CITATION:	*The Queen v Matthew John McDonogh* [2014] NTMC 007
PARTIES:	The Queen
	V
	Matthew John McDonogh
TITLE OF COURT:	Court of Summary Jurisdiction
JURISDICTION:	Criminal
FILE NO(s):	21307274
DELIVERED ON:	8 May 2014
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HEARING DATE(s):	8 and 9 April 2014
JUDGMENT OF:	Armitage SM

CATCHWORDS:

Criminal Law, Evidence –Execution of search warrant, *Police Administration Act* s120B & s120D, video recording of search warrant, propriety of police conduct

REPRESENTATION:

Counsel:

Prosecutor:	Mr Cade
Defendant:	Self Represented

Judgment category classification:	B
Judgment ID number:	007
Number of paragraphs:	61

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

No. 21307274

BETWEEN:

The Queen

AND:

Matthew John McDonogh

REASONS FOR JUDGMENT

(Delivered 8 May 2014)

Ms ARMITAGE SM:

1. Mr Matthew McDonogh was charged that on 8 January 2013 he unlawfully possessed a trafficable quantity (140.92 grams) of cannabis plant material, contrary to section (1) and 2(e) of the *Misuse of Drugs Act*.

2. On 9 April 2014, following a two day hearing, I found Mr McDonogh not guilty of that offence. The matter was adjourned so that I could provide written reasons for my decision.

The prosecution case

3. In summary, it was the prosecution's case that:

   (i) Based on information received, Detective Senior Constable Joleen Mackeown (since resigned), of the Drug and Organised Crime Squad, obtained a s120B *Police Administration Act* search warrant to search Mr McDonogh's premises in Berrimah.

(ii) At about 8.30 am on Tuesday 8 January 2013, Detective Mackeown briefed police officers who were participating in the execution of the search warrant as to its execution. Tasks were allocated to each officer.

(a) Detective Senior Constable Wayne Whitlock was assigned "method of entry", in other words he was the officer who would force entry onto the premises if that was necessary. Among other accoutrements, he carried a door rammer for that purpose.

(b) Detective Senior Constable Andrew Baldwin was tasked as the exhibit officer. Among his other accoutrements, he carried an exhibit bag which contained material for maintaining a written record of the execution of the warrant and recording and maintaining any seized items.

(c) Detective Acting Sergeant Vaughn Allitt was tasked to film and photograph the execution of the warrant. Among other accoutrements, he carried a digital video recorder and a camera for that purpose.

(d) Detective Sergeant Pfitzner was assigned the role of security. His task was to stay close to Mr McDonogh to ensure that he did not interfere with the execution of the search warrant.

(e) Sergeant Shane Arnison (since resigned) attended as a drug detection dog handler with his dog Plato.

(f) Other officers were allocated search duties.

(iii) Police attended the Berrimah residence at about 9 am and forced entry.

(iv) Following caution, Mr McDonogh admitted there were 3 – 4 ounces of cannabis in his freezer.

(v) The drugs were located, seized, exhibited and later tested identifying them as 140.92 grams of cannabis plant material.

The defence case

4. Mr McDonogh represented himself. Through his cross examination of the prosecution witnesses and his evidence Mr McDonogh took issue with the prosecution case as follows:

(i) The forced entry was unnecessary.

(ii) He was not given a copy of the search warrant nor an opportunity to read it.

(iii) While Mr McDonogh readily admitted possessing a small amount of cannabis in a small clip seal bag, he denied possessing the large bag and trafficable quantity alleged by the police. He claimed he was "fitted up" and pointed to the following:

(a) Before any drug was seized he saw the drug dog reacting to the Exhibit Officer but the dog did not react to Mr McDonogh or any part of his premises.

(b) To Mr McDonogh's observation a video recording taken by police of the execution of the search warrant was continuous. He contended that the prosecution produced an edited version in its case. Mr McDonogh contended that parts unhelpful to the prosecution case or helpful to Mr McDonogh's case had been edited out.

(c) Mr McDonogh was outside at the time of the seizure and was not in a position to see the seizure take place.

(d) There was no video of the seizure, nor any photo taken of the seized item.

(e) In the prosecution case the descriptions of the seized item were inconsistent with each other. One of the descriptions was consistent with there being only a small quantity of cannabis, and that description was to be preferred.

Ruling

5. At the conclusion of the case I was left with a reasonable doubt about the nature of the item seized from Mr McDonogh's residence and found him not guilty. There were a number of aspects of the prosecution case that I found

to be unsatisfactory and which contributed to my overall doubt about the case. The most significant matters giving rise to my doubt were the inconsistent prosecution descriptions of the seized item and the failure by police to video record or photograph the seizure or the item. Contributing to my overall doubt was my view of the less than satisfactory manner in which police carried out the execution of the search warrant including: the unnecessary force used to enter the premises, the failure to give a copy of or to provide an opportunity to Mr McDonogh to read the search warrant, and the failure to provide Mr McDonough with an opportunity to observe either the seizure or the seized item. Together these matters left me feeling uncomfortable about the police conduct and contributed to my doubts about the accuracy and truthfulness of their evidence.

Inconsistent descriptions of the seized item

6. The prosecution led evidence of four different descriptions of the seized item.

(i) The seizing officer, Detective Whitlock, gave evidence that he was an experienced police officer of 25 years' standing. He had been attached to the Drug and Organised Crime Squad since 2010. He made a statutory declaration about this matter dated 21 March 2013 (Ex D3). In it he stated that entry to the premises was at 0900 hours, at about 0910 hours he located a clip seal sandwich bag containing cannabis in the freezer compartment of the refrigerator, he seized the package and gave it to Detective Baldwin, the nominated Exhibits Officer. Consistent with his statement, in his oral evidence Detective Whitlock described the seized item as a small, clip seal, Glad sandwich bag, approximately 4 inches wide and 4 ½ inches high.

(ii) In his evidence Detective Baldwin said he received the seized item at 9.10 am. In the Search Warrant Booklet (Ex P2) Detective Baldwin recorded the item as "1 x large bag of cannabis". In his evidence Detective Baldwin further described the bag as a large, clip seal, sandwich bag, A4 in size. In cross examination he denied the bag was 4 inches by 4 inches or small. Detective Baldwin said he placed the seized item in a

drug exhibit bag, sealed and labelled the bag, and retained possession of it until it was lodged with the forensic science branch exhibit officer later that day.

(iii) In her evidence Detective MacKeown stated she was outside in the back yard and did not see the item being seized or exhibited. Later she saw an item in a police security bag inside a brown paper bag. She could not recall whether the security bag was sealed and had limited recall of what was inside the security bag but offered "it may have been a cryovac bag from memory". As to her description, in cross examination Detective Mackeown said "I could be wrong".

(iv) The Forensic Chemist, Ms McGorman gave evidence of receiving the exhibit on 29 January 2013. She described the clip seal bag she received as being approximately 25 x 30 centimetres.

7. Mr McDonogh gave evidence. He admitted being a long term cannabis user and was experienced with the packaging and weight of cannabis. He said he had received about 3 ½ ounces of cannabis from a friend about 3 weeks before he was raided. He said he had used some of the cannabis since receiving it. He was adamant there was "no way" there could have been in excess of 5 ounces in the bag. He said that as the bag was only 4 inches by 4 inches it could not physically contain that much cannabis.

8. As to the discrepancies between the prosecution witnesses' descriptions it was submitted that Detective Mackeown's description could be discounted as she clearly had a limited opportunity to observe the item. I have no difficulty accepting that submission.

9. As to the differences between Detectives Whitlock and Baldwin it was submitted that I should prefer Detective Baldwin's description because it was corroborated by the forensic chemist. Accordingly it is argued that, effectively by default, I should conclude that Detective Whitlock must have been mistaken.

10. In my view, this suggested line of reasoning is wrong. I have no doubt that the forensic chemist received a 25 x 30 cm zip lock bag. However, her receipt of that item is equally consistent with both the prosecution case (that it was found in Mr McDonogh's freezer) and the defence case (that it was planted by police into evidence) and fails to objectively enhance one case over the other.

11. The evidence as to Detective Whitlock's service and experience as a police officer was led by the prosecution. I have no difficulty accepting that he was an experienced drug detective. He located the seized item, handled it, and described it in some detail in his statutory declaration and again in oral evidence under oath. On each occasion his description was consistent. Further his description was internally consistent. By that I mean the use of the descriptor "sandwich bag" was consistent with the dimensions he described.

12. No sound reason has been advanced by the prosecution as to why Detective Baldwin's evidence is to be preferred. Although the descriptor "large" is contained in the Search Warrant Booklet, Detective Baldwin recorded neither the style nor the dimensions of the bag. The further descriptors of "clip seal", "A4", and "sandwich bag" were provided in his oral evidence. My understanding of a "sandwich bag" is a bag (clip seal or otherwise) designed to hold the average sliced bread sandwich. It is not usually associated with a larger A4 size bag. In my view, Detective Baldwin's evidence is less consistent over time and is less internally consistent than Detective Whitlock's.

13. Accordingly, I prefer Detective Whitlock's evidence which is consistent with Mr McDonogh's evidence as to the item in his freezer. Therefore, I am left in considerable doubt that the item examined by Ms McGorman belonged to Mr McDonogh or was seized from his freezer.

The video recording

14. It is possible that any doubt as to the nature of the seized item might have been resolved had a full video of the execution of the search warrant been tendered into evidence.

15. I note that there was a briefing as to the execution of the warrant and Detective Acting Sergeant Allitt, a police officer with 10 years' experience, was specifically tasked to record the execution of the warrant on video and with a still camera. This equipment was apparently kept by the Drug Squad for this purpose. This was Detective Allitt's sole task.

16. Further, I note that the warrant was a s120 B drug warrant. In his evidence Detective Allitt acknowledged that he was to "film the entry and anything that's relevant". It must have been readily apparent to Detective Allitt that any drug seizures would be relevant and, according to his understanding of the role, should be recorded. However, it is the prosecution case that there was no video made of the drug seizure or of the seized item nor any photos taken.

17. Various reasons were proffered in evidence and in submissions for the failure to record the entirety of the search warrant.

18. In his evidence Detective Allitt said "There was an issue with Mr McDonogh's special needs child running around unclothed at the warrant and its not appropriate for police to film such things". However the extracts of video tendered reveal that Mr McDonogh's son was clothed within 3 minutes of police arrival (Ex P8 segment 1). He was still clothed at the conclusion of the video extracts. Accordingly, I find this explanation unsatisfactory.

19. In her evidence Detective Mackeown asserted it would be impossible to maintain a continuous record as members searched simultaneously in different locations. While I accept that it may not be possible to record all

events contemporaneously, I make the following observations. It is neither impossible nor impracticable to operate a continuous video recording. When an item of interest is located it can be left in situ until the filming officer attends to record it, both in situ and its subsequent seizure.

20. In this case, Mr McDonogh very clearly and loudly volunteered the location of the seized item. Detective Allitt was videoing Mr McDonogh at that very moment. Detective Allitt was on notice that it was likely a drug exhibit would be located in the freezer and yet failed to record the search of the freezer or the seized item.

21. Another explanation proffered for failing to record the search of the freezer was that the search was conducted at the same time Mr McDonogh was being video recorded in the back yard.

22. How and when the search was conducted was entirely at the discretion of the police. Why they would choose to conduct the freezer search at a time when the filming officer was busy is unexplained. Further, from the diagram of the premises and its depiction on the video recording it is clear that all Detective Allitt needed to do was spin to his right in order to capture the search of the freezer.Accordingly, I find this explanation equally unsatisfactory.

23. I find there was an 8-9 minute difference between the real time events occurred and the digital time shown on the video recording. In making this observation I rely on the evidence led by the prosecution as to the time the search warrant was executed and concluded, namely: the search warrant booklet (Ex P2) which records that searching started at 9 am and was completed at 9.44 am; Senior Constable Meng's statutory declaration (Ex P9) which indicates he attended at the premises at 9 am; Detective Mackeown's notation on the search warrant (Ex P4) which indicates it was executed at 9 am and so on. In his evidence Detective Allitt said when the police arrived at the premises he "got out of the car with the video recorder

running and filmed entry that was forced ". However, the digital time shown on this first segment of footage is 9.09 am revealing a 9 minute discrepancy between the digital time and the real time. The sixth and final segment of video footage shows a digital time of 9.54 am but records Detective Allitt saying "46 past 9 video recording concluded" again revealing a discrepancy, this time of 8 minutes.

24. Mr McDonogh is recorded, following caution, disclosing the location of the cannabis on the fifth segment of video footage. This segment shows the digital commencement time as 9.15. Taking into account the discrepancy, the real time is therefore 9.06 or 9.07 am. The recording continues for 2.54 seconds, therefore in real time concluding at either 9.08.54 or 9.09.54 am. According to Detective Whitlock's statutory declaration (Ex D3) and the search warrant booklet (Ex P2) the seizure from the fridge occurred at 9.10, that is moments after the recording of Mr McDonogh concluded. On analysis of the evidence before me, there was no logistical impediment to recording the seizure and I find the suggestion that Detective Allitt was otherwise engaged with other filming at the time of the seizure to be incorrect.

25. Finally, in his evidence Mr McDonogh asserted that the police in fact video recorded the entirety of the search and the disc tendered containing six segments of footage was an edited record. This was denied by Detective Allitt. Without technical analysis of the footage, the hard drive on which it was downloaded, or the video camera, it is impossible to determine whether or not this is the case. However there are aspects of the video recording and evidence about it that cause me to have doubt about that denial.

26. As previously noted, Detective Allitt gave evidence that he knew he was to record the "entry and anything that's relevant". There were six segments of footage tendered in the proceedings (Ex P8).

    (i) The first segment started at 9.09 am (according to the digital time shown on the recording) and continued for 1.41 minutes. It shows the forced entry, an initial (pre-caution) admission by

Mr McDonogh and Mr McDonogh attending to dressing his son.

(ii) The second segment of video started at 9.11 am and continued for 11 seconds. It records damage to the wooden door.

(iii) The third segment of video started at 9.12 am and continued for 2.04 minutes. It records Mr McDonogh being given an opportunity to put the television on for his son and the general layout of the premises.

(iv) The fourth segment of video started at 9.15 and continued for 9 seconds. It records an injury to an officer's arm.

(v) The fifth segment of video started at 9.15 am and continued for 2.54 minutes. It records the conversation in the back yard in which, post-caution, Mr McDonogh readily admits to smoking marijuana and repeats that his "smoko" was in the freezer. He told police they would find 3 or 4 ounces. The video recording ceases moments later.

(vi) The sixth segment of video commenced at 9.54 am and continued for 35 seconds. It briefly scans over the exhibit table and two paper bags can be seen, it then depicts Mr McDonogh getting a drink and ice from the freezer. It records a voice saying "46 past 9 video recording concluded".

27. Police were at the premises for approximately 46 minutes, yet there are only 6.54 minutes of recorded footage. During that time 3 items were seized (Ex p2) (only the first relevant to these proceedings) yet it is the prosecution case that none of the seizures were videoed. Indeed, none of the items seized were videoed or photographed following their seizure. Detective Allitt gave evidence that he videoed "the finding of the exhibits". Detective Allitt's evidence as to his conduct is consistent with his experience and allocated role but is inconsistent with the video footage tendered. It causes me to have significant doubt as to what video footage was actually taken as compared to that which was tendered.

28. As to the sixth segment, in his evidence Detective Allitt said the purpose of the recording was to record "the state of the property when we left". However, there is no scanning of the property at all in this segment (as compared to segments 1 and 3). The focus is instead on Mr McDonogh getting a drink and ice from the freezer. This segment of video is not consistent with Detective Allitt's oral evidence. However, his oral evidence accords with logic. It would be eminently sensible for police to record the state of a searched premised before departure to avoid false allegations of damage. Did Detective Allitt in fact film the state of the premises at the end of the search, consistent with his experience and understanding of his role, and did editing remove this? I am left in doubt about that.

29. I note that by contrast to segment 6 which contains the audio recorded words "46 past 9 video recording concluded" (presumably the voice of Detective Allitt), there are no audio recorded times at the commencement or conclusion of any of the other discreet segments. If police were deliberately recording in segments, for clarity one would expect them to audibly record the commencement and conclusion of each segment. This would make it clear that the camera was going on and off and would go some way to avoiding allegations of undisclosed editing. In the circumstances of this case, it does not make logical sense for Detective Allitt to have gone to the bother of recording a concluding time at the end of a 35-second segment, and not a start time at the commencement of segment one, or start and stop times for each segment.

30. As to the first segment, in his evidence Detective Allitt said that he "got out of the car with the video recorder running". Presumably, he would therefore have had an opportunity to record the purpose of the recording and commencement time while he was in the police vehicle before alighting. I am concerned that there is no such information on the recording. Further, the first segment of the video recording commences not with Detective Allitt "getting out", by which I infer he means alighting from a car, rather it

commences with him walking forward. Again in my view this segment of footage is not entirely consistent with Detective Allitt's oral evidence about it. If he did in fact get out "of the car with the video recorder running" then that part of the footage was not tendered and supports Mr McDonogh's submission that the video was edited. Again I am left in considerable uncertainty about the state of the recording.

31. Finally, Detective Allitt was cross examined on his statutory declaration which was not tendered. He agreed that his statutory declaration contained the statement: "Throughout the course of the search I filmed the entirety of the warrant's execution". As to the apparent discrepancy between this statement and the tendered footage he explained "what I was merely trying to imply is that everything that was filmed at the search was filmed by me". I am not convinced by that explanation and find it artificial.

32. It is evident that I was left in considerable doubt as to the state of the video recording, whether it had been edited as alleged, and if so, why. This doubt contributed significantly to my overall doubt about the prosecution case.

The purported admission against interest

33. The prosecution relied on the fifth segment of the video footage as it contained admissions by Mr McDonogh that there were 3 or 4 ounces of cannabis in his freezer. In his evidence, Mr McDonogh said that in further conversation with police he clarified this statement. It was Mr McDonogh's evidence that he also told police he had been given the cannabis at Christmas and had used some of it, so there was less than that amount remaining. Mr McDonogh said that the police must have edited that part of the conversation out of the video tape.

34. Given the doubts I have as to the status of the video exhibit, I am unable to conclude that Mr McDonogh's assertion is inaccurate. Accordingly, I cannot

give much weight to the purported admission and evidence of it did little to remediate my overall doubt about the prosecution case.

The failure to photograph

35. Detective Allitt was also equipped with what was described as a digital still camera. According to his evidence, when the drug exhibit was seized he attempted to take a photo of it but the camera did not work. He said there was a "technical issue" with the camera about which he could not further elaborate. There was no evidence led, for example of maintenance or repair records, to confirm the existence of a fault. Detective Allitt was not asked and did not explain why he didn't then simply video the exhibit.

36. Further he was not asked about the possibility of using any other equipment to take photographs. There were 10 police members present at the search (Ex P2). I find it implausible that none were equipped with mobile phones capable of taking still photographs or that this option was not be considered by Detective Allitt or any other member present. (I assume that Detective Allitt had no reason to keep the equipment malfunction a secret and it would have been obvious to other members that no photos were being taken).

37. I find Detective Allitt's explanation for the failure to photograph the seized exhibit unconvincing. This contributed to my overall doubt as to the prosecution case.

The forced entry

38. Pursuant to s120 D of the *Police Administration* Act, police are authorised as follows:

> **120D Use of reasonable force**
>
> The power to search conferred by s120C or by warrant issued under section 120B authorises a member:

a) to use such reasonable force as is necessary to break into, enter and search the place to be searched;

b) to use such reasonable force as is necessary to open any cupboard, drawer, chest, trunk, box, package or other receptacle, whether a fixture or not, found at that place, and

c) to use such reasonable force as is necessary to carry out a search of a person authorised by or under this Division.

39. The premises the subject of the search consisted of a front brick room with a wooden door (used as a bedroom by Mr McDonogh's autistic son), connected to a shed which doubled as a work shop and Mr McDonogh's bedroom and living quarters. The shed could be entered either via the front brick room or directly through a cyclone wire gate and a roller shutter door, situated at the front of the property, at right angles to and about two metres away from the wooden door. When police attended the roller shutter door was open to above head height and the only barrier to entry into the shed directly was the large, see-through, cyclone wire gate.

40. At least two of the attending members, Detectives Whitlock and Pfitzner, were known to Mr McDonogh. Both police gave evidence that they had never known Mr McDonogh to resist police. Further, there was evidence that the premises had been entered and searched previously. At least in a general way it can be inferred that police had some working knowledge of Mr McDonogh, his son's readily apparent disability and the layout of the premises. Although the cyclone wire structure is not visibly a gate, it does open. In her evidence Detective Mackeown described it as a gate. I infer from her evidence that prior to her attendance she knew that it operated as a gate and entry was available through it.

41. The police attendance and entry into the premises is documented in the first segment of video footage. On arrival police congregate at the closed wooden door and at 00.01 on the footage call out "open the door or we'll break it".

From the body of the shed Mr McDonogh replies "the doors broken" but police mishear this as "open". They respond "the doors not open" and Mr McDonogh, who now sounds much closer and is presumably at the cyclone wire gate, replies "that door's broken since the last time you come here". The audio picks up a metallic, scraping sound consistent with Mr McDonogh commencing to open the cyclone wire gate. At 00.12 the footage scans to the Mr McDonogh and his hand can be seen at the top left hand end of the gate consistent with him unlocking the gate. At this point Detective Mackeown has moved towards Mr McDonogh and is seen next to the gate. At 00.13 a male voice can be heard saying "it's open now". The video scans back to the wooden door which has been forced open using the door rammer.

42. In his evidence Detective Whitlock, who was carrying the door rammer, said, "There were a number of demands for him to come to the door and open it. There was quite a good deal of arguing and conversation going on in relation to the door being opened. That from my understanding there was a refusal or delay to open the door" and I forced entry.

43. In my view that evidence of Detective Whitlock is inconsistent with the evidence on the video which shows Mr McDonogh immediately responding to the police. He did not argue, he explained that the wooden door was broken (from which it can be inferred could not be opened) and promptly commenced unlocking the gate. Before he could do so the wooden door was broken in.

44. In the sixth segment of video footage Mr McDonogh can be heard explaining to police that the wooden door was broken the last time police attended the premises, he did not have the funds to repair it, and had nailed it shut (presumably to provide security for his son).

45. As to the lawfulness of that use of force, the prosecutor submitted that irrespective of the circumstances, police were entitled to break into premises to execute a search warrant. In interpreting s120D in this way the prosecutor

submitted that the word "necessary" merely circumscribed the degree of force to be applied (that which is necessary to break in) and did not import or connote a requirement that a break in should only occur if circumstances necessitated it. In application, such an interpretation would mean that in a situation where police were confronted with a double door, one side open and the other closed, police could lawfully choose to break in through the closed half, provided they only used no more than the necessary force to do so. The prosecutor could not point to any authorities specifically in support of this interpretation, but helpfully referred me to the decisions of *R v Cant* [2001] NTSC 38, reported at (2001) 138 NTR 1 and *R v Jesson* [2009] NTSC 13, reported at (2009) 24 NTLR 86 in which Mildren J at [42] approved and applied *R v Cant*.

46. On the question of the proper approach to statutory interpretation, in *R v Cant* at [32] Thomas J accepted the submission that:

> "there are numerous authorities which stress an established principle governing the interpretation of statutory provisions relating to the issue of search warrants being a principle that dictates:
>
> - That the wording of procedural requirements concerning the issue and execution of warrants is to be construed strictly; and
>
> - In case of ambiguity, the ambiguity is to be resolved in favour of the citizen whose privacy and property were interfered with as a result of the proposed search taking place"

At [34] her Honour extracted and applied the following passage from *George v Rockett* (1990) 170 CLR 104 at 110-111:

> "A search warrant thus authorises an invasion of premises without the consent of persons in lawful possession or occupation thereof. The validity of such a warrant is necessarily dependent upon the fulfilment of the conditions governing its issue. In prescribing conditions governing the issue of search warrants, the legislature has sought to balance the need for an effective criminal justice system against the need to protect the individual from arbitrary invasions of his privacy and property. Search warrants facilitate the gathering of evidence against, and the apprehension and conviction of, those who

have broken the criminal law. In enacting s. 679, the legislature has given primacy to the public interest in the effective administration of criminal justice over the private right of the individual to enjoy his privacy and property. The common law has long been jealous of the prima facie immunity from seizure of papers and possessions: see Holdsworth, A History of English Law, vol. 10 (1938), pp. 668 – 672. Except in the case of a warrant issued for the purpose of searching a place for stolen goods, the common law refused to countenance the issue of search warrants at all and refused to permit a constable or government official to enter private property without the permission of the occupier: Leach v Money; Entick v Carrington. Historically, the justification for these limitations on the power of entry and search was based on the rights of private property: Entick. In modern times, the justification has shifted increasingly to the protection of privacy: see Feldman, The Law Relating to Entry, Search and Seizure (1986), pp. 1-2.

State and Commonwealth statutes have made many exceptions to the common law position, and s 679 is a far-reaching one. Nevertheless, in construing and applying such statutes, it needs to be kept in mind that they authorize the invasion of interests which the common law has always valued highly and which, through the writ of trespass, it went to great lengths to protect. Against that background, the enactment of conditions which must be fulfilled before a search warrant can be lawfully issued and executed is to be seen as a reflection of the legislature's concern to give a measure of protection to these interests. To insist on strict compliance with the statutory conditions governing the issue of search warrants is simply to give effect to the purpose of the legislation. ...."

47. In my view the construction submitted for by the prosecutor is not consistent with the principles of construction required in respect of search warrant legislation. A strict interpretation of s120D(a), resolving any ambiguity in favour of the person whose property is to be searched, requires:

(i) that it be necessary to break into the place to effect the search, and if that is so

(ii) the force used must be reasonable.

48. As an aside I note that necessity might be occasioned by physical, practical or operational considerations, such as urgency or known behaviour of the person of interest.

49. In the circumstances of this case, at the time of forced entry:

(i) Only 12-13 seconds elapsed between police announcing their arrival and the application of force,

(ii) Mr McDonogh immediately responded to police by presenting at another front entrance of the premises,

(iii) Mr McDonogh explained why the wooden door could not be opened,

(iv) Mr McDonogh was not arguing with police,

(v) Mr McDonogh was not refusing entry,

(vi) Mr McDonogh was not delaying entry, and

(vii) Mr McDonogh was in the process of opening the second entrance when the force was applied.

50. On the evidence before me, I can find nothing that indicates that it was necessary to break into Mr McDonogh's premises to effect the search, and I find that the force used was not necessary or authorised.

51. The prosecutor submitted that even if the manner of entry was unauthorised, I nevertheless should exercise my discretion pursuant to s138 of the *Evidence (National Uniform Legislation) Act* and admit the evidence of the search. In exercising my discretion, I received only limited submissions from Mr McDonogh, consistent with his self-represented status.

52. Taking into account the unauthorised method of entry only, and applying the factors that must be considered in s138(3), I admitted the evidence of the search in the exercise of my discretion. In particular, I was persuaded that

the method of entry had no direct impact on the probative value of the seized item. Further that it did not affect Mr McDonogh in any relevant way that might have caused me to question the admissibility of his admission. At no time did Mr McDonogh suggest that he was intimidated or overborne by the police action, and indeed, the contrary is evident from the video extracts. I accepted the submission that it was important that drug offending be prosecuted. Further, on the evidence I was persuaded that it was possible the unauthorised act was the result of mistake by the member as to the scope of his authority and the relevant circumstances, rather than an action taken in deliberate or reckless disregard of his authority.

53. Having admitted the evidence, the unauthorised method of entry together with the other matters that concerned me about the conduct of police in the execution of the warrant, contributed to my overall doubt about police conduct and the prosecution case

The failure to give Mr McDonogh a copy of the search warrant

54. Although I was not referred to the Police General Orders directly, a partial extract is contained in *R v Cant* at [61]. General Order 18.3 provides:

> Where practicable, the owner or occupier of the premises should be present when premises are searched under the authority of a Search Warrant. The owner or occupier shall, where practicable and appropriate be provided with a copy of the relevant search warrant prior to the commencement of any search.

55. Even though Detective Mackeown had a copy of the search warrant, it is clear both from the video footage and from her evidence, that Mr McDonogh was not given a copy. I am also satisfied that he was afforded no proper opportunity to read it. There was nothing in evidence before me that justified this failure to comply with the Police General Order and the failing contributed to my overall concern about police conduct and doubt about the prosecution case.

No opportunity for Mr McDonogh to observe the seizure or the item seized

56. On analysis of the video footage and other evidence I concluded that the item was seized from the freezer almost immediately after footage in segment five concluded.

57. At the conclusion of segment five Mr McDonogh can be seen walking away from the shed and deeper into his back yard, apparently looking for his dogs which were in hiding.

58. As previously noted, it was at the discretion of police when they searched the freezer. It is not clear why the police conducted the search when Mr McDonogh was not in a position to see the item being seized.

59. Mr McDonogh had been cautioned and made admissions. In those circumstances, it would be natural to show him the seized item and ask him if it was his. I am concerned that this did not occur.

60. Mr McDonogh made no secret as to the existence of cannabis in the freezer. It is concerning that the police methods lacked transparency.

Conclusion

61. At the conclusion of the case, I found much of the police evidence to be inadequate and unconvincing. I was left in considerable doubt about the prosecution case and acquitted Mr McDonogh.

Dated this 8 day of May 2014

Élisabeth Armitage
STIPENDARY MAGISTRATE