

**IN THE DISTRICT COURT  
AT ROTORUA**

**CRI-2016-063-000836  
[2016] NZDC 9811**

**THE QUEEN**

v

**RUTH ADELE WHEELER**

Hearing: 27 May 2016  
Appearances: A Hill for the Crown  
I Tucker and A Burns for the Defendant  
Judgment: 2 June 2016

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**JUDGMENT OF JUDGE P W COOPER  
[As to application to admit evidence obtained from search]**

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**The application**

[1] This is an application to determine the admissibility of evidence obtained by a search without warrant at [address deleted], Rotorua on 21 May 2015.

**The charge**

[2] As a result of evidence obtained during the search, the defendant faces a charge of possession of methamphetamine for the purpose of supply. This charge arises from the finding of a small shoulder bag containing six small plastic bags, each containing .1 grams of methamphetamine and \$2500 in cash.

### **The evidence on this application**

[3] Sergeant Watson gave evidence that on 21 May 2015, he stopped a car which had been unlawfully taken and from reliable information obtained at that time, believed the offender in respect of the unlawful taking of the motor vehicle was to be found at [address deleted], Rotorua. Together with Constable Fowler, Sergeant Watson went to [address deleted]. Constable Fowler went to the front door to knock and make inquiries as to the presence of the person the police were looking for. Sergeant Watson went around to the rear of the house in case the person decided to exit out the back door upon the arrival of the police.

[4] Sergeant Watson's evidence was that he heard voices coming from the front of the house and went around to see what was happening. He saw Constable Fowler speaking to a female at the front of the address and so went back to his position at the rear of the house. His evidence was that as he came around the corner of the house, he saw the defendant crouched down beside a shed on her knees appearing to be hiding something. She was in the vicinity of a broken brick which was at the edge of grass near the wall of the shed.

[5] The sergeant's evidence was that he had worked at the Rotorua Police Station as a custody sergeant for a number of years and although he did not immediately remember the defendant's name, he recognised her as a person he had dealt with on a number of occasions in relation to drug offending. The defendant's previous convictions for drug offending all emanate from Rotorua. They are convictions for offences; 10 January 2012, possession of methamphetamine; 8 March 2012, possession of items for using methamphetamine; 12 March 2012, possession of methamphetamine; 19 April 2012, possession of methamphetamine for supply; 20 April 2012, selling methamphetamine; 21 April 2012, conspiring to deal in methamphetamine and selling methamphetamine; 3 June 2012, offering to supply cannabis.

[6] On 20 December 2013, the defendant was sentenced to three years and two months imprisonment in respect of the methamphetamine and cannabis dealing offences.

[7] Sergeant Watson asked the defendant what she was hiding. The defendant made no reply and walked back inside the house.

[8] Back at the house there was the female who Constable Fowler had been speaking to at the front of the address. She was the owner or tenant of the address. There was also the defendant and another female and a male, who was the person the police were looking for. Constable Fowler had also come around to the rear of the address.

[9] At this point, Sergeant Watson decided to invoke s 20 Search and Surveillance Act 2012 and conduct a search without warrant. He explained that to the people who were present, including the occupier. He directed Constable Fowler to stay with the man that they had been looking for in relation to the unlawful taking of the motor vehicle and to start asking him questions about that alleged offence. The sergeant remained, keeping an eye on proceedings and participating in the conversation with the suspect in respect of the unlawful taking of the motor vehicle. That person made admissions in relation to the offence and at that point the sergeant said that he started taking photographs at the area where he had observed the defendant's actions.

[10] The sergeant moved the broken brick described earlier to one side and found a small black shoulder bag which had been secreted under it. He removed the bag and saw its contents, namely six point bags of methamphetamine and a wad of cash. While taking the photographs, Sergeant Watson made a radio call for back-up. He was advised that there were no units immediately available. The back-up arrived approximately 20 minutes later. The timing of this, taken from the sergeant's notebook, is:

10.10 am	Invoke Search and Surveillance Act
10.25 am	Locate a bag
10.41 am	Back-up unit started arriving (having been called between 10.10 and 10.25 am)

[11] The sergeant spoke to the defendant about what he had found and she denied any knowledge of the bag. She said that she had been out the back and had slipped over.

[12] In deciding whether to invoke powers of search without warrant, the sergeant said that based on his prior knowledge of the defendant's drug dealing offending and seeing her hide something beside the shed, he believed that she was hiding drugs. He said that he did not think it was practical to seek to obtain a search warrant at the time because he did not know when it would be likely that back-up units would arrive, if called; there were a number of people at the address, and he and Constable Fowler were having to deal with two things at once, the interview and subsequent arrest and containing of the person in relation to the unlawful taking of a motor vehicle on the one hand, and the unexpected actions of the defendant and the finding of the methamphetamine and cash on the other.

### **Defence evidence**

[13] The defendant gave evidence. She said that she was at the address at [location deleted] that morning. It was a brief visit to pick up some of her belongings. She said that the occupier of the address had said to her not to let the cat out, but unfortunately when she opened the door, the cat darted out and so the defendant ran out after the cat. She said that the cat darted around the side of the shed, so she ran after it to grab it, but she slipped over and that is when she looked up and saw Sergeant Watson walking around the side of the house. Her evidence was that he said to her, "I know who you are and you'll be up to something." She said that the sergeant walked straight past her and lifted some building materials by the shed. Her evidence was that the sergeant did announce that he was going to invoke the Search and Surveillance Act, but that this came after he found the bag. Her evidence was that the sergeant said, "This is what I found and now I'm going to invoke the Search and Surveillance Act (or whatever it is)."

[14] The importance of this evidence is that on the defendant's account, Sergeant Watson had searched for and found the bag prior to formally announcing that he was invoking his powers of search under s 20.

## **Factual dispute re sequence of events**

[15] Before turning to the other issues in this case, it is necessary to resolve the factual dispute relating to the sequence of events and whether the search and seizure of the bag happened before or after Sergeant Watson sought to invoke his powers under s 20.

[16] In resolving this dispute, I prefer the evidence of Sergeant Watson. His evidence is supported by notes made at the time and the times recorded in his notebook, as well as the photographs.

## **The issues**

[17] There are two broad issues:

- (a) Section 20 Search and Surveillance Act 2012 being complied with and the evidence properly obtained;
- (b) If the evidence was improperly obtained, should it nevertheless be admitted, applying the balancing test in s 30 Evidence Act 2006?

## **Section 20 considerations and analysis**

[18] Section 20 Search and Surveillance Act provides as follows:

**“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.”

[19] The issues under s 20 are:

- (a) Whether before searching at the address, Sergeant Watson had reasonable grounds:
  - (i) To believe that a controlled drug (as specified in the Schedule to the Misuse of Drugs Act 1975) was at the address;
  - (ii) To suspect that an offence against the Misuse of Drugs Act was being committed or is being committed or is about to be committed at the address in respect of that controlled drug;
  - (iii) To believe that it is not practicable to obtain a search warrant under s 6 Search and Surveillance Act;
  - (iv) To believe that if the search is not made immediately, evidential material relating to the suspected offence will be destroyed, concealed, altered or damaged.

[20] Sergeant Watson and Constable Fowler were lawfully at [address deleted] to make inquiries in relation to the person believed to have committed the unlawfully taking a motor vehicle offence. They were at the address pursuant to an implied licence. Counsel for the defendant submitted that the fact that Sergeant Watson had gone around to wait at the back of the house while Constable Fowler knocked at the front door went beyond the scope of the implied licence.

[21] Sergeant Watson gave evidence that his reason for going to the back of the house while Constable Fowler went to the front door was in case the person the police were looking for decided to leave out the back.

[22] The situation here is similar to that in *R v Balsley* [2013] NZCA 258. In that case, constables went to an address looking for a person involved in an alleged breach of bail and threatening to kill. One of the constables went directly to the front door to make inquiries. Another constable went to the rear of the house and positioned himself by the back porch to prevent the suspect from escaping. While at the rear of the house and before the suspect had been located and arrested, a constable at the rear of the house smelt cannabis coming from near the garage a few metres away and a short time later, a warrantless search under s 18(2) Misuse of Drugs Act was undertaken with cannabis plants found growing in the garage.

[23] In the District Court, the Court held that while it may have been a prudent strategy for a constable to go to the back of the property to ensure that the suspect did not attempt to leave, such an action was not for the purpose of communicating with the occupant and was therefore outside the terms of the implied licence to enter the address for the purpose of communicating with the occupier. This aspect of the case was upheld by the Court of Appeal. The Court said at paragraph [15]:

“Provided there is an attempt to engage with the occupier, New Zealand courts have interpreted the scope of the implied licence reasonably expansively. The common factor has been the existence of a reasonable attempt to make inquiries of an occupier. But, as the Court of Appeal in *Tararo* ([2010] NZCA 287 at [29]) confirmed, an implied licence does not allow police ‘to undertake activities that go beyond what is reasonable to enable a police officer to communicate with the occupier of a dwelling house on a property.’”

[24] In *R v Balsley* at paragraph [16], the Court of Appeal said:

“Constable Dixon's admitted purpose in going to the rear of the property was to prevent flight by Murray Balsley. Constable Dixon watched the back door, made no attempt to make any inquiries of an occupier, and had no real intention of doing so. Thus this is not a case where the reasonableness of attempting to engage an occupier from a back door, or other convenient point of communication to the occupier of a premises, is at issue. The fundamental purpose of attempting to make inquiries with an occupier was absent.

[25] The Court of Appeal held in these circumstances the constable's action was not within the implied licence and he was therefore a trespasser when he smelt the cannabis. As such, the search evidence was not independent of that trespass and was therefore improperly obtained. The Court, however, admitted the evidence applying the proportionality test in s 30 Evidence Act.

**Did Sergeant Watson have reasonable grounds to believe that there was a controlled drug on the property?**

[26] As with other aspects of s 20, this requires the Court to assess, there was an objective and credible basis for Sergeant Watson to believe that there is a controlled drug on the property (*R v Williams* [2007] 3 NZLR 207 at [213]).

[27] There was a very short period of time between Sergeant Watson leaving the position where he was standing at the rear of the house, going to the front to see who Constable Fowler was talking to, and returning to the rear of the house. In that period of time, the defendant had exited the back door of the house and was seen by the sergeant crouching on the ground, appearing to be hiding something. I note the defendant's evidence that she had tripped over while chasing after the cat, however I accept Sergeant Watson's evidence that what appeared to him was something more than that, namely the defendant hiding something while crouched down beside the shed. Those actions, together with the sergeant's knowledge that the defendant had a history for drug offending and her lack of response when challenged as to what she was doing, in my view, viewed objectively, provides an objective and credible basis for thinking that what the defendant had concealed was a controlled drug.

**Did Sergeant Watson have reasonable grounds to suspect that an offence in respect of that controlled drug had been committed at the address?**

[28] Reasonable grounds to suspect is something less than reasonable grounds to believe. It requires an objective and credible basis for thinking that it is likely that an offence has been committed (*R v Williams* at paragraph [213]). Given that Sergeant Watson had reasonable grounds to believe that the defendant had just concealed a controlled drug, then obviously the test under this heading has been met.

**Did Sergeant Watson believe it was not practicable to obtain a search warrant and did he have reasonable grounds to believe that if the search was not made immediately, evidential material relating to the suspected offence would be compromised?**

[29] Those two factors must be looked at separately, but they are somewhat interrelated. The defendant was aware that Sergeant Watson had observed her actions and he had challenged her as to what she was doing. There were four adults at the address, including the defendant. Apart from the person who had unlawfully taken the motor vehicle, there was no basis to arrest anyone else at the address at the time the power to search was invoked. Were the police to have simply left the address to obtain a search warrant, there was a significant risk that the drugs and cash which had been hidden would be removed by the defendant or someone else at the address. Counsel for the defendant submits that the proper course of action would have been for Sergeant Watson to have resort to s 117 Search and Surveillance Act and either secure the scene himself, or arrange for another constable to secure the scene pending the application and determination of an application for a search warrant.

[30] Such a course may have been theoretically open to the sergeant. Regard must be had to the practicalities of the situation. In *R v Williams* at paragraph [24]:

“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 that time, in assessing whether the situation faced by a police officer made it reasonable to invoke a warrantless power.”

[31] In this case, Sergeant Watson was confronted with a situation where he was with one other constable only. They were at the address to locate, speak to and, if necessary, arrest the suspect in the unlawful taking of a motor vehicle incident. The situation that developed with Sergeant Watson observing the actions of the defendant and forming reasonable grounds to believe that she had committed an offence under the Misuse of Drugs Act was something unexpected. The sergeant was aware, when he went on duty, that there were limited staff on duty that morning. He was told when he radioed for backup that there were no units immediately available. The defendant was aware that her actions had been observed by Sergeant Watson. With

that combination of circumstances, I accept that viewed objectively that there were reasonable grounds for Sergeant Watson to believe that it was not practicable to obtain a search warrant and that if the search was not made immediately, evidential material relating to the suspected offence would be compromised.

[32] I am satisfied, therefore, that the grounds for invoking a search without warrant under s 20 Search and Surveillance Act had been met. That is not the end of the matter however, because of the fact that applying *R v Balsley*, the sergeant was not acting within the scope of an implied licence and was therefore a trespasser when he observed the defendant's actions in hiding something beside the shed. As in *R v Balsley*, "the search evidence was not independent of that trespass and there is a close connection between the trespassing and the search evidence." Therefore, the evidence was improperly obtained.

[33] Section 30 Evidence Act 2006 requires the Court to consider whether exclusion of the evidence is a proportionate response.

### **Section 30(2)(b) Evidence Act 2006**

[34] Section 30(2)(b) provides:

“(2) The Judge must—

- (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 but also takes proper account of the need for an effective and credible system of justice.”

[35] In *R v Balsley* at paragraph [22], the Court said:

“An important feature of this case, as in a number of similar cases, is the accidental way in which the police first came to suspect the presence of cannabis. In that context various of the s 30(3) matters are, in our view, best analysed separately by reference to the circumstances that occasioned Constable Dixon's trespass, that is the police's lawful visit to the address, and those relating to the subsequent unlawful search. That conclusion is, we emphasise, central to our proportionality assessment. ...”

[36] Undertaking that exercise in the present case in relation to the s 30(3) factors:

Importance of rights breached and seriousness of intrusion

[37] The extent of the trespass itself in this case was relatively minor. Sergeant Watson was entitled to go to the front door to make inquiries of the occupier. Instead, he went a few metres further on beyond the point on the property to which he was lawfully entitled to go. The search itself was minimally intrusive. No building was entered. A broken brick between some long grass and the wall of a shed was lifted up to reveal the hidden bag of methamphetamine and cash.

[38] Furthermore, the defendant had limited connection to the premises. She was not an occupier of the property. Her evidence was that she was simply there to collect some of her belongings which she had been told were in the possession of the occupier. In *R v Williams* at paragraph [124], the Court of Appeal said:

“Given that the purpose of the exclusion of evidence under the Bill of Rights is to vindicate individual rights, the strength of the privacy interest of the individual involved will be of major significance. This will be judged by the degree of connection to the premises or land involved or to the property searched or seized in those premises. Obviously the person with a bare licence, whether or not they are present at the search, will have a lesser expectation of privacy than a person who is the owner or exclusive occupier of the premises or land ...”

[39] A similar approach was adopted in *R v Anderson* [2013] NZCA 511.

[40] Taking these factors together, there has been a relatively minor breach of the defendant’s rights. This factor counts in favour of admissibility.

The nature of the impropriety

[41] The trespass itself was deliberate but it was not reckless or in bad faith. A subsequent search was not carried out recklessly or in bad faith. The sergeant was confronted with a situation where he saw what he saw. There was a proper basis for the warrantless search under s 20. What rendered the search improper was the fact of the trespass.

[42] This factor is neutral.

The nature and quality of the evidence

[43] Methamphetamine in quantities and packaging consistent with drug dealing found together with \$2500 in cash is compelling evidence.

[44] This counts in favour of admissibility.

The seriousness of the offence

[45] Possession of methamphetamine for supply is a serious offence.

[46] This counts in favour of admissibility.

Other investigatory techniques

[47] This has little application in this case.

Alternative remedies

[48] There are no alternative remedies that could provide redress to the defendant. This factor counts against admissibility.

Avoiding apprehended physical danger

[49] This is not a factor in the present case.

Urgency in obtaining evidence

[50] The considerations referred to earlier when discussing whether Sergeant Watson reasonable grounds to believe that evidential material relating to the suspected offence would be compromised are applicable here. The police were on the property lawfully. Sergeant Watson had gone beyond a point where he was lawfully entitled to go for an understandable purpose but one outside the scope of the

implied licence to be on the property. Once he saw the actions of the defendant, knowing that the defendant had seen him observing her, he had to make a decision to secure the evidence quickly.

### **Overall assessment**

[51] Sergeant Watson was at the address lawfully but went beyond the scope of the implied licence by going further onto the property than he was entitled to. His trespass was not great. He was confronted with observing the defendant in what he believed to be hiding drugs. He had little alternative but to investigate in the way that he did. That search involved minimal intrusion in respect of the property itself and the defendant's right to privacy, as a visitor to the property. The evidence obtained is in relation to serious offending, namely possession of methamphetamine for the purpose of supply.

[52] Having regard to all of these circumstances, the exclusion of the evidence obtained by the search would be a disproportionate response to the impropriety involved.

[53] Accordingly, I rule that the evidence obtained by the search is admissible.

P W Cooper  
District Court Judge