CITATION: *Thomas v Watson* [2006] NTMC 098

PARTIES: PETER MARK THOMAS
(INFORMANT/COMPLAINANT)

v

SAMUEL WATSON
(DEFENDANT)

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Summary Jurisdiction

FILE NO(s): 20216090; 20216092; 20215349

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JUDGMENT OF: Jenny Blokland CM

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CRIMINAL LAW – EVIDENCE – VALIDITY OF SEARCH WARRANT – CONFESSION – VOLUNTARINESS – COMPLIANCE WITH LEGISLATION – RECORDING OF SECOND INTERVIEW MISSING – ADMISSIBILITY OF FIRST PART

*Criminal Code*, s229
*Misuse of Drugs Act*, s5(1)
*Police Administration Act,* ss117(2), 143, 140
*Police General Orders* Q1, Q2
*George v Rockett (*1990) 170 CLR 104
*The Queen v Tillett; ex parte Newton* [1969] FLR 101
*R v Jervis* (1998) SASR 429
*Zanet v Hentchke* (1988) 33 A Crim R 51
*R v Edlesten* (1990) 21 NSWLR 542
*Collins v R* (1980) 31 ALR 257
*Cleland v R* (1982) 151 CLR 1
*Van Der Meer v The Queen* (1988) 82 ALR 10
*Spence v Demasi* (1988) 48 SASR 536
*Butera* (1987) 30 A Crim R 417

*Gardner v Dune* (1978) 14 ALR 695
*R v Lobban* (2000) 77 SASR 24

**REPRESENTATION:**

*Counsel:*

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| Informant: | Ms Heske |
| Defendant: | Mr Loizou |

*Solicitors:*

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| Informant: | ODPP |
| Defendant: | NAAJA |

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| Judgment category classification: | B |
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| Number of paragraphs: | 38 |

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20216090, 20216092, 20215349

BETWEEN:

**PETER MARK THOMAS**
(Informant/Complainant)

AND:

**SAMUEL WATSON**
Defendant

REASONS FOR RULING ON THE SEARCH WARRANT

(Delivered 29 September 2006)

Jenny Blokland CM:

## Introduction

1. These reasons concern a number of rulings made during the course of a hearing concerning charges brought against Mr Samuel James Watson for offences alleged to have been committed by him in 2001 and 2002. Mr Watson has entered pleas of *Not Guilty* to a charge that between 1 and 6 April 2001 he received six rifles knowing they had been obtained by means of a crime, namely stealing contrary to *section 229* of the *Criminal Code*; that he supplied cannabis to a person or persons unknown contrary to *section 5(1) Misuse of Drugs Acts*; that he received *sidchrome* spanners that had been obtained by means of a crime, (namely stealing) contrary to *section 229 Criminal Code*; a further count of unlawful supply of cannabis to a person or persons unknown; a further count of receiving a wheelbarrow and a grease gun, and a further count of supply cannabis to a person or persons unknown during the same time period (file 20215349). He also pleaded *Not Guilty* to another count of receiving alleged to have occurred between the 3

April 2001 and 6  April 2001 concerning collectable toy trucks and other items and a further count of unlawful supply of cannabis to a person or persons unknown, (file 20216090).  He pleaded *Guilty* to one count of stealing alleged to have occurred on 6 April 2002 but denied certain facts concerning the mode appropriation of the goods, (a brief case containing cash and cannabis).  The counts on file 20216090 concerning receiving charges were investigated, in part utilising a search warrant issued on 5 April 2001.  A voir dire was held concerning the legality of the warrant and whether it contravened the *Police Administration Act*.  The challenge to the warrant was made on the basis that there was not a reasonable suspicion that the property was stolen.  It was suggested that police were not acting on a reasonable suspicion as they were relying on the allegations of the alleged victim; it was also suggested that the property was not stolen and that it belonged to the defendant: (transcript 7/11/2005 at 7-8).  The hearing proceeded by hearing both the evidence that might be relevant to the hearing proper and also evidence relevant to the question of the validity of the warrant.  I have ruled that the search warrant was valid and now publish reasons.  I have also heard a voir dire on the alleged confession at material and publish my decision.

**The Warrant**

2. The warrant before me as Exhibit VD1 was issued pursuant to *section 117(2) Police Administration Act* on 5 April 2001.  Section 117(2) *Police Administration Act* reads as follows:

> Where an information on oath is laid before a justice alleging that there are reasonable grounds for believing that there is at a place anything relating to an offence, the justice may issue a search warrant authorizing a member of the Police Force named in the warrant to enter and search the place and seize anything relating to an offence found in the course of the search at the place.
>
> (3) A justice shall not issue a warrant under subsection (1) or (2) in relation to an information unless –

(a) the information sets out or has attached to it a written statement of the grounds upon which the issue of the warrant is sought;

(b) the informant or some other person has given to the justice, either orally or by affidavit, such further information, if any, as the justice requires concerning the grounds on which the issue of the warrant is being sought; and

(c) the justice is satisfied that there are reasonable grounds for issuing the warrant.

(4) Where a justice issues a warrant under subsection (1) or (2) he shall record in writing the grounds upon which he relied to justify the issue of the warrant.

(5) There shall be stated in the warrant issued under this section the following particulars:

(a) the purpose for which the search or entry is authorized;

(b) a description of the nature of the things authorized to be seized; and

(c) the date, not being a date later than 14 days after the date of issue of the warrant, upon which the warrant ceases to have effect.

(6) A member may, at any time before a warrant issued under subsection (1) or (2) is executed, make application to a justice to withdraw the warrant.

3. The information laid before the justice refers to a member of the police force (Peter Stowers) having reasonable grounds for believing on Lot 3492 Fog Bay Road, Dundee Beach the following things are present: Set of sheets; grey 30 metre power lead; orange 30 metre power lead; submergable bilge pump; 20 litre spray unit; wheelbarrow; grease gun; approximately a dozen *sidchrome* spanners, being things related to or connected with an offence against the law in the Northern Territory, namely an offence of unlawful entry and stealing. The grounds set out that are relied in the information are:

> "Approximately three weeks ago the victim in the matter had property stored in a locked bus located at Lot 3486 Fog Bay Road, Dundee Beach. On Sunday 4th of April 2001 the complainant attended at Lot 3486 Fog Bay Road and discovered that his bus had been unlawfully entered and the above mentioned property had been

> stolen. The complainant made enquiries with a number of people in the area. As a result of these enquiries the complainant attended at Lot 3492 Fog Bay Road where he found that nobody was at home. Whilst there the complainant located the above mentioned property in an annex attached to a caravan. Leaving the property where he found it the complainant attended at Palmerston Police Station where he reported the matter to Police".

The information is signed on oath before Mr Feeney JP. Mr Feeney then issued a warrant stating that he was satisfied by the information that there were reasonable grounds for believing that property was in or upon the land described at Lot 3492 Fog Bay Road, Dundee Beach and that the property was connected to an offence, namely unlawful entry and stealing.

4. A Mr Gary Douglas Noble gave evidence before me that on 1 April 2001 he went to police because he had returned to his lot at Lot 3486 Dundee Downs and his bus that was situated on that lot was smashed and a number of items were missing; he said it was the fourth time he had been broken into. He said over the three month period prior to going to police he had been broken into about every three months. He would return back from working at the Tanami and find he had been broken into; he said he had repaired the damage on each occasion. He said a lot of food stuffs had gone missing as well as a wheelbarrow, grease gun, tool set, open end ring spanner tool set, spray outfit and brand new sets of sheets. He said nobody else lived on that block or had access to it. He said the majority of items were inside the bus but there were other items such and the wheelbarrow and grease gun that were outside the bus; he said the property he mentioned was property stolen by way of accumulation of the four break-ins and that after the fourth time he made some enquiries around the area; he said he knew who the thieves were so he went and visited them but none of his belongings were there. He made further enquiries with people at local businesses; he was asking people whether they knew anyone called the "Nightrider"; as a result of those discussions he said he went to a block that had a sign nailed to a tree "For Sale" and on the pretence of going and introducing himself and saying he

was interested in the block he thought he would see whether any of the stolen items were situated on the block.

5. He told the court he couldn't remember the block number but it was directly opposite to "Fitzy's Forest" and there was another person who lived directly across the road who had also been broken into; he said he knew the block by sight but didn't know what the number was. He said when he got into the block he noticed a caravan with a makeshift annex and he noticed his grease gun laying next to the lounge on the concrete pad; he said he identified it as his grease gun because it was a "Caterpillar"; he said he expected only operators of "Caterpillar" machinery would have the same grease gun. He said he knocked on the caravan door and there was no answer; he said he looked in the window and saw the sets of sheets that his former wife had provided to him from Jabiru; he said he identified them because the pattern was from the Aboriginal Association at Jabiru who had started silk screening and the particular sheets were not on the market as yet; he said they were an Aboriginal design with lizards and other animals depicted on them; he said he knew straight away they were his.

6. Mr Noble said he had a look around and noticed the wheelbarrow and the spanners; he could tell by some spray paint that was underneath the wheelbarrow that it was his; he also identified extension leads that he knew had certain paint markings on them; he said he could identify the assortment of spanners and could tell by the condition that they were his. He said he saw other items on the premises and he thought there were too many items for one person, for example two videos, a couple of TV's and small generators. He said there was *quite a bit of stuff* for a bush camp. He said he waited for several hours to see if anybody came and nobody attended; he said as he was working at the Tanami and as he was going to have to fly back he didn't want to disturb anything. The next day he went to Palmerston Police Station and reported what he had seen and advised them what block the items were on. He said he told police who he thought lived

on the block and gave them the name of "The Nightrider" known as "Sam"; he said it was only subsequently through other enquiries that he learnt his name as "Sam Watson"; he said he didn't know him at the time. He said he described the property to Police and told them where the block was situated. He said his only motive for looking around the block was to see whether his stolen goods were there. He referred to his police statement and said that in addition to the items he had seen at the block, there was a water pump set up for spraying weeds in a back pack unit that he didn't see when he visited the property. A number of his items were given back to him after police had investigated.

7. In cross examination Mr Noble said he mainly lived at his Dundee Downs block after coming back from the Tanami but he also had a residence in Nightcliff; he said he was familiar with other residents at Dundee Downs; he said he approached three or four different people and asked if they knew about the "Nightrider". He said that he had heard the name "Nightrider" previously and that some of the people he approached had also used the term "Nightrider". When he was asked how they described the "Nightrider" he explained that he had been around to see "Stretch" and people he referred to as "the other local thieves" and said that none of his gear was there; he said some of the other people without hesitation said the "Nightrider" rides around at night checking the blocks; he said that drew his interest towards finding out who the "Nightrider" was. He said he was told the "Nightrider" rode around on a bicycle and also had a vehicle. He said Stretch was "Australian" and Donny Baker was "Indigenous". He was asked whether he came across anyone of New Zealand origin and he said from memory he did not; he said no-one had mentioned that the Nightrider was a New Zealander; he said he believed there were two well known thieves who lived in the vicinity; he disagreed that his property had been "lost". He said it was stolen. He was asked about the first break into his premises and he said it was three months prior to 1 of April, so around mid January of 2001; he said

he didn't report the first one because he thought it would be a "one off thing"; he said the next break in may have been towards the end of January; the next was the beginning to mid March and the last one would have been at the end of March. He said altogether he was broken into about four times between mid January and the end of March 2001.

8. He was asked whether the business person called "Sue" told him that it was the "Nightrider". Mr Noble said he asked her if she'd heard of anybody called the "Nightrider" because he said the only tracks he'd seen from his property where bicycle tracks and when somebody told him a bicycle or a vehicle was being used, that's when it "clicked" about a connection with "Nightrider". He said Sue told him she had heard of "Nightrider" and he asked her for further information. She told him that his name was "Sam". It was suggested to him that the "Nightrider" could be a New Zealander and he replied he could be an Afghani or Irishman; it was put to him that the "Nightrider" was somebody else in the area but Mr Noble said the "Nightrider" was "Sam Watson". He said "Stretch" and Donny Baker did not mention the "Nightrider". He was asked whether he could remember the order in which goods had been taken from his property. He said the first was mainly food stuffs; the second time was a grease gun and the wheelbarrow; he said he wasn't sure about the third time, but he thinks it was the electrical leads; he said he thought the fourth time was the spanners and the spray pack but he said each time more items went missing. He agreed that when he was speaking to "Stretch" and Baker he may have asked them "who did it?" – they said they didn't know of anybody else; he said he may have spoken to the local Fire Chief (Cole Delaney). He said he didn't go into any detail about the "Nightrider" but asked them if they knew anything and they had mentioned the name "Nightrider"; he said they told him he was called "Nightrider" because he's been seen riding around the blocks at night checking out the blocks; he said they did not provide a description of this person; he said they told him that he sometimes drove a

*beat-up* four wheel drive; he wasn't sure whether they told him the make but he thought it was a Toyota; he said the most common reference was to a pushbike and he said there was a pushbike on the premises when he saw his gear. He said there was also mention of a panel van and he said there was a type of van on the block and a push bike in the back of the van; he said the pushbike was a black framed pushbike with an extended seat and standard handlebars; he said he didn't see anybody riding a pushbike around at any time but he had seen pushbike tracks coming from his property. He said he had been told by Sue to be careful because she knew the "Nightrider" had a gun. He said he was told of the property the "Nightrider" lived on; he said he was given an explanation and identity of the property that made it easy to find because of the "For Sale" sign. Mr Noble said he had only been made aware of one person living on the block. It was suggested to him that he did not suspect the well known thieves that he was aware of. He said that the local Fire Chief called Delaney had said he'd seen the "Nightrider" on occasions. He said there had not been any other break-ins since the "Nightrider" left the area.

9. Ms Susan O'Keefe who lives at 366 Fog Bay Road, Dundee Forest gave evidence that she and her husband have run a small business in the area for the last five years and have been living there for nine years. She said in about April 2001 she knew someone known as the "Nightrider" and believed she knew him as "Sam"; she said she understood he had this name because he was quite often seen on blocks where he shouldn't have been or had no genuine purpose to be there. She was asked if he was a local legend or an actual person and she said he was an actual person. She said she thought she had met him. She said she hadn't seen him since around 2001 until she gave evidence in court in these proceedings. She indicated the defendant as the person she knew. She said she knew Mr Gary Noble. She recalls that when Mr Noble went to see her about being broken into he told her he had heard the name "Nightrider" and she said "you're probably talking about

Sam down the road." She said she didn't know the block number but it was around a quarter of a mile from her place. She said she knew the block from her activities with her husband as a volunteer fire fighter. She said Sam was on that block when she had gone there concerning a fire and at that time he was raking to protect from fire. She said she remembered a dwelling there and a lot of items around the outside but her concentration on the fire. She said she was asking him if he wanted to evacuate given the fire but he chose to stay and rake so they decided to back burn. She said she was aware that he was living at that block because she had been told; she said she thought it was just locals; she said she couldn't say when Sam first came to live on that block; she said to her knowledge he was not living there anymore and left a long time ago, possibly two years ago. She said she'd seen him go up and down the road several times since she spoke to Mr Noble but she saw him in a Torana. She said she didn't believe Sam owned the property but she believed it was owned by someone living in Mandorah and Sam was caretaking it. She said the block was on the other side of the road and a few blocks down from "Fitzy's Forest". She said it was on Fog Bay Road; it was on the right hand side of the road going towards Darwin.

10. In cross examination she said she had spoken about this person as the "Nightrider" but not necessarily *to* him. She said she couldn't recall who had informed her that Sam was the "Nightrider". She said it was common knowledge. She said everybody referred to him as the "Nightrider". She said she couldn't be sure whether she saw a four wheel drive on the property. She said she could recall there was a "For Sale" sign attached to a tree of the property but she said it could have gone up when he moved on. She said he was driving a small car at one stage, it may not have been a Torana. She said Sam had been at Dundee for a while before she had heard that he was known as the "Nightrider" and she wasn't sure of the sequence of events. She said somebody would have pointed him out to her one day and said "that's Sam". She said she knew him as Sam first and did not know

him as the "Nightrider" until some time after. She said she couldn't say whether it was Sam that she saw on a pushbike. She said she had no doubt in her mind that when people were talking about the "Nightrider" they meant Sam; she said it could not have been anybody else staying at that property and it wouldn't have been anybody else riding around.

11. Mr Michael Sean O'Keefe gave evidence that he first met Mr Gary Noble three to four years ago; he said he showed up at his place, very angry, wanting to know if they'd seen anybody suspicious around the area because he had been broken into. During the conversation he said that Mr Noble had asked "who's this Nightrider?" and Mr O'Keefe said it was a bloke called Sam that lived on a block that was described to him. Mr O'Keefe said he first met Sam when he came over to his business. He asked him where he was living. He said he knew where he was living as he had attended as a volunteer fire fighter when Mr Watson was in the residence. He said when the fire was coming Sam was in a panic and he explained about raking out the leaf litter. He said they back burned and the fire went through. He described the block as being a 150/200 yards towards Darwin from Fitzy's Forest. He said the dwelling was a bush humpie and he saw there were a lot of old broken power tools such as angle grinders. He said he had not met Mr Watson since the fire and he indicated that he was in the court room. He said he did not speak to police after the incident with Mr Noble.

12. In cross examination Mr O'Keefe was asked if he knew anybody else living on the block. He said later on there was a person called "Crusty", "Crusty the Clown". He said he found out the block was owned by a person in Mandorah but before Sam came to live on the block he didn't recall anybody else living there. He said "Crusty the Clown" did not come onto the scene until three or four months after Sam had left. He agreed he couldn't say whether or not there was somebody else on the block; he said because of the nature of his business he would generally know if somebody was living on that block if they had a vehicle. He agreed he had heard of hundreds of

other "break-ins" at Dundee Downs. He said Mr Noble had been broken into six times; he said the last time nothing of value was left in the place but it was *trashed*. He said there were hundreds of people getting broken into. He said since Sam has left and also since another group has left Dundee Beach it's been very quiet. He said there's been a few opportunistic *robberies* but nothing of a scale that was going on previously. He said the other group was called the Maxwells who were breaking into properties all along the beach. He said that was common knowledge. He said they were about twenty kilometres away. He said at Dundee Forest the "break-ins" were a regular occurrence.

13. Detective Constable Peter Stowers said he attended a Justice of the Peace to obtain a search warrant in relation to a complaint of stolen property located at a place in Dundee Downs. Detective Stowers said he relied on information contained in a PROMIS job that had been assigned to him in relation to 3492 Fog Bay Road; he said he had not spoken to the person who made the complaint personally; he obtained the information from the PROMIS system. That document became VDP2 in these proceedings. He said the information on the PROMIS job was the information he used to justify the search warrant. He said the PROMIS job notes that the complainant reported that his bus had been unlawfully entered and that had occurred within the last three weeks. It lists the items suspected of being stolen and that the complainant had a suspect and had found his property on the suspect's property. The PROMIS entry notes that "Sam" lives on Lot 3492 on Fog Bay Road and the property has a "For Sale" sign on the front on a tree. It also notes that the complainant attended the block on the pretence of being a buyer as he had information that his gear may be there. It lists the items allegedly belonging to the complainant. Detective Stowers also said he was relying on information from other police officers who were investigating in the area concerning other unlawful entries and that the "Nightrider" had been identified as Samuel Watson. He also said Detective

Whitlock identified the block number. Detective Stowers said that he had applied for warrants previously and for this warrant the grounds were an *eye witness identification of stolen property by the victim*. He said he did not participate in the searches as he was unavailable. He also explained the original warrant was in his name and it was changed to Virginia Dixon who took the matter over when he was involved in other duties. He said he suspected the offences of unlawful entry and stealing on the basis of information from the complainant that the complainant's premises were unlawfully entered and property stolen from his premises.

14. In cross examination Detective Stowers said he didn't speak to residents at Dundee Forest or Dundee Downs himself. Detective Whitlock had identified the "Nightrider" as Sam Watson. He said that was the only name he was given. Detective Stowers said the information from the complainant was more than just a belief that his property was at particular premises. Here there was confirmation that he saw the property and he identified the property as belonging to him. He was asked whether he would attempt to speak with the suspect and he said "no"; he said he wouldn't speak to the suspect because he might risk losing the property. He said in this case he relied on the complaint on PROMIS and on hearsay information from Detective Whitlock which corroborated aspects of the complaint. He said he had no reason to believe that the complainant wasn't telling the truth. He said Detective Whitlock may have been involved in the investigation for a couple of weeks prior to his involvement. He said he also had information that the "Nightrider" or "Sam" may be in possession of firearms and so cautionary measures were taken.

15. Retired Detective Sergeant Chapman was involved in executing the search warrant. He said he carried out some briefings, he had information on Mr Watson; he said he had some knowledge that firearms may be involved. He said the premises searched consisted of a caravan with a lean-to. He said property was found in the caravan. On the top shelves were small toys; he

recalled a number of firearms being found and one had a magazine in it; he said one had part of the stock removed; he remembered the wheelbarrow, *sidchrome* spanners and a pump and spray unit. He said Detective Stowers had information that Mr Watson was residing there and had stolen a lot of property and that he was called the "Nightrider". He said after the search warrant was executed he went out to that area many other times for other incidents. He said there were matters concerning Mr Watson. He said Mr Watson had come to his attention in Mandorah around three to six months before concerning stolen property and a firearm. Detective Chapman said he thought it would be insufficient to apply for a warrant if someone just believed that a person had taken their property and now had it on their premises; he said you would not just take one person's word concerning it. He thought that information that the suspect was involved in other "break-ins" would be corroborating. He said if the information from one person was that they had seen someone do it, that would be good information to base a warrant on but if it was just that someone thought someone else was the suspect that would not be. He said in his experience it would be sufficient that someone had actually seen the property at the suspect's premises.

16. Senior Constable Virginia Miller (previously Dixon) gave evidence that she executed the search warrant in early April 2001. Based on information given to her by other officers, she applied for and was granted the search warrant. She said the actual warrant itself was originally taken out in Detective Stowers name but she subsequently applied for it herself as he was involved in other duties. She said she was told that a number of officers were looking at "break-ins" in the Dundee and Mandorah areas and through her sources there was a substantial amount of information concerning a person known as the "Nightrider" known by his behaviour on his bicycle going through fire trails. Her information was the address of 3492 Fog Bay Road was the possible address of the "Nightrider" and that there was

property at that address. She said this information tied in with what she had learnt over a number of weeks. She said the information concerning the specific property came from a Mr Gary Noble who had gone to the premises and seen his property in situ in the caravan annexe. She gave evidence of what was found including the .22 Birmingham rifle. She said that firearm was lodged as an exhibit. Detective Miller noted other items including "caterpillar toys" that she said were inside the caravan. She said the wheelbarrow was outside near a water stand. She said the information concerning the property would have come directly from complainants. Detective Miller was adamant that she could not have gone into that lot by mistake. She said the description lead her to that block. She said the property would have gone back to Palmerston Police Station after it had been seized. She said photographs would have been obtained. She said a few days later Mr Noble was contacted and identified his property and it was returned to him. She said she also thought there was another person called Anderson who went through that process. In cross examination she was asked whether she spoke to a man referred to as "Stretch"; she said she did remember him due to his criminal behaviour in the area. A number of other names she was not familiar with but she was familiar with the name "Nightrider" and she said she was aware of his suspicious behaviour. She was aware he was seen riding a bike and also a Toyota. She said she was aware there had been substantial "break and enters" in the area.

17. Detective Whitlock gave evidence about his assistance concerning the search warrant at Lot 3492 Fog Bay Road, Dundee Forest. He said in the month previously he had been concentrating on various "break-ins" and theft of property in the area; he said he had identified a person known to locals as the "Nightrider"; he said as a result he had tracked the "Nightrider" down to a block on Fog Bay Road; he said he didn't have the lot number at that stage but had his name as "Sam" and knowledge of certain of his activities; he saw that the bike tracks left from the "Nightrider" were leading on to a

block that he did not know the number of at that stage but was later identified as Lot 3492. He said when he attended with Detective Virginia Dixon the bike tracks were not apparent; he said the particular block had been identified as the second driveway around the corner on Fog Bay Road and identified with a tin plate number and a "For Sale" sign nailed to a tree. He said there was a possibility that 3492 maybe connected to another block but he was confident given the directions that were given to him that he had identified the correct lot number. He said that he did not at any stage see Sam Watson on the block. He said he provided information as a result of his enquiries prior to the execution of the warrant. He said the property he was looking for came to his knowledge as a result of investigations concerning "break-ins" and stealings in that area not necessarily attributable to the "Nightrider"; he said he had a number of targets which were identified as suspects not only for "break-ins" but other offences. He said in relation to Lot 3492 he was also concerned about some stolen firearms from the lot next door owned by a James Lange.

18. In cross examination Detective Whitlock said he had two persons left on a suspect list of four; he said he knew "Stretch" and was familiar with him as a thief; he said he came to this view as a result of investigations he had carried out. He said Snowy Baker was not on his list. He said the "Nightrider" was on his list and he had his name because he would ride a bike around at night; he said it was a push bike and believed locals believed it was a mountain bike; he said it had a tread pattern that he believed maybe a mountain bike; he agreed there was concern about the amount of criminal activity going on in the area in the months preceding the execution of the warrant on Lot 3492; he said he had arrested two or three people in the months preceding the execution of the warrant in relation to thefts at Dundee Beach, (not Dundee Forest), and he said there was a significant difference between the two. Detective Whitlock said the unlawful entries occurring in Dundee Beach had been cleared up, offenders were

apprehended and a substantial amount of property recovered and returned to owners. He said the Dundee Forest area was the area that the "Nightrider" appeared to be working in; he said he'd only been working in the area for a short time. He said the "Nightrider" had only been in the area for a short time; he said he thought they may only have been in the area for around a month. He said there was also another person working in Dundee Downs and when they left those "break-ins" ceased; he said when the people working Dundee Beach were apprehended the "break-in" in that area stopped and when the raid was executed against Lot 3492 in Dundee Forest the break ins in that area stopped. He said he did not arrest any person in relation to the Dundee Forest area; he said in relation to Dundee Beach he knew the name Maxwells, and the Holden Brothers.

**Discussion of the Issues Concerning the Warrant**

19. On behalf of the defendant it has been argued that there was not sufficient evidence for police to hold a reasonable belief that particular offences had been committed in support of the search warrant. It was submitted that the evidence of retired officer Chapman indicated there would need to be more evidence to support a reasonable belief. Mr Loizou submitted that even though there may have been some suspicion of break-ins: "*that particular belief in my view couldn't translate into unusual suspicion that property was on Mr Watson – the property of Mr Noble was at Mr Watson's premises. It is a large hurdle, your Honour, to put it mildly*" (Transcript 95).

20. The issue of warrants under the *Police Administration Act* requires information to be laid before a justice. This is not a jurisdiction where the issuing officers are police. The need to justify the belief before a justice of the peace is an important safeguard and procedural step. There is no question this was complied with. There were basic facts in the information justifying the issue of a warrant. The applicant(s) for the warrant on oath asserted that they entertained the reasonable belief. The warrant specified

particular items and premises. The offence was identified in the warrant. In my view the police had strong grounds for seeking a warrant. The section requires that the information laid before the justice alleges "reasonable grounds for believing that there is at a place anything relating to an offence". Here there was information that a person's premises had been broken into and that they had found their property and specifically identified it according to its particular individual characteristics at Lot 3492 Fog Bay Road. The belief required is not conclusive but reasonable. The evidence is that Mr Feeney JP would clearly have held the requisite belief before issuing the warrant on being shown the warrant. In my view the process and substance of issuing this warrant accords with relevant authorities on the correct pre-requisites for issuing a warrant.

21. Belief was described in *George v Rockett* (1990) 170 CLR 104 as follows:

> "The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture."

22. Counsel for the defendant sought to rely on *The Queen v Tillett; ex parte Newton* [1969] FLR 101. This decision of Fox J has indeed been highly influential in the Australian jurisprudence on the point and is often cited. I do not see that anything that has occurred in relation to this warrant that is contrary to that decision. His Honour makes the point that a justice cannot discharge their duty "*acting, parrot-like, upon the bald assertion of the informant*". There is no evidence that has occurred in this case. Neither does this case fall foul of the principle outlined by His Honour that:

> "The warrant cannot authorise the seizure of things in general or things that are related to offences in general. In my opinion the warrant should refer to a particular offence…….the description of the offence in the warrant must be sufficiently clear to enable the person where premises are being searched to know the exact object of the search."

23. In my view this has all been complied with. It is not suggested that the warrant is tainted by illegality due to Mr Noble visiting the property to see if his property was there. I have not had argument to that effect before me. It would appear to be a justifiable or excusable act in the circumstances, but even if not, it is not a circumstance where I would exercise the public policy discretion to exclude the evidence obtained pursuant to warrant. In all of the circumstances and given Mr Noble is not part of law enforcement I (*R v Jervis* (1998) SASR 429; *R v Lobban* (2000) 77 SASR 24) would not consider it a deliberate or serious enough impropriety to justify exclusion: *Zanet v Hentchke* (1988) 33 A Crim R 51; *R v Edlesten* (1990) 21 NSWLR 542. The warrant is valid and the results of the search admissible.

**The Record of Conversation – Question of the Admissibility of the Confessional Material**

24. An electronic record of conversation was conducted between investigating police and the defendant on 6 April 2002. That recorded conversation is the subject of objection. There is an unusual factor in these proceedings. The investigating officers recorded the conversation on tape as they are required to do (ss 139-143 *Police Administration Act*). In any event that has been the practice for some time. There were two tapes. One is still available (Tape 1) and the other, (Tape 2 – being the Master Tape) did not have any sound recorded on it when it came to be played and the working copy has gone missing. What is unusual is that a transcript had been made of both tapes by a Ms Moorecroft employed at that time in a clerical capacity by the Police Department. Initially Ms Heske for the prosecution was going to attempt to rely on the transcript of Tape 2 but in submissions told the Court she would not be relying on the transcript but would rely on the recollections of police

and Ms Moorecroft concerning their recollections of the conversation that had been taped on Tape 2 but is no longer available.

25. The defendant objects to all of the material firstly on the grounds of voluntariness or the fairness discretion alternatively through the public policy discretion. It is submitted the defendant did not choose to speak in the exercise of a free choice to speak or remain silent; that Police General Orders Q1 and Q2 were breached: (I.2 written submissions). In relation to voluntariness it is submitted and of course accepted that by virtue of *Collins* (1980) 31 ALR 257 the will of the person confessing must be assessed against their age and background. It was submitted the defendant is from a disadvantaged background; is a person unable to comprehend and understand English well as evidenced in the EROI; is of limited education; is unable to read English fluently. Further, breach of Police General Order Q1 is alleged: (II, 3, 4 and 5 written submissions). Similar arguments are raised in relation to exercise of the fairness discretion citing *Cleland v R* (1982) 151 CLR 1 as well as the consequential result to "*enhance the community's confidence in the proper administration of justice*": *Van der Meer v The Queen* (1988) 82 ALR 10. In summary, the following issues are raised: whether police accurately assessed the defendant's level of English; why the police did not arrange for legal representation when it had been asked for; whether the defendant understood the caution; whether leading questions were employed; whether independent evidence was pursued once a purported confession was obtained; whether the defendant was affected by illness or fatigue; whether the defendant's will was overborne: (Para IV Written Submissions). A number of grounds of challenge relate to the recording – *s 142 Police Administration Act* and the potential for rejection pursuant to *s 143 Police Administration Act.* It is also submitted that without the whole of the record being admitted, the principle in *Spence v Demasi* (1988) 48 SASR 536 should apply so that none of it should be admitted without the whole. (Pages 6-7 Written Submissions).

26. The onus for establishing voluntariness is on the prosecution on the balance of probabilities. The persuasive onus rests on the Defendant in relation to the exercise of the fairness discretion or the public policy discretion, save that nay breaches in relation to recording of the confession place the onus on the prosecution to persuade the court that admission would not be contrary to the interests of justice: s 143 *Police Administration Act*. Detective Stowers was recalled. In relation to the record of conversation he said he was on duty on the morning of 6 April 2006; he made preparations for a record of conversation with Detective Neesham; he listened to the *s 140* tape that had been made by other members. He didn't go into the cells but he woke the defendant up; he spoke to him; he said the defendant did not appear to know the reason why he was being arrested; he told the defendant he was under arrest for stealing a brief case. Detective Stowers said the defendant told him he had just finished smoking some cannabis and he needed to sleep and that he had not stolen the brief-case but he found it by some stairs at the wharf. Detective Stowers left the defendant to have a sleep for a couple of hours.

27. Detective Stowers said when he returned with detective Neesham he asked the Defendant if he was still under the effects of cannabis and he said "no"; he said he was fine "and he appeared fine to me". When taken upstairs Detective Stowers said he had a lengthy conversation with the defendant about other offences he wanted to talk to him about involving the seized property from Fog Bay Road. He also spoke to him about various hardships suffered by the defendant and about the defendant wanting to go on a drug rehabilitation programme; he said his demeanour was fine; he appeared approachable and open. Detective Stowers said the working copies of the tapes made of the record of conversation were given to Ms Morecroft to transcribe, Detective Stowers said he checked the transcriptions and it accorded with his memory. Without looking at the transcript he said he recalled some of the admissions that surprised him, for example about

finding the brief case near the wharf; not realising it was police who were chasing him; not knowing there was cannibas inside the brief case and then denying ownership of the brief case. In relation to property allegedly seized from his residence at Fog Bay Road, Detective Stowers say she admitted that lot was where he was staying; that he was known locally as "a fence" and that people took property to him so he could "hock it off"; he wasn't told the property was stolen, however, he wasn't stupid and he knew it was stolen. In relation to the model cars he said he knew the values because his father used to collect them and he would get more money for them in the individual boxes. He said that he gave cannabis in exchange for model cars; the same with a wheel barrow and a spray gun; that he was generally exchanging property for cannabis. He denied being involved in unlawful entries – that he's a "fence" and that is what he does. He also talked about protecting crops for "the syndicate" for ten years. He also said he had cut the butt off of a firearm; he said he didn't know who the firearm was stolen from; he demonstrated using a firearm when talking to police. He refused to answer who brought a firearm to him but said that the person who brought it brought other firearms as well. There was also discussion about a gnome that had gone all around the world.

*28.* The first tape was played to the court. It is an agreed fact that there was no sound on the second tape. The first tape contains what might be regarded as vague admissions. The defendant admits to living at the lot in relation to the Fog Bay Road offences; he admits to having an idea that various of the goods are stolen. As acknowledged, these are quite vague admissions. He admits to obtaining goods in exchange for cannabis. Detective Stowers gave evidence of other admissions that he recalled being on Tape 2 in relation to a video recorder, model trucks, a Mongoose bike, a dragon and a gnome. Detective Stowers gave evidence that the Master Log had also been misplaced by the prosecution's office along with the tape. He did not know that his copy had no sound on it until he was at Court in October 2005. He

said that after the Record of Conversation with the defendant he made inquiries, took witness statements and dealt with returning property to victims. He said the record of conversation went for over an hour.

29. In cross examination Detective Stowers disagreed that the defendant gave *"garbled"* responses. He said he was clear. Detective Stowers was asked about whether he was concerned about the defendant's level of intoxication; he said he was and that was why he delayed the interview. Detective Stowers agreed the defendant asked for representation when arrested; that police made inquiries and no-one was answering the NAALAS *after hours* number. He agreed the defendant told him when he first spoke to him in the cells he wanted a lawyer; that the defendant had referred to his lawyer as "the bitch" and Detective Stowers said he assumed his lawyer was female; he said the defendant was "a different person" when he brought him up for his interview. Detective Stowers agreed that the defendant didn't actually say he was "the fence" although he says if read in context that is clearly what the defendant is saying. Detective Stowers was cross examined about why he appeared to ask about one matter a number of times. He said it was to explore a vague answer.

30. Detective Neesham said he formed the opinion the defendant was not intoxicated; there was no slurring of his words; he said he appeared quite coherent; he said he was fairly cooperative; Detective Neesham recalled admissions in relation to the defendant working for a syndicate and the possession of firearms. He didn't recall much of the detail of the interview. Ms Moorecroft who listened to both tapes to make the transcript recalled one matter that the defendant spoke about being the toy trucks and how he knew he could get a higher value if he had the boxes; she also recalled a discussion about the gnomes; she also gave evidence about the editing process.

31. Mr Watson gave evidence saying he did not recall much of the events of 6 April 2002; on whether he was in custody at the time he said he's been in custody *a fair bit over my life*. He said he shot his father years ago when he was eight years old and his father never spoke to him again and he was made a state ward. He said he was in state care for most of his younger life. He said in relation to the toy cars in the record of interview he used to save money to buy them to send to his father; in relation to his statement in the record of conversation that he took cocaine, he said he didn't ever take cocaine; he said he didn't know about the property when he was asked about it; he said he didn't remember the record of interview as it was too long ago; he said he remembers he was living at Mandorah; he said he couldn't remember the tape being played in court the day before he gave evidence; he was shown the transcript; he agreed he could read; he told the court he remembered "going off" and getting thrown in "the bull wagon"; he said a lot has happened since then; he couldn't remember "this shit happening". He said he wasn't intoxicated at the time, he was "stoned"; he said intoxication refers to being drunk. He said he'd been smoking mull; he said he was affected while he was in custody; he gave a history of significant cannabis use; he said he is affected for days; he said his state of mind was *pretty terrible* at the time of being questioned; he said he'd been going mad in the cells for ages; he said he gets hypo – *"I get hyperactive, like adrenalin drips, and it can't be controlled.."* He said he could not say how he felt at the time of being questioned. He said he couldn't say how he felt *back then*.

32. In cross examination he was asked whether he knew if there would be any psychological evidence called; he said he didn't do that sort of thing; he said he believed it was his voice on the tape; he said he had two cones of cannabis the night before he was arrested; he had dinner and was then locked in (at St Vincents); he said he smoked the rest of the foil in the morning; he said he was mixing it with tobacco; he said he got 8-9 cones out

of it; he said he was sure of what he smoked that morning; he said when he goes mad he smashes his head against the wall; he agreed sleep calmed him down; he agreed he was a lot calmer when Detective Stowers was with him; he said he wasn't mad at the start of the interview; he said he was not scared of "any copper"; he was asked whether police made him tell his story and he said he "*wouldn't have a clue*".

**Consideration of the issues**

33. The vast bulk of the grounds suggested in relation to voluntariness and the asserted basis of the exercise of the discretion have simply not been made out. This defendant is not someone to whom *Anunga Rules* apply; he is not someone who is frightened of police; I do not accept for a moment that he was under any pressure to answer questions. In my view, having listened to both the police witnesses, Ms Moorecroft, the defendant himself and listened to that half of the tape that is available, I readily find the record of conversation voluntary. I find the defendant lacking in credibility about his use of drugs on the morning in question – he tells the court he can barely recall anything of being arrested but he has amazing detail of his cannabis use the night before and on the morning. If he was under the influence of cannabis when arrested and when first spoken to by Detective Stowers, he was not so under the influence when he was formally questioned. He sounds very confident on the tape although at times vague. He did request a lawyer but I accept police made inquiries of the NAALAS phone number and were unable to contact a lawyer. I accept this defendant has personal difficulties due to a harsh sounding childhood and young life and his issues with drug use and imprisonment. These are tragic factors and he has no doubt had a very difficult life but he does not display the vulnerabilities that become evident in cases where police questioning has had an unfair impact on the suspect. In my view the questioning was fair – it is true some answers were vague but when police have pursued the questioning, it has been for legitimate clarification and follow- up questioning. This defendant displays

a deal of bravado in the face of questioning – I do not criticise him for that, but he displays none of the characteristics that indicate he was vulnerable to pressure, even subtle, to confess.

34. I reject the defendant's assertion that he cannot remember the nature of the matters he spoke to police about. He resisted being played Tape 1 again when his counsel offered when he gave evidence. I accept it is likely that he does not have independent recollections of the detail. The prosecution do not rely on the tender of the transcript in relation to Tape 2. The prosecution seeks to rely on the memory of those admissions as recalled by police and Ms Moorecroft and as those memories were refreshed by the transcript. I accept that the electronic recording procedures of the *Police Administration Act* were followed by police. It is unfortunate for their investigation that Tape 2 did not record properly and the copy was lost. I accept that Ms Moorecroft's evidence is secondary evidence of what is on the tape in the sense contemplated by *Butera* (1987) 30 A Crim R 417 at 420:

> "If the tape is not available and its absence is accounted for satisfactorily, the evidence of its contents given by a witness who heard it played over may be received as secondary evidence. That evidence is not open to the same objection as the evidence of a witness who repeats what he was told out of court by another person who was not called as a witness. In the latter case the credibility of the other person cannot be tested; in the former case, assuming the provenance of the tape is satisfactorily proved, no question of its credibility can arise."

35. The problem with admitting Ms Moorecroft's recollections as effectively corroboration of Detective Stower's recollections is that both of them really can only give evidence of a summary of what is recalled from the tape. Not to have the full text of the conversation would be unfair to the defendant because he would not be in a position to defend himself against a general description of admissions, particularly after such a long period of time has intervened. When I say "defend himself", I do not necessarily mean on the

*voir dire,* but in the trial on the merits, he would not know precisely what the terms of the alleged admissions were. I am not sure, for example, if he chose to give evidence, what would be a permissible cross-examination in terms of any examination on his previous statement. Although Ms Heske has raised a creative answer to the problem, I think it is almost impossible to offer the defendant procedural fairness now without the full conversation of Tape 2 being before the Court. It is not at all for reasons of impropriety that I am not admitting the recollections of witnesses about Tape 2, but in relation to the ability to secure a fair trial for the defendant given the missing sounds from the tape.

36. In relation to whether Tape 1 should be admitted without Tape 2, in the circumstances of this case, I have decided that it would not be unfair to admit Tape 1. The defendant relies on *Spence v Demasi* (1998) 48 SASR 536 at 540:

> "It is common for the Crown to tender a record of the accused's interrogation by police, and often this will contain a mixture of admissions and self serving statements… The whole interrogation (or narrative statement, as the case may be) goes before the jury and it is for them to decide which parts, if any, they will act upon in reaching their verdict"

37. This influential case does, I accept, stand for the proposition that in mixed cases of exculpatory and inculpatory statements, the whole statement should go to the trier of fact. It does not address the problem in this case. It is not alleged or asserted and there is no evidence at all to suggest there is an exculpatory aspect in Tape2 that if missing from consideration will make Tape1 misleading or skewed. It cannot be credibly asserted that the Defendant will not secure a fair trial because of the non-admission of Tape2. I will admit Tape 1 of the Record of Conversation. If there were exculpatory statements or statements that shed light on Tape 1 or where it could be shown that through the relationships between Tape 1 and Tape 2 they are inextricably connected and must stand and fall together, my

conclusion may be different: *Gardner v Dune* (1978) 19 ALR 695. Here, all the evidence indicates there was nothing on Tape 2 to help the accused better contextualise Tape 1. I have not admitted that evidence for determining guilt but I will not be blind to it for the purpose of determining whether or not the defendant will secure a fair trial without it.

38. The matter will need to be given a further date. I note a substantial amount of the evidence concerning the search warrant is hearsay *vis a vis* the hearing of the charge and will not be admitted. It was of course necessary to pursue those matters as direct evidence concerning the quality of the belief of the issuing officer.

Dated this 29th day of September 2006.

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**Jenny Blokland**
CHIEF MAGISTRATE