CITATION: *Police v Booth* [2008] NTMC 021

PARTIES:	CRAIG JOHN MCPHERSON
	v
	DAMIAN BOOTH
TITLE OF COURT:	COURT OF SUMMARY JURISDICTION
JURISDICTION:	Criminal
FILE NO(s):	20733738
DELIVERED ON:	3 April 2008
DELIVERED AT:	Darwin
HEARING DATE(s):	4 March 2008
JUDGMENT OF:	Dr John Allan Lowndes

CATCHWORDS:

CRIMINAL LAW – POWERS OF PRISON OFFICERS – POWER OF DELEGATION UNDER PRISONS (CORRECTIONAL SERVICES) ACT – STATUTORY INTERPRETATION – EXCLUSION OF ILLEGALLY OBTAINED EVIDENCE

Prisons (Correctional Services) Act ss 7, 47 & 49
Interpretation Act s 62

Mills v Meeking (1990) 91 ALR 16 Applied
Grey v Pearson (1857) 6 HLC 61 Applied
Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (1981) 147 CLR 297 Applied
Bunning v Cross (1978) 141 CLR 54 Applied

REPRESENTATION:

Counsel:

Prosecution:	Mr I Marinov
Defendant:	Mr J Peyton

Solicitors:

Prosecution:	Summary Prosecutions
Defendant:	NAAJA

Judgment category classification:	A
Judgment ID number:	[2008] NTMC 021
Number of paragraphs:	82

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

No. 20733738

[2008] NTMC 021

BETWEEN:

CRAIG JOHN MCPHERSON
Prosecution

AND:

DAMIAN BOOTH
Defendant

REASONS FOR DECISION

(Delivered 3 April 2008)

Dr John Allan Lowndes SM:

THE NATURE AND COURSE OF THE PROCEEDINGS

1. The defendant was charged with an offence contrary to s 109 of the *Criminal Code* (NT), namely attempting to pervert the course of justice. The defendant pleaded not guilty to that charge.

2. The prosecution alleged that the defendant, while on remand at Berrimah Correctional Facility, attempted to send a letter to his wife. In that letter the defendant told his wife not to go to Court in relation to a pending criminal matter concerning an assault upon her. The letter was intercepted by a prison officer at the Correctional Facility.

3. The hearing of this matter, which took place on 4 March 2008, commenced with a voir dire into the admissibility of the letter that had been intercepted. The defence asserted that the prison officer had unlawfully intercepted the letter as she had no power to intercept it. The prosecution argued to the

contrary, asserting that the prison officer had been duly delegated the power by the Officer in Charge of the prison.

4. After hearing submissions from both the prosecution and defence, I ruled that the letter had been unlawfully intercepted by the prison officer. I indicated that I would give written reasons in due course.

5. I then heard submissions as to the admissibility of the letter, in light of the Court's discretion to exclude illegally obtained evidence. In the exercise of that discretion, I admitted the letter into evidence. Written reasons for that decision were also to follow.

6. My reasons for concluding that the interception of the letter was unlawful, though it should nonetheless be received into evidence, are as follows.

THE ORAL EVIDENCE ON THE VOIR DIRE

7. One witness was called on the voir dire, namely Ms Jodie Williams, the prison officer concerned.

8. Ms Williams gave evidence that at the relevant time, she was a prison officer, first class, employed at the Berrimah Correctional Facility. She was also working in the intelligence section of the gaol charged with the task of collecting and intercepting mail being sent by prisoners. It was under those circumstances that she came to intercept the subject letter (Exhibit 1).

9. Upon reading the letter, Ms Williams formed the opinion that it contained material indicating the commission of an offence by the defendant. She then contacted the Northern Territory Police for them to deal with the matter.

10. The witness said that, in intercepting and inspecting the correspondence, she was purporting to exercise the power conferred by ss 47 and 49 of the *Prisons (Correctional Services) Act,* which are set out later in these reasons for decision.

11. Ms Williams told the Court that she had been delegated the power to intercept and deal with the letter pursuant to ss 47 and 49 of the Act, and in that regard relied upon instructions and directions given to her by the Officer in Charge (the Superintendent) and the Commissioner (Exhibit 2).[1]

12. Finally, the witness believed that when she intercepted the correspondence she was acting in accordance with the law and acting under due authority.

THE STATUTORY SCHEME FOR THE INTERCEPTION OPENING AND INSPECTION OF PRISON MAIL

13. The starting point is s 47 of the *Prisons (Correctional Services) Act* which is in the following terms:

> Subject to section 48, the officer in charge of a prison or police prison may intercept, open and inspect any letter or parcel dispatched by or addressed to a prisoner.[2]

14. Section 49 of the Act provides as follows:

> (1) A letter or parcel intercepted, opened or inspected under section 47 by the officer in charge of a prison or police prison may, if in the opinion of that officer –
>
> (a) the contents may jeopardise the security or good order of a prison or police prison or a prisoner;
>
> (b) the contents contains subject-matter that would constitute a breach of this Act, the Regulations or any determination of the Director made under this Act;
>
> (ba) the contents contains subject-matter that would constitute a breach of a law of the Territory, the Commonwealth, a State or another Territory of the Commonwealth;
>
> (c) the contents may be threatening or insulting to any person;
>
> (d) the contents may have a detrimental influence or effect on a prisoner; or

[1] Specifically, those documents were the Superintendent's Instruction apparently issued 6 June 2006, the Superintendent's Instruction apparently issued 7 July 2006 and the Commissioner's Directive apparently issued 21 August 2006.

[2] Section 48, which is not relevant for present purposes, deals with letters addressed to or apparently originating from the Office of the Minister, the Ombudsman or Director.

(e) the letter is written in a code or is illegible,

be –

(f) censored by the Director and then forwarded as addressed;

(g) returned to the prisoner by the Director;

(h) retained by the Director; or

(j) destroyed by the Director.

(2) Where any action is taken under subsection (1), the officer in charge of the prison or police prison shall inform the prisoner that the action has been taken.

15. It is clear from the provisions of ss 47 and 49 of the Act that a letter or parcel may only be intercepted, opened or inspected by the officer in charge of a prison or police prison, and that it is the officer in charge who must form the opinion as to the existence of one of the state of affairs enumerated in s 49(1) (a) – (e) as the basis for action by the Director pursuant to subsections (f) – (j).

16. However, the prosecution sought to argue, in accordance with the evidence given by Ms Williams, that she had been delegated the powers under ss 47 and 49 of the Act by the officer in charge.

17. The matter of delegation is dealt with by s 7 of the Act:

(1) The Director may, either generally or as otherwise provided by the instrument of delegation, by writing signed by him or her, delegate to a person any of his or her powers or functions under this Act, other than this power of delegation.

(1A) The officer in charge of a prison may, either generally or as otherwise provided by the instrument of delegation, by writing signed by him or her, delegate to a person any of his or her powers and functions under Part VIII.

(2) A delegation under this section is revocable at will and does not prevent the exercise of a power or the performance of a function by the Director or the officer in charge of a prison.

18. The prosecution argued that the Court should adopt a purposive approach to the interpretation of s 7 (1A) of the Act and, having regard to the object or purpose of the legislation, it should not construe the subsection as confining the power of delegation to the powers and functions exercised and performed by the officer in charge under Part VIII. The prosecution submitted that the subsection should be interpreted widely to the effect that the officer in charge may delegate whatever powers he or she has under the Act, as well as his or her specific functions under Part VIII of the Act.

19. The prosecution submitted that it could never have been the intention of the legislature to restrict the power of delegation to those powers and functions conferred upon the officer in charge by Part VIII of the Act. The sheer impracticability of the officer in charge having to personally exercise the onerous and time consuming powers conferred by ss 47 and 49 was relied upon by the prosecution as favouring the broader construction of s 7(1A) of the Act.

20. In my opinion, the argument mounted by the prosecution cannot be sustained because it involves an incorrect application of the purposive approach to statutory interpretation.

21. The task of statutory interpretation is to ascertain the intention of the legislation. At common law, three main rules governed statutory interpretation - the literal rule, the purpose rule and the golden rule.

22. According to the literal rule of statutory interpretation, a Court should give effect to the ordinary and natural meaning of the text of a statutory provision. The purposive approach to statutory interpretation requires a Court to construe the meaning of the provision in a manner consistent with the purpose or object of the Act in which the provision appears. According to the golden rule of statutory interpretation, a Court should construe the meaning of the provision in a way that avoids absurdity or inconsistency

arising out of the ordinary and natural meaning of the language used in the provision.

23. As observed by Pearce and Geddes, [3] the common law generally accepted the purpose rule and the golden rule to be subordinate to the literal rule of statutory interpretation.

24. However, s 62A of the *Interpretation Act* (NT), which applies to the statutory construction of s 7(1A) of the *Prisons (Correctional Services) Act*, significantly alters the common law approach to statutory interpretation. Section 62A provides as follows:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.[4]

25. According to that provision, the literal approach to statutory approach no longer prevails, as explained by Dawson J in *Mills v Meeking* (1990) 91 ALR 16 at 30-31 when considering s 35 of the *Interpretation of Legislation Act* (Vic), the Victorian equivalent of s 62A of the *Interpretation Act* (NT):

> …the literal rule of construction, whatever the qualifications with which it is expressed, must give way to a statutory injunction to prefer a construction which would promote the purpose of an Act to one which would not, especially where that purpose is set out in the Act. Section 35 of the *Interpretation of Legislation Act* must, I think, mean that the purposes stated in Pt 5 of the *Road Safety Act* are to be taken into account in construing the provisions of that Part, not only where those provisions on their face offer more than one construction, but also in determining whether more than one construction is open. The requirement that a court look to the purpose or object of the Act is thus more than an instruction to adopt the traditional mischief or purpose rule in preference to the literal rule of construction. The mischief or purpose rule required an ambiguity or inconsistency before a court could have regard to purpose: *Miller v The Commonwealth* (1904) 1 CLR 668 at 674; *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* (1978) 140 CLR 503 at 513. The approach required by s 35 needs no ambiguity or inconsistency; it allows the court to consider the purposes of an Act in determining whether there is more than one possible interpretation. Reference to the purposes may reveal that the draftsman has inadvertently overlooked something which he would have dealt with had his attention been drawn to it and if it is possible as a matter of construction to repair the defect, then this must be done. However, if the literal

[3] Pearce and Geddes *Statutory Interpretation in Australia* 6th edition at [2.4] – [2.5].
[4] Section 62A of the *Interpretation Act* (NT) mirrors s 15AA of the *Acts Interpretation Act* 1901 (Cth).

> meaning of a provision is to be modified by reference to the purposes of the Act, the modification must be precisely identifiable as that which is necessary to effectuate those purposes and it must be consistent with the wording otherwise adopted by the draftsman. Section 35 requires a court to construe an Act, not to rewrite it, in light of its purposes.

26. This view of the effect of s 35 of the *Interpretation of Legislation Act* (Vic) – the Victorian equivalent of s 15AA of the *Acts Interpretation Act* - is echoed by Pearce and Geddes:

> Section 15AA, however, requires the purpose or object to be taken into account even if the meaning of the words, interpreted in the context of the rest of the Act, is clear. When the purpose or object is brought into account, an alternative interpretation of the words may become apparent. And if one interpretation does not promote the purpose or object of an Act and another interpretation does so, the latter interpretation must be adopted.[5]

27. However, Pearce and Geddes impose the following limitation on the purposive approach to interpretation (which has ramifications for the application of s 62A of the *Interpretation Act* (NT)):

> Generally speaking, it is only when the drafter has fallen short on his or her ideal that the dominance of the purposive approach as dictated by these provisions assumes prominence. If the drafter has achieved what he or she set out to do, applications of the literal and the purposive approaches will ordinarily produce the same result. In the words of McHugh J in *Sraswati v R* (1991) 172 CLR 1 at 21…: "In many cases, the grammatical or literal meaning of a statutory provision will give effect to the purpose of the legislation. Consequently, it will constitute the 'ordinary meaning' to be applied". In some instances, however, the complexity of the subject matter is such that the drafter must rely on a statement of purpose or object to assist in conveying the meaning intended.[6]

28. In my opinion, s 62A of the *Interpretation Act* (NT) has an identical effect to s 15AA of the *Acts Interpretation Act* (NT) and s 35 of the *Interpretation of Legislation Act* (Vic) as elucidated by Dawson J in *Mills v Meeking* (supra) and by Pearce and Geddes.

29. As pointed out by Pearce and Geddes, the process of statutory interpretation, in light of s 62A of the *Interpretation Act* (NT), begins with the identification of the purpose or object of the legislation in question:

---

[5] Pearce and Geddes n 3 at [2.8].
[6] Pearce and Geddes n 3 at [2.14].

> The task of the court under s 15AA and it equivalents is to seek to discover the underlying purpose or object of the Act or other legislation in which a provision is contained and, if possible, to adopt an interpretation of the provision that furthers the purpose or object.[7]

30. The long title of the *Prisons (Correctional Services) Act* describes in a general manner the purpose or object of the Act:

> an Act to provide for the control and conduct of prisons and prisoners, and for related purposes.

31. It is now well established law that the long title of an Act can be used as an aid to the construction of an Act.[8] Accordingly, the Court can look to the long title of the *Prisons (Correctional Services) Act* to ascertain the object or purpose of the legislation.

32. The *Prisons (Correctional Services) Act* does not contain a purpose or objects clause - setting out the purposes of the Act - which could have otherwise been resorted to as an intrinsic aid to the construction of the Act.

33. However, it needs to be borne that the purpose or object of an Act need not be set out in express words:

> A court can determine "the object of the legislation from a consideration of the provisions of the legislation", "by implication" or "by…necessary implication.[9]

34. Expressed another way, a Court may "divine or impute" the purpose or object of an Act.[10] In such instances:

> …the challenge is to deduce the relevant purpose of the Act, or of the provision being interpreted, without [an] explicit starting point. This usually can be achieved by a reading of the rest of the Act.[11]

---

[7] Pearce and Geddes n 3 at [2.10].
[8] Pearce and Geddes n 3 at [4.39].
[9] Gifford *Statutory Interpretation* , p 50 citing *Municipal Officers' Association of Australia v Lancaster* (1981) 37 ALR 559 at 579-580, per Evatt and Northrop JJ (FCA FC); *Byrne v Garrison* [1965] VR 523 at 529; *Bawn Pty Ltd v Metropolitan Meat Board* (1970) 92 WN (NSW) 823 at 842 per Mason JA.
[10] Gifford n 9 p 52 citing *Black –Clawson International Ltd v Papierwerke Waldhoff- Aschaffenberg AG* [1975] AC 591 at 645; *Farrell v Alexander* [1977] AC 59 at 81; *Hatton v Beaumont* [19977] 2 NSWLR 211 at 225.
[11] Pearce and Geddes n 3 at [2.11]. See *Pileggi v Australian Sports Drug Agency* (22004) 138 FCR 107.

35. What then is the object or purpose of the *Prisons (Correctional Services) Act* – express, implied or imputed?

36. When regard is had to the long title of the Act and the Act read as a whole, the *Prisons (Correctional Services) Act* has the general object or purpose of providing for the control and conduct of prisons and prisoners. Its various provisions – in particular those contained in Parts VIII and XII and s 7 of the Act – are to be read in light of that general purpose or object. No more specific object or purpose can be deduced from the long title of the Act or from the Act read as a whole, as being applicable to the construction of those provisions.

37. The prosecution argued that one of the purposes or objects of the Act was to confer upon prison officers all of the powers and functions of the officer in charge of the prison. In my opinion, no such purpose or object can be deduced from the long title of the Act or from the rest of the Act.

38. In my opinion, the provisions of s 7 and Parts VIII and XII of the Act are entirely consistent with the general purpose or object of the Act and promote that purpose or object. When the express or imputed purpose or object of the Act is brought into account, as is required by s 62A of the *Interpretation Act* (NT), the grammatical or literal meaning of those provisions of the *Prisons (Correctional Services) Act* gives effect to the purpose of the Act. This is not a case where the literal and the purposive approaches to statutory interpretation produce a different result – in fact the two converge. This is not a case where the provisions of s 7(1)(A) should be construed widely to promote a specific underlying policy of the Act that all the powers and functions of the officer in charge of the prison be capable of being delegated to prison officers.

39. The inherent flaw in the prosecution argument is that it assumes an underlying policy to confer all the powers and functions of the officer in charge of the prison on prison officers by a process of delegation and then

construes the provisions of s 7(1)(A) of the Act in order to give effect to that policy. That is not a proper application of the purposive approach to statutory interpretation: see Gifford *Statutory Interpretation* p 52 and the cases cited therein.

40. The literal meaning of s 7(1)(A) of the Act, reinforced by the purposive approach to the construction of the provision, makes it clear that the officer in charge can only delegate his or her powers and functions under Part VIII of the Act. The subsection does not say that the officer in charge can delegate his powers under the Act, as well as his or her functions under Part VIII of the Act. Nor is there a comma after the word "powers", which, if it had been inserted, might have indicated a power on the part of the officer in charge to delegate all his powers (presumably under the Act) and his or her functions under Part VIII.

41. There are other indicators pointing to the intention of the draftsman that s 7(1)(A) should bear its literal meaning.

42. Part VIII of the Act, which deals with "Prison Misconduct", differentiates between the functions of the officer in charge and a prison officer. Under that Part, a prison officer has merely a reporting function,[12] while the adjudicative functions are exclusively conferred upon the officer in charge of the prison. Here, the draftsman gave deliberate attention to the division of function between the officer in charge and a prison officer. However, by way of s 7(1)(A) of the Act, the draftsman made provision for the adjudicative functions of the officer in charge to be delegated to another person, either generally or as otherwise provided by the instrument of delegation, subject to the prohibition in s 32(2) on a charge of prison misconduct being heard and determined by the officer who laid the charge.

[12] See s 31(1) and (2) of the Act.

43. In a similar fashion, in Part XII of the Act, the draftsman was painstaking in differentiating between the powers and functions of the Director of Correctional Services and the officer in charge of a prison or police prison.

44. Under that Part, a prison officer has no role to play. Although s 48(2) makes reference to "an officer", it is clear that "officer" does not mean a prison officer appointed under s 8(1) of the Act.[13] When the whole of s 48 is read in conjunction with s 47 and the other provisions contained in Part XII, the word "officer" can only mean officer in charge. To attribute to the word "officer" its statutory definition makes a nonsense of s 48 and other provisions in the Part. As a contrary intention appears on the face of s 48, "officer" is to be read as officer in charge.

45. It is clear that the intention of the legislature was to completely exclude prison officers from performing a role in relation to the interception of prison mail – an understandably sensitive area entailing an interference with an individual's right to privacy. That is borne out by the provisions of s 7(1)(A) which do not permit the powers of the officer in charge to intercept, open and inspect any letter or parcel dispatched or addressed to a prisoner to be delegated to another person.

46. If the legislature had intended s 7(1)(A) to invest the officer in charge of a prison with the power to delegate his powers under Part XII of the Act, then why wasn't the officer in charge of a police prison given the same power of delegation? The powers conferred by Part XII are equally distributed between the officer in charge of a prison and an officer in charge of a police prison. Furthermore, concerns about mail jeopardising the security or good order of a prison or prisoner, or constituting a breach of the Act or its regulations, or a breach of the law, and the related concerns mentioned in s 49 of the Act are as real in the context of a police prison as they are in a

[13] See the definition of "officer" in s 5 of the Act.

prison proper. In fact, Part XII addresses those concerns in that dual context.

47. The legislative history of s 7 of the Act also reinforces the intention of the legislature that subsection 7(1)(A) is to be read literally. That subsection was inserted into the Act after subsections (1) and (2).[14] At the time s 7(1)(A) was drafted, the draftsman was undoubtedly aware of the provisions of subsection (1) which empowered the Director to delegate to a person any of his powers or functions under the Act. Had the draftsman been minded to give the officer in charge of a prison an identical power of delegation, then subsection (1) provided the perfect blueprint to give effect to such intention. The fact that subsection 7(1)(A) did not mirror the language used in subsection (1) evinces a clear legislative intent to confer upon the officer in charge a narrower power of delegation.

48. As noted earlier,[15] there was a second prong to the prosecution's contention that s 7(1)(A) should be broadly construed as empowering the officer in charge to delegate his or her power under ss 47 and 49 and related sections in Part XII of the Act. The prosecution argued that if the words in s 7(1)(A) were given their ordinary and natural meaning, then that would lead to inconvenient consequences, and indeed a degree of impracticality, giving rise to an absurdity. In pursuing this line of argument, the prosecution invoked the so-called golden rule of statutory interpretation which amounts to "a qualification of the literal approach" [16] to statutory interpretation, and which "contemplates the modification of the literal meaning of the words used to overcome an error or defect perceived in the text".[17]

49. The golden rule of statutory interpretation was explained by Lord Wensleydale in *Grey v Pearson* (1857) 6 HLC 61 at 106; 10 ER 1216 at

[14] See Amending Act No 21 of 1994.
[15] See above p 5.
[16] Pearce and Geddes n 3 at [2.4].
[17] Pearce and Geddes n 3 at [2.4].

1234 in the following terms:

> …in construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther.[18]

50. According to Pearce and Geddes certain limitations are placed on the operation of the golden rule:

> It would seem that the "absurdity" referred to by Lord Wensleydale was an absurdity appearing on the face of the Act from the words that had been used. His Lordship did not contemplate that the court would review the policy underlying the Act and modify the language of the Act if it considered the result to be "absurd". Put shortly, the golden rule contemplated that a mistake had been made in the wording of the Act: *President, etc, of Shire of Arapiles v Board of Land and Works* (1904) 1 CLR 679 per Griffith CJ at 687.

51. As pointed out by Gifford, "mere inconvenience resulting from the application of the literal rule does not constitute "absurdity".[19] In that regard, Gifford refers to the following passage from *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (Cth)* (1981) 147 CLR 297 at 320 per Mason and Wilson JJ:

> Generally speaking, mere inconvenience of result in itself is not a ground for departing from the natural and ordinary sense of the language read in its context. But there are cases in which inconvenience of result or improbability of result assist the court in concluding that an alternative construction which is reasonably open is to be preferred to the literal meaning because the alternative interpretation more closely conforms to the legislative intent discernible from other provisions in the statute.[20]

52. Although on a literal reading of s 7(1)(A) of the Act the officer in charge cannot delegate his or her powers under ss 47 and 49 and related provisions under Part XII of the Act, and that construction is liable to result in administrative inconvenience in that the officer in charge must personally exercise those powers, that does not in itself give rise to an "absurdity"

---

[18] See also *Australian Boot Trade Employees' Federation v Whybrow & Co* (1910) 11 CLR 311 at 341 -342; *Broken Hill South Limited v Commissioner of Taxation* (NSW) (1937) 56 CLR 337 at 371.
[19] Gifford n 9, p 35.
[20] Gifford n 9, p 34.

within the meaning of the golden rule. In this case the literal approach does not disclose an error or defect in drafting that requires the Court to modify the literal meaning of s 7(1)(A) and to imply words into the text of that subsection to give effect to the intended meaning of the provision.

53. It is worth noting that s 7(1)(A) was introduced into the Act in 1994. It may well be that back in 1994 it was not anticipated that the exercise of the powers contained in Part XII of the Act by the officer in charge, and no one else, would lead to inconvenient consequences; and it is only through the effluxion of time that the provision may have become administratively inconvenient.

54. There is another reason why the literal meaning of s 7(1)(A) should not be departed from – a reason that arises out of the commonly acknowledged overlap between the purposive approach to statutory construction and the golden rule of statutory interpretation. This is not a case, to use the words of Mason and Wilson JJ in *Cooper Brookes* (supra), in which the inconvenience of result assists "the Court in concluding that an alternative construction which is reasonably open is to be preferred to the literal meaning because the alternative interpretation more closely conforms to the legislative intent discernible from other provisions in the statute". There is no reasonably open alternative to be preferred.

55. Regardless of the administrative inconvenience that might result from a literal construction of s 7(1)(A), the language of that provision is so plain and unequivocal that the Court has no alternative but to apply it - see *BP Australia Ltd & Food Plus Pty Ltd v State of South Australia* (1982) 31 SASR 178 at 205 per Wells J. In my opinion, s 7(1)(A) embodies a considered policy to exclusively confer the powers under ss 47 and 49 and related provisions under Part XII of the Act upon the officer in charge of a prison or police prison.

56. Finally, but not least, the literal meaning of s 7(1)(A) is neither repugnant to, or inconsistent, with the rest of the Act. To the contrary, it blends with the rest of the Act, forming part of a coherent scheme for the control and conduct of prisons and prisoners and for related purposes.

57. As a matter of statutory interpretation, Ms Williams' interception of the letter from the defendant to his wife and her subsequent dealing with that correspondence was unlawful.

THE MANNER OF DELEGATION

58. There is an independent ground for concluding that the interception of the letter by the prison officer and her subsequent dealing with the mail was unlawful. Even if one were to construe s 7(1)(A) in the broad manner contended for by the prosecution, the relevant power was not validly delegated to the prison officer concerned or any other prison officer.

59. It is implicit in s 7(1)(A) – as well as in s 7(1) – that the delegation of power must occur by way of a written instrument of delegation. In my opinion, none of the documentation tendered on the voir dire satisfied that requirement.

60. The documents purporting to be instruments of delegation were nothing more than instructions or directives issued to prison officers to exercise and perform certain powers and functions. The Court was apparently expected to infer from those documents that the powers and functions referred to therein had been delegated to the persons to whom those instructions or directives had been given.

61. In my view, in order for a power or function to be properly delegated by one person to another, there must be evidence of a clear and unequivocal intention on the part of the person, possessed of the power to delegate, to delegate the exercise of that power or the performance of that function to a person to whom the power or function is capable of being delegated.

62. An instruction – of which a directive is a synonym – is simply a communication by one person to another informing that person what he or she is required to do. That cannot by itself amount to a delegation. First, it needs to be demonstrated that the person who is requiring the other person to do something, was in fact possessed of the power to do that particular thing. Secondly, it must be shown that the first person was delegating the exercise of that power or function to the other person. An instrument of delegation must either expressly or impliedly reflect those two aspects. The documents tendered failed to meet that dual requirement.

63. In the present case, the delegation could have been easily effected by adopting the following simple formula:

> I (insert name) pursuant to (insert statutory provision) delegate to (insert name or class of persons) to exercise the following powers or functions…
>
> This instrument is to take effect on (insert date)

64. There were other problems with the documentation that only serve to compound the inadequacy of the purported delegation of power to prison officers.

65. Two of the documents (Exhibit 2) purported to be instructions from the Superintendent. Although Ms Williams gave evidence that the Superintendent is the officer in charge of the prison, there is no reference whatsoever in the *Prisons (Correctional Services) Act* to the office of Superintendent.

66. The third document (Exhibit 2) purported to be a directive from the Commissioner. There was no evidence attempting to link the Commissioner to the officer in charge. But of greater significance, is the fact that there is no reference at all in the Act to the designation of "Commissioner".

THE ADMISSIBILITY OF THE CORRESPONDENCE

67. The fact that the interception of the letter was unlawful does not result in it being automatically excluded as evidence in these proceedings. Despite the illegality, the Court has a discretion – the so called "public policy" discretion - in relation to the admissibility of the correspondence.

68. Although the unlawful conduct in this case involved a breach of a statute - and a breach of that kind may more readily warrant the rejection of the subject letter[21] - the letter should be received into evidence, in the exercise of the Court's discretion, after taking into account all of the relevant considerations.

69. As is usual in cases of this type, the Court needs to balance the competing public requirements.[22] The first is the public need to bring to conviction those who have committed criminal offences.[23] The second relates to the public interest in the protection of the individual from unlawful treatment.[24] In performing that exercise, the Court must always bear in mind that convictions secured by the assistance of unlawful conduct may be obtained at an extravagant price.[25]

70. *Bunning v Cross* (1978) 141 CLR 54 remains one of the seminal authorities in this area of the law of evidence. At 78-90 Stephen and Aickin JJ considered a number of matters relevant to the exercise of the public policy discretion:

- whether the unlawful conduct involved a deliberate or reckless disregard of the law or was the result of a mistaken belief as to the lawfulness of the conduct;

- whether the unlawful conduct affects the cogency of the illegally obtained evidence;

---

[21] *R v Ireland* (1970) 126 CLR 321 at 335 per Barwick J; *Bunning v Cross* (1978) 141 CLR 54 at 72; *Hilton v Wells* (1985) 157 CLR 57 at 77.
[22] *R v Ireland* (1970) 126 CLR 321 at 335 per Barwick CJ; *Bunning v Cross* (1978) 141 CLR 54 at 72.
[23] *R v Ireland* (1970) 126 CLR 321 at 335 per Barwick CJ; *Bunning v Cross* (1978) 141 CLR 54 at 72.
[24] *R v Ireland* (1970) 126 CLR 321 at 335 per Barwick CJ; *Bunning v Cross* (1978) 141 CLR 54 at 72.
[25] *R v Ireland* (1970) 126 CLR 321 at 335 per Barwick CJ; *Bunning v Cross* (1978) 141 CLR 54 at 72.

- whether the unlawful conduct involved a deliberate "cutting of corners" and the ease with which the law may have been complied with in obtaining the evidence in question;

- the nature and seriousness of the offence charged;

- whether the legislation in question, which has been breached, evinces a "deliberate intent on the part of the legislature" to circumscribe the powers of police or other persons in authority.

71. In the present case, the unlawful interception of the letter and subsequent dealing with that letter by the prison officer was clearly the result of a mistaken belief on her part that she had the requisite power to do what she did. She referred to sections of the Act pursuant to which she purported to exercise the power, along with official instructions directing her to exercise those powers. Her error could in no way be characterised as a deliberate or reckless disregard of the law in relation to the interception, opening and inspection of prison mail. The circumstances under which the prison officer intercepted and dealt with the letter favour it being received into evidence.

72. However, in the present case, it is necessary to look at the broader picture and to consider the contribution made by the prison and other relevant authorities to the unlawful act.

73. It is clear that the instructions or directives comprising Exhibit 2 were the sine qua non in relation to the unlawful interception. It was those instructions that led the prison officer to believe that she had the power to deal with the correspondence. However, there was no evidence at all concerning the mental processes that resulted in the formulation of those instructions. Nor was there any evidence from the relevant authorities as to their state of mind with respect to the non–compliance with the statutory requirements. Did the relevant authorities deliberately or recklessly disregard the requirements of the Act? Or was the non-compliance the result of a misunderstanding of the statutory scheme – in particular, the scope of the power of delegation conferred by s 7(1)(A) of the Act?

74. It is difficult to divine what was in the mind of the relevant authorities when they issued the instructions or directives, and thereby induced the prison officer to engage in an unlawful act. Given the paucity of evidence, the state of mind of the authorities vis a vis compliance with the statute is, at best, a matter of inference.

75. In my opinion, it cannot be inferred from the evidence adduced on the voir dire that the relevant authorities acted with malice and deliberately disregarded the provisions of the Act when issuing the instructions or directives to prison officers. Nor, in my opinion, can it be sufficiently inferred such as to satisfy the Court on the balance of probabilities that the authorities recklessly disregarded the provisions of the Act. In my view, the most likely scenario is that the relevant authorities simply assumed that s 7(1)(A) conferred a broad power of delegation and were negligent in not verifying the ambit of the power therein.

76. Negligence is a less culpable state of mind than malice or recklessness. In my view, despite the enormity of the contribution of the relevant authorities to the unlawful act, that contribution does not weigh in favour of the rejection of the illegally obtained evidence.

77. The unlawful interception and subsequent dealing with the letter in no way affected the cogency of the evidence. That fact also favours the reception of the evidence.

78. As to the ease with which the statute might have been complied with, it is true that the evidence could have been lawfully obtained by the officer in charge personally intercepting the letter. However, it must not be overlooked that the prison officer honestly believed that she had the power to intercept the letter and that belief was engendered by negligence on the part of the prison authorities or other relevant authorities. I do not consider that the circumstances disclose “a deliberate cutting of corners”. The circumstances favour the letter being received into evidence.

79. Contrary to the submissions made by counsel for the defence, I consider the offence with which the defendant had been charged to be a serious offence. It is an offence against public justice and one that strikes at the very heart of the criminal justice system. The intrinsic seriousness of the offence favours the admission of the letter.

80. I accept that the statutory scheme evinces a legislative intent to circumscribe the powers of prison officers. The fact that there has been a breach of the legislative regime leans towards the rejection of the letter.

81. Exhibit 1 appears to be the only available evidence implicating the defendant in the commission of the alleged offence. That is a consideration that favours the admission of the letter.

82. After weighing and balancing the relevant considerations, I consider that the letter should be admitted into evidence. Notwithstanding the breach of legislative restraints on the powers of prison officers, I consider that the public interest in bringing offenders (including the defendant) to justice, clearly outweighs the public interest in protecting individuals (including the defendant) from unlawful treatment.

Dated this 3rd day of April 2008.

_____

Dr John Allan Lowndes
STIPENDIARY MAGISTRATE