers suffice to say she ran and when the words “stop Police” were called out she did not stop and she did not return to where the Police officer’s were located. The Police knew that Shane Holden was the de facto partner of Ms Griffen.

21. There are some facts which are not in dispute. The Drug Intelligence Unit had information which they deemed reliable with respect to the possible supply of drugs by Ms Griffen. They had gone mobile seeking to locate Ms Griffen and a motor vehicle they had reason to suspect she may be in. They located the motor vehicle and Ms Griffen was near the vehicle. Two male persons left the immediate area upon the Police arriving. Officers Carbone and Sims pursued the two male persons and Officer Dole went towards Ms Griffen. At that point she ran from the scene. Whilst Sims and Carbone were seeking to locate the two males they heard Officer Dole call out “stop”. Officer Dole was in the front of room 28 Mount Nancy Hotel. Officer Carbone went back and ascertained that Ms Griffen had left the area. He then returned to where the two males were, at the back of the hotel rooms. It is at this point that there is a dispute as to the facts on the voir dire.
22. Officer Dole says that at this point Shane Holden came out of room 28 and he appeared bewildered. Officer Dole recognised him as Shane Holden. He told Mr Holden that he was a Police officer and he believed Barbette was in possession of drugs. The officer gave evidence that he smelt cannabis coming from room 28 once the door was open. Officer Sims then arrived. The defendant Shane Holden gave evidence that Officer Dole immediately said to him you are under arrest for the suspicion of selling drugs, that Officer Dole directed him to sit down on an air conditioner unit at the front of the room and that is where he sat. The defendant said Officer Sims did not arrive for approximately ten minutes. He also said that Officer Dole asked Officer Sims if he had “found her”. There was no other evidence given to the effect that, at this point, Shane Holden was under arrest. Officers Carbone and Sims said they had returned from the side of the building and had a conversation with Officer Dole. Officer Dole’s focus of attention was on the fact that Ms Griffen had left and he did not suggest to either officer that he had arrested Mr Holden. There was no evidence that at any stage Mr Holden had been physically apprehended although I accept that a person can be under arrest without such physical contact. There was no indication of any type to suggest that Shane Holden was under arrest at this stage.
23. The next factual dispute relates to the question of when Officer Dole started telephoning for a warrant. The evidence of Shane Holden is that immediately upon

being arrested, the detective reached into his pocket got out his mobile phone and rang up for a warrant. This is in stark contrast to the evidence of Officers Dole and Sims. Their evidence is that there was a discussion between Sims and Dole about whether to seek a warrant and that Officer Dole gave Sims the information that Ms Griffen had run off, that both officers had smelt the cannabis and they formed the view that, together with the information they already had with respect to Ms Griffen, a warrant may be able to be justified. Officer Sims says that he then telephoned Superintendent Taylor to obtain authorisation to apply for a warrant, this being required by a general order. I pause here at this stage to note that this authorisation is not required under the Police Administration Act. It serves to ensure that warrants are only applied for in circumstances that a senior officer has deemed appropriate. Failure to obtain this authorisation is not fatal. But the obtaining of the authorisation is part of the checks and balances that operate to protect the interests of those who are the subject of an application for a search warrant. The discussion between Officers Dole and Sims is also an example of a check and balance, albeit not to the some extent. Officer Sims' evidence is that after he obtained authorisation from the senior officer, Dole then contacted the Justice of the Peace and applied for the warrant. In contrast the defendant's evidence was that Officer Dole was standing approximately one metre from him and he heard "vaguely although not exactly" what was being said. He said that a request was made for a warrant for room 28 Mount Nancy for Shane Holden and the name Barbette was not mentioned. He heard words like suspicion of selling drugs. He did not hear anything about smelling cannabis.

24. The contemporaneous notes of Mr Bongiorno (exhibit P2) and his evidence is to be considered in light of the evidence of the defendant. I find that the notes in P2 were written by Mr Bongiorno at the time of the phone call from Officer Dole. The words "Barbette S", "Barbette ran" and "smelt of cannabis" are written down, as well as other words. While the defendant conceded he did not hear exactly what was being said, his evidence is that Officer Dole was very close to him when the application for the warrant was being made. He expressly stated in his evidence there was no mention of Barbette and nothing about smelling cannabis. The prosecution evidence is that Officer Dole was not close to Shane Holden when he phoned the Justice.

25. When I consider all the evidence in the matter I am unable to conclude that Shane Holden's version of events accurately reflects what occurred. I find that the notes in P2 were contemporaneous notes, being written as the call was made. It is significant that Mr Bongiorno has written on his notes "approved by S Taylor". Mr Bongiorno recalls asking whether the request for a warrant was approved by the officer's Superintendent and that he was told approval had been given. If the events were as outlined by Mr Holden, no such approval could have been obtained prior to the warrant being obtained. Further the words "Barbette S" "Barbette ran" and "smelt of cannabis" could not have been written down by Mr Bongiorno on Shane Holden's version of events. I find that those words were spoken by Officer Dole and recorded by Mr Bongiorno at the time of the phone call from Officer Dole. On all the evidence before me it is open to find that Mr Holden was confused as to which phone call he witnessed. The call which he said he over heard is more likely to be the call that was made between Officer Sims and Superintendent Taylor. That call was a thumb nail sketch of why they believed a warrant should be sought and I am satisfied it did not contain the same amount of detail as the call to the Justice of the Peace. Officer Sims was not holding a Bible when he made that call. I do not go so far as to find that the defendant Shane Holden did over hear the call between Officer Sims and Superintendent Taylor. Nevertheless I find that the defendant Shane Holden was confused and mistaken as to his recollection of events on this occasion, and that his evidence can not be relied upon in consideration of the matters in issue. I accept that there is a significant departure between the evidence of Officer Dole and Sims on the question of whether the defendant went back inside the room. I prefer the evidence of Officer Dole on this question, which is in accordance with the defendant's evidence. I also find that this issue does not go to any of the matters in dispute which substantially effect the findings to be made about the call between Officer Dole and the Justice, and does not affect Officer Sims' credit to any significant degree.
26. I am satisfied beyond reasonable doubt that the events occurred as Officer Dole deposed. I find Officer Dole approached Ms Griffen, said some words to her and she ran away. She did not stop when called upon to stop by Officer Dole. Two other persons who had been in her vicinity left to go behind the Hotel area. As

Officer Dole called out for Ms Griffen to stop, a person emerged from room 28 of Mount Nancy Hotel and that person was known by Officer Dole to be the partner of Ms Griffen namely the defendant Shane Holden. Officer Dole could smell cannabis coming from the room when the door to room 28 was opened. When combined with the fact they had information with respect to Ms Griffen, there was justification for the request for a search warrant pursuant to s.120B of the Police Administration Act.

27. Officer Dole briefly conferred with Officer Sims. Officer Sims then made the call to Superintendent Taylor to obtain the authorisation pursuant to the Police general orders. Officer Sims used his mobile phone to make this call. Officer Dole then used his mobile phone and contacted Mr Bongiorno the Justice of the Peace. In making these finding I have considered the evidence of the Police officers and the Justice of the Peace and found them to be honest and reliable witnesses, albeit Officer Sims' evidence is not relied upon in its entirety.
28. The next series of disputed matters relate to the holding of the Bible and whether an oath was administered and taken.
29. Section 22 of the Oaths Act sets out the manner of taking an oath. That section reads as follows:

## **22. Manner of taking oath**

(1) Subject to this Act, and unless the person to whom it is proposed to administer an oath requests that the oath be administered in some other manner, an oath, whether in judicial proceedings or otherwise, shall be administered and taken in the manner provided in this section.

(2) The person taking the oath shall, standing up, hold a copy of the Bible, or the New Testament or the Old Testament in his hand and, after an oath in accordance with the form in Schedule 5 has been tendered by the officer administering it, shall utter the words "So help me God!":

Provided that no such oath shall be deemed to be illegal or invalid by reason of any breach of this section.

30. Schedule 5 of the Oaths Act sets the form of oath as “The evidence you are now about to give shall be the truth, the whole truth and nothing but the truth”. Section 9 and schedule 7 of the Oaths Act set out the provisions relating to affirmations.
31. I am satisfied that Officer Dole was holding a Bible at the time he was speaking to Mr Bongiorno. I cannot be satisfied on the evidence before me that Mr Bongiorno knew that Officer Dole was holding a Bible. I cannot be satisfied that Officer Dole said he had the Bible in his hand. The evidence of the Officers Sims and Dole is that Officer Dole said words to the effect of “the whole truth and nothing but the truth” at the beginning of the information he was providing to the Justice. These are the words which are to be administered at the beginning of the process. The evidence of Mr Bongiorno was that this statement was said by him at the end of the information by Officer Dole. None of these witnesses say that the statement was never made.
32. The person taking the oath must stand up and I am satisfied beyond reasonable doubt that Officer Dole was standing up as he made the telephone call. The person must hold a copy of the Bible and I have already indicated that I am satisfied that Officer Dole was holding the Bible. The oath in accordance to Form 5 has to be “tendered by the officer administering it”. Pursuant to s.22 of the Oaths Act that it is not for the person taking the oath to administer their own oath. The words in Form 5 are to be administered by the Justice or officer administering the oath. The words in schedule 5 “the evidence you are now about to give”, implies it is to be administered before the information or evidence is given. The person taking the oath is to utter the words “so help me God”. I cannot be satisfied on the material before me that these words were uttered by Officer Dole.
33. Whilst s.22 of the Oaths Act says that the oath “shall be administered and taken in the manner provided in this section” (my emphasis) there are 2 exceptions to that being a strict provision. First, s.22 (1) of the Oaths Act allows a request to be made for the oath to be administered in some other manner. Secondly, s.20 (2) of the Oaths Act includes the words “provided that no such oath shall be deemed to



be illegal or invalid by reason of any breach of this section”. It was submitted by defence that this was an invalid oath. Prosecution submit that I can be satisfied that there was an impression conveyed to Officer Dole that he was under a duty to tell the truth and I should not find it to be an invalid oath. I am not aware of any cases which assist the Court as to the meaning of s.22 of the Oaths Act in these circumstances.

34. Defence also submitted that I could not be satisfied that the Justice of the Peace had the requisite reasonable grounds to issue the warrant. Prosecution put the contrary view. I will deal with that issue prior to considering the question of the Oaths Act. Mr Bongiorno was not a Justice of the Peace who was rung regularly by the police. Nor did he present as someone who the police could have expected to have issued a warrant without him giving proper consideration to the question. He had only ever issued 2 or 3 such warrants before and had been a Justice of the Peace for 6 or 7 years. There is evidence of a professional and business like approach being taken to the seeking of the warrant. When the request was initially made Mr Bongiorno went and got a pen and paper and made his notes as he was speaking to the officer. The information he was given was noted in a sequence which was in accordance with the way the Police obtained the information. The notes refer to supply of tablets or drugs, the fact that Ms Griffen was found outside Mount Nancy room 28, that when it was said “Police” she ran off, and that a man who was her partner opened the door and the Police could smell cannabis. This is the same sequence as Police officers have given evidence that the information came to light, and was the information provided to the Justice.
35. This information was given to him by Officer Dole by way of a telephone application pursuant to s.120B ss.4 of the Police Administration Act. Mr Bongiorno’s evidence was that he would not have issued the warrant if he did not have a belief that there were reasonable grounds that dangerous drugs may be found on the premises. He had made inquires about whether approval had been obtained from Superintendent Taylor. I find the information given to the Justice justified the issue of a s.120B Police Administration Act warrant. I am satisfied Mr Bongiorno had the requisite reasonable ground for believing that there was a dangerous drug at the premises namely room 28 Mount Nancy Hotel.

36. I will now return to the question of the Oaths Act. Mr Bongiorno's evidence was that at the end of the information being provided he went through the oath in terms of words to the effect of "the whole truth and nothing but the truth". His evidence is that Officer Dole said that the words were the truth. He had not asked if Officer Dole would prefer to swear or affirm the information. He could not recall Officer Dole saying that he had a Bible. As found previously, I am satisfied Officer Dole was holding a Bible.
37. Based on all the evidence before me, I find that the Justice in this case did comply with the Oaths Act to such an extent that the oath should not be rendered invalid or illegal. That is, I am satisfied that the proviso in s.22 (2) of the Oaths Act should be invoked. I am satisfied that the information Officer Dole was providing was being given in circumstances where he fully understood that he was required to tell the truth. I am satisfied that at the beginning of the provision of the information Officer Dole himself recited that he was "telling the truth, the whole truth and nothing but the truth". This is the appropriate time for this statement to be made - before the information is given. But provided it is made before the Justice considers the application, in my view it is in substantial compliance with the Oaths Act. While this is not required by the Oaths Act that the deponent make the statement (it being the Justice who is to recite the oath) it does satisfy me that Officer Dole was taking the procedure solemnly and seriously. I find it proven beyond reasonable doubt that Mr Bongiorno asked whether Officer Dole was "telling the truth, the whole truth and nothing but the truth" at the end of the information he was given. I am satisfied on the evidence before me that Officer Dole answered in the affirmative. I am satisfied that Officer Dole knew that he was required to tell the truth. As previously found he was holding a Bible and standing up at the time he was giving the information over the phone. This reinforced his acknowledgement of the solemnity of the occasion.
38. It was the duty of the Justice to enquire whether the deponent wanted to swear or affirm and to administer the oath or affirmation. That inquiry was never made and the administration by the Justice occurred at the end of the process. If Officer Dole had elected to give evidence by oath, it would then have been for the Justice to satisfy himself as how an oath could be taken over the telephone. It is arguably

a more reliable practice to administer an affirmation in circumstances such as this. Nevertheless the Police Administration Act clearly allows for the possibility of an oath to be taken over the telephone. The kit in the back of the Drug Enforcement Unit car contains a Bible for these very purposes. The Justice cannot witness the Bible being held by the person who is making the oath when a telephone application is being made. But the Police Administration Act allows for such a procedure, and an enquiry would need to be made when a telephone application is made. In contrast, in a Court room or Chambers setting it can be seen by the Justice.

39. Section 22 of the Oath Act sets out that failure to strictly comply with that section does not necessarily invalidate an oath. The Justice did comply with parts of s.22 of the Oaths Act. Officer Dole took the matter seriously and understood the duty to tell the truth. He did all in his power to comply with the Oaths Act. I find that it is proven beyond reasonable doubt that in all of the circumstances of the case, including the words said to Officer Dole and his response, did sufficiently comply with the Oaths Act to render the oath valid.
40. The next question which arises is whether or not the search warrant should be rendered invalid by reason of the fact that the oath did not strictly comply with the Oaths Act. This is a discretionary matter. The Police officers did all that was necessary to comply with the standing orders and their responsibilities under the Oaths Act and the Police Administration Act. In the circumstances the only reasonable alternative the Police officers had was to telephone for a warrant. Leaving the scene had the potential to lead to the interference with the room they sought to search. Officer Dole gave the information and was in a position to have an oath taken by way of swearing on a Bible if called upon by the Justice. They placed the information before the Justice and the Justice did not request as to whether this information was to be on oath or affirmation.
41. I was referred to the case of the *Queen v Craig Cant* (delivered on the 25<sup>th</sup> of May 2001) a decision of the Northern Territory Supreme Court of Justice Thomas. The case of *Cant* was also a challenge to the admissibility of a search warrant and related to a telephone application pursuant to s.120B (4) of the Police Administration Act. The case of *Cant* is useful when considering the matters to be

decided in this case. *Cant* involved a telephone application which demonstrated a failure to comply with the requirements of s.120B of the Police Administration Act. The Justice did not forward the warrant to the Commissioner of Police and could not find the original copy of the warrant. There was no paperwork created by the Justice of the Peace which could have been of assistance in the consideration of the validity of the issue of the search warrant and the Justice did not have a recollection of the application. He was only able to advise the Court as to his usual practise with respect to matters such as this. A copy of the warrant was produced but no original was ever located.

42. As Mr Goldflam rightly points out, the error in *Cant* was that the Justice of the Peace had not forwarded the warrant within seven days to the Commissioner of Police and the Court found that s.120B (6) of the Police Administration Act was not complied with. Consideration was then given as to whether or not the warrant, or perhaps more accurately described as the copy warrant, should be declared invalid. The Court set out a number of principles which affected the exercise of the discretion in such an application. These included that the wording of procedural requirements concerning the issue and execution of search warrants should be construed strictly, in the case of ambiguity the ambiguity is to be resolved in favour of the citizen whose privacy and property were to be interfered with as a result of the proposed search taking place, as well as principles which have been set out in the High Court case of the *Queen v Swaffield* (1998) 192 CLR 159. At paragraph 40.6 in the case of the *Queen v Cant* the Court set out as follows:

“This Court does not condone a failure to comply with the requirements of the Police Administration Act. It does, however, recognise that the failure on the part of the Justice of Peace to create an original warrant does not mean the police officers who participated in the search acted improperly. I am satisfied that Detective Jordan genuinely believed he had obtained a properly authorised search warrant and that belief was shared by other officers who participated in the search.”

43. Despite the fact the warrant was found to be technically invalid in the case of *Cant*, the evidence of the search and the items seized from the search were not excluded by the Court. In my view, in the case of *Cant*, the defendant was far

more prejudiced than in this case, in that there was no evidence whatsoever from the Justice of the Peace as to the information he had before him and whether or not he had sufficient material before him to have reasonable grounds for suspecting that there may be drugs on the premises and for the warrant to be issued. There were no contemporaneous notes and there was no evidence by the Justice of the Peace as to any of the matters that were put to him. The evidence which was before the Court only related to his usual practice. No original warrant was ever located and there was no compliance with one of the sections of the Police Administration Act. In this case there is a failure to strictly comply with s.22 of the Oaths Act. Nevertheless I have found there was sufficient compliance with s.22 to render the oath valid.

44. The defendants have had the opportunity to test the way to application was made in this case, including on the question of whether the Justice of the Peace had the requisite reasonable grounds to issue the warrant. I find that there can be no criticism of the actions of the Police officers in the circumstances of this case. It was the actions of the Justice which lead to the irregularity under the Oaths Act. The irregularity was not so serious as to invalidate the oath. Nothing about the actions of the Police officers on this occasion calls for the warrant to be declared invalid. Similarly nothing about the actions of the Justice calls for the warrant to be declared invalid. I find that the warrant issued pursuant to s.120B (4) of the Police Administration Act at 9.30pm on Saturday 29<sup>th</sup> of April 2006 with respect to room 28 Mount Nancy Hotel and issued by Mr Michael Bongiorno JP is a valid warrant. The search undertaken and any seizure pursuant to this search is therefore a valid search and seizure.
45. As stated at the adjourned date, upon this ruling being made, the case will be adjourned to a date to be fixed for parties to consider their respective positions prior to the resumption of the hearing.

Dated this 30<sup>th</sup> day of November 2006.

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**M Little**  
STIPENDIARY MAGISTRATE