CITATION:	*RIGBY V IAN ALIMANKINNI [2021] NTLC 038*
PARTIES:	Kerry Leanne Rigby
	V
	Ian Ross Alimankinni
TITLE OF COURT:	LOCAL COURT
JURISDICTION:	CRIMINAL
FILE NO(s):	22012454
DELIVERED ON:	10 December 2021
DELIVERED AT:	Darwin
HEARING DATE(s):	12 & 19 November 2021
DECISION OF:	Greg Macdonald

CATCHWORDS:

Police Administration Act – s120C – Evidence (National Uniform Legislation) Act – s138.

REPRESENTATION:

Counsel:

Complainant:	Mr J Bainbridge
Defendant:	Ms B Wild

Solicitors:

Complainant:	DPP
Defendant:	NAAJA

Decision category classification:	B
Decision ID number:	NTLC038
Number of paragraphs:	42

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

No. 22012454

BETWEEN:

Kerry Leanne RIGBY
Complainant

AND

Ian Ross ALIMANKINNI
Defendant

REASONS FOR DECISION

(Delivered 10 December 2021)

JUDGE MACDONALD:

Background

1. On 19 November 2021 I gave oral findings in this proceeding, which ultimately included a finding of guilt against the defendant Ian Ross Alimankinni (Defendant), with written reasons to be published. These are those reasons.

2. The Defendant was on 16 April 2020 charged with one count of possess scheduled 2 less than trafficable quantity, in contravention of s 7D(1) of the *Misuse of Drugs Act*. On 12 November 2021 the Defendant pleaded not guilty to the charge, and a contested hearing conducted on a voir dire basis ensued.

3. Various of the facts involved were not contentious, due to agreed facts becoming exhibit P1. Relevantly, the agreed facts include that on 15 April 2020 the Defendant and three other Tiwi island men travelled by 4.5m dinghy under the 'captaincy' of Mr Ronald Cunningham from Wurrumiyanga to Tree Point on the mainland to collect Mr Robert Cunningham. On arriving at the mainland none of the five occupants disembarked. Mr Robert Cunningham arrived to embark in due course, accompanied by another three men, including Mr Jimmy Brown aka Cooper.

4. The small vessel departed the mainland carrying nine men, but broke down at 9:30pm shortly prior to reaching Wurrumiyanga. After being towed to Front Beach "*the defendant was driven back to Wurrumiyanga police station and cautioned by Sgt Peter Linfield*", following which "*a search of the defendant's person was conducted by Senior Constable Jack Mather*" and "*during the search, the defendant reached into the front of his underpants and pulled out a small white plastic bag with grey duct tape wrapped around the outside*".

5. That package proved to contain two packs of playing cards and 24.69gm of cannabis in a clip seal bag.[1] The Defendant was subsequently arrested, and also returned a positive BAC of .247%.[2]

6. Other evidence admitted by agreement were photographs of the package surrendered from inside the Defendant's underpants, a Forensic Science Branch certificate showing the content of the package to be 24.69 g of cannabis, the written statement of Sgt Sarah Hutchinson who received and exhibited the package, examined its contents, and also breath tested the Defendant, and a written statement of Mr Ronald Cunningham, the skipper of the dinghy (exhibits P2 through the P5 respectively).

7. It is also not in dispute that on 16 April 2020 one or more of the Cunningham family were worried by the non-arrival of Mr Ronald Cunningham and his passengers. More than one Tiwi Islander spoke to officers Jason Mather and Jessica Jordan, and provided a range of information. I accept that one of those persons, who was not able to be identified by the officers, said to them that the boat was "*possibly going to get some grog and ganja and bring it back*", noting that officer Mather could not be certain that this information was not in response to a leading question. It is also noted that at least one of the Cunningham family said the travellers had gone out turtle hunting. Lastly, it was accepted that the searching of the vessel and passengers commenced with officer Jordan instructing passenger Mr Jimmy Brown to open his sports bag to inspect the contents, which he did.

8. Subsequently, officer Mather directed the Defendant to show him what was down the front of his pants, in response to which the Defendant advised he wish to be taken to the police station for reasons of privacy.

9. Senior Constable Mather endeavoured to give his best evidence, and was frank and honest - he made appropriate concessions where required. However, various aspects of his recollection were not as accurate as they may have been, probably due to the 18 months which had elapsed since the incident giving rise to the charges and not having perused any statement he may have written and disclosed at the time, prior to giving evidence.

10. Officer Mather's evidence was also that he had completed an Information Report by entry of relevant information into the NT Police computer, but did not have a copy of the Report with him, and had not provided it to the DPP for the purpose of disclosure. The Report was very likely relevant evidence concerning the issues in dispute, regardless of its precise content.

11. It was apparent that Constable Jordan had also not refreshed her memory from her original statement, which resulted in confusion as to the order in which the search or searches began. However, officer Jordan's recollection was a little more precise than that of officer Mather. Officer Jordan's evidence was unguarded, frank and honest, including freely making appropriate concessions where required due to the effect of time on her recollection.

[1] Exhibits P1, P2 and P3 refer.
[2] Paragraph [9] of Exhibit P4.

12. Failure by the witnesses to review their contemporaneous statements prior to giving evidence seriously affected the accuracy of their oral evidence, so potentially the veracity of what was led in evidence at hearing. It is not an approach which assists the best disposition of criminal proceedings.

13. I note that the Information Report, which officer Mather entered onto the NT Police system at the direction of OIC Wurrumiyanga following conversations with family and community members, was not disclosed or tendered to the court in evidence. Similarly, no relevant Notebook entries, or broader records or statistics concerning the frequency with which vessels intercepted at the Tiwi Islands were found to be carrying alcohol or cannabis were provided or tendered. Nor were any more general Information Reports concerning trafficking of alcohol and/or cannabis relied on in evidence or tendered.

14. The evidence and issues on voir dire centred on the lawfulness or otherwise of searches conducted under the authority provided by s 120C of the *Police Administration Act* (PAA), particularly the precondition of "*reasonable grounds to suspect*".[3] Oral submissions also focused on the exercise of the discretion provided by s 138 of the *Evidence (National Uniform Legislation) Act 2011* (ENULA) in the event of impropriety or unlawfulness.

15. In relation to contested facts I find that:

    (i) The sports bag belonging to Mr Brown was searched prior to the Defendant being searched;

    (ii) The vessel itself was subsequently searched by police, after the Defendant had been taken to the Station and searched.

    (iii) When he first engaged with police members, the Defendant was not acting nervously or suspiciously

    (iv) The Defendant approach officer Jordan in an apparently 'up-front' or gregarious fashion, and asked "*do you remember me*".

    (v) In directing Mr Jimmy Brown to open his sports bag to inspection, and directing the Defendant to produce the contents of his underpants, the officers were purporting to exercise power conferred by s 120C of the PAA, and not any other legislated power.

    (vi) Although finely balanced, because had the Defendant refused to cooperate I consider he would have been immediately arrested, the Defendant was not "*in custody*" on either occasion he was requested to produce the item from his underpants.[4]

[3] An instructive summary of the principles which apply is in *R v Wilson-Anderson* [2020] NTSC 39 at [28]. See also *R v Gehan* [2019] NTSC 91 at [34] to [50].

[4] The Defendant had been requested to cooperate with members of police in the conduct of an investigation and did so, including by then requesting the privacy of the Station. Although he was cautioned prior to the search, he was not arrested until following production of the package. That analysis may leave open the suggestion that no powers under s 120C were exercised (through consent), but certainly excludes the possibility of the search having been authorised under s144 of the PAA.

(i) The Defendant would not have been searched by the officers if he did not have a bulge in the groin of his pants.[5]

(ii) The Defendant would have, at the time of engaging with members of police, appeared affected by alcohol.

16. At its highest, the information relied on by the officers to found a reasonable suspicion were;

(i) One family member had advised that the missing boat had gone to Darwin to pick up someone who could not fly back due to COVID lockdown.

(ii) Another suggested the passengers on the boat had gone out turtle hunting

(iii) An unidentified Tiwi Islander had said that the subject boat was also "*possibly going to get some grog and ganja to bring back*"

(iv) In officer Mather's 12 months experience on Bathurst Island, "*Every boat that left for Darwin was always on a mission to get grog and ganja*", the general context of that proposition being at least boats which arrived at night time.

(v) The officers did not know what time of the day or night the vessel departed Bathurst Island, and the evidence at hearing was that Mr Ronald Cunningham departed the island at 3pm on 15 April 2020.

(vi) The Defendant had an obvious bulge in the front of his pants, which appeared to be a foreign object.

(vii) At the time of engaging with members of police immediately prior to search the Defendant would have appeared intoxicated to some extent.

17. Following hearing of the evidence and submissions, the issues in dispute on voir dire were;

(i) Was officer Jordan's instruction to Mr Jimmy Brown to open his sports bag for searching a proper and lawful exercise of power under s 120C of the PAA?

(ii) Whether officer Jordan's instruction to Mr Jimmy Brown and officer Mather's direction to the Defendant are properly characterised as a single or inextricable exercise of power under s 120C or, alternatively, two separate and discrete exercises?

(iii) If officer Mather's direction to the Defendant was a separate and discrete exercise of power, was that exercise nonetheless tainted by officer Jordan's search such that the s 138 discretion to exclude should be exercised?

(iv) If not, was officer Mather's search proper and lawfully within the bounds of s 120C in any event?

[5] Noting that except for the sports-bag belonging to Mr Jimmy Brown, the evidence is that none of the other 7 passengers were searched.

(v) If the answer to issue (iv) is "no", whether the evidence seized should be excluded by exercise of discretion under s 138 of the ENULA?

(vi) If the evidence is not excluded, was the Defendant in possession of a dangerous drug to the required standard of beyond reasonable doubt?

18. Section 120C of the PAA provides relevantly;

120C Searching without warrant

A member of the Police Force may, without warrant, stop, detain and search the following:

*(a) [a] ship … if the member has reasonable grounds to suspect that a dangerous drug … **may** be found on or in it;*

(b) any person found on or in [a] ship … 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 ….*

19. It may be concluded that Parliament intended use of the word "*ship*" to mean any vessel capable of travelling on water.

20. Unlike in the matter of *R v Gehan* [2019] NTSC 91, none of the evidence before the court disclosed a possibility of 'ulterior purpose' infecting the exercise of the s 120C powers. Simply because the officers' predominant or initial concern was the welfare of the passengers in the dingy did not preclude other conduct in the due execution of their duty being valid. It was also noted in *Gehan* at paragraph [43] that; "*There is … limited utility in examining the particular circumstances which have been subject to consideration in other cases*", although that examination is at least illustrative.

Discussion

21. In relation to the first issue, concerning the search of Mr Brown's sports-bag, it is noted that knowledge obtained through a police officer's professional experience may be taken into account, albeit that ultimately, the information, material and circumstances must be sufficient to induce a "*reasonable suspicion*" to the satisfaction of the court. Time, place and circumstances may also be used in conjunction with other facts and information in the development of a reasonable suspicion. There is no doubt officer Jordan held a subjectively genuine belief that one or more passengers in the dingy may have been in the process of bringing alcohol or cannabis onto the Tiwi Islands, including due to her professional policing experience of the frequency with which those substances are transported illegally to communities there.[6] However, the only other basis on which officer Jordan acted in bolster of her professional experience was the suggestion of a possibility proffered by one unidentified person the members had spoken to that morning. Despite some surmise in officer Mather's evidence, there was no acceptable evidence concerning why the possibility was suggested, or any other information which may have assisted the veracity or credibility of the suggestion.

[6] The conditions discussed in *Prior v Mole* (2017) 261 CLR 265 at [4], [24], [71] and [98] – [100] potentially apply.

The suggestion could have emanated from either knowledge of the informant, or simply common experience at Wurrumiyanga, or even from vindictiveness as suggested by the surmise.

22. On one reading of statements from *Queensland Bacon Pty Ltd Rees* (1996) 115 CLR 266 at 303 and *George v Rocket* (1990) 170 CLR 104 at 115, the threshold to establish reasonable grounds to suspect is not high. However, I note his Honour Chief Justice Grant's statement in *Gehan* (supra) at [40] that "*the judicial assessment of what is required to found a reasonable suspicion involves a balancing exercise having regard to the limitations which the statute places on incursions into civil liberties and the public interest in effective law enforcement activity*", citing with approval two passages from the Full Court of South Australia in *R v Nguyen* (2013) 117 SASR 432 at [21] dealing with an analogous provision, including; "*the evaluation of the reasonableness of the suspicion must be undertaken in the context of the purpose of the powers, and the civil liberties abrogated by their exercise*".

23. Due to the likely availability of ss 238 and 239 of the *Liquor Act* discussed below, it might be concluded that that the civil liberties of the Defendant and Mr Brown could not have been significantly affected. That is not my view, including because it is important for members to be clear in themselves and to subjects concerning the basis on which coercive powers are being exercised.

24. Despite neither officer giving evidence of a positive recollection that the Defendant was intoxicated, due to the possibility suggested by the unidentified Tiwi Islander, alcohol was certainly a relevant factor in the officers' actions. That conclusion is particularly so in relation to officer Jordan's search of Mr Brown's sports-bag.

25. Although only raised by the unidentified information provided to officers that the vessel was "*possibly going to get some grog and ganja to bring back*", I note ss 238 and 239 of the *Liquor Act* authorise searches of both vessels and persons on a "*random*" basis (so without any grounds to suspect, reasonable or otherwise) in order to detect any "*forfeiture offence*" within any "*general restricted area*" or "*special restricted area*". Had evidence and submissions sought to address this aspect of Territory law, different considerations would arise. Due to no evidence of the 'area status' of the Tiwi Islands, the 'saving principle' from *Hart v Commissioner of AFP* (2002) 124 FCR 384 at 401 has no capacity to operate in relation to the possible authority provided by the *Liquor Act*.[7] Similarly, no opportunity was afforded to the parties by the court to make submissions on the issue as required by s 144 of the ENULA, towards avoiding prejudice to the Defendant.[8] Consequently, the possible application of the broad powers provided by the *Liquor Act* have not been taken into account in determination of the issues.

26. Due to the location of Mr Jimmy Brown at the time he was directed to open his sports bag, being in a public place rather than in the dingy, I consider officer Jordan's search was under s

[7] That principle was submitted by the prosecution through *R v Jesson* [2009] NTSC 13 at [45], primarily in relation to the proposition that officer Mather's search would be within the authority provided by s144 of the PAA. However, the court found that the Defendant was not "*in custody*".

[8] Likewise, the principle established by *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 426 concerning 'mistaken authority' cannot be relied on. Regardless of common knowledge in Darwin, the precise area status of the Tiwi Islands is not a matter satisfying the test for judicial notice, being the knowledge of a "*well-informed person in Australia*" set out in *Simpson v The Queen* (1998) 194 CLR 228. Evidence and/or procedural fairness would have been required.

120C(c) of the PAA. The two grounds on which officer Jordan's suspicion was based were policing experience on the Tiwi Islands, together with the (perhaps knowing) suggestion of a possibility proffered by an unidentified member of the community that morning. In the context of s 120C(c) and the circumstances, including the discussion above, I am not satisfied that the requisite "*reasonable grounds*" existed to suspect Mr Brown 'had in his possession a dangerous drug'. It legally follows that the search was either improper or unlawful; see paragraph [35] of *Gehan* (supra).

27. The search of Mr Brown did not produce any contraband whatsoever, so no material which could be possibly incriminating of the Defendant. On that basis no direct application of s 138 of the ENULA arises. However, the Defendant's position is that the foundational flaws of that search are relevant to issues (ii) and (iii) above.

28. The second issue for determination concerns characterisation of the officers' actions as one or two searches. Despite that Constable Jordan's search did not produce any contraband, if the searches of officer Jordan followed by officer Mather were simply components or stages of the one single search, consideration of the exercise of the s 138 ENULA discretion must arise. That is, on the basis that the search was commenced improperly or unlawfully.

29. I note the structure of s 120C. Paragraphs (a) and (b) are directed to private premises, whereas paragraph (c) is for exercise in relation to a person in a public place. They are separate limbs. The level or quality of the likelihood of the existence of a dangerous drug in each place is also slightly different, through use of the phrases "*may be found*" for paragraphs (a) and (b), compared to "*has in his possession*" for paragraph (c). I also note that; the Defendant had well and truly disembarked the vessel and was some distance from it; he was clearly in a public place; he approached the officers and engaged in conversation; he had an unnatural bulge in his pants which was noticed by officer Mather; and it was that bulge which precipitated the search. The searches were of a slightly different nature, conducted by different officers, and were of different individuals. The search of the Defendant would most likely not have occurred but for observation of the bulge. Lastly, I note the observations of Grant CJ at paragraphs [53] and [54] of *Gehan* (supra).

30. The search of the Defendant was a separate and discrete exercise of power under s 120C.

31. In relation to the third issue, I do not consider the characterisation attending the first search can infect the second search, such that s 138 arises. Regardless of whether officer Mather's actions might cause the product of the search of the Defendant to have been obtained "*improperly or in contravention of an Australian law*", that evidence was not "*in consequence*" of the flaws affecting the search of Mr Brown.

32. The fourth issue for determination is whether officer Mather "*immediately prior*" to embarking on the s 120C search had reasonable grounds to suspect that the Defendant had a dangerous drug in his possession.[9] In addition to relevant factors listed at [29] above, I note officer Mather's evidence that in his experience "*Every boat that left for Darwin was always on a mission to get grog and ganja"*. Regardless of the context of that statement, which was 'at night time' and the arguable scepticism the statement projects, officer Mather had 12 months experience on the Tiwi Islands. His evidence included reference to having regularly received

[9] See *R v Gehan* [2019] NTSC 91 at paragraphs [53] and [65].

complaints of illegal trafficking from residents adjacent to a night-time landing location, which was generally relevant.[10] Most relevantly, officer Mather was certain that the Defendant had a foreign item secreted in his groin area. A searching officer is entitled to consider all relevant information available to them up until immediately prior to conducting a s 120C search.[11] I consider it was s 120C(c) under which officer Mather was acting at the relevant time, despite that the search was ultimately not conducted in the public place. The ultimate location of the search did not invalidate the search.

33. The search of the Defendant was supported by sufficient "*reasonable grounds to suspect*" he was in possession of a dangerous drug, so was both proper and lawful. Section 138 of the ENULA is not enlivened so the fifth issue does not arise.

34. There remains the issue of whether the facts as found or agreed constitute a contravention of s 7D(1) of the *Misuse of Drugs Act*, to the essential standard of beyond reasonable doubt. The Defendant undoubtedly possessed a "*thing*", being the package, and the thing comprised a dangerous drug.

35. The question crucial to guilt or otherwise is whether the Crown has proven beyond reasonable doubt that the Defendant was reckless in relation to the circumstance of the thing containing a dangerous drug. The evidence is relevantly that the cannabis was not apparent through external inspection of the package (which was unopened), and that the Defendant remained in the dingy at all times. Subject one qualification, it can be inferred beyond any reasonable doubt that another person provided the package to the Defendant.

36. The qualification is the version provided by the Defendant to officer Mather that he found the package floating in the ocean. In all the circumstances, that is a fanciful possibility so could not constitute any reasonable hypothesis consistent with innocence.

37. Even if I were wrong in that, I would nonetheless find on the basis of the package's appearance, that the Defendant was reckless concerning an irresistible conclusion that the package contained dangerous drugs.

38. The Defendant secreted the package consistent with that conclusion, and did not tell skipper Mr Ronald Cunningham of its existence or its asserted finding. Nor did the skipper see the Defendant in possession of the package.[12]

[10] See *Prior v Mole* (supra) at [71].

[11] See *Gehan* (supra) at paragraphs [53] and [65].

[12] Paragraph [18] of Exhibit P5.

Findings

39. The search of Mr Brown was not sufficiently supported by reasonable grounds to suspect, so was an invalid exercise of s 120C.

40. The search of the Defendant was separate and discrete from the search of Mr Brown, and was sufficiently supported by reasonable grounds to suspect, so was valid and lawful.

41. Section 138 of the ENULA is not enlivened by either the search of Mr Brown or the search of the Defendant.

42. There is no reasonable doubt that the Defendant was recklessly in possession of a dangerous drug in contravention of s 7D(1) of the *Misuse of Drugs Act*, so is guilty as charged.

Dated this 10th day of December 2021

GREG MACDONALD
LOCAL COURT JUDGE