‘Antithetical to any free society’: A Practical Guide to Unlawful Stop and Search Cases

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March 2022

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"There is no doubt that a lot of crime could be proactively prevented simply by providing the police with the power to interfere with every citizen on every occasion in every place, to allow them to arbitrarily stop and search anyone on a hunch or a suspicion. That is not a power they now have and such a power is antithetical to any free society."

– McClintock DCJ, *R v Buddee* NSWDC at [115]

"Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

– Article 9.1, *International Covenant on Civil and Political Rights*

"Well. I ain't passed the bar, but I know a little bit.
Enough that you won't illegally search my shit."

– Jay Z, *99 Problems*

PART 1 – PROVING THE ILLEGALITY OR IMPROPRIETY

1. Introduction

The power of police officers to stop and search people without a warrant is limited by statute and case law. In short, police must have a 'reasonable suspicion' before they can stop and search you.

If a police officer does not comply with the law when stopping and searching someone, the Court may find that the evidence was improperly or illegally obtained.

Such a finding enlivens the Court's discretion to exclude, or 'throw out' the evidence, often resulting in a 'not guilty' verdict.

A prosecutor who loses such a case may complain that the defendant 'got off on a technicality.' However, all lawyers should understand that these sorts of breaches of the law by police officers go to the heart of the criminal justice system and the fundamental rights it was designed to protect. Although legally speaking, 'stop and search' cases can be quite technical, if a defendant is found not guilty on the basis of an illegal search, it should not be seen as being acquitted on a 'technicality', but rather being acquitted on the basis of society's recognition of the superior value of protecting our fundamental human rights over detecting and prosecuting every crime, however small.

This paper aims to provide a practical guide to the law surrounding 'stop and search' cases and how to argue them successfully in court. It will focus on the following areas:

- Key legislation and case law
- Procedure
- Police intelligence
- Use of the RBT
- Discretionary exclusion

Hopefully after you have read this paper, you should feel confident running stop and search arguments in your practice and recognising the importance of doing so in appropriate cases.

2. The Legislation

Sections 21 and 36 of the *Law Enforcement (Powers and Responsibilities) Act 2002* "LEPRA" outline the circumstances in which a police officer is empowered to stop and search a person or motor vehicle without a warrant. Section 21 applies to persons and s 36 applies to motor vehicles.

Section 21 – Power to Stop and Search Persons Without a Warrant

(1) A police officer may, without a warrant, stop, search and detain a person, and anything in the possession of or under the control of the person, if the police officer suspects on reasonable grounds that any of the following circumstances exists--

(a) the person has in his or her possession or under his or her control anything stolen or otherwise unlawfully obtained,

(b) the person has in his or her possession or under his or her control anything used or intended to be used in or in connection with the commission of a relevant offence,

(c) the person has in his or her possession or under his or her control in a public place a dangerous article that is being or was used in or in connection with the commission of a relevant offence,

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

Section 36 – Power to Stop and Search Vehicles Without a Warrant

(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.

There are two things to note here:

1. There is a precondition for exercising this power: 'the police officer suspects on reasonable grounds that any of the ... circumstances exists'

2. There are three distinct (although related) powers legislated here:

   A. The power to stop a person/vehicle

   B. The power to search a person/vehicle

   C. The power to detain a person/vehicle

3. Procedure

You are making an objection under s 138

When you challenge the legality of a stop and search at trial, you are making an objection to the admissibility of the evidence uncovered by the search (for example, prohibited drugs) on the basis that the evidence was illegally or improperly obtained: an objection under s 138 of the *Evidence Act.*

On the voir dire

Your objection should be determined on the voir dire. A voir dire is essentially a 'trial within a trial' used to determine a preliminary issue such as whether evidence should be admitted. In a trial the issue would be determined in the absence of the jury.

Section 189 of the *Evidence Act 1995* governs the use of the voir dire. S 189 specifically contemplates the voir dire being used to determine the admissibility of evidence under s 138.

To determine a s 138 objection such as a stop and search case, the prosecution will generally call evidence from the searching police as well as any other evidence relevant to that specific issue. The defence may call witnesses and tender evidence too.

Both parties then make submissions and the magistrate or judge determines whether the evidence on the voir dire should be admitted into evidence in the hearing or trial.

The issue must be identified explicitly and precisely

When asking for an issue to be determined on the voir dire, you need to explicitly state the issue which requires determination, with precision: *R v Salender Salindera* (unreported, NSWCCA 25/10/1996). For example, "The defendant objects to the admissibility of the evidence of prohibited drugs seized from the defendant's car under s 138 of the *Evidence Act* on the grounds that evidence was obtained in consequence of an illegal or improper stop and search."

Whilst it is important to state the issue clearly and precisely, this does not mean that it has to be a narrow. There could be multiple acts or improprieties that give rise to your objection under s 138 such as illegal use of the RBT (see below) or improperly obtained admissions. Consent may also be in issue. For this reason, it is important to prepare your case thoroughly in advance because the prosecutor will be well within his or her rights to object to your questioning if it falls outside the ambit of the voir dire.

You bear the onus of proof - on the balance of probabilities

If the defence are seeking to use s 138 to exclude evidence then the defence has the onus of proving, on the balance of probabilities that the evidence was obtained unlawfully or improperly: see s 142 *Evidence Act*. It is not enough to establish a reasonable doubt about whether police had a reasonable suspicion. You have to prove to the civil standard that they did not have a reasonable suspicion.

This can make the defence lawyer's job quite difficult as you are essentially required to prove a negative (i.e. that police did not have a reasonable suspicion). Furthermore, you will usually have to use the prosecution's witnesses (who are generally not sympathetic to your client's cause) to do this.

The onus of proof and the nature of the inquiry can make these cases challenging to win. However, there are legal principles and useful strategies that can assist. There are also times when you may get a concession from a police office that really damages their argument.

4. Reasonable Suspicion

It is useful to keep in mind the facts as well as the principles from the most significant cases in this area. It is surprising how often you can use similarities/differences between your case and decided cases to your advantage.

This paper outlines some of the most useful cases, and how the principles and facts of those cases can be used when dealing with issues that commonly arise in stop and search cases.

4.1 Key Principles

***R v Rondo* [2001] NSWCCA 540**

This case is the most important authority on the law of reasonable suspicion. Every criminal lawyer should be familiar with this case.

Facts: In *Rondo* the appellant was driving a sports car when police drew up alongside him and asked him whether it was his car. He said it was not, and the police required him to stop. It was alleged that as an officer approached the vehicle, he saw the appellant reach across and appear to place something in the glovebox. The vehicle was then searched and $860 in cash was found in the centre console and some cannabis was found in the glovebox.

Police suspected the cannabis came from his home and applied for, and were granted a search warrant which they executed and found more cannabis, leading to a cultivation charge. The trial judge exercised his discretion to admit evidence of the search.

Held: The CCA held that the stopping of the vehicle was unlawful, excluded the evidence and ordered an acquittal.

[53] These propositions emerge:

(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 or more of the states of affairs covered by s 357E [the precursor 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.

(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 surrounding circumstances.

4.2 Police "Intelligence"

Sometimes police will say they had 'intel' that supported their reasonable suspicion. They may put this in the police facts sheet, in their witness statements or they may even raise it for the first time in their evidence in chief or cross-examination.

Often whatever document this 'intel' consists of will not be disclosed to the defence – whether for operational reasons or otherwise. However, police cannot simply say they have intel and rely on that as a basis for their reasonable suspicion.

Whilst is true that a reasonable suspicion "may be hearsay material or materials which may be inadmissible in evidence." (***Rondo***) "The materials must have some probative value." It would be impossible for the court to assess whether the materials have probative value without having the materials at hand to examine.

Streat v Bauer; Streat v Blanco **(unreported, Supreme Court of NSW, Smart J, 16 March 1998)**

This is a useful case where police tried to rely on intel and were unsuccessful.

Facts: Police stopped the applicant's car based on the following circumstances:

- Police had obtained information over the radio that the vehicle may be used in a break and entering offence.
- There were three men in the car.
- The car was seen at 1.05am on a Thursday in New South Head Road
- Further (after the car had been stopped) the defendants strongly objected to being searched.

Held: Smart J held that these three matters (and the accused persons' robust insistence on their rights) did not constitute reasonable grounds for suspicion on the part of the appellant.

"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 earlier mentioned 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."

Also, "The nebulous nature of the radio information was unsatisfactory."

4.2.1 Requesting disclosure

To challenge the value of the intel, you will need to request disclosure of the intel. This can be done in advance of the hearing, just before the hearing or during the hearing.

"Pre-hearing disclosure" - Request disclosure by the prosecution in advance of the hearing or trial.

- The advantage of this option is that you will have plenty of time to explore the weaknesses of the intel and get evidence that contradicts it if necessary.
- The disadvantage is that the prosecution will be on notice that you are making a stop and search argument and may try and fix up their case or be prepared for the cross-examination. However, sometimes it will be apparent that this is the only issue in the hearing anyway. Also, sometimes they may not be able to fix up their case.

"Morning-of disclosure" - Ask the prosecutor/OIC if you can look at the intel on the morning of the hearing or trial.

- The advantage of this option is that the prosecutor and police witnesses will all be present, so it will likely be available. It also give you an opportunity to look at the intel before the hearing commences so that you can tailor your cross examination accordingly (or if it is very compelling, advise your client to reconsider his or her plea).
- The disadvantage is that you will have to make some fairly involved forensic decisions in a high-pressure high-stakes court environment.

"Mid-hearing disclosure" – When the police officer gives evidence of intel under cross-examination, you say "I call on that document".

- You will need to support your application with legal argument from *Rondo* and *Streat*, above.
- Sometimes the prosecutor will adjourn or stand the matter in the list to get the intel. Other times they may elect to "push on" without it. The risk with this approach is that sometimes police will produce intelligence that will irreparably damage your client's case. However, sometimes it may be necessary and appropriate to take this risk.

4.3 Client's Criminal Record

A bad criminal record alone (or with other equally dubious factors) is not grounds for a "reasonable suspicion" to stop and search someone.

***Corey O'Connor v R* [2010] NSWDC**

Facts: 18 year old Corey O'Connor was riding a bicycle in Broken Hill at midnight when he was stopped by a police officer and told to turn out his pockets. He complied, and police found a small resealable bag containing 1.1g of cannabis. The police officer's suspicion was based off the time of night and Mr O'Connor's record for dishonesty offences.

Held: [5] Parliament could not have intended that if police officers were aware of a citizen's criminal record, that would mean the police officer could stop, detain and search a person at any time on the basis of a reasonable suspicion that a person might have possession of stolen goods. Had Parliament had such a view, in my view, it would be easily accommodated in the legislation.

4.4 Value Judgments

Often police fail to consider innocent explanations. It is important to draw attention to this during cross-examination and in your submissions. Although the existence of an innocent explanation does not, in itself, negate a reasonable suspicion, a failure by police even to consider it may suggest that their sole intention was to find evidence confirming the accused was guilty of something, which would not support the contention that they had a reasonable suspicion.

***R v Orm* [2011] NSWDC 26**

Facts: An officer was conducting random breath testing at Gundagai on the Hume Highway when observed a Nissan with South Australian number plates turn back into a service station and leave by a different exit. He stopped and searched the defendant. [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 Formula 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.

Dicta: **Per Lakatos DCJ:** [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 inculpating the accused.

4.5 When Police don't have a Plan B they use the RBT

Police have the power under the *Road Transport Act 2013* to pull drivers over and subject them to a random breath test (RBT). If, during an RBT, a police officer sees or hears something that gives her a "reasonable suspicion" of one of the matters outlined in s 36 (a)-(f) *Crimes Act,* it is within her power to stop, search and detain the vehicle.

However, it is illegal for police officers to use the RBT power as a "ruse" to pull people over for the real purpose of gathering evidence that might justify searching the vehicle. This doesn't seem to stop them doing it, however.

***R v Pizarro* [2015] (NSWDC 20 October 2015 unreported)**

Facts: Meagan Estefania Pizzarro was driving along Regent Street, Redfern when she was pulled over by police and searched. Police had accessed intelligence on the vehicle using the mobile data system which contained a reference to Ms Pizarro supplying ice out of the vehicle in Newtown earlier that year and two other references saying the vehicle may be driven by her, and that she was the subject of a Firearms Prohibition Order. The police purported to use the RBT power to stop the vehicle.

Held: The police were using the RBT power as a "ruse" to pull the vehicle over for the real purpose of conducting criminal investigation of the vehicle and its occupants. Therefore, the purported exercise of the RBT power to stop the vehicle was unlawful and improper.

The warnings on police intelligence alone, would not be enough to constitute a lawful basis to stop and search the vehicle. However: [23] There were very significant suspicions relating to the vehicle, the location, the time of night and the occupant. Very little further information would have been needed to justify a legal stoppage of the vehicle on criminal investigation grounds. In particular, as already mentioned, simply identifying the driver as a female fitting the general description of the accused could have led to a legal search under the Firearms Act. Similarly if the vehicle had been observed behaving in a manner consistent with flight or drug dealing, that would probably have enlivened the LEPRA powers.

Regarding the defendant's behaviour once pulled over: [23] Being nervous and failing to make eye contact did not justify a search. Nor having indicated the desire to go to the toilet urgently with squirming or placing one's hands near one's legs constitute a reasonable suspicion.

Regarding the use of the RBT power, the Court held that the intention of the legislature was to allow police to randomly breath test people driving vehicles for road traffic and safety management purposes and no other purposes – at [21].

***R v Buddee* [2016] NSWDC 422**

Facts: The defendant was pulled over in her car by police in Merrylands "for the purpose of a random breath test." The police officer noticed a number of Scarface memorabilia photo frames in the car. The officer asked the defendant, "is there anything in the car that there shouldn't be?" The defendant produced an ice pipe. Police searched the vehicle and located a Mentos container with 6.76 grams of methylamphetamine in it. No officer referred to doing any registration checks, and police VKG records were not produced.

Held: The RBT power was being used as a ruse.

[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 a crime.

[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 RBT powers cannot be used to justify the arbitrary stopping of vehicles, interrogating of occupants or searching of vehicle 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."

McClintock DCJ held the evidence to have been improperly obtained and excluded it under s 138 of the Evidence Act 1995.

Note: a similar argument was advanced by the defendant in *R v Mihajlovic (No 2)* [2019] NSWDC 141. Majoney DCJ adopted the general principles outlined by McClintock in *Buddee*, but distinguished the facts of *Mihajlovic* in choosing to admit the evidence.

***R v Large* [2019] NSWDC 627**

Facts: At 12:30am on 28 January 2018 police were patrolling on Glenmore Road, Paddington when they saw a dark grey Mazda driven by the accused "accelerate harshly" from a stationary position. They did a U Turn, followed the Mazda and came across it stopped around the corner in Hopetoun Street.

All three officers got out of the police vehicle. SC Ward spoke to the driver whilst the other two walked to the passenger side where SC Aston spoke with the passenger. Ward identified inconsistencies in the accused's account as to her relationship with the passenger, where she had 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. He had a breath testing device in his possession but ultimately did not administer a breath test on the accused.

Both the accused and passenger were removed from the car and cautioned. A search was conducted of the car and police they found 88 capsules of MDMA weighing a total of 8.38g, and 18 clear resealable bags containing 12.41 grams of cocaine and $13,420 cash.

Held: Norrish QC DCJ identified four features that this case had in common with *Buddee* and which suggested that the police were using the RBT as a ruse:

1. a coordinated approach of all the officers exiting the police motor vehicle
2. the coordinated interrogation of the driver and the passenger
3. the requirement of the passenger to identify himself and
4. the requirement that the driver and the passenger remain whilst their identities and background checks were carried out

At [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.

See also: ***R v Kovac*** **[2021] NSWDC 85** especially re: general conversation vs investigative questioning.

Bottom line

If you can establish, through cross-examination that police used the RBT power as a ruse to gather evidence against your client, or even to turn a mere hunch into a more reasonable suspicion, then you will have established that the evidence was illegally obtained.

5. Consent

Consent is an important issue that is often overlooked by defence lawyers in stop and search cases.

If your client consented to the search, police do not have to prove they had a reasonable suspicion. Even if police had no reasonable grounds to conduct a search at the time, a search is not illegal if the defendant consented: *DPP v Leonard* [2001] NSWSC 797 at [46]

If the police assert that the accused consent to the search, the onus is the defence to disprove this on the balance of probabilities.

There are two ways a defendant may counter the assertion:

(1) argue there was no *actual* consent or
(2) argue there was no *valid* consent.

5.2 No Actual Consent

This involves proving that the police were untruthful or mistaken.

Contrasting evidence with contemporaneous notes

One method is request disclosure of – or subpoena – the COPS entries, police notebooks and any contemporaneous notes made at the time. It can also be useful to cross-check the police officer's witness statement or evidence in chief with the police facts.

COPS entries, notebook entries and the police facts are usually made closer to the time. If there is no record of consent in these documents, you may be able to ask the court to draw an inference that the police officer was mistaken or added it later to thwart any stop and search argument. You will have to put this to the officer in cross-examination, a suggestion they will emphatically deny. Merely pointing to inconsistencies in the police officer's evidence will not necessarily prove your case.

Challenging memory

It can be more effective to suggest that the police officer not clearly remember the events of that day and therefore, was likely mistaken in their witness statement or evidence.

An example of that type of cross-examination would go something like this:

Q. You've been a highway patrol officer for 5 years.

A. Yes.

Q. You stop dozens of cars every day.

A. Yes, hundreds sometimes.

Q. The traffic stop we are talking about occurred on 10 June last year.

A. Yes.

Q. You wrote your statement in December last year.

A. Yes.

Q. You would have conducted hundreds of RBTs between this incident and when you wrote your statement.

A. Yes.

Q. When you sat down to write your statement, you refreshed your memory from the COPS entry (or police notebook entry or fact sheet).

A. Yes.

Q. That was because before you looked at the COPS entry you didn't have a clear memory of that particular vehicle stop.

A. That's right.

Q. The COPs entry was written on the day.

A. Yes.

Q. The COPS entry records important information gathered by police about an incident.

A. Yes.

Q. If someone consented to a search that would be important information.

A. Yes.

Q. The COPS entry from 10 June 2020 doesn't contain any record of the accused consenting to a search at that time.

A. No.

Q. It's possible that you might be mistaken in your evidence (or statement) about the accused consenting to the search.

A. Yes, what you are suggesting makes perfect sense to me. I could indeed be mistaken about the accused consenting to the search.

[You will never an answer like this, but hopefully by laying the groundwork in in your cross-examination, the Court will be more likely to accept, on balance, that consent was not given.]

Calling your client

Another option is to call your client. If the legality of the search is the only issue, there is little to be lost by doing so – assuming you are at least half-way confident that your client will be able to withstand the prosecutor's cross-examination.

For example, the accused gave evidence in *Large*, and whilst the judge found her evidence was "not satisfactory in some respects" aspect of her evidence, such as not having seen the police car before it pulled her over and her memory of parts of the conversation with SC Ward were taken into account and assisted the defence case.

5.2 No Valid Consent

Any consent must be voluntary. Whether consent is voluntary is judged by looking at the state of mind of the accused, not the intention of the searching officer. There is no single controlling factor which determines whether consent was validly given.

***DPP v Leonard* [2001] NSWSC 797**

Facts: Mr Leonard was stopped in his car by police and subjected to a search after the officer smelled cannabis. In the first instance, the magistrate held that because he was not aware of his legal right to refuse, consent had not been validly given.

Held: [51] Whether a person requested to consent to a procedure which police wish to carry out, is aware of his or her right to refuse consent, can be a factor in determining whether an apparent consent should be regarded as a valid consent. However, in my opinion, in elevating this factor to the status of a critical or controlling factor, such that, if it is not present, it will be "very difficult" for an apparent consent to a procedure to amount to a valid consent, the Magistrate was committing an error of law.

***R v Orm* [2011] NSWDC 26**

Facts: Before searching his car, the police officer said to the accused, "When I search your vehicle, I won't find anything illegal in there will I, like drugs?"
The accused answered, "No."
The officer then said, "So can I search your vehicle?"
The accused answered, "Yeah."

Held: Per Lakatos DCJ from [35]: As the authorities to which I have been referred indicate, the critical question in relation to whether the accused consented to the search is not the intention of the officer who conducts the search, it is whether the will of the accused has been overborne, that is, that he was caused to consent to the search by a direction or command or by any representation or trick or improper behaviour. ...

[38] In particular, when a police officer carrying with him the authority of his office tells an accused person in circumstances where he has detained him that he, in effect, proposes to search the vehicle involved and inquires as to the presence of drugs, the conclusion that the consent was obtained by a direction or command would be difficult to avoid.

[39] The statement of the accused, however, appears to disclose that he interpreted the officer's statement as a request rather than a direction. Absent evidence from him on the voir dire, that is the best evidence of his thinking. It is, in my view, not evidence that his will was overborne or that his consent was extracted by improper means.

These remarks provide a useful guide for constructing an argument that genuine consent was not given. Para [39] also suggests that calling the defendant on the voir dire to give evidence on this may be something that could tip the balance, especially where there is some suggestion on the evidence that the accused's will was overborne.

6. Use of District Court Decisions

Whilst it is essential to demonstrate your knowledge of the higher court authorities such as *Rondo*, some of the most recent in-depth decisions on stop and search cases come from the District Court. District Court decisions are not strictly binding on the Local Court. However, their reasoning is instructive.

If you are running a stop and search case in the Local Court and the magistrate challenges you on the use of District Court decisions, you should refer them to the following case:

***Valentine v Eid* (1992) 27 NSWLR 615**

Facts: This was a case involving the cancellation of a drivers licence, the facts of which are not especially important.

Held: In this case, Grove J explores the (predominantly historical) reasons why District Court decisions are not binding on the Local Court, but states at 622:

> I emphasise that I am not suggesting that a Local Court may not be considerably advantaged by reference to a relevant judgment of the District Court and I would expect that, except on rare occasions, such judgment would be compellingly persuasive and I hold no more than that a binding precedent has not been created. I refer to Lord Goddard's statement of principle in *Police Authority for Huddersfield* that a judge of first instance of the High Court will follow a decision of another judge of first instance, unless he is convinced that that judgment is wrong, as a matter of judicial comity — a principle now extended to apply to divisional courts in Britain: *R v Greater Manchester Coroner; Ex Parte Tal* [1985] QB 67 at 81. As comity is required between courts of equal rank, co-ordinate decision must also exist between the Local Court and District Court and a magistrate should not depart from following any decision of the District Court unless after earnest consideration and for good reason he or she became convinced that the decision was wrong.

So, whilst the Local Court is not bound by decisions of the District Court, 'a magistrate should not depart from following any decision of the District Court unless after earnest consideration and for good reason he or she became convinced that the decision was wrong.' It would be a bold magistrate that would be prepared to rule against the reasoning a District Court decision in light of this statement.

It is useful to note that in the more recent District Court decisions of *Large* and *Kovac*, Priestley SC DCJ and Norrish QC DCJ make detailed reference to *Buddee* both in relation to the legality of the stop and search, and the s 138 balancing exercise.

PART 2 – EXCLUDING THE EVIDENCE

7. Discretionary Exclusion under s 138

Once you have done the hard work of persuading the Court that the stop and search was illegal, your job is by no means over. Arguably, persuading the Court to exclude the evidence is even harder.

7.1 The Legislation

Section 138 - Evidence Act 1995

(1) Evidence that was obtained:
  (a) improperly or in contravention of an Australian law; or
  (b) in consequence of an impropriety or of a contravention of an Australian law;

is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

...

(3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account:
  (a) the probative value of the evidence; and
  (b) the importance of the evidence in the proceeding; and
  (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and
  (d) the gravity of the impropriety or contravention; and
  (e) whether the impropriety or contravention was deliberate or reckless; and
  (f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and
  (g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and
  (h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

7.2 The Standard Approach

The standard approach defence lawyers take to s 138 arguments in stop and search cases is to look at each of the matters outlined in s 138 (3)(a)-(h), see if they apply to the present case and make an earnest plea about how serious the police's breach of LEPRA, how insignificant the crime is, and how unfair it would be to use the evidence against the defendant.

The trouble with this approach is that many magistrates consider that no crime is insignificant. Also, it gives the appearance of asking the magistrate to 'overlook' their client's crime because the police officer's crime is greater (when often it isn't).

Finally, s 138 is not at all concerned with fairness:

R v Em **[2003] NSWCCA 374** per Howie J (with whom Ipp JA and Hulme J agreed)

> [74] Section 138 is not, in its terms at least, concerned with the court ensuring a fair trial for the accused. Certainly that is not a paramount consideration when exercising the discretion. The discretion exercised under s 138(1) seeks to balance two competing public interests, neither of which directly involve securing a fair trial for the accused.

7.3 The Better "*Buddee*" Approach

The better approach is to recognise that this is a contest between two competing public interests: that of detecting and preventing crime versus that of ensuring that all people have the benefit of the freedoms and protections granted by the operation of a democratic legal system in a free society such as freedom from arbitrary arrest, detention or search.

This frames the defence lawyer as a human rights advocate and reminds the court of its role in protecting the liberties of the entire community.

A good way to develop your submissions is to read the stop and search cases where evidence has been excluded and paraphrase or quote from the learned judges' reasoning to the extent that their remarks are relevant to your case.

There is no better case for this than *R v Buddee*.

Even when the use of the RBT is not in issue, it is still a fantastic guide to making s 138 arguments concerning the misuse of police powers.

***R v Buddee* [2016] NSWDC 422**

From [115] onwards, McClintock DCJ addresses each subsection of s 138(3) and how it applies to the case:

[115] In considering whether the Crown has discharged the onus I may take into account the following, that is the matters in [s 138] subsection (3):

(a) **The probative value of the evidence.** There is no doubt that the evidence of the finding of the drugs has high probative value. Ms Beckett indicated that there were aspects of the conversation which were denied and that she would rely upon the so-called "Filippetti defence". (See *Filippetti v R* (1984) 13 A Crim R 335). Whilst there are indications in the ERISP that such a defence might be open, that is a factual matter at trial and in my view does not diminish the probative value at least of the existence of the drugs.

(b) **The importance of the evidence in the proceedings**. It was acknowledged that the evidence was fundamental to the proceedings.

(c) **The nature of the relevant offence, cause of action or defence and the nature of the subjective matter of the proceeding**. All cases of drug possession are serious and involve a degree of criminality. In this case the Crown relies upon the deeming provision of s 29 of the *Drug Misuse and Trafficking Act* 1985 and the circumstances of the finding and associated items, as I have indicated, to base the allegation of supply. The amount is a relatively small amount. It is barely above the amount which would bring it into this court. It is just over the deemed supply amount. The amount itself is not inconsistent with personal use all other things being equal, although the existence of the bags points away from this conclusion. If it were proved, would be at the bottom range of seriousness for such an offence.

(d) **The gravity of the impropriety or contravention**. The gravity of the impropriety and contravention was significant. I adopt the words her Honour Justice Penfold in the *Application of Huy Huu Lee* [2009] ACTSC 98:

"[68] This is not a case in which the police entrapped a person, or participated in the commission of an offence themselves. In one sense the impropriety in this case may be less serious than the kind of impropriety that involves police engaging in, or provoking,

criminal activity. In another sense, however, a breach of clear rules that have been laid down by the legislature to permit certain kinds of police investigation in certain circumstances, while prohibiting certain other kinds of investigative activity in order to protect the civil liberties of members of the community, may be more objectionable. This is because it undermines the protections that benefit all members of society and particularly those innocent members who may find themselves wrongly suspected of criminal activity. Certainly it does not seem to me that Miles CJ's comments require me to accept as tolerable police activity that can only be justified by a warrant that turns out to have been seriously defective or that seems to be directly inconsistent with specific provisions of the Crimes Act 1900 enacted to protect innocent members of society."

(e) **Whether the impropriety or contravention was deliberate or reckless**. I have little doubt that the conduct of Senior Constable Embleton was as a part of what appears to be a directed activity that went under the name of "proactive policing". The various descriptions of the process of "proactive policing" were highly suggestive of the proposition that without any reasonable suspicion people were being pulled over and investigated for matters unrelated to road safety. The reconstruction purporting to justify the stop and detain again is suggestive of a conscious attempt to justify, on a lawful basis, what was known by police to have been improperly undertaken in the first place. However characterised, the conduct demonstrated a disregard for the proper use of police powers and a disturbing assumption that police could pull over anyone on a whim.

(f) **Whether the impropriety or contravention was contrary or inconsistent with the right of a person under the International Covenant on Civil and Political Rights 1980**. At least three articles cover the rights involved here, none of which I will read: article 9; article 12; and article 17. The conduct of the police was contrary to these provisions and as such fundamental rights, as I have already indicated, were infringed.

(g) **Whether any other proceeding has been taken or is likely to be taken**. There is no evidence of any other proceeding being taken against the police.

(h) **The difficulty of obtaining the evidence without impropriety or contravention of an Australian law**. There is no doubt that a lot of crime could be proactively prevented simply by providing the police with the power to interfere with every citizen on every occasion in every place, to allow them to arbitrarily stop and search anyone on a hunch or a suspicion. That is not a power they now have and such a power is antithetical to any free society.

[116] As noted, I need to assess the matters relating to undesirability and desirability and they are not limited to 138(3). In addition I also take into account that the officers acted outside their lawful authority. I can take into account disciplining police for illegality and impropriety, deterring future illegality, protecting individual rights and encouraging other methods of police investigation. Certainly in relation to the latter three I take those matters into account in this case.

[117] I also take into account and note that the court should refrain from being seen to unjustifiably condone police misconduct...

The reasoning here speaks for itself. It is particularly relevant to a society in which police are becoming more "proactive" about the measures they use to detect crime and less mindful of the limits placed on them.

In *Large* Norrish QC DCJ points out that a police culture of attempting to subvert clear rules for investigation laid down by parliament can in fact be more objectionable than police actually engaging in or provoking criminal activity.

***R v Large* [2019] NSWDC 627** at [121]:

> **(iv) The gravity of the impropriety or contravention**
>
> The very uncomfortable impression made upon the court from the evidence of the two senior police officers, the manner in which they conducted themselves both in the giving of evidence and on this evening, as well as the 'revealing' understanding of the process in the evidence of the Probationary Constable, was that this random stopping of vehicles under the pretence of administering a random breath test, taking the opportunity to ask a series of questions for the purposes of developing a suspicion that might justify a search that was not permitted at law, was a 'modus operandi' regularly practised although not admitted. It was clear from SC Ward's evidence that he had a "patter" which he euphemistically described as keeping the conversations going before administering a breath test, light-hearted et cetera. The police officers clearly understood the line that was required to be crossed before a search could be justified under the legislative powers available to police. To paraphrase the words of Justice Penfold in *The Application of HH Lee* [2009] AC TSC 98, an attempt to avert clear rules as understood by the police lay down by the legislature that permit particular kinds of police investigation in certain circumstances, while prohibiting certain other kinds of investigative activity in order to protect the civil rights of members of the community may be more objectionable than an impropriety that involves police engaging in or provoking criminal activity.

If you are looking for some words to persuade a judge or magistrate who has who has found an impropriety but is struggling with the discretion to exclude evidence, Norrish DCJ's reasoning in *Large* at [122] may be helpful:

"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."

7.3.1 Whether deliberate or reckless

Section 138(e) should not be read as saying "deliberate' = bad, "reckless" = not as bad.

If the court finds that the breach was either deliberate or reckless, that is a matter which would weigh in favour of excluding the evidence: Cf *R v Orm* at [111].

What is recklessness in the context of an illegal search?

***R v Sibraa* [2012] NSWCCA 19**

Per Whealy JA at [1], Rs Hulme J at [7], Hidden J at [30]:

> The approach taken by James J in *DPP v Leonard* [2001] 53 NSWLR 227 at [103] was that a finding of reckless would require a finding that the police officer failed to give any thought to

whether there was a risk of a search being illegal in circumstances where if any thought had been given it would have been obvious that there was such a risk.

***DPP v Nicholls* [2001] NSWSC 523**

In terms of police powers more broadly, Adams J in this case at [23] that:

> "[R]eckless" within the meaning of s 138(3)(e) of the *Evidence Act* requires a serious disregard of the relevant procedures amounting to a deliberate undertaking of the risk that the rights of a suspect will be substantially prejudiced.

Reckless or deliberate conduct can be made out where police follow a 'modus operandi' of taking shortcuts to circumvent limits on their investigative powers.

***R v Large* [2019] NSWDC 627** at [121]:

(v) Whether it was deliberate or reckless

The conduct was at least reckless but in the context of being a modus operandi it was deliberate, for the purposes of detaining improperly for questioning a person to develop the basis for claiming a reasonable suspicion for the purposes of powers the were understood to be available under the relevant legislation. The false assertion of SC Aston that he saw a breath test administered has the hallmark of an ex post facto justification for conduct that was otherwise illegal or improper in the minds of the officers.

7.3.2 Whether illegal or improper

Courts will sometimes draw a distinction as to whether a breach was improper or illegal. There is nothing wrong with doing this. However, advocates should not concede that just because a breach was improper, as opposed to illegal that it is necessarily less serious. It will depend on the circumstances of the case.

It is easy to imagine a breach of the law (speeding, using a mobile phone while driving) that is less serious than improper conduct (bullying, not keeping notes of important conversations, being heavy-handed with the use of force).

Lawyers should always keep in mind that profound abuses of power can (and more often than not do) occur within the bounds of the law.

7.3.3 Difficulty of obtaining the evidence without impropriety

Section 138(3)(h) allows the court to take into account 'the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.' There has been some recent debate about whether, in a situation where the evidence would have been impossible to obtain were it not for the contravention, this factor should weigh in favour of admission of the evidence.

This was recently addressed by the High Court in *Kadir v The Queen* [2020] HCA 1. The judges considered the policy reasons for s 138(3)(h) and concluded at [20] that:

> The significance of factor (h) to the balancing of the competing public interests under s 138(1) will vary depending upon the circumstances. In a case in which action is taken in circumstances of urgency in order to preserve evidence from loss or destruction, it is possible that factor (h) would weigh in favour of admission, notwithstanding that the action involved deliberate impropriety or illegality . Putting such a case to one side, where the impropriety or illegality involved in obtaining the evidence is deliberate or reckless (factor (e)), proof that it would have been difficult to obtain the evidence lawfully will ordinarily weigh against admission . By contrast, where the impropriety or illegality was neither deliberate nor reckless, the difficulty of obtaining the evidence lawfully is likely to be a neutral consideration. The assumption on which the parties and the Courts below proceeded, that proof that it would have been difficult to lawfully obtain the surveillance evidence was a factor which weighed in favour of admitting evidence obtained in deliberate defiance of the law, inverts the policy of the exclusion for which s 138 provides.

In other words, it depends on the circumstances of the case, but this factor would not ordinarily favour the admission of the prosecution evidence because it is contrary to the policy considerations behind s 138. This stands to reason, because police officers should follow the law, and any discretion that rewards them for breaking it (especially where the breach was deliberate or reckless) would be contrary to the purpose of the criminal justice system.

8. Always cross-examine with one eye on s 138

The more serious the offence, the harder it will be to persuade the court to exclude the evidence. In fact the experience of this author is that in most cases it is not enough to demonstrate a 'mere' breach of the provisions in s 21 or 38 of LEPRA.

Your argument will be much stronger if you can demonstrate that the police acted in high-handed manner towards a vulnerable person or that their conduct has real potential to infringe on the liberties of 'ordinary' citizens. (Think about who your audience is.)

Police officers can make very telling admissions under cross-examination, sometimes without even realising they are doing so.

Here is an example from one of this author's cases:

Q. You told the Court in your evidence that it was suspicious that someone was driving around at 3.20am at night in Wauchope?

A. Yes.

Q. And that 3.20am is an unusual time to be out, it's a common time when people are active and by "active", you mean active in relation to drug related offences?

A. Yes, a number of different type of offences, yes.

Q. You said that's because there's a changeover of police around that time or something like that?

A. That's what I believe it to be.

Q. So when you saw this car drive past on High Street, Wauchope, at 3.20am, that aroused your suspicions, didn't it?

A. No. It was a car - there's not many cars around at that time of morning. Every car that drove past was getting stopped for a breath test. ...

Q. But you've said it's unusual for a car, any car, to be out driving at that time?

A. Without a valid excuse.

Q. An excuse, so you need an excuse to be out at 3.20am?

A. Well, quite a lot of cars that we would stop at that time as well are maybe workers heading into work. There's a quarry out there. Quite often we stop people that were heading to the quarry.

Q. So those drivers provide valid excuses, do they?

A. Well, they didn't provide a number of intelligence reports related to drug relation drug related activities and passed a breath test, so -

Q. So when you use this language of "without an excuse", I take it, then, that your view is that anyone that's out at that time, but is not going to or from work, must be up to something suspicious?

A. No, not necessarily, but when we speak to somebody and determine that they're not heading to work, they don't have anywhere they're particularly heading, they're just going for a drive, then it starts to raise something is suspicions.

In this example, it appears that the police officer simply did not seem to think it was unreasonable for police in a free democratic society to pull over anyone who was out driving in the early hours of the morning, subject them to a breath test and question them to see if they had a 'valid excuse' to be out at that time.

The magistrate ruled that:

(1) The breach was reckless.

(2) There was a serious disregard of relevant procedures.

(3) Article 9.1 of the *International Covenant on Civil and Political Rights* – recognition of right to liberty and security had been breached.

The objection under s 138 was upheld and the charge of 'deemed supply' was dismissed.

9. Conclusion

Stop and search cases can be difficult, but they are some of the most rewarding cases to argue. They highlight the defence lawyer's role as an advocate for the rights of all members of the community.

Law enforcement offices play an important role in detecting and preventing crime, but where they exceed their prescribed powers, it is the role of the defence lawyer to bring them to account. One of the most effective ways to do this to ensure that the fruits of their labour – the improperly obtained evidence and charges – are thrown out.

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APPENDIX – PUTTING IT INTO PRACTICE

A. Further reading

For a more comprehensive discussion of the voir dire and s 138, see Mark Davies, 'The Voir Dire, Section 138 and Roadside ERISP's' (March 2014).

B. Preparation Pointers

When preparing your next stop and search case, think carefully about how to frame your argument. It is useful to ask the following questions:

- Was the stop or search illegal, or both?
- Who ultimately exercised the power to stop/search the vehicle/person?
- At what point during the encounter was the power exercised?
    - It will usually be in the defence's interests to establish that the power was exercised early on in the encounter. This is because the amount of evidence supporting the police officer's reasonable suspicion generally increases as the encounter goes on.
- Was the defendant detained at any point?
    - If an officer concedes that the accused was not free to leave at a certain point, that is a sure sign that the power to stop and/or detain that person had been exercised.
- What did the police officer base his/her reasonable suspicion on?
    - In cross-examination, it is important to 'shut the gates' by establishing that the officer in question based her reasonable suspicion on A, B and C and *nothing else.*
- Do I need to request disclosure?
    - At what point will I request disclosure?
- Did Police breach or misuse any other powers?
    - For example, the RBT provisions, the requirement to caution the suspect pursuant to s 139 of the *Evidence Act*, requirements under s 202 of LEPRA.
    - If so, these things may be used to bolster your s 138 argument.
- Is consent likely to be an issue?
- Was the impropriety the cause of obtaining the evidence?

C. On the Day – Format of a stop and search hearing

1. Pre-trial issues are flagged

Before the hearing starts, you indicate there is an objection to the evidence and the basis

- E.g. "The defence objects to the evidence of the drugs seized from the defendant's car under s 138 of the Evidence Act on the basis that the stop/search was illegal."
- If the legality of the stop and search is the only issue, it is not uncommon for the magistrate to invite the parties to call all the evidence in the case on the voir dire, in which case step 7 usually does not apply.

2. Parties call witnesses/evidence on the voir dire

(a) The prosecution will call their witnesses to give evidence on the voir dire. You will have the opportunity to cross-examine them.

(b) You may call your own witnesses (if any) to give evidence on the voir dire. The prosecution will have the opportunity to cross-examine them.

3. Submissions are made on the voir dire

(a) You make your submissions as to:

(i) why the stop/search was illegal and

(ii) why the magistrate should exercise their discretion to exclude the evidence under s 138.

- Hand up copies of any relevant cases

(b) The prosecution makes their submissions in response.

5. Judgment is given on the voir dire

6. Evidence from the voir dire is either admitted or not admitted

(a) If the evidence is admitted:

(i) there may be no possibility of defending the charge, in which case your client should enter a plea of guilty; or

(ii) there may be another defence – e.g. a *Filippetti* defence – in which case the hearing continues.

(b) If the evidence is not admitted:

(i) there may be no evidence left capable of proving the charge, in which case the charge will usually be withdrawn or dismissed (*no prima case*); or

(ii) if the prosecution think they can prove the charge another way, or there are other charges that aren't affected by the exclusion of the evidence, the hearing continues.

7. Hearing continues

(a) the prosecution (and then defence) may call other evidence in the substantive hearing if they wish to.

(b) the prosecution and defence will make closing submissions.

8. Judgment is given on the hearing

The court will find your client guilty or not guilty. If your client is found guilty the matter will proceed to sentence as normal.