CITATION: *NT Police V SH [2016] NTLC 019*

PARTIES:	Police v SH
TITLE OF COURT:	Youth Justice Court
JURISDICTION:	Youth Justice Court
FILE NO(s):	21559916
DELIVERED ON:	11th July 2016
DELIVERED AT:	Darwin
HEARING DATE(s):	2nd and 3rd June 2016
JUDGMENT OF:	Judge Fong Lim

CATCHWORDS:

Evidence – Admissibility- grounds for reasonable belief -impropriety of Police officer –gravity of impropriety- probative value of evidence

Section 138 Evidence (National Uniform Legislation) Act

Traffic – power to impound vehicle- grounds for reasonable belief – written impounding determination - Section 29AD & 29DF of Traffic Act

Execution of duties – improper use of powers

Coco v the Queen [1994] 179 CLR 427

Project Blue Sky v Australian Broadcasting Authority[1998] 194 CLR 355

George v Rocket [1990] 170 CLR 104

REPRESENTATION:

Counsel:

Complainant:	Ms Haack
Defendant:	Mr Morgan

Solicitors:

Complainant:	Director of Public Prosecutions

Defendant:	North Australian Aboriginal Justice Agency
Judgment category classification:	B
Judgment ID number:	*[2016] NTLC 019*
Number of paragraphs:	63

IN THE YOUTH JUSTICE COURT OF
THE NORTHERN TERRITORY OF AUSTRALIA
AT DARWIN

No. 21559916

BETWEEN:

Police
Complainant

AND:

SH
Defendant

REASONS FOR JUDGMENT

(Delivered 11 July 2016)

Judge Fong Lim:

1. The defendant faces four charges arising out of one incident. The charges allege he was disorderly in a public place, he hindered a police officer in the execution of his duties, resisted a police officer in the execution of his duties and the assaulted a police officer by spitting on him.

2. On the 11th July 2016 I handed down my reasons for decision on the admissibility of the evidence of the Police officers involved in this matter and dismissed the charges at that time I indicated I would provide written reasons for decision and these are those reasons.

3. On the day in question the police were called to Harney Street in Ludmilla in a response to a complaint by a resident as to some hooning behaviour. When they attended they were advised by Ms I that a young man on a motor bike had been "tearing" down the street. She also told them and that he had done this many times before as well as tearing around the nearby Bagot community. Officer W and his partner then made enquires of neighbours as to whether they had observed such behaviour and were given further information by Mr S that he had observed the motor bike go down a laneway to the back of the residences and that the bike was likely to be from Minmarama Park, which was a residential area separated from Harney street residences by bushland and Dick Ward Drive. Mr S also advised that the same bike was often ridden around the area by the same young man and when on the dirt track behind his house would spray up dirt and stones into his backyard and onto his washing. He gave a detailed description of the

bike including its brand, colour, model number and the fact that it had an enlarged petrol tank.

4. Officer W and his partner T then attended Minmarama Park and upon walking around that place looking into yards they found a bike which matched the description given to them. That bike was in the yard of the defendant's home.

5. W and T spoke to the defendant's father and were told the bike belonged to the defendant. W felt the engine of the bike and concluded that it had been recently ridden as the engine was hot. He informed the father that the bike was to be seized because he had formed a view that the bike had been involved in hooning. The defendant's father protested and arranged for his son to attend.

6. The parents and the defendant were not happy about the W's decision to seize the bike and became verbally aggressive towards the police officers. W decided the situation was becoming out of hand and called for assistance from other police.

7. Four other police officers attended and with the assistance of their presence the bike was removed outside of the gates of the property all the while with the defendant and his family protesting the police's power to take the bike and demanding to know what evidence the police had of any offending.

8. It was then Officer D and his partner B attended. D being the senior officer took control of the situation and directed W to take the bike out to the main road to wait for the tow truck and then engaged in a conversation with the mother in an attempt to explain what was happening and to answer her queries. It is D's evidence that all the time he was attempting to explain to the mother what was happening and why he was constantly interrupted by the defendant who was yelling and swearing very close to his face. D says he warned the defendant several times to move away and when the defendant didn't desist in his behaviour D arrested him for being disorderly. At the time of his arrest the defendant then turned and spat in D's face and continued to struggle until he is placed into the police van. D accepted that prior to the deliberate spit the defendant's spittle had landed on his face a couple of times because the defendant was so angry and spittle was accidently coming out of his mouth however he was adamant on the third occasion defendant deliberate spat at him.

9. The mother's evidence is in stark contrast to D in that she says she was talking to a police officer when her son approached. She says the officer immediately grabbed the defendant's arm and bent him over and that her son was screaming in pain. She does not see her son spit on the officer or accept that he was yelling and swearing close to the officer. She

categorised her son as upset not angry. The police officers' involved in the arrest D and B deny excessive force and D explained the need for putting his hand on the defendant's neck was to avoid being spat upon again.

10. There was also evidence from the mother and father that the defendant was "thrown" into the police van "like a dog" which is denied by the police.

11. Evidence of the assault was taken on the basis that the Defence would be making submissions about the lawfulness of the seizure of the bike and consequently the admissibility of the evidence supporting the charges pursuant to section 138 of the Evidence (National Uniform Legislation) Act.

12. I also invited submissions from both parties as to the whether any impounding determination made pursuant to section 29AD must be in writing.

13. The issues to be decided are:

a. Was Officer W's power to seize the bike enlivened? Is there a requirement for the impounding determination to be written?

b. Did Officer W have reasonable belief that the defendant had committed prescribed offences which properly enlivened his power to impound and seize the bike under section 29AD and section 29AF of the Traffic Act.

c. If the exercise of the power to seize of the bike by Officer W and subsequently Officer D was not properly exercised then should the evidence of the alleged assault be admitted considering section 138 of the Evidence (National Uniform Legislation) Act.

d. If the evidence is admitted were the police officers in the execution of their duties?

e. Was 28 Minmarama Park a public place?

14. Was the police officer's power to impound or seize the motor bike properly enlivened?

15. Section 29AD of the Traffic Act gives the police power to make an impounding determination in writing on the basis of reasonable belief that a motor vehicle was used in the committing of a prescribed offence. That impounding determination can be made on the basis of a statement on oath

by a complainant [1]. A determination cannot be made more than 14 days after the alleged offence[2] and a copy must be given to the relevant parties setting out the basis for the determination and details of where the vehicle will be kept[3].

16. In this present matter an impounding determination in writing was produced and tendered in evidence[4]. Officer W could not remember when exactly he produced that document however it was clear from the evidence that was not before he physically took the bike into his possession.

17. The evidence of W is that he made the decision to seize the bike on the basis of the oral complaints from two lay witnesses Ms I and Mr S as well as the fact that the father of the defendant had confirmed his son had been riding the bike on that day, the bike fitted the description given by Mr S and that the engine on the bike was still hot when he attended the residence.

18. W's evidence was Ms I had complained of the motor bike having come out of Bagot community and flying down the street and that same motor bike had done it many times over the last few weeks. His recollection of Mr S's complaint was that the bike was often ridden down the street through a laneway and along a dirt track along the back of Mr S's property spraying dust and pebbles onto Mr S's washing. Mr S gave a detailed description of the bike down to the brand and model number and where he believed it came from.

19. W formed a view that the bike and the rider may be present at Minmarama Park and when he went there to investigate he was directed by other residents to a particular house on that estate. He says he walked around the estate and only found one bike matching the description and that bike was in the yard of the defendants' residence.

20. Upon the admission from the father that the defendant had ridden the bike and that the bike's engine was hot W formed a belief that it was the bike that had been involved in "hooning" and therefore he was going to seize the bike. When he advised the defendant's father of the decision the father protested and called for his son to come home.

21. When the defendant returned to the premises the defendant immediately became aggressive and verbally abusive towards the police and that is when W called for back up.

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[1] **section 29AD(2))**
[2] Section 29AD (3)
[3] Section 29AD(
[4] Exhibit P2

22. It is clear from the evidence of all witnesses that W had made the decision to seize the bike. It is also clear that his decision was not based on a written complaint on oath by Ms I and Mr S as their sworn statements were later taken on oath by another police officer back at the police station later that day.

23. It is my view that before the Court considers whether W held a reasonable belief that the bike was used in a prescribed offence the Court must decide whether the power to seize the bike pursuant to section 29AF is only enlivened when a written impounding determination is made.

24. The section 29AD provides an officer "may determine in writing" the question is as the section does not say "must" or "shall" is the officer first required to make a written impounding determination before seizing the bike. Section 29AF grants the power to seize a vehicle "for the purposes of the impounding determination" referring back to the determination made pursuant to s29AD and can only be enlivened if the impounding determination is made properly.

25. Defence submit the power to seize someone's motor vehicle and deprive them of its use is an incursion on that person's liberty to enjoy their property. The effect of the exercise of the power is to deprive a person of the use of their property for up to 48 hours without any charges being laid and on the basis of a police officer's belief that the vehicle was used in a prescribed offence. It is submitted that given the incursion of personal liberties the section must be read in favour of the citizen if there are any ambiguities in the legislation.

26. The only submission Prosecution made in relation to this issue is that the determination in writing is not a prerequisite to the exercise of the power to impound a vehicle and because of the inclusion of the words "as far as reasonably practicable" in section 29AD (4) however those words relate to the service of the impounding determination not the making of the determination.

27. It is trite to say when legislation is enacted to interfere with a person's personal liberties then Parliament must be clear and unambiguous in it's intention and any ambiguity in the legislation must be read in the favour of the citizen.[5] It is also trite to say the purpose of the legislation must also be taken into account when interpreting such provisions[6].

28. In the second reading speech for the introduction of these sections the Minister stated the bill provided the police power to '<u>immediately</u> impound or immobilise an offender's vehicle for 48 hours <u>when</u> they commit an offence(emphasis mine)". Nonetheless the provisions enacted relating to

[5] Coco v the Queen (1994)179 CLR 427
[6] Project Blue Sky v Australian Broadcasting Authority [1998] 194 CLR 355

that power refer to complaints on oath and powers to seize pursuant to an impounding determination which would suggest any " immediacy" may have to wait until those written complaints on oath could be obtained.

29. The purpose of the legislation is clear and that is to penalise the alleged hooning offender and to stop them from continuing that behaviour by depriving them of that vehicle. The motivation for the introduction of the sections is also contained in the second reading speech and that was "to deliver harsher penalties to those people who continue to hoon and present a danger to others on the road."

30. Two situations were clearly envisaged by the Minister when introducing these sections and they were:

a. Where a police officer witnesses hooning that police officer can issue the impounding notice immediately and take control of the vehicle and

b. Where the police receive a complaint from a member of the public and can act on that complaint to impound the vehicle and issue a traffic infringement notice[7]

31. Given all of the above it is my view that the word "may" in section 29AD relates to a police officer's exercise of his discretion to issue an impounding determination not the form of that determination. Given the incursion of personal liberties it is my view that Parliament intended any impounding determination must be in writing so the citizen concerned is made aware of why his vehicle has been impounded. The short period of impoundment without charges being laid, the requirement for the impounding determination to me referred to a senior officer for review as soon as practicable[8] and that the review must been done by the senior officer within 24 hours of the referral[9] all support the view that the Parliament recognised the police powers conferred were an incursion on the citizen's right to property and it was important that power was exercised with care.

32. In this matter there was no written determination before the W decided to seize and impound the bike and therefore his power to seize the bike under section 29AF was not enlivened.

33. Prosecution submitted W may have been seizing the bike under his general power to seize for the purpose of investigation however it is clear from the evidence of W and other officers present that he had in mind section 29AD

[7] Second reading speech for Transport Legislation (Hooning Behaviour) Amendment Bill
[8] Section 29AE (1)
[9] Section 29AE (2)

when he advised the defendant and his parents that the bike was being seized for "hooning". I reject that submission on the grounds that there was no evidence to support a finding W was exercising his general power to seize evidence in the course of an investigation.

34. Did Officer W have reasonable belief that the defendant had committed prescribed offences which properly enlivened his power to impound and seize the bike under section 29AD of the Traffic Act?

35. If I am wrong about the requirement for the impounding determination to be in writing I have to consider whether W held a reasonable belief that the bike had been used in a prescribed offence and therefore properly seized the bike.

36. Defence counsel submitted that while W clearly believed the bike had been used in a prescribed offence, the written determination did not support the view that W's belief was reasonable.

37. The offences noted in the impounding determination were offences contrary to Traffic regulations 37A and 37B, that is the bike was used in riding in a manner in which one or more wheels have lost traction and / or has damaged the surface of a road or public place. The determination also nominates the date of this suspected offending was on the 6th of December 2015.

38. The evidence of W was he believed the bike had spun up dirt and pebbles on that day and that was evidence the bike had lost traction with the dirt path. He did not give any evidence about the basis for his belief that there was damage to the road or public place.

39. Defence counsel submitted W to reasonably believe those offences had taken place he must have sufficient information to support a "sound fair and sensible" belief. The High Court decision in George v Rocket [10] was relied upon to support the view that there must be "reasonable grounds" to support a belief for the Court to decide that there was a reasonable belief however that decision referred to statutory provisions which refer to "reasonable grounds" for a state of mind to exist. There is no reference to "reasonable grounds" in the provisions being considered in this present case.

40. Nonetheless the test must be a twofold test and that is the officer must hold a subjective belief and objectively that belief must be reasonable. The belief can only be reasonable if based on reliable evidence particularly when the exercise of powers is an immediate interference of a person's liberties.

[10] (1990) 170 CLR 104

41. It is submitted by defence counsel that section 29AD(2)[11] mandates if the officer's belief is based on a complaint of a member of the public then that complaint must be made on oath and in this matter W's belief was not based on a complaint on oath. However that subsection is prefaced by the words " without limiting (1)" and by inserting those words it is the clear intention of the legislature to indicate a complaint on oath is not the only basis upon which the belief can be formed by the officer.

42. There is some strength in the argument that a reasonable belief cannot be formed if the only evidence is an unsworn complaint from a member of the public given the serious consequences of the exercise of the police officer's power to impound a vehicle. The requirement under section 29AD to have a complaint on oath is a clear protection of a person's property rights and to avoid the use of section 29AD by disgruntled vindictive members of the public to cause trouble for others without proper grounds.

43. Nonetheless it is my view an unsworn complaint could form part of the basis for a belief held by a police officer. However, if the complaint is in the form of an unsworn statement then the police officer should be more cautious in accepting what he is told by members of the public.

44. The need for caution in accepting unsworn complaints is clearly demonstrated in the present case by the inconsistencies in the contents of the sworn statements of both of Ms I and Mr S and what W remembers he was told by those people. In particular W believed he was told by Mr S that the bike had thrown up stones and dirt on that day and that formed the basis of his belief there had been an offence committed contrary to regulations 37A (1) and 37B(1). Mr S's sworn statement does not make that allegation and neither does Ms I's statement. There was some evidence in the sworn statement of Ms I that could possibly support a belief of other offences eg speeding and riding without a helmet but not the offences identified in the impounding determination.

45. Given these inconsistencies between the sworn statements and W's memory of what he was told the belief held by W was based on unreliable information. Even in conjunction with W's other observations the complaint made by Ms I and Mr S cannot form the basis for a reasonable belief that the bike was involved in a relevant offence on that day.

46. In those circumstances it is my view that while W held a belief the bike had been used in prescribed offences his belief was based on evidence which could not support a reasonable belief, the impounding determination was not properly made and the subsequent exercise of the power to seize the vehicle under section 29DF was not properly exercised.

[11] "a police officer may form the belief upon a statement made on oath by a complainant"

47. D also compounded the error by accepting that W had exercised his authority properly and by directing the bike be taken out to the main road for seizure. By doing so he too wrongly exercised the power to seize the vehicle.

48. If the exercise of the power to seize of the bike by Officer W and subsequently Officer D was not properly exercised then should the evidence of the alleged assault, resist and hinder police be admitted considering section 138 of the Evidence (National Uniform Legislation) Act.

49. The evidence of the offences of assault, hinder and resist police in the execution of their duties all comes as a consequence of the impropriety of W impounding the bike without proper process. The charges are all serious offences. The probative value of the evidence of all of the police officers to those offences is particularly high given without that evidence the charges could not be proven. The impropriety being the seizure of property by the police is also of a serious nature even though such a seizure under this legislation can only be for up to 48 hours and is subject to immediate review by a superior officer[12].

50. Clearly the impropriety was not deliberate or reckless on behalf of W or D. W could have been more cautious about accepting the unsworn complaint from the civilian witnesses and more circumspect is making his decision to seize the vehicle. D could have taken more time to establish the grounds for the impounding of the bike instead of accepting W had properly exercised his power to seize the bike however he was faced with a heated situation and his main concern was to diffuse the situation instead of allow it to escalate and I accept the safety of his officers was his main concern.

51. The defendant's father complained of the need for six police officers to attend for the seizure of a bike belonging to a 16 year old and suggested it was unnecessary. However it clear he and his family were aggressive towards the police from the outset and their behaviour caused the need for other officers to attend.

52. The decision to seize the bike was clearly outside of the authority of the police - there were no charges laid or even an infringement notice issued and the misbehaviour of the defendant and his parents arose out of that decision.

53. Had the defendant and his parents listened to D's explanation they would no doubt have been told the vehicle was going to be impounded for 48 hours and returned after that but because of their immediate aggression D did not have a chance to give that explanation. I find D to be a credible

[12] Section 29AE of the Traffic Act

and reliable witness because it is clear the defendant's mother was highly emotional at the time and her evidence contradicts the father's evidence as to the defendant's actions. It is my view she was trying to mitigate her son's behaviour or while she was concentrating on shouting at D was not really aware of what her son was doing. She could not remember the words he was using even though he was very close to her and D and yelling. Her evidence was not reliable and I do not accept her evidence where it conflicts with D.

54. Balancing the seriousness of the offending against the impropriety of the exercise of police powers and the limited effect of that exercise of powers it is my view that it would be more desirable to allow the admission of the evidence of the police officers relating to the behaviour of the defendant after the "seizure" of the bike than not to allow the admission of the evidence.

55. Were the Police officers acting in the execution of their duties?

56. Given the basis for the presence of all of the police officers was to assist Officer W in the seizure of the bike and that seizure was outside of his authority then none of the police officers who attended and assisted in that seizure were properly exercising their powers and therefore the prosecution on charges 6,7,& 8 must fail.

57. Officer D's evidence is that he was there to assist in the seizure of the motor bike and he was concerned the bike be taken at that time because if it were left to another day it would not be there when the police came back. He was clearly exercising his police powers to assist in the seizure of the bike. Those powers were being exercise without proper basis and therefore he was not in the execution of his duties.

58. Charges 6,7 & 8 are dismissed and all that remains is for me to decide the final charge of the defendant being disorderly in a public place.

59. Was 28 Minmarama Park a public place?

60. It is clear from the evidence that some of this behaviour occurred beside the police vehicle outside of the fence surrounding the defendant's family home and within the area known as Minmarama Park and while the defendant's father insisted that it was not a public place rather it was aboriginal land it is my view the area was a public place.

61. "Public place" is defined in the Summary Offences Act as "every place to which free access is permitted to the public, with the express or tacit consent of the owner or occupier thereof". The sign at the entrance of Minmarama Park says " Welcome to Minmarama". That sign gives tacit

consent of the owners to the area for members of the public to enter that place.

62. What is important however is that that the defendant is charged with being disorderly in a public place "namely 28 Minmarama Communtiy" that address is the residence of the defendant and his family and does not fit into the definition of "public place" and therefore that charge cannot be made out.

63. Charge 4 is dismissed and the defendant is discharged.

Dated this 11th day of July 2016.

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Tanya Fong Lim
Judge