SUPREME COURT OF QUEENSLAND

CITATION:	*R v Keen* [2015] QSC 7
PARTIES:	**THE QUEEN** (respondent) v **CLAYTON TY KEEN** (applicant)
FILE NO/S:	BS688/14
DIVISION:	Trial
PROCEEDING:	Application under s 590AA of the *Criminal Code*
DELIVERED ON:	5 February 2015
DELIVERED AT:	Brisbane
HEARING DATE:	9 December 2014
JUDGE:	Jackson J
ORDER:	**The order of the Court is:** **1. The application is dismissed.**
CATCHWORDS:	EVIDENCE – ADMISSIBILITY AND RELEVANCY – ONUS AND STANDARD OF PROOF – where an application is made to exclude evidence under s 590AA of the *Criminal Code* – whether the requisite standard of proof is beyond reasonable doubt or on the balance of probabilities CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – ILLEGALLY OBTAINED EVIDENCE – where two police officers attended a briefing where they were informed that the applicant was the target of an operation involving covert surveillance, interception of telephone calls and text messages – where the police officers were tasked with intercepting the applicant's vehicle – where the police officers later intercepted and searched the applicant's vehicle while the applicant and a co-accused were standing outside it and located dangerous drugs the subject of the charges against the applicant – whether at the time of the search, the applicant and the co-accused were "occupants" of the vehicle within the meaning of s 31 of the *Police Powers and Responsibilities Act* 2000 (Qld) – whether the police officers were acting under dictation in searching the vehicle – whether the police officers had a "reasonable suspicion" of a prescribed circumstance under s 32 of the *Police Powers and Responsibilities Act* 2000 (Qld)

Criminal Code, s 590AA
Police Powers and Responsibilities Act 2000 (Qld), s 31, s 32

Arizona v Gant 556 US 332 (2009), referred to
Bread Manufacturers of New South Wales v Evans (1980) 180 CLR 404, cited
Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation (1981) 147 CLR 297, cited
Davis v the United States 564 US 1 (2011), considered
George v Rockett (1990) 170 CLR 104, cited
Lee v New South Wales Crime Commission (2013) 251 CLR 196, considered
Legal Services Board v Gillespie-Jones (2013) 249 CLR 493, cited
Middleweek v Chief Constable of Merseyside [1992] 1 AC 179, referred to
Potter v Minahan (1908) 7 CLR 277, referred to
R v Griffiths [2013] QCA 120, followed
R v Jaudzems [2014] QSC 74, considered
R v Hagan [1966] Qd R 219, cited
R v Pohl [2014] QSC 173, considered
R v Versac (2013) 227 A Crim R 569, considered
Wendo v The Queen (1963) 109 CLR 559, followed
Woolford v The Nominal Defendant [1993] 1 Qd R 465, cited

COUNSEL: D Murray for the applicant
J Geary for the respondent

SOLICITORS: Kenny & Partners Solicitors for the applicant
Director of Public Prosecutions (Qld) for the respondent

[1] **JACKSON J**: The applicant, Clayton Ty Keen, is charged on indictment with five counts of possession of a dangerous drug in contravention of sections 9(b), 9(c) or 9(d) of the *Drugs Misuse Act* 1986 (Qld). He has been committed for trial. He has not yet entered a plea.

[2] By an application made under s 590AA of the *Criminal Code* he seeks a ruling that the police officers' search of his motor vehicle, where the dangerous drugs were found, was conducted without lawful authority and, therefore, an order that the results of that search should be excluded from the evidence to be admitted at the trial.

Facts

[3] The search took place about 5:00 pm on 31 March 2013 at the Shell Service Station on the New England Highway, Highfield.

[4] The applicant and Shannon Wiremu Hetet were standing outside but near the rear of a blue Holden Barina motor vehicle. It was stationary on the tarmac at the rear of the service station, near the toilets. They were approached by Snr Constable Troy

Anthony Cameron and Snr Constable Christopher Michael Hurtz. The police officers had driven into the service station in a marked police car.

[5] The police officers identified themselves and asked the applicant and Mr Hetet for their names. The applicant and Mr Hetet gave their names. Mr Hetet said that he was the driver of the Barina. I infer that one of the police officers asked who was the driver. SC Hurtz required Mr Hetet to carry out a breath test.

[6] SC Cameron returned to the police car and conducted a name check with Toowoomba Police Communications. He returned to the Barina and advised the applicant and Mr Hetet that he was going to search the vehicle. He advised the applicant and Mr Hetet that they were detained whilst he conducted the search of the vehicle. SC Hurtz stood with the applicant and Mr Hetet next to the vehicle while SC Cameron conducted the search.

[7] SC Cameron located a small plastic tub that contained what appeared to be a small amount of cannabis in the vehicle. He returned to the applicant and spoke to him about the tub and its contents. The applicant said that it was his cannabis. SC Cameron continued the search of the vehicle. He located a small tub that contained what appeared to be a pink crystalline substance. He spoke to the applicant and Mr Hetet about it. Neither took ownership.

[8] SC Cameron returned to the search. He located a plastic water pipe on the floor underneath the driver's seat. He spoke to the applicant about it. The applicant said the water pipe was his and he had used it to smoke cannabis.

[9] SC Cameron returned to the search. He located a large sports bag in the boot. Inside the bag he located two large vacuum sealed plastic bags that contained what appeared to be cannabis. He asked Mr Hetet about the bags. Mr Hetet said the sports bag was his. Hetet said that the cannabis was his and that he put it in the bag.

[10] Other police then attended the scene. They arrested the applicant and Mr Hetet.

[11] Earlier in the afternoon, SC Cameron had attended a briefing conducted by Det Snr Sgt Robb. He was a senior officer responsible for a drug investigation or operation known as "Kilo Agitator". SC Cameron was informed that the applicant was a target of an operation involving covert surveillance, interception of telephone calls and text messages, and their analysis. He was informed that it was believed that the applicant was intending to pick up dangerous drugs from the principal target of the operation at an address in Hodgson Vale and would thereafter be in possession of dangerous drugs. He says that based on information provided at the briefing he believed that the applicant would be leaving a property in the Toowoomba area later that afternoon or evening and would be in possession of dangerous drugs.

[12] SC Cameron and SC Hurtz were brought into the operation by Det Snr Sgt Robb as a deliberate strategy. The plan was that they would make a "traffic" interception of the vehicle carrying the applicant. They would conduct a search of the vehicle. If, as believed, the vehicle contained dangerous drugs, the applicant would be arrested and the dangerous drugs confiscated without alerting the applicant and others involved in the unlawful trafficking operation to the presence of covert surveillance or to the extent of police knowledge about their business.

Grounds of the application

[13] Section 31(1) of the *Police Powers and Responsibilities Act* 2000 (Qld) ("PP&RA") provides

> **"31 Searching vehicles without warrant**
> (1) A police officer who reasonably suspects any of the prescribed circumstances for searching a vehicle without a warrant exist may, without warrant, do any of the following—
> (a) stop a vehicle;
> (b) detain a vehicle and the occupants of the vehicle;
> (c) search a vehicle and anything in it for anything relevant to the circumstances for which the vehicle and its occupants are detained.
> …"

[14] Section 32 of the PP&RA sets out the prescribed circumstances for searching a vehicle without warrant. They include that "…there is something in the vehicle that …may be an unlawful dangerous drug".

[15] Schedule 6 of the PP&RA provides that "reasonably suspects" means suspects on grounds that are reasonable in the circumstances.

[16] The prescribed circumstance for the search relied on by SC Cameron was that there was something in the Barina that may be an unlawful dangerous drug.

[17] There are three questions raised for decision about the lawfulness of the search. First, were the applicant and Mr Hetet "occupants… detained", within the meaning of s 31(1)(c), when the power to search was exercised? It was submitted that they were not, because they were standing outside the vehicle when police approached, so that the power to search under s 31 was not engaged. Second, was SC Cameron acting under dictation or undue influence from a superior officer when he purported to exercise the power to search under s 31? It was submitted that if he was, then there was no independent or lawful exercise of the power to search under s 31. Third, did SC Cameron reasonably suspect that there was something in the vehicle which may have been an unlawful drug? The last question resolves into whether his suspicion was reasonable. It was submitted that SC Cameron had insufficient information to form a reasonable suspicion.

Onus and standard of proof

[18] There was some debate on the hearing of the application as to the onus and standard of proof on the questions of fact raised in this application. Both parties submitted that the onus of proof as to admissibility lay on the prosecution. I accept that submission. Both parties also submitted that it was to the standard of beyond reasonable doubt. I reject that submission.

[19] In my view, although brought under s 590AA, the application is in substance an application to decide a question of the admissibility of evidence at the applicant's trial on the indictment. At the trial, the question would have been resolved by the

Judge on the voir dire. *Wendo v The Queen*[1] is the leading case, at common law, on the onus of proof and standard of proof upon a voir dire as to the voluntariness of a confession and its admission into evidence. Taylor and Owen JJ said:

> "Confessional statements are but one illustration of the type of evidence the tender of which may give rise to preliminary questions of fact which the judge must decide for himself. Other illustrations were given by Lord *Denman* C.J. in *Doe v. Davies* where his Lordship said: 'There are conditions precedent which are required to be fulfilled before evidence is admissible for the jury. Thus an oath, or its equivalent, and competency, are conditions precedent to admitting *viva voce* evidence; and the apprehension of immediate death to admitting evidence of dying declarations; and search to secondary evidence of lost writings; and stamp to certain written instruments: and so is consanguinity or affinity in the declarant to declarations of deceased relatives'.
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> But proof of the fulfilment of these or any other conditions precedent to the admission of evidence is not required to be given beyond reasonable doubt. As *Starke* J. said in *Cornelius v. The King*: 'The judge merely decides whether there is prima facie any reason for presenting the evidence at all to the jury'; and in *Sinclair v The King* the same learned judge said: 'But then it was contended that the mere possibility that the confessions were the result of a disordered mental condition was sufficient to exclude them from evidence. Again I am unable to agree. A judge is not bound to exclude a confession from evidence because of such a possibility. He is entitled and bound to consider the probability of the mental condition affecting the truth of a confession in all the circumstances of the case and to decide whether there is prima facie reason for presenting it to the jury'." (footnotes omitted)[2]

[20] In *R v Griffiths*,[3] that decision was applied in relation to an application under s 590AA as to the admissibility of a confession. White JA said:

> "In Australia, the voluntary nature of the confessional statement is not required to be proved beyond reasonable doubt. This is because, as Taylor and Owen JJ observed in *Wendo v The Queen*, quoting from Starke J in *Cornelius v The King*:
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> > 'The judge merely decides whether there is prima facie any reason for presenting the evidence at all to the jury.'
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> In *Tofilau v The Queen* Callinan, Heydon and Crennan JJ said that this standard was 'on the balance of probabilities'."[4]

[21] On the hearing of a voir dire in the present case, the prosecution would have borne the onus of proof on factual questions and the standard of proof would have been on

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1 (1962-1963) 109 CLR 559. See also *R v Hagan* [1966] Qd R 219.
2 (1962-1963) 109 CLR 559, 572.
3 [2013] QCA 120.
4 [2013] QCA 120, [81].

the balance of probabilities. I approach the factual questions on this application on the same footing.

Occupants of the vehicle

[22] In *R v Versac*[5] it was conceded by the prosecution that s 31 did not authorise a search of a parked car by police without warrant. In that case, the police officer observed the applicant at a court hearing and suspected that the applicant may have been under the influence of heroin. The applicant was approached and gave responses to questions which the police officer considered evasive. The applicant said that he had been dropped off at court by a friend and denied that he possessed a motor vehicle. However he had a set of keys. The police officer formed the belief that the vehicle which the keys would open would contain illicit drugs. The suspicion that the vehicle contained drugs was founded on the applicant's history, his demeanour, his possession of the keys and his evasive answers. Police subsequently used the electronic remote on the keys to locate the vehicle in a nearby car park. However, it appears that s 31 did not apply because the applicant was not an occupant of the vehicle at the relevant time and the vehicle and its occupants were not detained so as to authorise the search.

[23] Further, in *R v Pohl*[6] it was conceded by the prosecution that s 31 did not authorise the search in another similar case. The applicant in that case was arrested for supplying a dangerous drug at a hotel. The arrest was based on an anonymous tip that a man who the applicant was accompanying outside the hotel was intending to buy unlawful dangerous drugs at the hotel. Upon questioning, the applicant stated to police that he lived at a certain location and had walked to the hotel. The police knew from a review of CCTV footage that he had not walked to the hotel. Due to the false story, and the fact that no drugs had been found on the persons involved, the police formed the view that the drugs were in the vehicle in which the applicant had arrived, visible on the CCTV footage. Using a remote key pad found in the applicant's pocket, police located and unlocked a vehicle in the car park, which was searched. Again, the case seems to have proceeded on the basis that the applicant was not an occupant at the relevant time and the vehicle and its occupants were not detained so as to authorise the search.

[24] If that characterisation of *Versac* and *Pohl* is correct, the possible difference between those cases and this is that the applicant and Mr Hetet were standing next to the Barina when approached by SC Cameron and SC Hurtz. In this case, there was no concession by the prosecution that the search was unlawful and no concession that the applicant and Mr Hetet were not occupants.

[25] Section 31 expressly confers three separate powers: to stop a vehicle; to detain a vehicle and the occupants; and to search the vehicle. However, there is at least one internal contradiction in the way that the section is expressed. It expressly provides that a police officer who reasonably suspects the prescribed circumstances for searching may exercise "any" of those powers. That suggests that the power to search does not depend on the prior exercise of the power to detain. As well, the punctuation and paragraph structure of pars (a), (b) and (c) support that construction.

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5 (2013) 227 A Crim R 569.

6 [2014] QSC 173.

[26] On the other hand, the search power is expressed as a power to search for "anything". But the thing must be "relevant to the circumstances for which the vehicle and its occupants are detained". Thus, exercise of the power to detain the vehicle and its occupants is made a condition of the exercise of the power to search.

[27] It will not always be necessary for a police officer to exercise the power to stop a vehicle before he or she can detain the vehicle and its occupants. A vehicle may be stationary but have occupants. A police officer may detain the vehicle and its occupants under s 31 if he or she reasonably suspects that a prescribed circumstance exists. But, in my view, he or she cannot search the vehicle under s 31 unless they have detained the vehicle and its occupants.

[28] In the present case SC Cameron purported to exercise a power to detain the Barina and the applicant and Mr Hetet. But were they occupants of the vehicle?

[29] The ordinary meaning of the expression "occupants of a vehicle" extends to all those in the vehicle, namely the driver and any passengers.[7] However, the scope of the expression becomes more difficult when the person or persons are no longer in the vehicle. For example, the persons in a stationary vehicle may get out, either voluntarily or under instruction from the police officer who has approached the vehicle and detained them for the purpose of exercising the power of search. If they were in the vehicle when the police officer approached the vehicle, in my view, those persons are occupants of the vehicle under s 31. The contrary view would make s 31 unworkable. The Court is "to adopt a construction that will avoid a consequence that appears irrational or unjust."[8]

[30] Can a person outside the vehicle at the time that the person and the vehicle are approached by police who is then detained be an occupant? The prosecution relies on the fact that not long before they were intercepted the applicant and Mr Hetet had been observed by other police driving in the Barina. The inference is that they got out of it at the service station, although that was before SC Cameron and SC Hurtz arrived there.

[31] The word "occupant" might have a different meaning depending on the context where it is used. In some contexts, a person who lives in a house might be described as an occupier or occupant, notwithstanding that they are outside it temporarily. But it would not be a common usage of language to describe a person who is not in a vehicle as an occupant of the vehicle. If a person who is outside the vehicle can be an occupant, where is the line to be drawn? For example, if the vehicle is parked and the person goes elsewhere to attend to business but intending to return within minutes, is he or she an occupant? What if it is hours, or longer? What if the vehicle is parked overnight in a garage, or driveway, or on the street?

[32] The right to possession of a motor vehicle free from search may be a fundamental right of the kind that attracts the "principle of legality", as it is now termed, in the common law of the construction of statutes. That statement of principle was analysed in *Lee v New South Wales Crime Commission*[9] and in Australian law is

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7 See, for example, in a different context, *Woolford v The Nominal Defendant* [1993] 1 Qd R 465, 476.

8 *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493, [48]; *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 321.

9 (2013) 251 CLR 196.

often traced to *Potter v Minahan*.[10] The effect of the principle is that general words are construed as limited to the objects of the Act, and as not altering the law in a way that would infringe upon fundamental rights. In the present case, however, the important qualification explained by Keane and Gageler JJ in *Lee* is relevant:

> "Application of the principle of construction is not confined to the protection of rights, freedoms or immunities that are hard-edged, of long standing or recognised and enforceable or otherwise protected at common law. The principle extends to the protection of fundamental principles and systemic values. The principle ought not, however, to be extended beyond its rationale: it exists to protect from inadvertent and collateral alteration rights, freedoms, immunities, principles and values that are important within our system of representative and responsible government under the rule of law; it does not exist to shield those rights, freedoms, immunities, principles and values from being specifically affected in the pursuit of clearly identified legislative objects by means within the constitutional competence of the enacting legislature.
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> The principle of construction is fulfilled in accordance with its rationale where the objects or terms or context of legislation make plain that the legislature has directed its attention to the question of the abrogation or curtailment of the right, freedom or immunity in question and has made a legislative determination that the right, freedom or immunity is to be abrogated or curtailed. The principle at most can have limited application to the construction of legislation which has among its objects the abrogation or curtailment of the particular right, freedom or immunity in respect of which the principle is sought to be invoked. The simple reason is that '[i]t is of little assistance, in endeavouring to work out the meaning of parts of [a legislative] scheme, to invoke a general presumption against the very thing which the legislation sets out to achieve'.[11]

[33] In my view, s 31 is plainly intended to alter the law in a way that would interfere with the right of a person to possession of a motor vehicle free from search. The answer to the question as to the extent of the interference with that right conferred by s 31 is not advanced by resort to the principle of legality. The greatest assistance lies in the context in which s 31 appears in the PP&RA.

[34] One important contextual factor is that the power to search a vehicle, where the vehicle and the occupants are detained, is an exception to the requirement that in general a search warrant must be obtained to search a place. A police officer may apply for a search warrant of a place under s 150 of the PP&RA. A vehicle is a "place" as defined in the dictionary in Sch 6 for the purposes of that section. So, the PP&RA clearly provides for a search warrant to be obtained to search a vehicle as an alternative power of search to a search empowered under s 31.

[35] Second, s 31 operates in circumstances where the exercise of the power to obtain a search warrant may be inapt because there is not enough time to do so before the

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10 (1908) 7 CLR 277, 304.

11 *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, 310-311.

vehicle and the things suspected to be in it may be moved. This may explain why the power to search is predicated on exercise of the power to detain the vehicle and occupants. That is, it is a power to facilitate search where the vehicle and its occupants might otherwise decamp.

[36] Third, s 31 is the only section of the PP&RA which refers to an occupant or occupants of a vehicle. Other sections refer to a "person in control of a vehicle" or similar.[12] A person who is not inside a vehicle may be in control of the vehicle.[13]

[37] Fourth, if a person outside a vehicle when it is stopped or detained by police is an occupant, the limits of the operation of the section are difficult to identify.

[38] There may be difficulties within cases where occupants get out of a vehicle, before the vehicle and occupants are detained, when the vehicle is being approached by a police officer, but they are not this case. This case was one where the persons detained were not in the vehicle when SC Cameron arrived at the scene.

[39] In my view, the applicant and Mr Hetet were not "occupants" because they were not inside the vehicle when SC Cameron approached it before the power to detain the vehicle and them was exercised.

Acting under dictation or undue influence

[40] As previously stated, the deployment of SC Cameron and SC Hurtz to intercept the applicant and Mr Hetet was a deliberate strategy intended, if possible, to preserve the secrecy of the ongoing covert surveillance operation.

[41] The applicant's counsel submitted that SC Cameron was directed to make the intercept, so that he did not independently exercise the powers under s 31. He submitted that because SC Cameron was directed to make the intercept, and to do so to search the vehicle, there was no scope for an independent exercise of power or, in fact, SC Cameron did not personally form the suspicion required to exercise the powers.

[42] It was not in contest that the powers under s 31 are personal. A police officer who exercises any of those powers must personally have the reasonable suspicion required as a pre-condition to exercise of the power.

[43] The parties did not refer to any cases on this question. If a repository of statutory power acts in accordance with an external direction or policy, an exercise of the power may be invalidated.[14] Much depends on the statute, the nature of the power, and the circumstances of the external direction or policy. Many of the cases are not useful comparators in other contexts. However, there is an example in the area of police powers of search.[15]

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12 Sections 41(k), 56(2), 58(5), 60, 61(2), 62(1), 67(1), 67(2), 68(1), 68(2),124(2), 124(3), 125(1)(a), 125(1)(b), 125(1)(d), 125(2)(b) and 125A(2).

13 PP&RA, Sch 6; *Road Use Management Act* 1995 (Qld), Sch 4.

14 *Bread Manufacturers of New South Wales v Evans* (1980) 180 CLR 404, 418-419, 429-431 and 445.

15 *Middleweek v Chief Constable of Merseyside* [1992] 1 AC 179, 186-189. Later decisions have refused to follow this case, but on another point.

[44] In my view, SC Cameron was an experienced officer who was well familiar with s 31. He did not purport to exercise power under s 31 without turning his mind to whether he had the required reasonable suspicion.

[45] Detective Snr Sgt Robb accepted in evidence that he had briefed and directed SC Cameron to make the intercept, but not that SC Cameron was required to search the applicant's vehicle whether or not he reasonably suspected that there were drugs in the vehicle.

[46] SC Cameron also agreed that at the briefing he was instructed to make the intercept, but not on the basis that he was required to make the search whether or not he reasonably suspected that there were drugs in the vehicle.

[47] I am satisfied that SC Cameron did exercise the powers under s 31 personally. He personally reached the mental condition that he suspected that there was something in the Barina that may have been a dangerous drug. He was not acting under "dictation or undue influence"[16] from Det Snr Sgt Robb.

Reasonable suspicion

[48] The applicant submits that by 2:00 pm SC Cameron was aware of the facts which formed the basis of the alleged reasonable suspicion. The applicant's primary submissions focus on whether the police should have obtained a warrant to authorise a search of the vehicle. In my view, this focus misses the true question. If s 31 authorised the search, it does not matter that there may have been another way of obtaining a similar authority.

[49] The applicant submits that SC Cameron's suspicion was not reasonable because there was insufficient evidence of facts which Det Snr Sgt Robb informed SC Cameron at the briefing to form the basis or grounds of a reasonable suspicion that something in the vehicle may have been a dangerous drug. The information that was imparted to SC Cameron was not clearly identified in evidence.

[50] There is no question that ample evidence to form a reasonable suspicion existed.

[51] First, on the hearing of the application reference was made to the transcripts of recordings of telephone intercepts of conversations between the applicant and the principal target of the covert surveillance operation which relatively clearly suggested that the applicant was driving from Gladstone to Toowoomba to pick up dangerous drugs from the principal target on the day in question. However, it was not suggested that SC Cameron saw the transcripts or heard the recordings. Instead, he was briefed on the facts by Det Snr Sgt Robb. So the transcripts themselves are not to the point.

[52] No record was made of the briefing. Naturally enough, neither Det Snr Sgt Robb nor SC Cameron had a clear recollection of what was said. But it included that there was a drug operation involving covert surveillance of the principal target, that the surveillance showed that the applicant was driving to Toowoomba for the purpose of picking up dangerous drugs from the principal target and that after he went to the address it was expected that the applicant would have dangerous drugs in his vehicle.

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16 *Bread Manufacturers of New South Wales v Evans* (1980) 180 CLR 404, 419.

[53] Det Snr Sgt Robb said that the briefing included the background of the investigation, the principal target, an outline of the telecommunication intercepts that were happening, that the communications indicated that the applicant was to travel from Gladstone to the principal target's property at Hodgson Vale where he was going to source cannabis and amphetamine and then travel back to Gladstone. The briefing was fairly detailed.

[54] SC Cameron recalled the briefing, being requested to do the interception and receiving information that the applicant was going to be in possession of drugs. The reason he searched the car was because of the information from the briefing. He believed that there was enough information and formed what he believed was a reasonable suspicion that there were drugs in the car. He recalled that Det Snr Sgt Robb told him of the information that there were going to be drugs in the car, that the applicant was a target of the operation and that the applicant was mentioned in phone calls. Later, the covert surveillance unit informed SC Cameron by telephone that they had observed the applicant in the Barina leaving the principal target's address.

[55] In *R v Jaudzems*[17] a question whether there were grounds to reasonably suspect dangerous drugs were in a vehicle was considered. In that case, a vehicle in which the applicant was driving was pulled over for a random breath test. While that was occurring, one of the police officers involved had a radio conversation with the Townsville area police communications. Communications informed him that an intelligence submission posted 12 days earlier stated that the driver of the vehicle may be involved in the supply and trafficking of amphetamines in the Cairns area. A further statement was made shortly afterwards that the driver was a large scale supplier of ecstasy in Cairns and that the informant who had provided that information to police had been open and honest regarding the informant's involvement.

[56] Henry J observed that there is a "…well-established principle regarding reasonable suspicion that there must exist some factual basis to reasonably ground the suspicion, but it is unnecessary that there exists proof of the fact reasonably suspected."[18] His Honour continued that:

> "The existence of apparently reliable information that one of four men in a vehicle pulled over at Ayr was an active drug trafficker in Cairns gave Constable F grounds that were reasonable in harbouring his suspicion unlawful dangerous drugs may have been in the vehicle."[19]

[57] In my view, on the balance of probabilities, there were grounds that were reasonable in the circumstances for SC Cameron to reasonably suspect that there was something in the Barina that may have been a dangerous drug. SC Cameron had the required suspicion and that suspicion was reasonable.

Conclusions on the lawfulness of the search of the vehicle

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17 [2014] QSC 74.
18 [2014] QSC 74, [21], referring to *George v Rockett* (1990) 170 CLR 104, 115.
19 [2014] QSC 74, [22].

[58] In my view, it follows that the search was unlawful because it was not authorised by s 31 of the PP&RA, but only because the applicant and Mr Hetet were not occupants of the vehicle when the power was exercised.

[59] It was not unlawful because SC Cameron did not personally exercise the power under s 31.

[60] It was also not unlawful because SC Cameron did not reasonably suspect that there was something in the Barina that may have been a dangerous drug.

Admissibility

[61] Having formed the view that the search was unlawful, the question remains whether the evidence obtained by reason of the search should be excluded from evidence. As both *Versac* and *Pohl* show, the question involves the exercise of discretion to allow or exclude unlawfully procured evidence on public policy grounds. The relevant principles are stated in both those cases and I need not repeat them.[20] They stem from the decisions of the High Court in *Bunnings v Cross*[21] and *Ridgeway v The Queen*,[22] recently applied in the Court of Appeal in *R v Milos*.[23]

[62] I would add to them a recent extensive analysis of this question made by the Supreme Court of the United States. The legality of a search of a motor vehicle in a case where an occupant of a vehicle is detained is the subject of extensive case law in that country because of the guarantee of freedom from unreasonable searches contained in the Fourth Amendment to the Constitution of the United States. In 2009, the Supreme Court overruled its previous decision about the lawful limits of a vehicle search by police.[24] In 2011, in *Davis v the United States*,[25] the Court had to consider the admissibility in evidence of a thing found on search of a vehicle which at the time of the search complied with the then current view of the law, but was invalid on the restated principles.

[63] The Supreme Court identified the exclusionary rule for suppressing evidence obtained in violation of the Fourth Amendment as a "prudential doctrine" and "not a personal constitutional right".[26] They continued: "The rule's sole purpose, we have repeatedly held, is to deter future Fourth Amendment violations… Real deterrent value, is a 'necessary condition for exclusion' but it is not 'a sufficient' one… The analysis must also account for the 'substantial social costs' generated by the rule… Exclusion exacts a heavy toll on both the judicial system and the society at large. It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence."[27]

[64] Having referred to a more stringent approach taken in earlier cases, which led to the exclusion of evidence obtained in violation of the Fourth Amendment, the Supreme Court continued: "In a line of cases… we also recalibrated our cost-benefit analysis

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20 See also *Evidence Act* 1977 (Qld), s 130.
21 (1978) 141 CLR 54.
22 (1995) 184 CLR 19.
23 [2014] QCA 314, [91]-[95] and [101].
24 *Arizona v Gant* 556 US 332 (2009).
25 564 US 1 (2011).
26 564 US 1(2011), 6.
27 564 US 1(2011), 6-7.

in exclusion cases to focus the inquiry on the 'flagrancy of the police misconduct'".[28]

[65] In my view, the unlawful search of the Barina did not involve a deliberate or reckless disregard for the law. Nothing suggested that SC Cameron did not believe he was lawfully exercising the power to search under s 31. I do not consider that his actions were reckless. The unlawfulness is based on the proper construction of the meaning of s 31, having regard to the particular facts of the case. As far as I am aware, it is not a question which has previously been decided.

[66] The evidence which was found in the Holden Barina is plainly cogent evidence of the commission of the offences with which the applicant is charged. That is a fact favouring admission of the evidence at least when the unlawfulness arises only from mistake and is neither deliberate nor reckless.

[67] Similarly, the evidence is vital to the successful prosecution of the applicant. There is no untainted evidence that can stand in its place, which is a reason in the public interest for admitting it.

[68] The nature and seriousness of the offences is significant. The more serious the offence, the more likely it is that the public interest requires the admission of the evidence. The seriousness of the offending in this case is evidenced by the multiple charges which the applicant faces.

[69] No submissions were made as to the likely range of sentence which the applicant would be liable to serve if convicted.

[70] The unlawfulness in this case did not involve the derogation of the right to silence or an invasion of the applicant's home. There was, however, an invasion of property of which the applicant was entitled to have exclusive possession, being his car.

[71] Although the police conduct may not be characterised as reckless, an unauthorised search of a vehicle does involve serious disregard of the statutory constraints on the exercise of an invasive power of search. The law provides such constraints in relation to obtaining a search warrant, or the exercise of the power to search a vehicle without warrant. It is an important policy consideration that the constraints are to be upheld and observed by the police. It is, therefore, important that the power under s 31 to search a vehicle without warrant is to be exercised only where there are occupants of the vehicle and when the vehicle and its occupants have been detained.

[72] There is no evidence in the present case that the failure to recognise that the applicant and Mr Hetet were not occupants was a matter of an established or systemic failure of police procedure. The appropriate procedure is one for which police officers in higher authority than SC Cameron would be responsible. The only instances of a similar problem brought to the Court's attention were the unlawful searches in *Versac* and *Pohl*. If it emerges that there are continuing or systemic failures by police to observe the limit on the power to search under s 31 that there must be occupants of the vehicle, the Court may take that into account in

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[28] 564 US 1(2011), 8.

exercising the discretionary power to exclude evidence unlawfully obtained. There was no evidence of that kind in the present case.

[73] There is no evidence as to whether it would have been relatively easy for the police officers to have waited until the applicant or Mr Hetet got back in the vehicle. But it seems quite likely that it would have been so. That makes it all the more unlikely that there was any deliberate breach of the limits of power under s 31 to a situation where there ia an occupant of the vehicle in the present case.

[74] In the particular circumstances of the present case, the public interest in bringing a wrongdoer to justice and the factors favouring admission of the evidence outweigh the factors supporting its exclusion.

[75] Accordingly, I dismiss the application.