

Table of Authorities for Reasonable Suspicion to Stop and Search under Sections 21 and 36 LEPRⁱ

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Definition of <i>Reasonable Suspicion</i>	
<p>In <i>R v Rondo</i> [2001] NSWCCA 540, Smart JA reviewed the relevant authorities and concluded that the following propositions emerge regarding <i>reasonable suspicion</i> at [53]:</p> <ul style="list-style-type: none"> (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... 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. 	
<p><i>Ohlsen v Jones</i> (1991) 53 A Crim R 136 <i>Possession of cannabis leaf</i></p>	<p>Reasons and Orders</p>
<p><i>Asserted grounds for vehicle stop:</i> [138] Time – early hours of the morning. Presence of two persons in the vehicle. Vehicle registered to a distant residence.</p>	<p>[138] The evidence upon which the magistrate relied... certainly did not compel the conclusion that a suspicion held by the informant was an objectively reasonable suspicion.</p> <p>Orders: The Court dismissed the appeal as there was <i>some</i> evidence capable of grounding a reasonable suspicion and the evidence may have been admitted per <i>Bunning v Cross</i> (common law predecessor of s 138 EA) anyway.</p>
<p><i>Streat v Bauer; Streat v Blanco</i> (Unreported, NSWSC, Smart J, 16 March 1998 (see pg 9 of “Police Powers Update, January 2013” by Jane Sanders, Principal Solicitor, the Shopfront Youth Legal Centre) <i>Hinder police</i></p>	<p>Reasons and Orders</p>
<p><i>Asserted grounds for vehicle stop:</i> Police relied on the time and place, the fact that there were three men in the car, and a suggestion received from police radio that it was a “suspect” vehicle that may be involved in offences. Once the car had been stopped the police relied, as a further basis for their suspicion, on the fact that the defendants strongly objected to being searched.</p>	<p>The magistrate dismissed the charge, holding that none of these factors provided reasonable grounds for suspicion and therefore the police were not acting lawfully in the execution of their duty.</p> <p>This was upheld on appeal to the Supreme Court. Smart J said: “No adverse inference can be drawn against either accused because they were irate at being wrongly stopped and refused to be compliant. They were entitled to insist on their rights and on the law being strictly followed and to advise each other and their friend of their rights and their exercise. I do not accept the suggestion that the other three matters</p>

	<p>earlier mentioned [i.e. the factors which led the police to stop the car] coupled with their robust insistence on their rights constituted reasonable grounds for suspicion on the part of the appellant. Bold and irritating conduct must be distinguished from conduct which might be characterised as suspicious.</p> <p>Orders: Acquittal affirmed.</p>
<p>R v Rondo [2001] NSWCCA 540 Supply cannabis leaf (224g)</p>	<p>Reasons and Orders</p>
<p>Asserted grounds for vehicle stop: [32] At about 7pm the police noticed navy blue Toyota Supra coupe (a sports car) with panel damage on driver's side. The vehicle had smart appearance and appeared capable of travelling at fast speeds. In response to police question re whether he owned the vehicle, the driver said "no".</p> <p>Asserted behaviour after vehicle stop: [33] As the officer walked up to the vehicle, he saw the appellant lean across to the passenger side of the vehicle and place something in the glovebox.</p>	<p>[51] The evidence that the police had to support stopping the vehicle was that a young fresh faced man was driving a smart fast open couple with some panel damage along Epping Road and when asked if the car was his, he replied "No". He was not asked to whom it belonged. The mere fact that the appellant was driving a car which he did not own or lease or hire is not sufficient to give rise to a reasonable suspicion.</p> <p>[58] Placing an item in a glovebox at any stage is a very routine matter. Mostly it would be an innocent everyday act not calling for comment. A glovebox is also a place which stolen or illicit items can be put as numerous cases in the courts have revealed. The Crown relied on the time at which the item appeared to be placed in the glovebox, that is just after the vehicles had stopped... My mind has fluctuated as to whether the appellant's alleged actions were sufficient to ground the reasonable suspicion alleged. Not without doubt I have concluded that it was open to the trial judge to find that they were.</p> <p>Orders: <i>Inter alia</i>, the stop was unlawful; no retrial warranted; verdicts of acquittal entered.</p>
<p>Lassanah v State of New South Wales (No. 3) [2010] NSWDC 241 Tort – wrongful arrest and false imprisonment</p>	<p>Reasons and Orders</p>
<p>Asserted grounds for stop: [132] The police stopped, search and detained the plaintiffs because... they suspected on reasonable grounds that the plaintiffs had in their possession or under their control something stolen or otherwise unlawfully obtained and/or something used or intended to be used in connection with a relevant offence, namely an indictable offence for the purposes of s 20 [LEPRA].</p> <p>The manager told police there were two males in the shop... They were acting suspiciously... lifting cabinets... they were walking away from the Tag Heuer shop. He then said they were attempting to rob the store.</p>	<p>[143] I am satisfied that the plaintiffs were not in fact arrested. They were stopped and searched under LEPRA because of the very serious allegations made by the servants and agents of the second defendant.</p> <p>[145] I am satisfied that the police did not arrest the plaintiffs, either at common law or pursuant to LEPRA. They were called to the scene to investigate a potential robbery of a store and were exercising their rights to stop and search under LEPRA.</p> <p>Orders: The stop was lawful. Damages awarded for false imprisonment on the basis that the shop employee defendants made false allegations to police.</p>

R v Fortescue, Michael [2010] NSWDC 272 Supply ecstasy (53 tablets)	Reasons and Orders
<p>Asserted grounds for stop:</p> <p>[11] In the case before me, two police officers had been alerted to the presence of the accused and his companion in a laneway more dimly lit than surrounding areas. The two men were in the vicinity and police believed had been in attendance at the Tank Nightclub which had a reputation among police as a well known establishment for drug users. At some point the police stopped the accused and his companion and whilst they were so stopped searched them. The point in time at which the accused and his companion were stopped, that is the point at which they were required to comply with the demand they remain and were no longer free to leave for the moment, although not yet arrested.</p> <p>[13] It was the Crown case in the early hours of 15 February 2009 that two plain clothes police, Constable Luke Pisani and then Probationary Constable Nathan Coates were on duty in the Tank Stream Way and Bridge Lane, Sydney area. The Tank Nightclub is located nearby.</p> <p>[14] They saw the accused and his male companion walking down Bridge Street lane into Tank Stream Way. Each describes the accused as looking over his shoulder at least three times as they walk. Both sat down on a bench.</p> <p>[17] During the course of the conversation police made observation of the accused having dilated pupils and white paste material in the corner of his mouth. Both symptoms were significant to the officer, because each was consistent with drug use.</p>	<p>[23] While the nightclub’s reputation may have been tainted by some association with drugs that would be insufficient to select customers at random for search. Nor was the fact that the two men made their way down a laneway less brilliantly lit than the front of the club. Nor was the fact that both men looked over shoulders as they walked down the laneway at 2am. In a metropolis such as Sydney where street crime is not unknown it may have been prudent to do so. That the two men were pointed out as being of interest for a particular reason by another police officer, could not supply reasonable grounds for suspicion. That both men sat and had a cigarette is not a fact that can be taken as encouragement to form suspicion. Nor do all of these facts taken together supply enough to entitle police to stop, search or detain.</p> <p>[26] The evidence has not established that the accused was “stopped” by police... I am satisfied once the questions about drugs were asked, Constable Pisani’s purpose was no longer to “talk to them” but rather to cause each to be searched at his direction and by his subordinate. I am satisfied at least from that point both men were “stopped” by police.</p> <p>[27] Once the drug question was asked, which may have been one and a half or so minutes into the conversation, he had noticed the dilated pupils, the white paste, the trembling leg and the clenched jaw. The more significant symptoms are the dilation of the eyes and presence of the paste in the corners of the mouth at 2.15am. While the significance of the dilation of the eyes has been put in issue, as capable of having an explanation inconsistent with drugs, in combination with other symptoms, the officer was entitled to take it into account.</p> <p>[33] Given the symptoms observed by Pisani, the location, time and context of the circumstances, I am satisfied such suspicion as he entertained qualified as more than a mere possibility, and would have created in the mind of a reasonable person a suspicion that the accused was in possession of a drug in contravention of the DMTA. I am satisfied the information before the police officer afforded reasonable grounds for the suspicion he formed.</p> <p>Orders: Application on behalf of defence to exclude evidence of search warrant and evidence of drugs found upon the accused is rejected.</p>

Police v Thao Phuon Nguyen [2010] NSWLC 15 Resist, hinder, receiving, GIC, PPD etc	Reasons and Orders
<p>Asserted grounds for vehicle stop:</p> <p>[6] At about 11.20am and while travelling on Canterbury Road, Glenfield police observed a dark blue Mercedes Benz sedan (AJK 74H). The vehicle was displaying red “P” plates. The Mercedes Benz, which was being driven by the accused’s boyfriend Ahmet Fahri, was stopped outside the accused’s premises.</p> <p>[11] Constable Navin denied that the reason the vehicle was pulled over was that checks on the vehicle had been conducted and that those checks revealed police intelligence that the vehicle may be involved in drug distribution. He said that this information was only available to police <u>after</u> the initial contact with Mr Fahri. This denial was despite the Fact Sheet that he had prepared containing the following – “Police conducted a check on the vehicle which revealed it had recent intelligence in relation to the supply of heroin in the Liverpool area. Police have activated all warning lights and sirens and have stopped the vehicle outside 74/8 Kikori Place, Glenfield.” – Given these words in the Fact Sheet there is some real question that arises as to the reliability of the denial by Constable Navin as to the reason the vehicle was pulled over. This unreliability is further demonstrated by conflict between Constable Navin’s evidence and the evidence of other police as to the issue of the stop, to which I will shortly refer.</p> <p>[15] Ms Glancey’s (counsel for the accused) submission is that there is no explanation for the vehicle stop that could be relied upon. She referred to the discrepancies in the police evidence and to the absence of any detail in the statements of the officers dealing with either a random breath test or an inappropriate manner of driving. She observes that no evidence is offered of police speaking to Mr Fahri as to his manner of driving after they had approached him; as she submits one might expect. It is relevant to note that the inconsistency between police extends to which of the officers approached the car and who it was that conducted the random breath test.</p>	<p>[22] In the present matter I am not persuaded that the vehicle stop by police of Mr Fahri was improper, my already having concluded that it was not unlawful. In my view the community accepts and expects that police have a wide general power to stop motor vehicles whether that be because a traffic offence has occurred or because police have determined to conduct a random breath test. Ms Glancey does not persuade me on behalf of the accused that the standards expected of police by the community were breached in this instance. If I am wrong as to that, then in any event I would not regard the police conduct in stopping the vehicle as any more than a minor blurring or contravention of those standards.</p> <p>Orders: Objection overruled – evidence admitted.</p>

<p><i>R v Yana ORM [2011] NSWDC 26</i> <i>Deemed supply (314.6g pseudoephedrine)</i> <i>Deemed supply (133.8g methylamphetamine)</i></p>	<p>Reasons and Orders</p>
<p>Asserted grounds for vehicle stop:</p> <p>[4] About 8:25pm on 23/12/19, police were conducting RBTs near a service station at Gundagai. They observed a Nissan motor vehicle with SA registration plates in the vicinity. The vehicle turned back into the service station and appeared to leave the service station by a different exit.</p> <p>[5] The officer, Senior Constable Magnoni, was conducting breath testing. He got into the caged vehicle and in the event followed the vehicle and stopped it. He did so on the basis that it appeared to him that the driver of the vehicle seemed to be trying to avoid the breath test.</p> <p>Asserted grounds for the subsequent search:</p> <p>[20] It appears that the officer made his decision based upon five factors. They are, in broad compass, that the accused avoided eye contact with him; secondly, that the accused stayed at Liverpool at the Formule 1 Hotel; thirdly, that the accused did not stay at the home of his cousins for whom he could not nominate an address; fourthly, that the accused attempted to avoid the random breath test, although the officer conceded that that could have been by reason of the position concerning his cancelled licence; and lastly, that the accused got out of the car and smoked a cigarette.</p>	<p>[19] The Crown concedes, in my view properly, and the parties agree that the officer did not have reasonable grounds to suspect that there were drugs in the motor vehicle driven by the accused. That is not to say it is a concession that the officer did not have an honest belief in what he said. It is simply a concession that his honest belief did not in law amount to reasonable grounds.</p> <p>[55] I pause to note that it is one thing for a police officer to use his common sense and experience to seek out and investigate leads in relation to an offence. In my view, it is quite another for an officer to make value judgments about the actions of a suspect and to translate those value judgments to the level of a reasonable suspicion of offending. This is especially so when the officer appears to make little effort to consider any innocent explanation for such actions. This approach may indicate a closed rather than an open and inquiring mind and may suggest that the officer's intention was to gain evidence inculcating the accused.</p> <p>[98] In my opinion, the officer did not intentionally contravene the law. The inference I draw from the facts is that he mistakenly believed that the facts he relied upon grounded a reasonable suspicion and he actually held that belief.</p> <p>[109] The next is the degree of impropriety involved. It is clear, as I have indicated based on the statement of principles from the highest authorities, that an illegal search is undoubtedly a serious breach of the rights of a citizen of a free country.</p> <p>[110] In the present case, however, the accused had been initially stopped and detained for a lawful purpose and I conclude that the officer was acting on honest suspicions held by him, although they were clearly not reasonable.</p> <p>[111] The next question is whether or not the impropriety was deliberate or reckless and I have already given my reasons for holding that they were, in the circumstances, neither of those.</p> <p>Orders: the desirability of admitting the evidence outweighs the undesirability of admitting it.</p>

<p>Castillo v R (Unreported, NSWDC, North DCJ, 4 August 2011) (see pp 5-6 of “Police Powers Update, January 2013” by Jane Sanders, Principal Solicitor, the Shopfront Youth Legal Centre) Resist officer</p>	<p>Reasons and Orders</p>
<p>Asserted grounds for stop: The defendant was seen by police talking to another man in Kings Cross, an area said to be well-known for the use and distribution of prohibited drugs. Police asked him to stop but he kept walking. He also appeared to take something from his pocket and put it in his mouth and chew.</p> <p>Police approached him, asked him what was in his mouth (to which he did not respond) and told him twice to spit it out, but he continued chewing. The police officer said he could see some plastic which he believed contained a prohibited drug. He grabbed the accused under his jaw and tilted his head backwards, saying “spit it out, you’ll choke”.</p>	<p>His Honour found that the police had decided to stop and search the accused, and therefore the relevant sections of LEPRa came into play. His Honour noted that s 21A permits police to request a person to open his or her mouth, but subs (2) specifically does <i>not</i> authorise them to forcibly open a person’s mouth...</p> <p>His Honour did not accept that there was any other explanation for Constable Lowe’s conduct, other than that he was trying to stop the appellant from swallowing, and therefore disposing of possible evidence.</p> <p>Orders: Appeal against conviction allowed.</p>
<p>Azar v DPP [2014] NSWSC 132 Possess cocaine Deal with money suspected proceeds of crime (\$3,900)</p>	<p>Reasons and Orders</p>
<p>Asserted grounds for vehicle stop [21]:</p> <ol style="list-style-type: none"> (1) Mr Azar was driving a hire car, which police regarded as a notorious means of transporting prohibited drugs; (2) Mr Azar drove to namely Lime St, King St Wharf area in the proximity of the Cargo and Bungalow 8 bars, which is an area well-known to police for the use and supply of prohibited drugs; and (3) The incident that involved a male getting into the vehicle and leaving it after a very short time. 	<p>[43] In my view it was reasonably open to the Court below to find that the following combination of factors was sufficient to give rise to reasonable suspicion within the meaning of ss 21(1)(d) and s 36(1)(e) LEPRa:</p> <ol style="list-style-type: none"> (1) Mr Azar was driving a hire car, against a background of police experience that it is not uncommon for drug dealers to use hire cars to transport drugs for supply; (2) He was in an area known to police to be connected with drug use and supply; and (3) The other male got in and out of Mr Azar’s car in a short period of time (which led the officers to suspect that a drug transaction had taken place). <p>[44] In my view, the Court below was also entitled to take into account Mr Azar’s use of the hand held device/mobile phone.</p> <p>Orders: Amended summons (appeal) dismissed.</p>

<p>Varty v Director of Public Prosecutions (NSW) [2015] NSWSC 304 Possession of methylamphetamine</p>	<p>Reasons and Orders</p>
<p>Asserted grounds for vehicle stop: [4] Thurs 4/9/12 at 2:20pm the plaintiff was a passenger in a red Holden Commodore sedan travelling northbound on the Pacific Highway near Chatswood. Police in unmarked cars noticed the vehicle being driven erratically. The vehicle swerved into a 7/11 service station for a short period before continuing along the Pacific Highway.</p> <p>[5] Police recognised the driver in connection with other police matters in the Forster area.</p> <p>Asserted behaviour after vehicle stop: [6]: SC Hassett went to the passenger door of the Commodore. He recognised the plaintiff and noticed that his hands were shaking and he was sweating.</p>	<p>[11] The Magistrate at first instance held that the search was illegal as SC Hassett did not have reasonable grounds to suspect, within the meaning of s 21 LEPR, that the plaintiff had a prohibited drug within his possession or control.</p> <p>[12] The Magistrate then admitted the evidence under s 138 finding, <i>inter alia</i>, it is more likely that it was proactive policing gone too far, but I cannot definitively say that he was reckless or deliberately disregarded s 21 on the evidence before me and therefore I have to give him the benefit of the doubt that his belief as to what the law was, was clearly erroneous.</p> <p>[53] The Supreme Court was not asked to intervene in respect of the finding that the search was illegal.</p> <p>Orders: The conclusion which her Honour reached, to admit the evidence, was open to her in the exercise of the discretion conferred by s 138(1) <i>Evidence Act</i>.</p>
<p>R v Buddee [2016] NSWDC 422 Supply methylamphetamine (6.76g)</p>	<p>Reasons and Orders</p>
<p>Asserted grounds for vehicle stop: [10] Random breath test under Schedule 3 Road Transport Act 2013</p> <p>Asserted grounds for subsequent search: [10] Seeing <i>Scarface</i> photo frames in the car.</p> <p>[17] An alleged admission as to possession of an ice pipe in the car.</p>	<p>[60] None of the immediately contemporaneous documents supports any conclusion other than that the specific purpose of stopping the vehicle was for criminal investigation or the prevention of crime – a random crime stop.</p> <p>[81] The totality of the evidence inevitably leads to the conclusion that the road safety power to pull people over randomly for a breath test was in fact being selectively relied upon to pull people over on a hunch or mere suspicion that they might be involved in crime.</p> <p>[107] It may be added that the police cannot rely on 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 LEPR.</p> <p>[112] In conclusion, the police purpose in stopping the vehicle was not to conduct a random breath test. The stopping was illegal; the detention whilst inquiries were made was illegal; the process was not based on any legally justifiable state of mind of the part of the officers...</p> <p>[115] If it were proved, would be at the bottom range of seriousness for such an offence.</p>

	<p>Orders: The stop was unlawful and the evidence obtained in consequence is excluded.</p>
<p><i>Ussher v State of New South Wales [2017] NSWDC 189</i> <i>Tort: lawfulness of search – false imprisonment etc</i></p>	<p>Reasons and Orders</p>
<p>Findings of fact re stop and search [146]:</p> <p>(k) the first police sighting of the plaintiff occurred sometime between 11pm and 11.30pm on 12 December 2013...</p> <p>(m) as they passed its intersection with Ploughmans Lane, Senior Constable Bunting observed the plaintiff and his bags in the same or a similar position to that which they were located about an hour earlier when they had made their way out to Cargo...</p> <p>(o) at about 12:12am a call was made by Senior Constable Bunting or Constable Corbridge to VKG reporting back that they had observed a male walking about in the area of the intersection and that they were to check his bona fides;</p> <p>(p) when the police officers returned to the intersection, the plaintiff was not there, although his bags were...</p> <p>(s) a short time later, they observed the plaintiff coming out from trees within the property boundary of 228 Ploughmans Lane, Orange;</p> <p>(t) the plaintiff was trespassing and quite probably guilty of the offence of unlawful entry on enclosed lands;</p> <p>(u) when they observed the plaintiff at that time, he was pulling up or adjusting his shorts. It is likely that the plaintiff either had urinated or attempted to urinate raising the real prospect of an offensive conduct arrest;</p> <p>(v) the police officers asked the plaintiff a number of questions in an attempt to identify him and understand what he was doing;</p> <p>(w) the plaintiff was evasive in his response and refused to answer the questions put to him by the police officers;</p> <p>(x) after considering all of the circumstances, Constable Corbridge undertook a regular search of the plaintiff by placing his hands on the rear of the police vehicle and searching his outer clothing...</p>	<p>[154] Constable Corbridge suspected that the plaintiff had been committing property offences, namely break, enter and steal. That suspicion was based upon his observations of the plaintiff trespassing, intelligence as to frequency of break and enters in the area and the fact that the plaintiff had been loitering in the area for at least an hour. Further, suspicion would have been raised by the plaintiff’s conduct. He was evasive and uncooperative with the police.</p> <p>[155] In my opinion, I find that the suspicion held by Constable Corbridge that the plaintiff may have had something stolen or otherwise unlawfully obtained in his possession was reasonable, if not compelling, in the circumstances. A reasonable person in his position would have held such a belief.</p> <p>[156] I find that suspicion was sufficient to warrant the search of the plaintiff’s person and bags. I find the search was lawful and justified under s 21 LEPR.</p> <p>[157] Senior Constable Bunting either thought that the plaintiff was on the lookout for somebody else engaged in illegal activity or that he was breaking into places. She also suspected drugs. She had a suspicion that the plaintiff may have committed an offence of break enter and steal. The reason for formulating that suspicion was based upon the plaintiff’s behaviour, the time of night and the fact that he would not tell them who he was or where he lived. She thought that he may be on drugs or had mental health problems because of his erratic behaviour, lack of cooperation and rambling. Senior Constable Bunting told the Court that a multitude of offences ran through her mind. It is apparent from the police documents that self-harm or harm to others were amongst the possible circumstances which may give rise to an offence.</p> <p>[158] It is plain that Senior Constable Bunting had in her mind the possibility that the plaintiff had in his possession or under his control something stolen or otherwise unlawfully obtained or, alternatively, drugs, in contravention of the DMTA. I find that the suspicions held by Senior Constable Bunting were reasonable and justified the exercise of the power to search provided by s 21 LEPR. A reasonable person in her position would have held such a belief.</p> <p>Orders: Verdict for the defendant.</p>

<p><i>Filip Black v Regina [2017] NSWDC 326</i> <i>Offensive language</i></p>	<p>Reasons and Orders</p>
<p><i>Asserted grounds to stop and search:</i> [3] At about 9:15am on 14/7/16 the appellant was walking on Robertson Rd Centennial Park wearing a black hoodie and carrying a backpack. A police patrol stopped to speak to him.</p> <p>[4] The appellant objected to being spoken to by the police and was uncooperative with them... when asked what he was doing, he responded, “None of your fucking business”. Constable Ritchie informed the appellant that he was under arrest for offensive language... the police officer agreed to let the original use of offensive language “slide” but told the appellant that he was not free to leave and was to be searched. The reasonable suspicion relied on by the police officer was that the area was renowned for break-ins and that the appellant had given him ‘attitude’.</p> <p>[7] At the completion of the search the appellant was told to leave, at which point he uttered certain statements.</p>	<p>[8] The Magistrate found that the last statement was offensive language and convicted the appellant.</p> <p>[31] In my view, the magistrate made a number of legal and factual errors in determining that the search was lawful.</p> <p>[32] The initial arrest for offensive language was unlawful. The police officer did not turn his mind to whether there was an alternative way that the matter could be dealt with.</p> <p>[33] The only proper basis for holding a suspicion was that the area was allegedly renowned for break-ins. No evidence was produced to support that allegation, for example in the form of intelligence reports or hearsay directions by the police officer’s superiors to patrol that area for that purpose. The other bases were that the appellant had insisted on his legal rights not to identify himself and not to assist the police. Those matters could not be a proper basis for the suspicion. All that was left was that the appellant was walking along a street at about 9am in the morning, wearing a black hoodie, with the hood up, on a cold day.</p> <p>[35] Considering all the circumstances, the police officer was determined to get the appellant’s identity information from him and to challenge his right to be walking on a public street, whether his powers allowed him to do so or not. Notwithstanding that the appellant’s behaviour was impolite and progressing to obnoxious, the police officer’s powers were limited. The police officer sought to achieve a result with little regard to the appellant’s rights. It was the protracted and unjustified interference with the appellant’s civil liberties that ultimately culminated in the offence being committed.</p> <p>Orders: Appeal against conviction is allowed.</p>
<p><i>R v Rebecca Cook [2017] NSWLC 24</i> <i>Possess cannabis</i></p>	<p>Reasons and Orders</p>
<p><i>Asserted grounds for vehicle stop:</i> [31] The only witness was Senior Constable Plichta, the informant in the proceedings. In evidence in chief he describes seeing the car travelling in the opposite direction to his unmarked police vehicle. He recognised the car as belonging to the defendant, but did not see who was driving. He then conducted a U-turn, with a view to carrying out a random breath test and drug test.</p>	<p>[33] In cross examination the officer agreed that he was present at the execution of the search warrant the subject of the first set of charges discussed above. He knew the defendant and he knew her car, and had previously had other contact with her in drug related matters.</p> <p>[37] The officer clearly drew a distinction between his powers under section 36 of the <i>Law Enforcement</i></p>

Asserted grounds for the subsequent search:

[32] When he pulled the car over the window was wound down and he noticed a strong cannabis smell coming from the vehicle. Further, he noticed that the passenger in the vehicle was subject to bail conditions and that by being in Nimbin she was in breach of those bail conditions. Accordingly, the police arrested and detained the passenger, searched the vehicle and secured the cannabis located and then undertook the breath and drug tests.

(Powers and Responsibilities) Act 2002 (NSW) (LEPRA), for which he needed reasonable grounds to believe that there were drugs in the vehicle, and his powers to stop under the traffic laws. He exercised the LEPRA powers once he had stopped the vehicle and could smell cannabis coming from the vehicle. That excited the reasonable grounds to believe, and this is not controversial. However the totality of the officers' evidence shows he did not purport to have the reasonable grounds to believe any offence had been committed at the time he exercised his powers to stop the vehicle. That was based merely on identifying the vehicle as having connection to the defendant and in turn her involvement with prior drug matters. In effect that was a suspicion, but one that the officer knew would not meet the section 36 LEPRA test. In effect it was a hunch, or as he later described, 'a possibility'. Clearly, there was nothing 'random' about the stopping.

[54] In the current case I am satisfied that there was nothing random about this stop at all. It was done to further a hunch or a possibility. Accordingly, in the light of the authority of *Buddee*, I am satisfied that the stopping was illegal, in the sense that it was not a proper use of the random breath or drug test powers. I note that this decision is based on these facts, and the similarity to the facts in *Buddee*.

[55] This was the specific targeting of a known motor vehicle on a hunch that there may be drugs or other offences being committed and then using the RBT powers to explore that possibility. That is not empowered by LEPRA and the traffic provisions do not make what would have been unlawful, lawful.

[59] In my view the breach of the law by police is serious, in the sense that if road safety rules are used for an ulterior motive then it brings into question the community acceptance of such provisions. In my view random breath testing is seen as a necessary infringement on the rights of drivers provided it is utilised for road safety purposes. The courts in decisions such as *Buddee*, determined that the practice of utilising RBT powers for another purpose is illegal.

[63] On balance, I am not persuaded to admit the evidence. The charge is particularly minor and the infringement by police serious. The law on this issue has been stated repeatedly in the intermediate courts, and ought to be well known and adhered to by the police.

Orders: The evidence is excluded under s 138 EA.

<p>Attalla v State of NSW [2018] NSWDC 190 Tort – wrongful arrest – false imprisonment etc</p>	<p>Reasons and Orders</p>
<p>Asserted grounds to stop and search: [2] Tues 24/3/15 at 3:30am the plaintiff was sitting on a stone wall in Bourke St, Darlinghurst, texting on his mobile phone.</p> <p>[27] Bourke St, Darlinghurst, are very well known for prostitution, solicitation, street offences, drug crime.</p> <p>[32] He appeared startled... eyes widened... he maintained a fixated watch on us as our vehicle approached which was at slow speed.</p> <p>[34] Eyes extremely wide... didn't blink at all during the conversation... strange facial expression.</p>	<p>[30] I reject the grounds of the time of day, and the day of the week as being relevant to the reasonableness of Officer Cruikshank's suspicion.</p> <p>[36] It is unsurprising that a person's attention (in the early hours of the morning, when there is no evidence of other activity) would be directed to a police car driving towards them with headlights on...</p> <p>[39] The only matters raised by Officer Cruikshank that, in my view, have any arguable connection with the suspicion of possessing prohibited drugs are the location of Mr Attalla, and him having the appearance of being under the influence of drugs.</p> <p>[41] In this circumstance, I do not accept that at the time, Officer Cruickshank believed that Mr Attalla was under the influence of drugs.</p> <p>[42] That leaves the location of Mr Attalla. That matter could, with other relevant matters, form the basis for a reasonable suspicion, but it is plainly insufficient by itself.</p> <p>[43] I find that there was no reasonable grounds for Officer Cruikshank suspecting that Mr Attalla possessed prohibited drugs, and therefore she had no lawful justification to search him.</p> <p>Orders: Judgment for the plaintiff in the sum of \$112,387.67.</p>
<p>R v Large [2019] NSWDC 627 Supply (12.41g cocaine) Supply (8.38 g MDMA)</p>	<p>Reasons and Orders</p>
<p>Asserted ground for the vehicle stop: [7] At about 12:30am 28/1/18 the police were patrolling in a marked police vehicle on Glenmore Rd. They followed for a period of time a dark grey Mazda 2... Constable Ward claimed he saw the vehicle "from a stationary position accelerate harshly".</p> <p>[8] Police stopped the vehicle behind the accused's car, turning on his blue and red lights and alighted from the police vehicle ostensibly to administer a roadside breath test.</p> <p>Asserted grounds for the subsequent search: [9] SC Ward after talking to the accused for a period, identified inconsistencies in the accused's account as to her relationship with the passenger, where she had</p>	<p>[37] 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.</p> <p>[88] In the context of the evidence given as to the purpose of the police driving in the Paddington area prior to speaking to the accused, that is performing "proactive" policing duties, particularly having regard to the evidence of SC Ward that he was patrolling his command looking for anyone committing an offence or offences and deterring crime, there are good reasons for accepting the submission of the accused that the 'stopping' of the vehicle was for a purpose beyond simply administering a roadside breath test. This was</p>

been earlier that evening and to where she was driving and also made observations of her demeanour that led him to suspect that the driver and the passenger were in the area to supply prohibited drugs.

demonstrated by the fact that all of the police officers in the police car got out of their car and approached the vehicle of the accused from both sides. Both SC Ward and SC Aston proceeded to question the driver and the passenger about matters relating to their previous movements and the like (not their consumption of alcohol) whilst at the same time endeavouring to elicit information from them.

[92] It is admitted as such by the police that there was nothing about the vehicle driven by the accused or its manner of driving that provided a reasonable suspicion that the motor vehicle was connected with the commission of any offence or any other matter that might arise for consideration under s 36 LEPR.

[94] Whilst it was lawful for SC Ward to “stop” the accused’s vehicle in order to administer a breath test, I am not satisfied that the primary purpose for speaking to the driver at the time SC Ward approached the vehicle was to administer a roadside breath test. It is clear having regard to the fact that he did not get around to administering the test and his own evidence of the purpose of his prolonged “chat” with the accused, in conjunction with SC Aston’s similar “chat” with Mr Copeland, that an “ulterior” purpose was to make inquiry of the occupants of the car in order to ascertain whether they were involved in criminal activity, including drug supply.

[97] The two senior police officers had a suspicion about the accused and her passenger in the context of the command in which they are operating being an area where drug supply regularly occurred, it was early in the morning and they had a captive audience for as long as the pretence of the need to administer a random breath test was being played out.

[101] The opportunity to detain the vehicle and its occupants for what the defence submits to be “investigative questioning”, which in my view the questioning clearly was, provided the opportunity to obtain information upon which the reasonable suspicion required to conduct a “search” was based.

[103] His Honour Judge McClinktock SC in the decision of *Buddee* pointed to circumstances in the matter before him that “point away” from the purpose of the stop being a “real RBT” and that it was not a stop for a “motor traffic purpose”. Those features his Honour identified were common to the matter before this court:

- i. a coordinated approach of all officers exiting the police vehicle;

- ii. the coordinated interrogation of the driver and the passenger;
- iii. the requirement of the passenger to identify himself; and
- iv. the requirement that the driver and the passenger remain whilst their identities and backgrounds checks were carried out.

[104] I accept the proposition reflected in *Magnus Kaba* [2014] VSC 52 that the curtailment of liberty can only occur by specific provision of the law. At common law unlawful interference of any kind with personal liberty creates an action in damages and “even apparently minor deprivations of liberty are viewed seriously by the common law” grounding monetary compensation. There are also the obiter observations in *Cleland v The Queen* of Dean J, approved by Justices Mason and Brennan in *Williams v The Queen* (1986) 161 CLR 278 that: “it is of critical importance to the existence and protection of personal liberty under the law that the restraints which the law imposes on police powers of arrest and detention be scrupulously observed”. To this their Honours added the observation: “The right to personal liberty cannot be impaired or taken away without lawful authority and then only to the extent and for the time which the law prescribes”.

[109] I have concluded that the accused has established that the “stopping” of her motor vehicle and her continued detention up until the caution was administered was certainly improper and likely unlawful having regard to the legislative provisions in Schedule 3, s.3 and 4 of the RTA. I am satisfied on balance that the power exercised purportedly in furtherance of authority under the Schedule to the RTA was ostensibly exercised, the primary purpose was for investigating matters relevant to the exercise of power to stop detain and search pursuant to s 36 LEPR which the police officers knew they could not do at that stage.

[111] The questioning of the accused up until administering the caution was for the purpose to obtain information that might assist a wider investigation in relation to matters consistent with “proactive policing” and then using that information obtained to justify a search of the vehicle which was not otherwise permitted up to that point of time by s 36 LEPR or pursuant to the RTA.

[114] It has been observed that even “intelligence” linking a particular vehicle to crimes may not be sufficient for a reasonable suspicion (Streat op. cit.). The conduct of the accused in *Rondo* (handling transpired to be prohibited drugs) was not of itself

deemed in that matter to be sufficient to warrant the powers under identical legislation at an earlier time.

[122] The evidence here raises issues that leave the resolution of the objection as an exercise not without difficulty. Modern police powers are dependent upon legislative fiat and constraint, which must be strictly observed not just by the police but by courts. I appreciate that if I determine that the evidence of the interaction with the accused, the searching of the car and related matters the subject of objection should be excluded then the Crown's case against this accused "collapses". I appreciate as I earlier noted the importance of this evidence in the Crown case. However, it is also important that courts not only give "lip service" to the legislative protections of the rights of the citizen, but also enforce them. It is important that police who have considerable responsibilities and powers not be permitted to take shortcuts to satisfy legitimate investigative purposes. It is also important that courts do not give their approval to illegal and/or improper practices or conduct, but rather identify it, censuring such conduct where appropriate and endeavour deter such behaviour from occurring in the future.

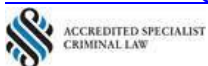
[123] Taking all matters into consideration identified by the accused's counsel and the prosecution I have concluded that evidence of the questioning of the accused in Hopetoun St. Paddington and that of the search of the motor vehicle driven by the accused, as well as the "product" of that search, not 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.

Ruling: The stop, questioning, detention and search of the accused were unlawful; the resulting evidence is excluded.

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ⁱ This table comprises the relevant authorities from a range of jurisdictions that I was able to locate as of January 2020. It is a guide only, containing *some* paraphrasing, and individual cases should be read if they are to be relied upon. I hope, however, that it serves as a useful quick point of reference when dealing with cases involving the ubiquitous exercise of the stop and search power in NSW.