CITATION:	*Sally Nicholas v Kenneth Hopkins* [2020] NTLC 024
PARTIES:	Sally NICHOLAS
	v
	Kenneth HOPKINS
TITLE OF COURT:	Local Court
JURISDICTION:	Criminal
FILE NO:	21936721
DELIVERED ON:	11 November 2020 (Published 24.12.20)
DELIVERED AT:	Darwin
HEARING DATE(s):	7 September and 10 & 15 October 2020
DECISION OF:	Greg Macdonald

CATCHWORDS:

Search – Section 120C *Police Administration Act* – Exercise of police powers -Reasonable grounds to suspect – Exclusion of evidence – Sections 7D, 12 and 40 of *Misuse of Drugs Act* – Evidentiary presumption – Standard of proof – Burden of proof.

Legislation:

A**uthorities cited**:

REPRESENTATION:

Counsel:

Complainant:	Mr S Lipert
Defendant:	Ms H Sridhar

Solicitors:

Appellant:	DPP
Respondent:	NAAJA

Decision Category Classification:	B
Decision ID number:	024
Number of paragraphs:	34

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 21936721

BETWEEN:

Sally NICHOLAS

Complainant

AND:

Kenneth HOPKINS

Defendant

REASONS FOR JUDGMENT

(Delivered 11 November 2020 – published 24 December 2020)

Judge Macdonald

Background

1. On 11 November 2020 I gave summary ex tempore reasons for, firstly, why evidence obtained through a search conducted of a vehicle driven by Mr Kenneth Hopkins (the Defendant) under s120C of the *Police Administration Act (1978)* (NT) (PAA) should be excluded. Secondly, for finding the Defendant not guilty of the alleged contraventions of sections 7D(1) and 12(1) of the *Misuse of Drugs Act 1990* (MoD Act) in any event. I advised that the reasons would be provided in writing, these being those reasons.

2. Following an incident involving interaction with police around midnight on 4 September 2019 at Leanyer in the Northern Suburbs of Darwin, the Defendant was charged that he was in possession of a less than trafficable quantity of Schedule 1 dangerous drug and also a thing for the administration of a dangerous drug, contrary to s7D(1) and s12(1) of the MoD Act respectively[1]. It was agreed that the quantity of methamphetamine seized was 1.04 grams and that the implement was an ice pipe[2].

3. The circumstances of the Defendant being alleged to be in possession of the methamphetamine and implement were that shortly after midnight on 4 September 2019 a

[1] The allegation was first made by Notice to Appear issue and served on 4 September 2019, then subsequently substantiated by Information and Complaint dated 22 October 2019, as prescribed by s190 of the *Local Court (Criminal Procedure) Act*.
[2] Exhibit 1 – Certificate quantifying and identifying the drug was tendered without objection, and it was uncontentious that an ice pipe had been seized.

white Commodore registration CC74LQ (the vehicle), for which the Defendant was the driver, was seen and recognised by Sergeant Martin Ramage (the Officer) in Savannah Drive Leanyer. The vehicle was parked outside an unspecified residence, with the ignition engaged if not running. On the basis of matters given by the Officer in evidence, he decided to and then did search the vehicle in exercise of his powers under s120C of the PAA.

4. There was also a passenger in the vehicle, Mr Thomas Lui, who was similarly charged. However, at the commencement of the hearing on 7 September 2020 those charges were withdrawn, with the DPP then calling on Mr Lui to give evidence on oath. That call was ultimately not opposed by defence counsel.

5. On 7 September 2020 the Defendant pled not guilty to the 2 counts referred to, with the hearing proceeding that day and also on 10 and 15 September 2020.

Issues in dispute

6. The issues at hearing concerned, firstly, whether the Officer's search of the vehicle was conducted in compliance with s120C of the PAA, or otherwise. Second, if the search was found to not comply with s120C, should the evidence thereby obtained be excluded by exercise of discretion under s138 of the *Evidence (National Uniform Legislation) Act* (ENULA)? Thirdly, regardless of the first and second issues, whether the prosecution had proven beyond reasonable doubt that the Defendant was in possession of the methamphetamine and ice pipe.

The Legislation

7. Section 120C of the PAA provides;

> ***120C Searching without warrant***
>
> *A member of the Police Force may, without warrant, stop, detain and search the following:*
>
> *(a) an aircraft, ship, train or* ***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****;*
>
> *(b)* ***any person found*** *on or* ***in a****n aircraft, ship, train or* ***vehicle being searched*** *under paragraph (a);*
>
> *(c) a person in a public place if the member has reasonable grounds to suspect that the person has in his or her possession, or is in any way conveying, a dangerous drug, precursor or drug manufacturing equipment.* (***emphasis*** added)

8. The second issue in dispute seeking to invoke s138 of the ENULA relied upon the first contention being made out. Namely, that insufficient grounds existed to support the reasonable grounds to suspect on which s120C of the PAA is conditioned. The position of burden of proof in relation to s138 of ENULA is a two stage process. The party seeking to exclude evidence bears the onus of proving on the balance that it was obtained improperly or in contravention of an Australian law. If so, the burden then shifts to the party seeking to adduce the evidence to prove the facts relevant to the matters weighing in favour of admission, and also of persuading the court that the desirability of admitting the evidence outweighs the undesirability of admitting evidence obtained in the way in which it was obtained[3].

9. However, I also note that aspects surrounding whether sufficient basis or bases exist to support reasonable suspicion are not subject to usual forensic analysis based strictly on onus, burden of proof, and evidentiary principles. The Supreme Court noted in *The Queen v Gehan* that determination of the issue of reasonable grounds to suspect does not involve the application of ordinary rules of proof and evidence, and approved the Supreme Court of Victoria's statement in *Walsh v Loughnan* that the issue is "… *not to be resolved by reference to the rules of evidence or by the application of a test related to the balance of probabilities. In the process of investigation it is by no means uncommon for information to be obtained which would not be admissible in a court of law, or for well-founded suspicions and beliefs to be developed on the basis of a variety of pieces and types of information, including evidence of consistency or inconsistency of conduct, which could not be advanced as proof of the facts outlined or suspected to exist*".[4]

10. In practice the evidence relevant to determination of the issue of reasonable suspicion (so whether the evidence was improperly or unlawfully obtained) will often be a combination of prosecution and defence evidence, as in this case, but with the prosecution first being obliged to lead evidence from the officer concerned who held the relevant suspicion[5]. If the court's determination is that insufficient grounds existed to found a reasonable suspicion, consideration of the factors prescribed by s138(3) of the ENULA in the context and objects of the discretion is required, noting the shift in onus referred to.

11. Section 138 of ENULA provides relevantly;

> ***138 Exclusion of improperly or illegally obtained evidence***
>
> *(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*

[3] *Parker v Comptroller-General of Customs* (2009) 83 ALJR 494 at [28] per French CJ, applied in *R v GP* [2015] NTSC 53 at [41], *Nicholas v Cann* [2018] NTSC 83 at [41] and *The Queen v Gehan* [2019] NTSC 91 at [15].
[4] *Walsh v Loughnan* [1991] 2 VR 351 at 357, cited with approval in *The Queen v Gehan* [2019] NTSC 91 at [39].
[5] Although in relation to analogous South Australian provisions, *R v Nguyen* [2015] SASCFC 7 at [27] notes the evidential onus on the prosecution.

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.

The Evidence

12. The primary evidence led at hearing on 7 September 2020 in relation to the s120C search issue was from the Officer, which included;

(i) Prior to commencing shift the Officer had perused recent Information Reports (IRs) compiled or filed since his previous shift, the subject matter of which dealt primarily with drug supply in Darwin. However, he could not say whether there were any particular items which piqued his attention[6].

[6] Transcript 7 September 2020 page 9.9.

(ii) Particular premises at Baroalba Street Leanyer had been featuring in a number of IRs around that time, which premises he was proceeding to for the purpose of making observations of any apparent drug activity at that place[7].

(iii) While driving down Savannah Drive at approximately 12:40am en route to the Baroalba Street premises of interest, the Officer saw and recognised the vehicle as "*coming and going*" from other premises at Damaso Place, Woolner, which he was familiar with and also knew through IR entries and personal observations to be a location of interest in relation to drug supply[8].

(iv) The Officer could tell from lit brake lights that someone was in the driver's seat of the vehicle, in circumstances where he knew Leanyer in the early hours of the morning to be "*generally dead*" with "*very little traffic movement*"[9].

(v) The "*proximity*" of the vehicle to the Baroalba Street premises, together with what he knew of the vehicle and the Damaso Place premises, caused him to suspect that the vehicle (and particularly its occupant(s)) were involved in some form of drug transaction[10].

(vi) The vehicle was parked approximately 500 metres distant from the Baroalba Street premises[11].

(vii) The Officer's statement, made two weeks following the search, simply stated that his reason for conducting the search was that he had seen the vehicle "*regularly*" at the Damaso Place premises, of which the Defendant was a resident[12].

13. The Officer is clearly an experienced and fearless officer. His evidence was given openly and honestly and, except on one aspect, could not be said to have embellished or gilded any of the facts on which he based his suspicion on 4 September 2019. I generally accept the forthright evidence of the Officer, not simply due to his frank and unvarnished presentation, but also because of the manner in which he sought to carry out his duty on 4 September 2020.

14. There is no doubt the Officer had a genuine suspicion that the vehicle the subject of his s120C search might be found to contain a dangerous drug and, as matters transpired, the vehicle contained methamphetamine and an ice pipe[13]. The product of a search can in no way, shape or form, be relied upon to retrospectively bolster or add to the grounds on which a member exercises the s120C power[14]. However, it can confidently be concluded that the

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[7] Transcript 7 September 2020 page 10.2.

[8] Transcript 7 September 2020 page 10.5, 10.9, 12.8 and 15.5.

[9] Transcript 7 September 2020 page 10.9.

[10] Transcript 7 September 2020 page 11.1.

[11] Transcript 7 September 2020 page 17.6.

[12] Transcript 7 September 2020 page 16.2 and 18.1.

[13] I note the operative phrase prescribed by s120C is "***may** be found in*" the vehicle, indicating the objective necessity of a possibility or slight probability, rather than more. However, despite the understandable inclination of experienced members of police to suspect, it is crucial that they then take pause to consider whether sufficient objective circumstances support their suspicion.

[14] *The Queen v Gehan* [2019] NTSC 91 at [54] and [65] - "*The relevant enquiry is whether the information in possession of the officer **immediately prior** to the search was sufficient to found a reasonable suspicion*", which I note is different to the position suggested in *R v Nguyen* [2015] SASCFC 7 at [9]. However, see also *R v Nguyen* [2013] SASCFC 91 at [34] and [35].

Officer did not act capriciously, or for any purpose unconnected with legitimate policing of the MoD Act, or for any ulterior purpose of general criminal investigation[15].

15. It is clear from the Officer's evidence that his decision to search was made upon seeing and recognising the vehicle in Savannah Drive, and prior to engaging with the Defendant present in the driver's seat of vehicle[16]. Upon attending on the Defendant (who he then recognised from prior dealings) the Officer did not conduct any registration or licence check or random drug or alcohol test, so did not invoke those processes as a pretext, ploy or precursor to the s120C search, despite that such inquiries might possibly have provided information for further arguable bases in support of the search he then conducted[17]. The dangers of ulterior purpose were referred to at paragraph [11] of the *Gehan*, and no such suggestion could be made in relation to the Officer's conduct. He cut straight to the chase, informed the occupants of his proposed course under s120C and that they were in custody until the search had been completed.

16. Each of Mr Thomas Lui and the Defendant also gave oral evidence at hearing. However, their evidence was generally irrelevant to the issue concerning the s120C search, as opposed to the third issue in dispute, namely proof of the Defendant's possession of the physical evidence comprising Exhibit 1.

Reasonable grounds to suspect

17. A significant body of jurisprudence has developed in relation provisions conditioned on the requirement for reasonable grounds to suspect, including s120C of the PAA. Paragraphs [37] to [50] of *Gehan* and paragraphs [28] and [67] of *Wilson-Anderson* discuss the accepted principles, considerations and approach, together with a summary of relevant decisions[18]. I note the emphasis placed in submissions by the Defendant on the 2013 and 2015 South Australian Full Court decisions in *Nguyen*, but that jurisdictions equivalent of s120C is quite different and s138 of the ENULA does not apply in that State, its jurisdiction relying on the common law[19].

18. The Officer did not seek in oral evidence to introduce the nature and extent of his prior knowledge of the Defendant into the rationale or bases for deciding to exercise the s120C power, that decision having crystallised immediately upon recognising the vehicle from a distance in Savannah Drive[20]. It is very possible that had sufficient resources and focus been expended at the outset of the proceedings, particularly in drafting his relatively contemporaneous statement approximately 2 weeks following the search, sufficient current

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[15] See *Gehan* at [11] and, in a broader and different context, *Babui v O'Neill* [2020] NTSC 50 at [17].
[16] Transcript 7 September 2020 at pages 10.9, 12.8, 13.4 and 17.1. The honesty of the Officer's evidence is commendable.
[17] It was noted that the Defendant's evidence (which was not challenged in cross-examination) included that he had invited the Officer to test him for drugs (by swab under the *Traffic Act*) but that the invitation was not accepted.
[18] *The Queen v Gehan* [2019] NTSC 91, *The Queen v Wilson-Anderson* [2020] NTSC 39, and see also *The Queen v Ireland* [2020] NTSC 47.
[19] *R v Nguyen* [2013] SASCFC 91 and *R v Nguyen* [2015] SASCFC 7, relying on principles from *R v Ireland* (1970) 126 CLR 321 and *Bunning v Cross* (1978) 141 CLR 54, as applied in *Ridgeway v The Queen* (1995) 184 CLR 19.
[20] Noting that any prior conviction for drug based offending could not of itself constitute reasonable grounds to suspect; *Gehan* at [57]. However, such knowledge in relation to occupants of a vehicle can be important; *R v Nguyen* [2013] SASCFC 91 at [23] to [26].

information concerning the Damaso Place premises and, perhaps, the vehicle could have been disclosed by the Officer to support the s120C exercise of power[21].

19. However, the Officer's statement and oral evidence concerning what contemporaneous and current knowledge and information he had as at the date of search was sparse and imprecise[22]. The knowledge and information disclosed by his statement and oral evidence was generally based on vague observations made from frequently driving past the Damaso Place premises, and from IRs which often concerned drug dealing, including in relation to the Baroalba Street premises. Regardless of the restrictions and confidentiality which must be applied to various information in possession of NT Police and its members through provisions of the MoD Act, ENULA and in public interest immunity, it will ordinarily be necessary for appropriate detail and particularity of relevant information to be provided in order to support a s120C search at trial[23].

20. It would not be my view that the detail descended to in some decisions on s120C searches, particularly concerning provenance, source and classification of information contained in IRs, is essential. However, the currency, extent and possible veracity of all relevant information is important, as are contemporaneity and specificity[24]. Wherever possible, relevant details addressing those matters should be included in both police witness statements and oral evidence put before the court. That was not the case here.

21. Nor was any information included in the Officer's statement or evidence put before the court concerning any previous relevant arrests or charges, or whether any searches under warrant or s119 of the PAA had ever been executed at the Damaso Place premises, or in relation to the subject vehicle either by warrant or through any previous s120C search and, if so, with what result[25]. The same might be said in relation to the Baroalba Street premises, although, in the final analysis, I consider those premises and the activities said to have been conducted at that place leading up to 4 September 2019 to be irrelevant.

22. Where the evidence in any prosecution is the product of a s120C search, inclusion of all relevant (disclosable) information from the outset, so in the relevant member's statement, is important. That course is prone to avoid unnecessary challenge by defendants, and the risk of the member(s) being exposed to suggestions of 'recent invention' in cross examination at trial of the issues.

23. The one aspect of the evidence which I do not accept is the Officer's oral evidence that the "*proximity*" of the vehicle to the Baroalba Street premises was relevant to his decision to exercise the s120C power[26]. Coupled with this is that I do not accept the Officer's suggestion concerning how the Defendant could be associated with the Baroalba Street premises known to sell dangerous drugs, but nonetheless parked 500 metres or half a kilometre away.

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[21] Despite the court's trust in the Officer's integrity, it is substantive evidence of sufficient grounds which is essential to any finding of "*reasonable grounds*".
[22] Although on the basis of South Australian provisions and noting that each matter will entail its individual circumstances, the decisions of *R v Nguyen* [2013] SASCFC 91 and *R v Nguyen* [2015] SASCFC 7 provide comparators at each end of the spectrum.
[23] Sections 24 to 26 of the MoD Act, s130 of the ENULA, and noting that the common law concerning public interest immunity in relation to informants, sources of information and investigative techniques/methodology is not abrogated by those provisions.
[24] The extent of the relevant officer's operational experience, which here was significant, can also be relevant; *Prior v Mole* (2017) 261 CLR 265 at [71] applied in *Gehan* (supra) at [61] and *Wilson-Anderson* (supra) at [67].
[25] Evidence led in the 2013 and 2015 South Australian matters of *Nguyen* are examples of what may be required.
[26] Transcript 7 September 2020 10.9.

Namely; "*Well, people involved in* [purchasing illicit drugs] *wouldn't advertise that they're attending that residence by parking straight in front of it*"[27]. The implication that a drug user would park half a kilometre from their dealer then walk that distance to purchase their desire is fanciful. Moreover, the Officer well knows that frequent fleeting visits by a variety of vehicles is a hallmark of drug premises, and some of his other evidence belied the suggestion[28]. I took the Officer's suggestion to be jousting with defence hypotheses in the adversarial context, however it did not assist his evidence.

24. In the final analysis, it was the connection of the vehicle seen in Savannah Drive Leanyer by the Officer to premises at 5 Damaso Place Woolner which was the foundation for the Officer's suspicion, supplemented by some less significant factors such as the early hours and general traffic conditions in Leanyer. On the basis of the evidence accepted and reasons above, in my view the Officer did not have reasonable grounds to suspect that a dangerous drug may be in the vehicle the subject of the traffic apprehension and search, or on the person of the Defendant[29].

25. In those circumstances, the physical evidence comprising Exhibit P1 was at least obtained in consequence of an impropriety, so s138 of the ENULA is enlivened[30].

26. Having regard to the criteria described by s138(3), which are not exhaustive, I note both the probative value and importance of the evidence in the proceeding are particularly significant. The offences charged could not be described as trivial, involve dangerous drugs, and are prevalent in the community. Nonetheless, the relatively small quantity of dangerous drug in combination with an implement apparently for personal use are circumstances placing the alleged offences at the lower end of the spectrum. The gravity of the impropriety is not insignificant, despite the conclusion that the officer had a genuine suspicion, and in the circumstances contravened recognisable civil rights of the Defendant[31]. Although any request for consent can be relevant to the gravity of impropriety, I accept the Officer's reason for not adopting that course in this case, so would not attach any adverse weight to that aspect[32]. There was no evidence of any other proceedings, and I note the distinct prospect referred to at [18] above.

27. I also note the submissions of defence counsel that matters of denunciation, specific deterrence and general deterrence are relevant to the exercise of the s138 discretion and point to exclusion in order to send a message to members of NT Police. Despite that the criteria prescribed by s138(3) are not exhaustive and regardless of paragraphs (d) and (e) of the subsection and the policy underpinning s138, I consider those concepts are not germane to this matter or the exercise of discretion under s138 generally[33].

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[27] Transcript 7 September 2020 17.8.
[28] Transcript 7 September 2020 page 10.5, 10.9, 12.8 and 15.5.
[29] Noting those two objects are separate and discrete subject matter of s120C and, depending, different grounds and considerations may apply.
[30] Noting various views of Superior Courts, including Grant CJ in *Gehan* (supra) at [35].
[31] The Defendant was in custody for the duration of the search, had his person and 'property' searched, and was not 'free to go' – Articles 9 and 17 of the ICCPR are relevant.
[32] See *The Queen v Ireland* [2020] NTSC 47 at [49].
[33] The spectre of failed prosecutions which might otherwise succeed (which was not the case here) should be sufficient incentive to members of police to know and comply with their legislated obligations in the exercise of coercive powers.

28. Lastly, I note the 'definition' posited in *Parker v Comptroller-General of Customs*, and the 'quite or clearly inconsistent with minimum standards' test referred to in *Robinson v Woolworths*[34]. In all of the circumstances and seeking to balance the countervailing aspects of the criteria, I would have exercised positive discretion under s138 to exclude the evidence obtained through the search.

The Charges

29. However, the Defendant pled not guilty to the charges and both he and the passenger in the vehicle gave evidence at hearing, including as to the methamphetamine and ice pipe found in the vehicle on conduct of the s120C search. Section 40 of the MoD is an evidentiary provision casting a presumption of possession upon persons in the situation of the Defendant. Even where that presumption is not rebutted by a defendant, the Crown must nonetheless prove possession to the standard of beyond reasonable doubt[35].

30. Mr Lui's evidence was brief, and essentially that he had no knowledge of the existence of the methamphetamine and ice pipe located in the vehicle.

31. The Defendant's evidence included in relation to the business and activities he conducted at Damaso Place in 2019; what he had been doing on 3 September 2019 at those premises; why he was driving the vehicle which belonged to another person on 4 September 2019; where he was going; and his purpose in being in Savannah Drive in the early hours of that day. He also gave evidence concerning his methamphetamine use, including that the last occasion post-dated 4 September 2019. His evidence was also that he was unaware of the existence of the methamphetamine and ice pipe located in the vehicle and seized in consequence of the s120C search[36].

32. The Defendant was not evasive and was generally open and unguarded in his answers and was cross-examined at length, during which he was steadfast in his evidence. Obviously it is always possible that answers on crucial aspects are manufactured, however that was not my assessment.

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[34] (2009) 83 ALJR 494 at [29] and (2005) 158 A Crim R 546 at [23] respectively.
[35] *Carnesi v Hales* [2000] NTSC 98 at [18] to [22], [27] to [30], *Jaeger-Steigenberger v O'Neill* [2011] NTSC 42, *Wilson v Malogorski (No 2)* [2011] NTSC 88 at [56] to [71], and *Grosvenor v The Queen* [2014] NTCCA 5 at [29] to [37].
[36] And had volunteered for a roadside drug test prior to or during the search, which was not availed of.

Findings

33. Having regard to the standard of proof which a defendant must meet in relation to the presumption posited by s40 of the MoD, I do find the presumption to have been rebutted on the balance of probability. Had that not been so, I nonetheless consider a reasonable doubt would have existed on consideration of the whole of the evidence.

34. I find, having particular regard to the Defendant's evidence and the burden of proof, that Defendant Kenneth Hopkins is not guilty of counts 1 and 2 charged.

Dated this 24th day of December 2020

GREG MACDONALD
LOCAL COURT JUDGE