

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

**IN THE DISTRICT COURT  
AT CHRISTCHURCH**

**CRI-2017-009-001667  
[2018] NZDC 3979**

**NEW ZEALAND POLICE**  
Prosecutor

v

**COREY IAN NORLING**  
Defendant

Hearing: 7 November 2017 & 14 February 2018  
Appearances: S Burdes for the Prosecution  
P Johnson for the Defendant  
Judgment: 5 March 2018

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**RESERVED JUDGMENT OF JUDGE A D GARLAND  
RE ADMISSIBILITY OF EVIDENCE**

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**Introductions**

[1] Mr Norling is charged with:

- (a) Unlawful possession of an airgun;
- (b) Unlawful possession of ammunition;
- (c) Driving while suspended – third or subsequent;
- (d) [details deleted — charge subsequently withdrawn];

(e) Unlawful possession of a knife.

[2] Items that form the basis of these charges were found by Police during a warrantless search of Mr Norling's car on 22 February 2017.

[3] The defendant has challenged the lawfulness of the warrantless search.

[4] At a pre-trial hearing on 7 November 2017 and 14 February 2018 I heard evidence from [Constable 1] and [Sergeant 1].

[5] At the conclusion of the hearing I reserved my decision and directed the parties to file written submissions.

### **Factual Background**

[6] At about 8pm on Wednesday 22 February 2017 the Police stopped a Mitsubishi motor vehicle on Dyers Road as part of a normal vehicle related check. [Sergeant 1] spoke to the driver, the defendant Mr Norling. [Constable 1] spoke to [the passenger].

[7] [Constable 1] asked [the passenger] if she had anything on her that she should not have and she replied in the affirmative. She reached into the waistline of her pants and produced a small black bag containing Ziplock bags, commonly used to contain methamphetamine. The Constable asked what was in the bags and she responded that she did not know as the driver had asked her to hold on to them for him when the vehicle was stopped.

[8] The Constable formed the belief that the bags contained methamphetamine and that there was a strong likelihood that there would be more drugs in the vehicle or on the passenger.

[9] The Constable then invoked the statutory search power under the Search and Surveillance Act 2012. Located in a backpack belonging to the defendant Mr Norling were two knives in sheaths. The Constable then called for backup, and other police officers arrived to assist with the search. Located in a purple sunglass case were two glass pipes with black and grey residue inside, commonly used for smoking

methamphetamine. Located in a black carry case were 100 rounds of ammunition in various calibres. Located in the boot of the vehicle was a Gamo Silent Cat 1250FPS air rifle with an attached suppressor.

[10] Mr Norling admitted knowledge of the items in the vehicle and explained that he had picked them up from a friend's house and was disposing of them for her.

### **The Issues**

[11] The parties agree:

- That [Constable 1] purported to invoke powers under the Search and Surveillance Act 2012 to search the car for drugs but spoke only to the female passenger;
- That [Sergeant 1] then entered the defendant's car via the rear left passenger door. He found a black backpack in the foot well of the rear left passenger seat. Inside the backpack were the knives;
- That the defendant was not told of the invocation of any search powers by either [Constable 1] or [Sergeant 1];
- The defendant was the person in charge of the vehicle. The Police failed to carry out the identification and notification requirements specified in s 131(1)(b) of the Search and Surveillance Act 2012 ("SSA");
- The defendant was only notified in accordance with s 131 when other police officers arrived and prior to those officers conducting a full search of the car.

[12] The Police therefore accept that the mandatory requirements of identification and notice set out in s 131 of the SSA were not followed before [Sergeant 1] entered the motor vehicle and found the knives.

[13] The Police also accept that the other police officers who arrived at the scene, 10 to 15 minutes later, and who did comply with s 131 only arrived at the scene because [Constable 1] requested assistance due to discovery of the knives. It is accepted therefore that the evidence subsequently discovered by those officers is tainted by the initial failure of [Constable 1] and [Sergeant 1] to comply with s 131 of the Act.

[14] The Police therefore accept that all of the evidence in relation to all charges (except driving while suspended – third or subsequent) was improperly obtained.

[15] The Police nevertheless seek admission of the evidence improperly obtained pursuant to s 30 of the Evidence Act 2006.

### **Section 30 Evidence Act 2006**

[16] Section 30 provides:

#### **30 Improperly obtained evidence**

(1) This section applies to a criminal proceeding in which the prosecution offers or proposes to offer evidence if—

(a) the defendant [or, if applicable, a co-defendant] against whom the evidence is offered raises, on the basis of an evidential foundation, the issue of whether the evidence was improperly obtained and informs the prosecution of the grounds for raising the issue; or

(b) the Judge raises the issue of whether the evidence was improperly obtained and informs the prosecution of the grounds for raising the issue.

(2) The Judge must—

(a) find, on the balance of probabilities, whether or not the evidence was improperly obtained; and

(b) if the Judge finds that the evidence has been improperly obtained, determine whether or not the exclusion of the evidence is proportionate to the impropriety by means of a balancing process that gives appropriate weight to the impropriety [and] takes proper account of the need for an effective and credible system of justice.

(3) For the purposes of subsection (2), the court may, among any other matters, have regard to the following:

- (a) the importance of any right breached by the impropriety and the seriousness of the intrusion on it:
- (b) the nature of the impropriety, in particular, whether it was deliberate, reckless, or done in bad faith:
- (c) the nature and quality of the improperly obtained evidence:
- (d) the seriousness of the offence with which the defendant is charged:
- (e) whether there were any other investigatory techniques not involving any breach of the rights that were known to be available but were not used:
- (f) whether there are alternative remedies to exclusion of the evidence which can adequately provide redress to the defendant:
- (g) whether the impropriety was necessary to avoid apprehended physical danger to the police or others:
- (h) whether there was any urgency in obtaining the improperly obtained evidence.

(4) The Judge must exclude any improperly obtained evidence if, in accordance with subsection (2), the Judge determines that its exclusion is proportionate to the impropriety.

(5) For the purposes of this section, evidence is improperly obtained if it is obtained—

- (a) in consequence of a breach of any enactment or rule of law by a person to whom section 3 of the New Zealand Bill of Rights Act 1990 applies; or
- (b) in consequence of a statement made by a defendant that is or would be inadmissible if it were offered in evidence by the prosecution; or
- (c) unfairly.

(6) Without limiting subsection (5)(c), in deciding whether a statement obtained by a member of the police has been obtained unfairly for the purposes of that provision, the Judge must take into account guidelines set out in practice notes on that subject issued by the Chief Justice.

[17] Section 30 requires the Court to determine whether or not the exclusion of the improperly obtained evidence is proportionate to the impropriety and which also takes proper account of the need for an effective and credible system of justice.<sup>1</sup>

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<sup>1</sup> S 30(2)(b)

[18] In making this assessment, the Court may have regard to the factors in s 30(3) of the Evidence Act.

## **Submissions**

### *Police*

#### *Importance of right breached – s 30(3)(a)*

[19] The Police accept the right breached was the defendant's right to privacy. It is accepted that that was a significant right but it is submitted that the right to privacy of a vehicle is less than that attached to a house or human body.

#### *Nature of Impropriety – s 30(3)(b)*

[20] The Police submit that the failure of [Constable 1] and [Sergeant 1] to comply with s 131 was not done in bad faith. It is submitted that [Constable 1]'s initial indication of the warrantless search powers to search the car for drugs in fact complied with s 20 of the Search and Surveillance Act. But for the failure to comply with s 131, the warrantless search would have been valid.

#### *Nature and quality of evidence – s 30(3)(c)*

[21] The Police submit the items found are of real evidence and are central to the Police case.

#### *Seriousness of the offence charged – s 30(3)(d)*

[22] The Police submit that the combination of drugs paraphernalia and weapons charges place the alleged offending at the moderate to serious level.

#### *Other investigatory techniques – s 30(3)(e)*

[23] The only other investigatory technique would have been for Police to obtain a search warrant and/or secure the vehicle under s 17 of the Act while a warrant was

sought. The Police submit this option was not practicable in the circumstances faced by [Constable 1].

*Alternative Remedies – s 30(3)(f)*

[24] The Police accept there is no meaningful remedy other than exclusion of the evidence from trial.

*Danger to the Police – s 30(3)(g) and Urgency – s 30(3)(h)*

[25] These are not applicable in the circumstances of this case.

[26] In conclusion, the Police submit that consideration of these criteria favour admission of the evidence. Although the right breached was an important right, it was not done in bad faith and it was at the lower end of the scale. The offending is reasonably serious and the evidence is of central importance to the Police case. It was impracticable to obtain a warrant to secure the vehicle under s 117 while a warrant was sought.

*Defence*

[27] On behalf of the defendant, Mr Johnson submitted:

*Importance of right breached – s 30(3)(a)*

[28] It is accepted that the defendant's right of privacy was breached, but the right of privacy in a vehicle is less significant than that which would attach to a house or a human body.

*Nature of Impropriety – s 30(3)(b)*

[29] It is accepted that the failure to comply with s 131 was not done in bad faith.

[30] The Defence accepts that [Constable 1] had reasonable cause to invoke the provisions of s 20 of the SSA. It is accepted that if there had been compliance with s 131 the warrantless search would have been valid.

[31] In contrast with that concession, defence counsel does not accept that an application for a search warrant was not a practicable option at that time. While a written application for a search warrant may have taken three to four hours, counsel submits that there was the alternative option of making an oral application. Mr Johnson submitted that with the occupants of the vehicle having been arrested, and the vehicle secured, the Police had a sufficient opportunity to obtain a search warrant.

*Nature and quality of evidence – s 30(3)(c)*

[32] The defence accepts that the items found are central to the police case and are real evidence.

*Seriousness of the offence charged – s 30(3)(d)*

[33] The defence accepts that the offences charged are at a moderate to serious level.

*Other investigatory techniques – s 30(3)(e)*

[34] The defence submits that the Police had another investigatory technique available, namely to obtain a search warrant by means of an oral application.

*Alternative Remedies – s 30(3)(f)*

[35] The defence accepts there is no real meaningful remedy other than exclusion of the evidence from trial.

*Danger to the Police – s 30(3)(g) and Urgency – s 30(3)(h)*

[36] These are not applicable in the circumstances of this case.



[37] In conclusion, the defence submits that consideration of these criteria favours exclusion of the evidence. The right breached is an important one which was not at the lower end of the scale. While the alleged offending was moderately serious and the evidence is central to the police case, the defence submits that it was practicable for the Police to have obtained a search warrant in the circumstances of this case.

## **Discussion**

*Was the search unlawful and unreasonable?*

[38] I agree with counsel that because the mandatory provisions of s 131 of the Search and Surveillance Act were not complied with, the search was unlawful and unreasonable. Consequently, the evidence discovered as a result of the search was improperly obtained.

*Should the evidence be admitted?*

[39] In this regard I consider the factors in s 30(3).

*The Importance of the Right Breached (s 30(3)(a))*

[40] The right breached was the defendant's right to privacy. That is a significant right, however, the right to privacy of a vehicle is less than that attached to a house or a human body.

*Nature of Impropriety (s 30(3)(b))*

[41] Section 131(1)(b) of the SSA provides:

131 Identification and notice requirements for person exercising search power (other than remote access search)

(1) A person exercising a search power (other than a remote access search) must

...

(b) before or on initial entry into or onto the place or vehicle, or other thing to be searched, provide the occupier of the place or the person in charge of the vehicle or other thing with—

(i) a copy of the search warrant; or

(ii) if the power is exercised without a warrant, the name of the enactment under which the search is taking place and the reason for the search under that enactment unless it is impracticable to do so in the circumstances.

[42] On the evidence it is clear that [Constable 1] informed [the passenger] of his name, rank and advice that he would be searching her and the vehicle under the Search and Surveillance Act for drugs. Had [the passenger] been the person in charge of the vehicle, then that advice would have been in compliance with the requirements under the Act.

[43] It is common ground that he did not give the same advice to Mr Norling.

[44] [Constable 1] did, however, say in evidence (which was not challenged) that he asked Mr Norling if there was anything in the vehicle that the Police should know about. He advised Mr Norling that they would be searching the vehicle.<sup>2</sup> He told Mr Norling that within 30 seconds of announcing the search power to [the passenger], and before he had opened any doors or searched any part of the vehicle.<sup>3</sup>

[45] While [Constable 1] had not identified himself to Mr Norling by name, he was in police uniform and he did announce to Mr Norling his intention to search the vehicle. He did not name the enactment under which the search was to take place. Nor did he indicate the reason for the search, although that was likely to be obvious to Mr Norling in the circumstances.

[46] [Constable 1] decided to proceed with a warrantless search.

[47] Section 20 of the SSA provides:

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<sup>2</sup> Page 9 Line 27 to Page 10 Line 3 NOE

<sup>3</sup> Page 13 Line 6 - 12

## **20 Warrantless search of places and vehicles in relation to some Misuse of Drugs Act 1975 offences**

A constable may enter and search a place or vehicle without a warrant if he or she has reasonable grounds—

(a) to believe that it is not practicable to obtain a warrant and that in or on the place or vehicle there is—

(i) a controlled drug specified or described in Schedule 1 of the Misuse of Drugs Act 1975; or

(ii) a controlled drug specified or described in Part 1 of Schedule 2 of the Misuse of Drugs Act 1975; or

(iii) a controlled drug specified or described in Part 1 of Schedule 3 of the Misuse of Drugs Act 1975; or

(iv) a precursor substance specified or described in Part 3 of Schedule 4 of the Misuse of Drugs Act 1975; and

(b) to suspect that in or on the place or vehicle an offence against the Misuse of Drugs Act 1975 has been committed, or is being committed, or is about to be committed, in respect of that controlled drug or precursor substance; and

(c) to believe that, if the entry and search is not carried out immediately, evidential material relating to the suspected offence will be destroyed, concealed, altered, or damaged.

[48] It is accepted that [Constable 1] had reasonable grounds to believe that methamphetamine was in the vehicle; and that he had reasonable grounds to suspect that an offence against the Misuse of Drugs had been, or was being, or was about to be committed in the vehicle.<sup>4</sup> The defence contends, however, that [Constable 1] did not have reasonable grounds to believe that it was not practicable to obtain a search warrant. Nor did he have reasonable grounds to believe that if an entry and search was not carried out immediately, evidential material relating to the suspected offence would be destroyed, concealed, altered or damaged.<sup>5</sup>

[49] [Constable 1] gave evidence as to his assessment at the time. It was approximately 8pm. He said there were only two officers present. The female passenger had a young child with her and he was concerned about the welfare of that child. He was concerned that obtaining a warrant would require one officer to remain

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<sup>4</sup> Section 20(b)

<sup>5</sup> Section 20(c)

with the vehicle while the other officer sought a warrant. He estimated that at that time of the evening, it could have taken three to four hours to obtain a warrant.

[50] [Constable 1] also said in evidence that he was concerned that evidence would be destroyed, concealed, altered or damaged if entry was not effected immediately. He was conscious that the defendant had allegedly passed the drugs to the female passenger in an attempt to conceal them. The female passenger had then attempted to conceal the drugs on her person.

[51] In *McGarrett v R* [2017] NZCA 204, the Court of Appeal referred to *R v Williams* [2017] 3 NZLR 207 at [24] and confirmed that:

...a police officer is not bound to obtain a warrant every time he or she has sufficient information to justify the issue of a warrant, as this would place improper constraints on police investigation work. Instead, as this Court commented in *R v Williams*:

Regard must be had to the practicalities of policing, including whether a property can be kept under surveillance, and the resources available to officers at the time in assessing whether the situation faced by a police officer made it reasonable to invoke a warrantless power...

[52] Mr Johnson submitted that [Constable 1] could have made an oral application for a search warrant. He suggested that it was practicable to do that in a shorter period of time. That was not raised with [Constable 1] in cross-examination. In my view, oral applications should be rare. Nevertheless, given that the matter was not raised in cross-examination I am unable to determine whether or not such an application could have been made in a much shorter time period. The officer would still have needed to have collated sufficient information to put before a judicial officer, no doubt on oath, at some convenient location at that time of night. I infer that this would have occasioned a considerable time delay, giving rise to the same concerns expressed by [Constable 1] in relation to a written application.

[53] In those circumstances, in my view, it was reasonable for [Constable 1] to conclude that he had reasonable grounds to believe it was not practicable to obtain a search warrant, and that if a search was not carried out immediately, evidential material relating to the suspected offence would be destroyed, concealed, altered or damaged.

[54] I therefore conclude, that if [Constable 1] or [Sergeant 1] had fully complied with s 131, the warrantless search in this case would have been lawful.

[55] I note that when the officers who had been called in to support [Constable 1] and [Sergeant 1] arrived at the scene, before they initiated a full search of the car, they complied with the provisions of s 131 prior to commencing that search. Those officers discovered all of the other evidence (apart from the knives found by [Sergeant 1]).

[56] I conclude that the nature of the impropriety in this case can be categorised as a honest and genuine error by [Constable 1] at the lower end of the scale. In my view, Mr Norling was not prejudiced by [Constable 1]'s error.

*Nature and Quality of the Evidence (s 30(3)(c))*

[57] The items discovered are real evidence and are central to the Police case.

*Seriousness of the Offence charged (s 30(3)(d))*

[58] I agree with counsel, that although the individual charges are not at the most serious end of the spectrum, the combination of drugs paraphernalia and weapons makes it appropriate to categorise the offences charged as moderate to serious.

*Other investigatory techniques (s 30(3)(e))*

[59] The only other investigatory technique available to the Police was to obtain a search warrant and/or secure the vehicle under s 117 of the Act while a warrant was sought. In my view, that option was not practicable in the circumstances faced by [Constable 1].

*Alternative Remedies (s 30(3)(f))*

[60] There is no real or meaningful remedy other than exclusion of the evidence from trial in the circumstances of this case.

*Danger to Police (s 30(3)(g) and Urgency (s 30(3)(h)).*

[61] Neither of these considerations are applicable in the context of this case.

**Balancing Exercise**

[62] In the present case, the breach of the privacy was a breach of an important right. The breach was not in bad faith. It was a breach at the lowest end of the scale. The offending is moderate to serious and the evidence is of central importance to the police case. No other investigatory technique was reasonably practicable in the circumstances. I reach the view that exclusion of the evidence would not be proportionate to the impropriety after giving appropriate weight to the impropriety and taking proper account of the need for an effective and credible system of justice.

[63] I therefore rule that the evidence obtained as a result of the search is admissible.

A D Garland  
District Court Judge

Signed at Christchurch on 5 March 2018 at                      pm.