Rigby v Mulhall [2019] NTSC 70

PARTIES:	RIGBY, Kerry Leanne v MULHALL, Shane Robert
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from LOCAL COURT exercising Territory jurisdiction
FILE NO:	LCA 26 of 2019 (21851621)
DELIVERED:	4 September 2019
HEARING DATE:	2 September 2019
JUDGMENT OF:	Riley AJ

CATCHWORDS:

CRIMINAL LAW – Prosecution appeal from Local Court – summary proceedings – s 120C of the *Police Administration Act 1978* (NT) permits search of vehicle without warrant where Police member has reasonable grounds to suspect that a dangerous drug may be found – Police search located prohibited weapon in vehicle – Local Court held that Police acted unlawfully as information relied upon by Police to raise suspicion was objectively insufficient to support suspicion – test "reasonably suspects" – evidence of prohibited search unlawful and excluded – no finding of error of law – evidence obtained was unlawful – appeal dismissed.

Police Administration Act 1978 (NT) s 120C
Weapons Control Act 2001 (NT)

Nicholas v Cann [2018] NTSC 83, *George v Rockett* (1990) 170 CLR 104, *Parker v Comptroller–General of Customs* (2009) 83 ALJR 494, *Queensland Bacon Pty Ltd v Rees* (1996) 115 CLR 266, *Williams v Keelty* (2011) 111 FCR175, referred to.

REPRESENTATION:

Counsel:

Appellant:	D Morters SC
Respondent:	T Berkley

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
Respondent:	Darwin Family Law

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Rigby v Mulhall [2019] NTSC 70
LCA 26 of 2019 (21851621)

BETWEEN:

Kerry Leanne Rigby

Appellant

AND:

Shane Robert Mulhall

Respondent

CORAM: RILEY AJ

REASONS FOR JUDGMENT

(Delivered 4 September 2019)

[1] On 16 May 2019, following a hearing in the Darwin Local Court, the respondent was found not guilty in relation to a charge that he had possessed a prohibited weapon, namely knuckle dusters, without an exemption or approval under the *Weapons Control Act 2001* (NT). The charge was dismissed and he was discharged after he successfully argued that he had no case to answer.

[2] The appellant appeals on the sole basis that the Local Court Judge erred in determining that the search of the respondent's motor vehicle, which led to the location of the weapon in the vehicle, was unlawful.

[3] At the Local Court hearing, the parties agreed upon the relevant facts and the trial Judge was informed that the "main issue" between the parties was the lawfulness of the search of the respondent's vehicle which was said to have been carried out pursuant to s 120C of the *Police Administration Act 1978* (NT). That section permits a member of the Police Force, without warrant, to search a vehicle if "the member has reasonable grounds to suspect that a dangerous drug, precursor or drug manufacturing equipment may be found on or in it".

[4] The only evidence led at the hearing was of the two arresting police officers, and was limited to the basis upon which they asserted they had reasonable grounds to hold the suspicion required for a lawful search. The evidence was to the effect that they had been patrolling on 8 December 2018 when, at around 3am, they saw a vehicle leaving a service station. They conducted a registration check and learned that it was registered in the name of the respondent. The vehicle was pulled over and the occupants were found to be the respondent, his partner (who was dressed in her pyjamas) and their child. A roadside breath test was conducted on the respondent which produced a negative result.

[5] Officer Curtis gave evidence that "recent information that we had seen on the information system that (the respondent) was picking up a supply of drugs within the Darwin area and Katherine" had informed their decision to conduct a search of the vehicle to see if there were any drugs within the vehicle. The officer stated that the following factors contributed to his

suspicion: the information regarding the respondent on the database; it was about 3 o'clock in the morning; the vehicle had just left a service station; and the respondent was driving around at that time even though he had daytime employment.

[6] In cross-examination Officer Curtis said his "understanding" was that the information on the database or "information system" came from a "human source" provided to a police officer which was then placed in the database. He understood the information was "vetted". It was there for police to view.

[7] Officer Motter-Barnard gave evidence that "the human source information" upon which he relied included that the respondent "did drug runs at night" and was supplying drugs in Katherine, Palmerston and the rural areas. The officer was aware that the respondent worked during the day and thought it was "an odd hour of the night to be out and about". He added that there was "extensive Intel holdings on police databases regarding (the respondent) as well".

[8] Officer Motter-Barnard confirmed that, when the vehicle was pulled over for the random breath test, the respondent had his "baby, his wife and his dog in the car" and that the respondent's wife was in her pyjamas. The officer made no enquiry as to what the family was doing out at that time of night and he did not speak to the wife. He was not asked what, if any, impact those matters had upon his suspicions.

[9] In *ex tempore* reasons for decision the Local Court Judge summarised the evidence and then observed:

> There need only be a reasonable suspicion established, very, very different to a fact. But that reasonable suspicion must be founded upon a fact or facts. And at the heart of the suspicion was I think I have characterised as unspecified, unverified police raw intelligence coming up on a screen.
>
> We do not know who said it. We do not know the circumstances in which it was said and we do not know if it was corroborated. And the police it seems when they received it did not know either. They were unable to corroborate, assess or give weight to it. Such raw intelligence of a non-specific nature cannot be considered a fact upon which a reasonable suspicion can be founded.
>
> And certainly taking that fact from the mix the other matters relied upon to found the reasonable suspicion are insufficient. A man driving a car at night, 3:10 in the morning in a crime hotspot, that a man with a day job, that is insufficient to found a reasonable suspicion of involvement in drugs as stated under the *Police Administration Act*.
>
> Therefore, taking the prosecution case at its highest there is no evidence upon which a reasonable suspicion to search without warrant can be made out and the defendant must be found not guilty on the basis of a no case application and it is dismissed.

The submissions

[10] It was submitted on behalf of the appellant that the Local Court Judge erred in several respects. The first of those was that his Honour failed to adopt the correct test in regard to s 120C of the Act. It was submitted the test applied was more akin to that of a reasonable belief on the part of the officers rather than a reasonable suspicion as required by the statutory provision.

[11] The test to be applied under s 120C of the Act was discussed by Barr J in *Nicholas v Cann*[1] where his Honour made reference to, and applied, the High Court decision in *George v Rockett*[2]. As observed by the High Court in that case, Barr J noted that "suspicion" and "belief" are different states of mind. His Honour said that the insertion of the word "reasonably" into the statutory provision required that there be objectively reasonable grounds for the suspicion. His Honour quoted the following passage from *George v Rockett*[3]:

> When a statute prescribes that there must be "reasonable grounds" for a state of mind – including suspicion and belief – it requires the existence of facts which are sufficient to induce that state of mind in a reasonable person.

[12] As to the meaning of the word "suspicion" his Honour[4] adopted the following observations of the High Court:[5]

> Suspicion, as Lord Devlin said in *Hussein v Chong Fook Kam* … "in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove'". The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown.

[13] In *George v Rockett* the High Court referred, with approval, to a statement in *Queensland Bacon Pty Ltd v Rees*[6] that:

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1 [2018] NTSC 83.
2 (1990) 170 CLR 104.
3 (1990) 170 CLR 104 at 112.
4 [2018] NTSC 83 at [7].
5 *George v Rockett* (1990) 170 CLR 104 at 115.

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

[14] The High Court also observed in relation to the expression "reasonable belief" that:[7]

> Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture.

Accepting that "belief" and "suspicion" are different states of mind with suspicion being the lesser or lower level of state of mind, reasonable grounds for suspicion may also leave something to "surmise or conjecture".[8]

[15] The issue to be determined in this case was whether, on the facts as found, the officers reasonably suspected that a dangerous drug would be found in the vehicle. The test was whether there were objectively reasonable grounds for the suspicion which the Local Court Judge accepted the officers held. Was there something which in all the circumstances "would create in the mind of a reasonable person an actual apprehension" of the presence of such drugs?[9]

[16] Initially, the onus falls on the party seeking to have the evidence excluded to demonstrate, on the balance of probabilities, that the evidence was

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6 (1996) 115 CLR 266 at 303 per Kitto J.
7 (1990) 170 CLR 104 at 117.
8 See *Nicholas v Cann* [2018] NTSC 83 at [14].
9 *Williams v Keelty* (2011) 111 FCR175.

unlawfully obtained. The burden then falls upon the party seeking the admission of the evidence to persuade the court that it should be admitted. It is a two-stage process.[10]

[17] In this case there was no dispute in the Local Court that the officers held the relevant suspicion. The Judge expressly accepted the evidence of the officers as "truthful police doing their job". The issue to be determined was whether they *reasonably* suspected that a dangerous drug may be found in the vehicle.

[18] The appellant submitted that there was a sound basis for the officers to hold a reasonable suspicion that a dangerous drug may be found in the vehicle. It was submitted that the Local Court Judge erred in his consideration of the information contained in the police intelligence database. In doing so, it was argued that his Honour elevated the objective circumstances required for a reasonable suspicion to that which would be required to found a belief.

[19] The appellant pointed out that the "understanding" of Officer Curtis was that the information recorded on the police intelligence database was initially provided by "a human source" to a police officer and that information was then "vetted" by the manager of the intelligence database. There was no evidence as to what was meant by the term "vetted". There was nothing to suggest the quality of this information rose above mere rumour. There was nothing to alleviate any concern that the information may have been

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10 *Parker v Comptroller–General of Customs* (2009) 83 ALJR 494 at [28].

maliciously provided by an unidentified source. There was no information regarding the "human source" and whether that source was reliable, unreliable or of unassessed reliability. Notwithstanding that lack of evidence and lack of information it was argued that the vetting process provided a "degree of legitimisation" to the information and was a relevant factor for consideration in determining whether the suspicion held by the officers was reasonably based. I do not see how that vague description of the nature of the database could add strength to the legitimacy of the information contained within it.

Discussion

[20] The respondent sought to exclude the evidence of the search said to have been conducted pursuant to s 120C of the *Police Administration Act*. The initial onus rested upon the respondent to establish, on the balance of probabilities, that the police acted unlawfully.

[21] In support of the appellant's contention that the officers had reasonable grounds to suspect that a dangerous drug may be found in the vehicle were the following identified factors:

a) the vehicle was being driven by the respondent who was the subject of information contained on the police intelligence database to the effect that he was involved in transporting drugs between Palmerston and Katherine and the rural areas and that those runs occurred at night;

b) this information from the intelligence database was vetted by the manager of that database lending it a higher degree of legitimisation from the point of view of those referring to the database;

c) the time of the events was shortly after 3am and, to the knowledge of the officers, the respondent had a daytime job; and

d) the vehicle was observed to be leaving a service (petrol) station.

[22] It was argued that, when considered objectively, those factors provided a basis for the members of the Police Force to have held a reasonable suspicion that the respondent was leaving the service station, having refuelled his vehicle, and, given the time of night and his daytime employment, being about to embark upon a journey involving the transportation of drugs.

[23] It was submitted by the appellant that the Local Court Judge focused his decision upon the "unverified intelligence" without paying due regard to the quality of that intelligence and the surrounding circumstances in which the police officers found the respondent.

[24] I see no error on the part of the learned Local Court Judge. The evidence demonstrated that the information upon which the officers relied to form their suspicions centred largely upon what they had learned from the police database. As discussed above, without further evidence the quality of that information was subject to serious concern. In my opinion it was of

insufficient weight to support a reasonable suspicion as required by the section. The other matters referred to at [21] above, considered alone or in conjunction with the information on the database, do not provide a basis for the necessary reasonable grounds to suspect that a dangerous drug may be found in the vehicle. In addition to the dearth of information upon which to base a reasonable suspicion, as addressed by his Honour, neither officer seemed to have taken into account the presence of the wife of the respondent, dressed in her pyjamas, and the presence of the baby. This information, which was known to them before undertaking the search, would seem to be inconsistent with a drug run taking place (if there was, in any event, evidence to support suspicion of such an undertaking) and more consistent with a late night trip to the service station for some domestic need.

[25] In my opinion, considering the whole of the evidence before the Local Court, there was no evidentiary basis upon which the officers could have relied to provide reasonable grounds to suspect that a dangerous drug was in the vehicle. The requirements of s 120C of the *Police Administration Act* were not met and the search was, therefore, unlawful.

[26] The appeal is dismissed.
