

"COCKLE BAY COWBOYS"

Very Short Facts

Police observe accused driving hire car (Bayswater Rentals) in Oxford St Surry Hills.

Accused is of "Middle Eastern appearance", bald, wearing a white shirt

Accused appears to be manipulating a device.

Police follow through various city streets.

Accused arrives in Cockle Bay area (outside Price Waterhouse Coopers).

Police observe guy in suit sitting in car.

Later guy in suit seen walking away.

Police approach administer "random" breath test. Proves negative.

Police question accused.

After some discussion accused refuses to answer question.

Police claim a reasonable suspicion and announce intention to search car.

Accused is out of car and refuses to hand over car keys. Questions police authority ("Don't you have to have a warrant?").

Accused refuses to comply with purported police direction.

Further police arrive.

Physical confrontation between police and accused.

Accused arrested.

Car searched.

Accused taken to police station to be charged.

Power to Stop Vehicle

RBT (typical excuse)

Used to overcome LEPR s.36

Power to Search Vehicle

LEPR s.36 [specifically s.36(1)(e)]

must "suspect on reasonable grounds"

What is a "suspects on reasonable grounds" / "reasonable suspicion"

- actual (subjective) suspicion must evidence based (can be hearsay)
- must also be objectively reasonable

Leading cases:

- *Hyder v Commonwealth of Australia* [2012] NSWCA 336 see especially McColl JA at [15]:
Suspect arrested arrested for alleged offences of tax fraud
Relevant provision fro arrest required "reasonable belief"
McColl JA at [35]:

The following propositions, adapted by reference to s 3W, can be extracted from decisions considering how a person required to have reasonable grounds either to suspect or believe certain matters for the purposes of issuing a search warrant or arresting a person might properly form that state of mind:

(1) When a statute prescribes that there must be "reasonable grounds" for a belief, it requires facts which are sufficient to induce that state of mind in a reasonable person: George v Rockett (at 112);

(2) The state of mind that the reasonable grounds for the relevant suspicion and belief exist must be formed by the person identified in s 3W (the "arresting officer"); the arresting officer may not "discharge the ... duty [of forming the relevant opinion] parrot-like, upon the bald assertion of the informant": George v Rockett (at 112), quoting R v Tillett; Ex parte Newton (1969) 14 FLR 101 (at 106) per Fox J;

(3) The proposition that it must be the arresting officer who has reasonable grounds to suspect (or believe) the alleged suspect to be guilty of an arrestable offence is intended to ensure that "[t]he arresting officer is held accountable ... [and] is the compromise between the values of individual liberty and public order": O'Hara v Chief Constable of Royal Ulster Constabulary (at 291) per Lord Steyn (Lords Goff, Mustill and Hoffmann agreeing);

(4) There must be some factual basis for either the suspicion or the belief: George v Rockett (at 112); the state of mind may be based on hearsay material or materials which may be inadmissible in evidence; the materials must have some probative value: R v Rondo[2001] NSWCCA 540; (2001) 126 A Crim R 562 (at [53](b)) per Smart AJ (Spigelman CJ and Simpson J agreeing); Shaaban Bin Hussien v Chong Fook Kam (at 949); O'Hara v Chief Constable of Royal Ulster Constabulary (at 293) per Lord Steyn;

(5) "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": George v Rockett (at 116);

(6) "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": George v Rockett (at 116);

(7) What constitutes reasonable grounds for forming a suspicion or a belief must be judged against "what was known or reasonably capable of being known at the relevant time": Ruddock v Taylor [2005] HCA 48; (2005) 222 CLR 612 (at [40]) per Gleeson CJ, Gummow, Hayne and Heydon JJ; whether the relevant person had reasonable grounds for forming a suspicion or a belief must be determined not according to the subjective beliefs of the police at the time but according to an objective criterion: Anderson v Judges of the District Court of New South Wales (1992) 27 NSWLR 701 (at 714) per Kirby P (Meagher and Sheller JJA agreeing); see also O'Hara v Chief Constable of Royal Ulster Constabulary (at 298) per Lord Hope;

(8) The information acted on by the arresting officer need not be based on his own observations; he or she is entitled to form a belief based on what they have been told. The reasonable belief may be based on information which has been given anonymously or on information which turns out to be wrong. The question whether information considered by the arresting officer provided reasonable grounds for the belief depends on the source of the information and its context, seen in the light of the whole of the surrounding circumstances and, having regard to the source of that information, drawing inferences as to what a reasonable person in the position of the independent observer would make of it: O'Hara v Chief Constable of Royal Ulster Constabulary (at 298, 301, 303) per Lord Hope. (O'Hara concerned the formation of a suspicion, but the proposition Lord Hope stated is equally applicable to the formation of a belief); it is "[t]he character of the circumstances [which have] to be decided: were they such as to lead to the specified inference?": Queensland Bacon Pty Ltd v Rees [1966] HCA 21; (1966) 115 CLR 266 (at 303) per Kitto J;

(9) "The identification of a particular source, who is reasonably likely to have knowledge of the relevant fact, will ordinarily be sufficient to permit the Court to assess the weight to be given to the basis of the expressed [state of mind] and, therefore, to determine that reasonable grounds for [it] exist": New South Wales Crime Commission v Vu [2009] NSWCA 349 (at [46]) per Spigelman CJ (Allsop P and Hodgson JA agreeing); see also International Finance Trust Co Ltd v New South Wales Crime Commission [2008] NSWCA 291; (2008) 189 A Crim R 559 (at [134] - [135]), per McClellan CJ at CL. Although McClellan CJ at CL was in dissent, Allsop P (with whom Beazley JA agreed) (at [51]) would have agreed with

McClellan CJ at CL's conclusion in this respect subject to qualifications none of which are in issue in the present case. International Finance Trust Co Ltd v New South Wales Crime Commission was overturned in the High Court insofar as it concerned the constitutional validity of s 10 of the Criminal Assets Recovery Act 1990, but not in a manner which affects the statements concerning the reasonable grounds issue: International Finance Trust Co Ltd v New South Wales Crime Commission [2009] HCA 49; (2009) 240 CLR 319;

(10) In Holgate-Mohammed v Duke (at 443), Lord Diplock held that the words "may arrest without warrant" conferred on a public official "an executive discretion" whether or not to arrest and that the lawfulness of the way in which the discretion was exercised in a particular case could not be questioned in any court of law except upon the principles Lord Greene MR enunciated in Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223. That aspect of Lord Diplock's reasoning was applied in Zaravinos v State of New South Wales (at [28]) where Bryson JA (Santow JA and Adams J agreeing) held that that the validity of an exercise of the statutory power to arrest, in that case under s 352(2) of the Crimes Act 1900 (which provided that "[a]ny constable or other person may without warrant apprehend"), was "not established conclusively by showing that the circumstances in s 352(2)(a) exist[ed], and that the validity of the decision to arrest and the lawfulness of the arrest also depend on the effective exercise of the discretion alluded to by the word 'may' "; see also Bales v Parmeter (1935) 35 SR (NSW) 182 (at 188) per Jordan CJ. Holgate-Mohammed v Duke has not been followed in Australia to the extent that Lord Diplock held that an arrest for the purpose of asking questions was lawful: see Zaravinos v State of New South Wales (at [31] - [33]); Williams v The Queen (at 299) per Mason and Brennan JJ.

- *R v Rondo [2001] NSWCCA 540, 126 A Crim R 562 at [53]*

(a) 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. A reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence.

(b) 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.

(c) 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.

- *Streat v Bauer & Blanco* NSWSC 16/3/98; unrep. Smart J BC9802155
- *George v Rockett* (1990) 170 CLR 104 (search warrant case)

{Suspicion} "In its ordinary meaning is a state of conjecture or surmise where proof is lacking...The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown."

- *R v Armstrong* (1989) 53 SASR 25
King CJ obiter remarks re arbitrary stops at 28-28
- *Queensland Bacon Pty Limited v Rees* (1966) 115 CLR 286 Kitto J at 303 (a bankruptcy case cited with approval in *Rondo*)

"A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to a 'slight opinion, but without sufficient evidence', as Chambers Dictionary expresses it. Consequently, a reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence."

- *DPP (NSW) v Leonard* [2001] NSWSC 797, 53 NSWLR 227
consent to a search renders it lawful.

How to Deal With This Issue As Defence Practitioner

Voir Dire - Evidence Act s.189

Aim to have the evidence characterised as unlawfully obtained.

Aim to have bench refuse to admit the evidence pursuant to Evidence Act s.138

Breaking Down Reasonable Suspicion

Pinpoint when it was that suspicion formed (earlier is better).

Pinpoint when the accused detained or "not free to leave" (earlier is better)

Elicit each and every factor contributing to the suspicion.

Ask a question that "caps" the basis of the suspicion.

Cross-examine on each and every point forming the basis of the suspicion.
(Perhaps) call evidence
Make submissions as to why suspicion not reasonable.

The Attack On Reasonable Suspicion In The Present Matter

1. The lead up - following the car
2. The Hire Car
3. The Hire Car Company
4. Middle Eastern appearance
5. The location of the stop
6. The general locality
7. The distance from "known" bars.
8. The accused getting out of the vehicle.
9. The questioning of police powers.
10. The request to speak to a lawyer.
11. The exercising of the right to silence.
12. The CCTV
13. The origins of the CCTV

Part 9 of LEPR

No case law from the Supreme Court (yet).

Failure to Comply With a Police Direction

LEPR s.39(b)

This is subject to lawful announcement - see esp. LEPR s.201(3)(b)

Resist Police

Execution of Duty

Reasonable Suspicion

Lawful Announcement

LEPR s.201

Semaan v Poidevin [2013] NSWSC 226

But note the appeal to the NSW Ct of Appeal [*Poidevin v Semaan*] - listed for hearing 27/8/13

EXTRACTS FROM LAW ENFORCEMENT (POWERS AND RESPONSIBILITIES) ACT 2002 (NSW)

36 Power to search vehicles and seize things without warrant

(cf Crimes Act 1900, ss 357, 357E, Police Powers (Vehicles) Act 1998, s 10, Drug Misuse and Trafficking Act 1985, s 37)

- (1) A police officer may, without a warrant, stop, search and detain a vehicle if the police officer suspects on reasonable grounds that any of the following circumstances exists:
 - (a) the vehicle contains, or a person in the vehicle has in his or her possession or under his or her control, anything stolen or otherwise unlawfully obtained,
 - (b) the vehicle is being, or was, or may have been, used in or in connection with the commission of a relevant offence,
 - (c) the vehicle contains anything used or intended to be used in or in connection with the commission of a relevant offence,
 - (d) the vehicle is in a public place or school and contains a dangerous article that is being, or was, or may have been, used in or in connection with the commission of a relevant offence,
 - (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,
 - (f) circumstances exist on or in the vicinity of a public place or school that are likely to give rise to a serious risk to public safety and that the exercise of the powers may lessen the risk.
- (2) A police officer may, without a warrant, stop, search and detain a class of vehicles on a road, road related area or other public place or school if the police officer suspects on reasonable grounds that any of the following circumstances exist:
 - (a) a vehicle of the specified class of vehicles is being, or was, or may have been, used in or in connection with the commission of an indictable offence and the exercise of the powers may provide evidence of the commission of the offence,
 - (b) circumstances exist on or in the vicinity of a public place or school that are likely to give rise to a serious risk to public safety and that the exercise of the powers may lessen the risk.
- (3) A police officer may seize and detain:
 - (a) all or part of a thing that the police officer suspects on reasonable grounds is stolen or otherwise unlawfully obtained, and
 - (b) all or part of a thing that the police officer suspects on reasonable grounds may provide evidence of the commission of a relevant offence, and
 - (c) any dangerous article, and
 - (d) any prohibited plant or prohibited drug in the possession or under the control of a person in contravention of the Drug Misuse and Trafficking Act 1985, found as a result of a search under this section.

36A Power to stop vehicles

A police officer may stop a vehicle if the police officer suspects on reasonable grounds that the driver of, or a passenger in or on, the vehicle is a person in respect of whom the police officer has grounds to exercise a power of arrest or detention or a search power under this Act or any other law.

38 Power to give reasonable directions

(cf *Police Powers (Vehicles) Act 1998*, s 10)

A police officer who exercises a stop, search or detention power under this Division, or who is authorised to exercise a vehicle roadblock power under this Division, has the power to give reasonable directions (to facilitate the exercise of the power) to any person:

- (a) in or on the vehicle concerned, or
- (b) on or in the vicinity of a road, road related area or other public place or school.

39 Failure to comply with directions

(cf *Police Powers (Vehicles) Act 1998*, s 10)

A person must not, without reasonable excuse:

- (a) fail or refuse to stop a vehicle the person is driving when directed to do so by a police officer under this Division, or
- (b) fail or refuse to comply with any other direction given by a police officer under this Division.

Maximum penalty: 50 penalty units or 12 months imprisonment, or both.