Police v Chris Nowlan
H1234 5678

For Hearing XX November 2025
Downing Centre LC

Defence Submissions

Issue for Determination

1. The Defence contends that the search of the Accused's motor vehicle was improper or unlawful and makes application under s138 Evidence Act that the proceeds of the search should not be admitted because the desirability of admitting the evidence is outweighed by the undesirability of admitting the evidence obtained in the way in which it was obtained.

2. It is submitted that the improper and unlawful conduct by police in this case arose from the following:

    a. The unlawful, or at least improper, stopping of the accused's vehicle on the basis of the misuse of the power to conduct an RBT/ROFT (that is, for the ulterior purposes of conducting an investigation, and not for the bona fide purposes of conducting an RBT/ROFT);
    b. The unlawful questioning of the accused and the passengers in his vehicle;
    c. The unlawful detention of the accused and the passengers in his vehicle;
    d. The improper exercise of the power to search the vehicle in the absence of reasonable grounds for so doing.

3. The bases upon which the application is made:

    a. Evidence as to the search was obtained in the consequence of an impropriety and/or contravention of an Australian law in respect of the stopping of the motor vehicle because the court would be satisfied that the vehicle was not actually stopped for the lawful purposes of undertaking a random breath test (as claimed by the police);

    b. In the alternative, even if the court is satisfied that the stopping of the vehicle was for the purposes of undertaking an RBT/ROFT, then the stopping of the vehicle was "unlawful" in that that RBT/ROFT was used for the basis of carrying out pro-active policing duties, namely to create an opportunity for "Traffic Section North" police to conduct questioning, investigation and search, without a proper power to do so, as opposed to a genuinely utilising the RBT provisions for their road safety purpose;

    c. In the further alternative, even if the court is satisfied that the vehicle was pulled over for the bona fide purposes of undertaking a RBT and no other purpose, then the subsequent search of the vehicle arose from impermissible detention and questioning of the occupants of the vehicle;

d. In the further alternative, even if the court finds that the questioning and detaining of the occupants of the vehicle was permissible, at the time the police determined to search the vehicle they still had no reasonable grounds to do so.

4. It was submitted that the police conduct was for the purposes of an unlawful "random crime stop", as referred to in *R v Buddee* [2016] NSWDC 422 (at [60]-[62]).

Power to Stop a Motor Vehicle

5. The police power to stop a motor vehicle without a warrant arises for the purposes of undertaking a random breath test and or random oral fluid test (per ss3 & 6, Schedule 3, *Road Transport Act* 2013, hereafter 'RTA').

6. A separate power to stop a motor vehicle arises where a police officer suspects on reasonable grounds any of the circumstances contained in s36 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (hereafter 'LEPRA'). In that section, reference to "relevant offence" means an indictable offence, or specific offences involving possession of firearm or weapons (s35 LEPRA).

The RBT/ROFT Power

7. The RTA provides a power to test breath and oral fluid. The objects of the Act, as set out in s 3, are to consolidate provisions concerning road users, road transport and the improvement of road safety and efficiency. The provisions of this Act have nothing whatsoever to do with the exercise of police powers in the course of the investigation of criminal offences (except, of course, intoxicated driving).

The LEPRA Power

8. The power to stop, detain or search a motor vehicle without a warrant for the purposes of conducting a search is allowable under s36 LEPRA if the police officer 'suspects of reasonable grounds':

> …
> *(e) the vehicle contains, or a person in the vehicle has in his or her possession or under his or her control, a prohibited plant or prohibited drug in contravention of the Drug Misuse and Trafficking Act 1985.*
> ...

The Law in Respect of Questioning

9. There is no power contained in LEPRA that provides for questioning of citizens prior to arrest. A person has a right to silence. There is no power to arrest or detain someone for the purposes of questioning.

10. The admissibility of the evidence of the ensuing search are objected to on the basis that they took place in consequence of the contravention of the unlawful stopping, questioning and detaining of the occupants. There is a clear chain of causation between the contravention of the power to stop and / or search and the obtaining of evidence within the car. The subsequent search could not have taken place but for the stopping. (*Rondo* (2001) 126 A Crim R 562, at [5] and [50]).

11. The Accused's motor vehicle was pulled over for failing to display P-plates and not for the purpose of an RBT/ROFT. At this point there was no basis for a suspicion under s36 LEPRA for the stopping and searching of the motor vehicle.

12. Police then further detained the Accused and his passengers ostensibly for an RBT/ROFT. If the Court is satisfied that they were detained for the real purpose of conducting an investigation, then that evidence is tainted by the unlawful exercise of the power under the RTA.

13. If the Court is satisfied that the Accused and his passengers were detained for the lawful purpose of conducting an RBT/ROFT, and that the search took place thereafter on the basis of the questions asked of the occupants, then it is submitted the search of the vehicle is unlawful as the questioning and detention of the occupants of the vehicle was unlawful and improper.

14. If the Court is satisfied that the Accused and his passengers were detained for the lawful purpose of conducting an RBT, and satisfied that the questioning and detention of the occupants was lawful and that a search took place thereafter, then it is submitted that the search was unlawful as at the time the decision was made to search the vehicle there were no reasonable grounds upon which any suspicion was based.

Reasonable Suspicion

15. The propositions concerning the basis upon which a suspicion might be considered to be reasonable were summarised in *Rondo[2001] NSW CCA 540* by Spigelman CJ (at [53]) as follows:

    i. A reasonable suspicion involves less than a reasonable belief but more than a possibility. There must be something which would create in the mind of a reasonable person an apprehension or fear of one of the state of affairs covered by s 357E [the predecessor to s 36 of LEPRA]. **A reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence.**

    ii. Reasonable suspicion is not arbitrary. Some factual basis for the suspicion must be shown. A suspicion may be based on hearsay material or materials which may be inadmissible in evidence. The materials must have some probative value.

    iii. **What is important is the information in the mind of the police officer stopping the person or the vehicle or making the arrest at the time he did so.** Having ascertained that information the question is whether that

information afforded reasonable grounds for the suspicion which the police officer formed. In answering that question regard must be had to the source of the information and its content, seen in the light of the whole of the surrounding circumstances.

(emphasis added by counsel)

16. In *R v Buddee* [2016] NSWDC 422, Judge McClintock SC dealt with a similar issue as to admissibility after a random breath test, referred to in that case as a "random crime stop". His Honour said at [104]-[108]:

> *[104] Applying these principles, it is clear that Parliament intended to distinguish motor traffic powers from criminal investigation powers. The random nature of the motor traffic powers is a very significant interference in the liberties of citizens lawfully going about their business. They are not part of the criminal investigation powers conferred by LEPRA. There was a clear intention to delineate powers based on suspicion of the commission of crime from powers directed primarily at ensuring road safety and proactively preventing driving over the prescribed content of alcohol.*
>
> *[105] The authorities and statutory interpretation all point to the proposition that the RBT powers cannot be used to justify the arbitrary stopping of vehicles, interrogating of occupants or searching of vehicles for crime detection.*
>
> *[106] That is what happened in this case. I do not find that there was a mixed purpose.*
>
> *[107] It may be added that the police cannot rely on a statutory RBT power to engage in "proactive" policing or satisfy a curiosity or hunch not amounting to a specific state of mind as required by LEPRA.*
>
> *[108] At no time, of course, prior to the stop and detain, did the police claim to have any relevant reasonable suspicion. Nor, prior to the elicited admission, was there any material available upon which a suspicion could have been based.*

17. Counsel submits that the decision to search the car was made shortly after the car was stopped, as a result of engaging in unlawful questioning and improper detention of the occupants. This is a case where police engaged in "proactive policing" to satisfy a curiosity or "hunch" not amounting to a specific state of mind as required by LEPRA and a case where at no time prior to their interrogation of the accused and his passengers was there any material available upon which a suspicion to search the car could have been based.

Stopping of the Vehicle

18. The police officers involved in the stopping and searching of the motor vehicle do not claim that they stopped the motor vehicle as a result of a suspicion as contained in LEPRA, that is, a suspicion based upon reasonable grounds that the persons within the car had items in their possession unlawfully obtained or that the vehicle contained a relevant prohibited drug

19. Police cannot, and do not, assert that when they detained the Accused and his passengers, they were exercising a lawful power to stop the motor vehicle under s 36 LEPRA. Rather, police relies solely upon the "stop" power under ss3 & 6 RTA to undertake an RBT/ROFT.

20. Counsel submits that, in the present case, the police did not properly exercise the power pursuant to ss3 & 6 RTA to undertake an RBT/ROFT, but rather, used such a power to justify what was otherwise a pro-active and investigative "sussing" out of the occupants of the vehicle. In other words, the RBT power was used as a "ruse" to facilitate the investigation of the occupants of the vehicle.

21. The purpose of the RBT/ROFT power is the maintenance of the road safety system, not for the purposes of investigation, citing *R v Buddee,* at [104]-[105] earlier quoted:

> *... The random nature of the motor traffic powers is a very significant interference in the liberties of citizens lawfully going about their business. They are not part of the criminal investigation powers conferred by LEPRA. There was a clear intention to delineate powers based on suspicion of the commission of crime from powers directed primarily at ensuring road safety and proactively preventing driving over the prescribed content of alcohol.*
>
> *The authorities and statutory interpretation all point to the proposition that the RBT powers cannot be used to justify the arbitrary stopping of vehicles, interrogating of occupants or searching of vehicles for crime detection.*

22. If this Court is satisfied (on the balance of probabilities) that the police did not detain the Accused and his passengers for the purpose of undertaking a RBT/ROFT per the RTA, but rather were doing so for investigative purposes, then there is no other lawful basis for the stop.

The Questioning of the Passengers

23. If the Court is satisfied that the police did detain the Accused and his passengers lawfully, for the purpose of undertaking the RBT /ROFT, the Court would be satisfied that the ensuing conduct was not lawful.

24. There is no such power in LEPRA, nor in the RTA, to ask questions of the driver and passenger of a vehicle in the way that was done in the present case. The questions were clearly investigative, and the Court would not accept that the questions were simply "light-hearted", "a little bit of a joke" and "general chit chat", in circumstances

where the questions were geared towards finding out where the accused and his passengers had been, what they had been doing, and whether they could be "caught out" on any lies and whether it was "more than just a random breath test".

Grounds for the Search

25. Counsel submits that, even if the Court finds that the detention and questioning of the accused and his passengers was lawful or proper, the Court would still not be satisfied that there were reasonable grounds to conduct the search of the vehicle.

26. Police assert that the Accused and his passengers were nervous and gave conflicting accounts of where they had been and what they had been doing. Presumably, this is relied upon to justify a search pursuant to s36 of LEPRA, that, the police officer suspected on reasonable grounds that the vehicle is being, or was, or may have been, used in or in connection with the offence of drug supply, or contained anything used or intended to be used in connection with an offence of drug supply (s.36(1)(c) or (d)).

27. Counsel submitted that such grounds are not "reasonable" in accordance with the principles in *Rondo,* on the following bases:

    a. Even if the officer's observation of the accused being "nervous" was accurate, it is submitted that this is not reasonable grounds for the suspicion said to be held by police. The Court would find that it would be commonplace for citizens to appear nervous in the presence of police, particularly in the present case where the accused was being asked multiple questions in the presence of two police officers.

    b. The differing accounts to persistent police questioning would not ground a reasonable suspicion that the car contained drugs. All that could be said was that they were people who did not wish to engage in persistent and unsanctionable "friendly" "light-hearted" "chit-chat" with police after being stopped in the middle of the night.

    c. If this can justify a search, it places an obligation on citizens to co-operate and comply with police, and do so comfortably without any fear or nerves, at risk of be subjected to the coercive investigative powers of police.

The Balancing Exercise of the Discretion by Reference to s138(3) Considerations

Probative Value

28. The probative value of the evidence of the drugs and money found in the motor vehicle is the foundation for the proof that the accused was taking part in the supply of prohibited drugs and in possession of proceeds of crime. Thus, the evidence is highly probative.

Importance of the Evidence in the Proceedings

29. The evidence caught by the objection is essential to the police case. The police is untenable without it.

The Nature of the Relevant Offence

30. The offence of drug supply is generally considered a serious offence, but is a relatively small amount (3.35g) and the matter can be dealt with summarily in the Local Court. This must be measured against the gravity of the impropriety, and the public policy issues that arise.

The Gravity of the Impropriety or Contravention and whether it was deliberate or reckless

31. Assuming a finding that the Accused and his passengers were not detained for the purposes of an RBT/ROFT as claimed, or alternatively that it was carried out for the ultimate reason of investigation / searching the vehicle, it is submitted that the gravity of the unlawful conduct and impropriety was significant, involving a breach of the laws in respect of the power to stop vehicles.

32. Counsel submits that there was deliberate improper and unlawful conduct, particularly in questioning the accused and the passenger. It would appear to be at least "reckless".

33. Should the court find the stopping was unlawful, or if the evidence was obtained in consequence of an impropriety, then the stopping of the vehicle and detaining of the occupants amounted to an unlawful interference with the accused's freedom of movement and freedom from harassment. Spigelman CJ considered these matters "important" in *Rondo* at [60].

34. They are a breach of Common Law rights and of Article 9 of the *International Covenant on Civil and Political Rights*. Counsel submits that any infringement of a fundamental right or liberty ought to be regarded as significant.

35. The test as to the reasonableness of the suspicion grounded in the statutory provision providing for the power to stop, search and detain, is recognition of the fact that officers with such powers are to be accountable reflective of the compromise reached within the legislative provision between "the values of individual liberty and public order" (see [15] *Hyder* citing *Ohara v Chief Constable of Royal Ulster Constabulary*).

The Difficulty of Obtaining the without Impropriety

36. Evidence of this nature should be obtained within the safeguards of the ample powers according to the safeguards in LEPRA.