SUPREME COURT OF QUEENSLAND

CITATION:	*R v P & Anor* [2016] QSC 49
PARTIES:	**THE QUEEN** (respondent) **v** **P** (applicant) and **N** (applicant)
FILE NO:	Indictment 596 of 2015
DIVISION:	Trial Division
PROCEEDING:	Section 590AA application to exclude evidence
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	14 March 2016
DELIVERED AT:	Brisbane
HEARING DATE:	16 December 2015 and 26 February 2016
JUDGE:	Applegarth J
ORDER:	**1. The evidence obtained from and during a search by police of a Toyota Hi-Ace van, parked in the driveway of 62 Jordan Street, Richlands in the State of Queensland on 11 July 2014, and prior to the execution of the search warrant obtained at around 7.40 pm on 11 July 2014, be excluded from evidence to be admitted at the applicants' trial. The evidence so excluded includes evidence of police officers of what was observed or seized by them in the course of carrying out a search of the vehicle without a warrant on the afternoon and evening of 11 July 2014.** **2. Liberty to apply.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – SEARCH WARRANTES – EXECUTION – EMERGENT SEARCH - where police searched unoccupied vehicle – where police lacked authority under *Police Powers and Responsibilities Act* 2000 (Qld), s 31 because "the vehicle and its occupants had not been detained – whether police officer suspected that drugs may be concealed or destroyed unless the van was "immediately entered and searched" – whether any such suspicion was reasonable in the circumstances

CRIMINAL LAW – PROCEDURE – SEARCH WARRANTS – ISSUE – POST-SEARCH APPROVAL ORDER – where post-search approval application not made until 28 days after asserted power to search without warrant exercised – whether application was made "as soon as reasonably practicable"

CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – ILLEGALLY OBTAINED EVIDENCE – GENERALLY – where the applicants charged with possession of dangerous drugs – where police officers conducted unlawful search of unoccupied vehicle – whether action of police officers was reckless – whether discretion to exclude evidence should be exercised

Police Powers and Responsibilities Act 2000 (Qld), s 29, s 30, s 31, s 31(1), s32, s 160, s 160(1), s 160(3), s 161, s 161(1)
Evidence Act 1995 (NSW), s 138(3)(c)

Bunning v Cross (1978) 141 CLR 54; [1978] HCA 22, cited
Burdeau v McDowell, 256 U.S. 465 (1921), cited
DPP v Leonard (2001) 53 NSWLR 227; [2001] NSWSC 797, cited
DPP v Nicholls (2001) 123 A Crim R 66; [2001] NSWSC 523, cited
George v Rockett (1990) 170 CLR 104, cited
Nicholas v The Queen (1998) 193 CLR 173; [1998] HCA 9, cited
Olmstead v United States, 277 U.S. 438 (1928), cited
Pollard v The Queen (1997) 176 CLR 177; [1992] HCA 69, cited
R v Christensen (2005) 157 A Crim R 297; [2005] QSC 279, cited
R v Dalley (2002) 132 A Crim R 169; [2002] NSWCCA 284, cited
R v Day and Anor [2008] QSC 358, cited
R v Keen [2015] QSC 7, cited
R v Lobban (2000) 112 A Crim R 357; [2000] SASC 48, cited
R v Milos [2014] QCA 314, cited
R v Munck [2010] QSC 416, cited
R v Toon [2015] QSC 117, cited
R v Versac (2013) 227 A Crim R 569; [2013] QSC 46, cited
R v Williamson [2009] QSC 434, cited
Ridgeway v The Queen (1995) 184 CLR 19; [1995] HCA 66, cited
The Queen v Swaffield (1998) CLR 159; [1998] HCA 1, cited

COUNSEL:	A Boe for the applicant P P Morreau for the applicant N R A Swanwick for the respondent Crown
SOLICITORS:	Boe Williams Anderson for the applicants Director of Public Prosecutions (Qld) for the respondent

[1] On 11 July 2014 police searched a parked van without a search warrant. They found a substantial quantity of Schedule 1 drugs. The prosecution seeks to rely on the fruits of the search in the prosecution of the applicants, P and N, for possession of dangerous drugs. P and N apply to exclude the evidence obtained as a result of the search of the van.

[2] The substantial issues to be decided are:

1. Was the search of the van unlawful because:

   (a) the relevant officer did not reasonably suspect that any drugs in the van may be concealed or destroyed unless the van was "immediately entered and searched", and so the search was not authorised by s 160 of the *Police Powers and Responsibilities Act* 2000 (Qld) (*PPRA*); or

   (b) a post-search approval was not applied for "as soon as reasonably practicable", as required by s 161(1), in that there was a delay of 28 days in making the necessary application?

2. If the search was unlawful, should the discretion to exclude the evidence be exercised?

[3] The essence of the applicants' submissions is that the police had no real regard to the source of the power to conduct the search, initially sought to justify it under s 31 of the *PPRA*, and belatedly sought to explain that the search was authorised, instead, by s 160 of the *PPRA*. In any case, there were no reasonable grounds to suspect that evidence would be lost or destroyed if the van was not immediately entered and searched. The two police officers at the scene were in control of the van and its keys, and could have locked it. They had detained the applicants. Other police were minutes away from arriving at the scene, and they also could have guarded the van until a warrant was obtained to search it. The police's disregard of the law's requirements, the ease with which the law could have been complied with and other factors are submitted to provide ample reason to exercise the discretion to exclude the evidence obtained as a result of an unlawful search.

[4] The essence of the respondent's submissions is that the police made a good faith decision on the spur of the moment, conscious of the proper procedures for searching vehicles. They did not display a reckless disregard for the law. If, however, the search was unlawful, then the evidence should not be excluded because the search was conducted in good faith and the balance of relevant considerations favour its admission in the public interest.

[5] The parties' submissions raise a number of factual issues including:

(a) the roles played by officers Webster and Campbell in deciding to search the van and in conducting the search;

(b) each officer's state of mind in deciding to search without a warrant.

FACTS

The Firth Street search

[6] Investigations led police to believe that premises at 28 Firth Street, Richlands were being used as a "safe house" by P and others to store and pack drugs. At around 2.30 pm on 11 July 2014 police executed a search warrant at those premises. No person was present at the premises, and so before the search proceeded a Justice of the Peace was enlisted to observe it. In that search, police located small quantities of drugs, some money and a money counter, as well as packaging, a heat sealer, unused heat sealer plastic and scales. P's fingerprints and DNA were located on many of the items police found at the Firth Street premises.

[7] Police also located a driver's licence in P's name which bore the address 62 Jordan Street, Richlands.

Observations of Jordan Street

[8] Detective Sergeant Shane Campbell, who participated in the search of 28 Firth Street, instructed two other officers to go to 62 Jordan Street. They did so and kept the house under observation. A dark-coloured Audi and a Honda vehicle were parked in the front driveway. No-one was seen in the house, leaving it or attending it. The two police officers left Jordan Street at around 3.45 pm.

[9] Some time later, probably around 5 pm, Detective Sergeant Campbell and Detective Senior Constable Sean Webster, drove to 62 Jordan Street. As they approached they saw two males standing in front of the Honda vehicle, which was parked in the front yard with its bonnet up. One male was leaning into the bonnet. Parked nearby was a Hiace Van, and the dark Audi was parked on the grass. The officers parked outside the house. They saw P enter the Audi, start it and commence to back it out of the driveway. N was standing in front of the Honda.

The detention of P and N

[10] DSC Webster walked up to the Audi and spoke to P, while DS Campbell spoke to N. P was reluctant to tell Webster his name and kept glancing in the direction of the Hi-Ace Van. Ultimately, he gave his name and produced an identity card. While talking to Webster he started walking backwards. Webster found P's behaviour suspicious and suspected that P and N, or the vehicles they were standing next to, held dangerous drugs. His suspicion of P was also based on a combination of intelligence which had been gathered over a substantial period and the evidence that had been gathered at 28 Firth

Street, which indicated that a large amount of dangerous drugs had recently been packaged at that address.

[11] While Webster spoke with P, Campbell spoke with N, who denied that he lived at the Jordan Street residence. N admitted to Campbell that he was the owner of the Hi-Ace van which was parked in the driveway.[1]

[12] Webster's witness statement dated 9 December 2014 recorded:

> "As a result of my observations and inquiries I detained both males for a search".

Campbell's statement dated 31 August 2014 recalled that as a result of P starting to walk away, Webster "formally detained both persons under the provisions of *Police Powers and Responsibilities Act* for the purposes of a search". Campbell's notebook records, however, "Detained by Webster For search at 28 Firth". The notebook does not record that the detention was for the purpose of an "emergent search"[2] of the vehicles.

[13] Campbell's addendum statement dated 18 February 2015 stated that Webster detained both P and N under the *PPRA* to prevent the loss of any evidence. In a further addendum dated 13 October 2015 Campbell further reported that Webster verbally stated that P and N were detained under the Act, but that neither were physically detained nor under any form of restraint at the time. Campbell stated that when Webster explained his powers under the Act this was with reference to s 29 in respect of search of a person without warrant in conjunction with s 30 (the prescribed circumstances being an unlawful dangerous drug). Campbell stated in relation to the vehicles that the search without warrant was under s 31(1)(b) and (c) (the prescribed circumstance under s 32 being an unlawful dangerous drug).

[14] Section 31(1) of the *PPRA* states:

> "**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;
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> (b) detain a vehicle and the occupants of the vehicle;
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> (c) search a vehicle and anything in it for anything relevant to the circumstances for which **the vehicle and its occupants are detained**." (emphasis added)

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1 An application to exclude evidence of this admission was not pursued.

2 The term "emergent search" is used by police and lawyers to describe a search conducted in circumstances calling for prompt or urgent action, and, more specifically, the kind of search undertaken to prevent loss of evidence authorised by s 160 *PPRA*: see, for example *R v Williamson* [2009] QSC 434 at [10]; *R v Pederson* [2011] QDC 69 at [44].

Section 32 defines the "prescribed circumstances" and they relevantly include that there is something in the vehicle that "may be an unlawful dangerous drug".

[15] Significantly, the respondent's original written submissions filed 30 October 2015 sought to justify the search of the van on the basis of s 31 of the *PPRA*, namely that police suspected that there may have been drugs in the van. However, this submission was not pressed at the hearing before me. This is understandable because s 31(1)(c) of the *PPRA* permits a vehicle search only where "the vehicle and its occupants" have been detained.[3]

[16] As for the actual detention of P and N, it is clear that Webster detained them because he suspected that they or the vehicles they were standing next to held dangerous drugs. Campbell had the same suspicion. His evidence is that both P and N were very nervous and evasive in relation to questions relating to the vehicles at the dwelling.

The search of the van

[17] Although it was Webster who later applied for a post-search approval order in respect of the search of the van, it was Campbell who actually undertook the search of the van shortly after Webster detained P and N. Webster remained with P and N at this time. Campbell observed a Blackberry mobile telephone in the front centre console of the van. N said that he did not know who owned it. Campbell observed packets of various foodstuffs in the passenger side's footwell and that one bag appeared to contain a large heat-sealed bag. He suspected that some of the sealed bags had been resealed. He opened one of the heat-sealed bags and observed that it contained a number of clip-seal plastic bags containing a crystallized substance, which proved to be methylamphetamine. Another large heat-sealed bag contained cocaine.

[18] Shortly after Campbell began to search the van, other police arrived at the scene and took custody of P. Police observed what Campbell had found in the van. The food packets located in the passenger side footwell later were found to contain the following quantities of drugs: 52.639 grams of cocaine (16.755g pure), 295.683 grams of heroin (97.509g pure) and 281.236 grams of methylamphetamine (130.956g pure).

[19] Other items were found in the van such as iced tea and water bottles. DNA evidence connected an iced tea bottle to N and a Mount Franklin water bottle to P. A search of P located in his pocket a receipt for items which had been purchased at a service station at Richlands at 2.07 pm that day, which included the iced tea, water bottles and other items found in the van. CCTV footage from the service station confirmed a male person entering and leaving it at that time carrying those items to a white van.

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[3] *R v Versac* [2013] QSC 46 at [40] – [43]; *R v Pohl* [2014] QSC 173 at [13]; *R v Toon* [2015] QSC 117 at [9]; *R v Keen* [2015] QSC 7 at [26], [33] – [39]; *R v Barbaro* [2015] QSC 346 at [16].

Search warrants

[20] At 7.40 pm, a search warrant for the Jordan Street premises and the vehicles was obtained by another police officer. The residence was searched and $11,000 in cash was located inside an en suite.

Post-search approval

[21] On the night of 11 July 2014 Webster and Campbell discussed what had to be done, and they agreed that Webster would have to make a post-search application. Webster's recollection is that Campbell told him that he believed that Webster needed to make such an application.

[22] The application was not made until 7 August 2014: some 28 days after the date of the search. The magistrate to whom the application was made sought an explanation for the delay in making the application. DSC Webster explained that he was on rest days on 12, 13 and 14 July. He did not account for 15 July, but explained that thereafter he was deployed on various operations, worked long hours and, despite making numerous attempts to make the application, was prevented by pressure of work from doing so. The application was not finalised until 5 August, when Webster set about finding a Justice of the Peace before whom he could swear it. The application was approved.

Legal context and the central issue

[23] Contrary to Campbell's belief, as stated in paragraph 6 of his addendum statement dated 13 October 2015, s 31(1)(b) and (c) of the *PPRA* did not authorise a search of the van without warrant. The "vehicle and its occupants" had not been detained. As a result, the power to search it under s 31 did not arise.[4]

[24] Section 160 of the *PPRA* provides that "if a police officer reasonably suspects":

- that there is a thing at or about a place,[5] or in the possession of a person at or about a place, that is evidence of the commission of an offence;[6] and
- the evidence may be concealed or destroyed unless the place is immediately entered and searched

then the police officer may enter the place and exercise search warrant powers.

[25] "Reasonably suspect" means suspect on grounds that are reasonable in the circumstances.[7] There must be facts sufficient to induce the required suspicion in the mind of a reasonable person.[8]

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4 Ibid. The respondent's final submissions did not seek to justify the search of the van under s 31 on the basis that at the relevant time P and N were "occupants": c.f. *R v Keen* [2015] QSC 7 at [35] – [39].

5 A vehicle is a place for the purposes of the Act according to the definition of "place" in Schedule 6.

6 The offence must be an indictable offence or one of the other offences specified in s 159.

7 See the definition of "reasonably suspects" in Schedule 6.

8 *George v Rockett* (1990) 170 CLR 104 at 112.

[26] In this case the relevant issues are whether at the time the van was entered and searched:

(a) the relevant officer suspected that evidence in the form of drugs "may be concealed or destroyed" unless the van was "immediately entered and searched"; and

(b) if so, whether the grounds for that suspicion were reasonable in the circumstances.

Whose search and whose suspicion?

[27] An interesting issue is whether the required suspicion had to be held by Campbell, who conducted the search, or Webster who, on one view of the evidence, made the decision to search the van, with Campbell being prepared to carry into effect Webster's decision that P and N and the vehicles be detained for the purpose of a search.

[28] The applicants advanced a persuasive argument that the officer who enters and searches the place is the officer who must hold the requisite suspicion and then apply for a post-search approval. This argument points to the fact that s 160(3) provides the power to "a police officer" to enter a place and exercise search warrant powers, and that s 160 only applies "if a police officer reasonably suspects …". The consistent reference to "a police officer" suggests that s 160(1) and s 160(3) are referring to the same officer. The applicants acknowledge that a suspicion could reasonably arise on the basis of information provided by another officer. However, the provision, which provides an exception to the requirement to obtain a warrant, depends on the person who actually exercises the power of entry and search having the reasonable suspicion.

[29] The respondent submits that although both officers in this case had the same reasonable suspicion, it was DSC Webster's reasonable suspicion that is relevant. DS Campbell shared the same knowledge and information, and independently held the suspicions. He agreed with Webster's assessment. According to the respondent's submissions, Webster played the leading role in that he declared that the suspects were detained for the purposes of a search.

[30] In the light of these arguments, it is appropriate to consider the state of mind of each officer and the reasonableness of any suspicion he held that drugs may be concealed or destroyed if the van was not "immediately entered and searched". If the applicants' submissions are correct, and Campbell is the relevant officer, then the fact that he did not seek and obtain post-search approval for his search provides an additional ground to find the search to be unlawful. This is because it is the police officer who has exercised the powers under s 160 who must apply for the post-search approval order under s 160.[9]

Webster's suspicion and its reasonableness

[31] Webster gave oral evidence of P looking at the van, and that Webster believed P was considering fleeing. Webster made a "split second" decision to detain P and N because he believed drugs were in the van. Webster's suspicion that there were drugs in the van was based on a combination of factors, and included:

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[9] *R v Day* [2008] QSC 358 at [28]; *R v Munck* [2010] QSC 416 at [28].

- months of investigation and surveillance of suspects;
- criminal intelligence that suspects were bringing drugs into Queensland in the engine blocks of cars;
- the two suspects were looking under the bonnet of one car;
- P, after seeing the police officers as they drove past, made an attempt to leave the property in the Audi;
- P appeared to be walking backwards and preparing to leave;
- P was vague about his address;
- P was looking at the van.

[32] Webster was an experienced detective and his suspicion that there may be drugs in the van was reasonable. His desire to control the situation was understandable and reasonable. As explained in his oral evidence, he detained P and N because he believed the drugs were in the car and "the drugs were going to go".

[33] The issue, however, is not his reasonable desire to detain P and N, or even his desire to control the van. The two police officers were able to maintain control of the van by maintaining possession of its keys and detaining P and N, whilst waiting perhaps five or ten minutes for the arrival of other police. Campbell had obtained the key to the van at an early stage, before he commenced to search the van.

[34] Webster, in his oral evidence, raised the possibility that there could have been someone in the back of the van, and that to control the situation he might need to open the back door of the van and look into it. Incidentally, he did not do so.

[35] Campbell did not state that he had a similar concern. In any case, any such concern on either officer's part could have been addressed by looking in the back of the van and opening its back door to see that there was no-one in it. Campbell could see that there was no-one in the front of the van, and seemingly was not concerned about the possibility of someone being in the back of it because he did not open the back door until later. He acknowledged that he could have determined whether someone was in the back of the van just by opening the back door and looking into it.

[36] Campbell explained that his concern was not about people being in the vehicle. His concern was stated to be "unknown persons in the house." He did not search the van because of any concern that someone might have been in it and able to drive away. He had the key and might have locked the van, so that it could not easily be driven away.

[37] The circumstances did not require an officer to climb into the van to conduct an active search of its contents. Any concern about someone being in the van could have been addressed by simply opening its door and looking in. The respondent submits that, upon that being done, the emergent search had effectively commenced and, on one view, there

was no point in stopping it as the process had already commenced.[10] I do not agree. Ascertaining whether there was anyone in the van did not entail a search of the van, as DS Campbell acknowledged in his evidence.

[38] DSC Webster's evidence emphasised his concern to control the situation and to ensure that neither the detainees nor the van left the scene. However, having Campbell search the vehicle before other police arrived required Campbell to distract his attention from the suspects and the front of the house. Rather than two officers detaining the two detainees (without the need to handcuff them) and ensuring that no-one approached the van or the other vehicle, Campbell was distracted from aiding Webster to control the situation until other police arrived. The respondent submits that having one officer search the van would not take that officer "completely out of the equation". He could search the van whilst checking on the suspects. However, an immediate search of the van was not necessary to control the situation. Even before other police arrived, Webster and Campbell were in control of the situation. If they had great concern about the detainees' escaping, then they might have been handcuffed. Campbell was able to satisfy himself no-one else was in the van. He had no concerns about the van being driven away.

[39] Webster was able to observe what Campbell was doing, and to realise that the search was for drugs, not for individuals who might threaten the police's control of the situation.

[40] The present issue is whether Webster suspected that any drugs in the van might be concealed or destroyed unless the van was "immediately entered and searched". He was concerned that any drugs in the van might be lost if he did not take control of the situation by detaining P and N, and thereby remove their ability to drive the van away. He detained P and N for the purpose of searching them and the vehicles. He was not required to undertake an *immediate* search of the van, provided it was secured, which it was. His desire to control the situation and to prevent loss of evidence was satisfied by the time Campbell began to search the van.

[41] I am not persuaded that once P and N had been detained that DSC Webster actually suspected that any drugs in the van might be concealed or destroyed if it was not immediately searched. If, however, he held such a suspicion he did not have reasonable grounds for it. Campbell and he were able to readily establish that there was no-one else in the van. Any search could await the arrival of other police in a few minutes, who might stand guard until a warrant was obtained. There was no need for an immediate warrantless search, as distinct from a need to maintain control of the van's movements by detaining P and N, keeping its key, locking it and otherwise stopping anyone who might come on the scene from attempting to enter the van or to drive it away. I conclude that Webster did not have reasonable grounds to suspect the evidence may be concealed or destroyed unless the van was "immediately entered and searched". If he is the relevant officer for the purpose of s 160 of the *PPRA*, he did not have the reasonable suspicion required by s 160(1)(b) to authorise the exercise of search warrant powers without a warrant.

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[10] Cf *R v Milos* [2014] QCA 314 at [4], [83] where the facts were quite different.

Campbell's suspicion and its reasonableness

[42] Despite having relied in his addendum statement dated 13 October 2015 upon s 31(1)(b) and (c) as the basis upon which the van was searched without warrant, DS Campbell's oral evidence was that his authority to search the van arose from Webster's decision that P and N and the vehicles had been detained for the purpose of a search under s 160. His evidence was that he understood that the declaration which Webster made was for the purpose of searching the suspects, the van and the Honda under s 160. Section 31 might have applied to the Audi in that P had been an occupant of that vehicle which had been stopped. Campbell's evidence is that he believed that Webster invoked powers under s 160 of the Act for the purpose of searching the other vehicles, and that this authorised him to search the van comprehensively until "the urgency had finished" once other police had arrived.

[43] DS Campbell's own concerns were not about any risk that someone might be in the van and drive it away. As noted, his concerns were that there might be "unknown persons in the house". However, if there were such persons they could not easily drive the van away because Campbell had the key. DS Campbell apparently did not have any concerns about persons hiding in the van, but quickly discovered that there was no-one in the van. In any case, he acknowledged that any concerns about persons being in the van did not exist when he commenced the search of it.

[44] As for his concerns that there might be unknown persons in the house, he did not know at the time if there was anyone inside the house. DS Campbell gave evidence that he conducted an emergent search, rather than wait for a search warrant, because he was of the belief that "if we didn't search then, we would lose evidence".

[45] Again, but in the context of Campbell's conduct, beliefs and suspicions, it is important to distinguish between:

(a) a suspicion that there were drugs in the van: the suspicion required by s 160(1)(a); and

(b) the suspicion that the evidence might be concealed or destroyed unless the van was *immediately* entered and searched, that is before the arrival of other police.

The latter was required by s 160(1)(b).

[46] DS Campbell's evidence under cross-examination asserted that he applied his mind to the threat or the likelihood of loss of evidence, however, he had difficulty in explaining how he did so or what his thought processes were. He was unable or unwilling to explain why his and Webster's purpose could not have been achieved by detaining the two suspects and waiting for the few minutes that he knew it would take for other police to arrive.

[47] Any suspicion which Campbell entertained before he commenced the warrantless search, that evidence would be lost unless an emergent search was undertaken before the arrival of other police, did not have reasonable grounds. If Campbell suspected that someone else was in the house then the best course was to control the situation by maintaining a

two on two control of the suspects, handcuffing them if necessary to prevent their flight (DS Campbell thought to do so would have been an over-reaction) and keeping hold of the van key. Campbell had no concern about any third party who might be inside the house driving the van away. If he was genuinely concerned about loss of evidence from the van by unknown people in the house, then he might have locked the van. He could not explain in his evidence whether he turned his mind to merely securing the vehicle by either locking it or standing next to it. He could not recall if he gave any thought to that option.

[48] I conclude that he probably did not turn his mind to that measure and that his inability to explain why that course was not taken is because he wrongly believed Webster's declaration was sufficient authority to search the vehicle.

[49] The respondent's submissions concede that the concerns of the officers about the security of any evidence contained in the van could have been addressed by locking the van after detaining the suspects. The decision to do more than ascertain whether anyone was in the van and to embark upon a search is one that occurred in what is submitted to have been "the whirl of considerations surrounding the object of ensuring that evidence was not destroyed". I accept that the presence of a suspicion and its reasonableness does not depend upon the fact that, well after the event, someone can point to a different process of reasoning and course of conduct which could and should have been undertaken. I am prepared to assume, for example, that DS Campbell may not have turned his mind to locking the van, even though he thinks that he probably did. If he did not turn his mind to the option of locking the van then this was probably because the situation was under control, with neither the detainees nor anyone else threatening to access the van. If he did in fact think about locking the van but decided not to, it was also because the situation was under control.

[50] I do not reject the proposition that at some point or other before he embarked upon a search of the van, Campbell was concerned about the possibility of losing the evidence in it. However, that possibility was addressed by the detention of the suspects, Campbell's control over the van via the key, his assessment that no-one was in it and his and Webster's ability to guard the van until police arrived in a few minutes. Once Webster and he established control over the situation there was no reasonable basis for a concern that, absent an immediate search, any drugs or other evidence in the van may be lost or destroyed. Webster had immediately called other police to attend, who were less than five minutes away.

[51] I conclude that any suspicion which Campbell may have entertained that evidence "may be concealed or destroyed unless the place is immediately entered and searched" was not reasonable in all the circumstances. In essence, it was unreasonable because of the alternative means available, and in fact deployed, to secure the van pending the arrival of other police, after which a search warrant could be obtained with relative ease.

[52] DS Campbell's conduct is best explained on the basis that he did not turn his mind to the question of whether evidence would be concealed or destroyed unless the van was immediately entered and searched. Instead, he simply presumed that he had authority to search the van as a consequence of Webster's declaration and their shared suspicion that there were drugs in the van.

Conclusion

[53] Neither Officer Webster nor Officer Campbell reasonably suspected that evidence may be concealed or destroyed unless the van was immediately entered and searched. As a result, s 160 did not provide authority to conduct the search which was undertaken by Campbell. The search which was undertaken was unlawful.

Post-search approval

[54] Section 161 of the *PPRA* requires that an application for post-search approval be made "as soon as reasonably practicable" after exercising the powers under s 160. The applicants submit that the exercise of the powers under s 160 of the *PPRA* was conditional upon the application for post-search approval being made by DS Campbell, since he was "the police officer" who exercised powers under s 160. This submission should be accepted.[11] As a result, the search was rendered unlawful.

[55] If I am wrong in the conclusion that the application needed to be made by Campbell, rather than Webster, then the applicants submit that the application by Webster was not made "as soon as reasonably practicable" after exercising the powers under s 160. They submit that a delay of 28 days from the time of the search clearly is not "as soon as reasonably practicable". They rely upon *R v Day*[12] where A Lyons J found an application that was made ten days after the search had not been made as soon as reasonably practicable.

[56] In his explanation to the magistrate about the 28 day delay, DSC Webster outlined in some detail his commitments on various dates when he was principal investigating officer in a large drug operation and preoccupied with other operational matters. He was also engaged in rural travel, and had some days' leave. In his evidence before me he said the reasons for the delay were "mainly operational reasons". Operational matters consumed much of his time including deployments in other parts of the State. Under cross-examination he acknowledged that the 28 day period was "a long time" and that, upon reflection, things could have been done better. He was not able to explain what occupied him on 15 July 2014, which was a few days after the search. He was probably at work that day and there was no evidence that he was involved in active surveillance.

[57] The respondent submits that, under the circumstances in which DSC Webster was working long hours and busy with operational matters, it could not be said that he would have been able to complete the application on 15 July 2014. Further, the statutory requirement to make the application "as soon as reasonably practicable" does not mean "as soon as possible".[13]

[58] There is no fixed limit upon the number of days which constitutes a reasonably practicable period for the purpose of s 161. Appropriate understanding should be accorded to the operational demands placed upon an officer in DSC Webster's position. That said, if he was preoccupied with other matters on most days (there being no evidence about what he

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11 *R v Day* [2008] QSC 358 at [28]; *R v Munck* [2010] QSC 416 at [28].
12 [2008] QSC 358 at [29].
13 *Wills v Whiteside; ex parte Wills* [1987] 2 Qd R 284 at 288.

was doing on 15 July 2014), then additional support should have been provided to him by his superiors. Drafting of the application could have been undertaken by another officer, such as DS Campbell, who was familiar with the matter. There is no evidence that other officers could not have been given the task of preparing a timely application for DSC Webster to review.

[59] Material in any application, whether drafted by Webster or by someone else for his review, about the background to the search could have been drawn from other documents. They were not required to write a novel. The drafting exercise need not have been time consuming. The application needed to focus on the reason for the warrantless search and what founded the officer's belief. None of this required 28 days to complete.

[60] I am not satisfied in the circumstances that the application was made "as soon as reasonably practicable" after exercising the powers under s 160. Non-compliance with the requirements of s 161 provides an additional reason to conclude that the search was unlawful. The granting of post-search approval under s 162(1) does not render an unlawful search lawful.[14]

The discretion to exclude

[61] The public policy discretion to exclude unlawfully obtained evidence weighs competing public interests. One is "the desirable goal of bringing to conviction the wrongdoer."[15] Another is "the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law."[16]

[62] The discretion "is necessary to protect the processes of the courts of law in administering the criminal justice system."[17] This judicial integrity principle holds that courts should not admit the tainted fruits of unlawful conduct, lest the administration of justice be brought into disrepute.[18] The discretion also serves the policy of deterring unlawful conduct by those entrusted with powers of law enforcement.[19]

[63] Although Australian courts have recognised a number of relevant factors in the exercise of the public policy discretion to exclude evidence, as Henry J observed in *R v Toon*,[20] these factors are illustrative, and the focus must be on the case at hand. Some factors support exclusion, whilst others support admission. Depending on the circumstances at hand, the factors may include:

(a) whether the unlawfulness was a deliberate or reckless disregard of the law, as distinct from a mere oversight or accidental non-compliance with the law;

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14 *R v Milos* [2014] QCA 314 at [3] and the cases cited therein.
15 *Bunning v Cross* (1978) 141 CLR 54 at 74.
16 Ibid.
17 *Nicholas v The Queen* (1998) 193 CLR 173 at 217.
18 *R v Lobban* (2000) 112 A Crim R 357 at 367 [39] – [40]; *Pollard v The Queen* (1997) 176 CLR 177 at 203; *Ridgeway v The Queen* (1995) 184 CLR 19 at 32; *The Queen v Swaffield* (1998) 192 CLR 159 at 175-180, 190-191, 212.
19 *Ridgeway v The Queen* (supra) at 32; *The Queen v Swaffield* (supra) per Brennan CJ at 176-182.
20 [2015] QSC 117 at [17].

(b) the cogency of the evidence and whether the nature of the illegality affects the cogency of the evidence so obtained;

(c) the importance of the evidence in the proceeding;

(d) the nature and seriousness of the offence;

(e) the nature of the unlawful conduct;

(f) whether such conduct is encouraged or tolerated by those in higher authority in the police force; and

(g) how easy it would have been to comply with the law.[21]

[64] If any of the factors are present, then the weight given to each depends on the circumstances. In *R v Versac*[22] it was observed:

> "The weight given to competing factors depends on those circumstances. For example, the particular circumstances may deprive the principle of deterrence of much weight. The unlawful conduct may have been the subject of disciplinary procedures, counselling or other remedies which sanction wrongful conduct or deter its repetition. If this is not the case, exclusion of the evidence may be appropriate to both uphold the judicial integrity principle and to deter such conduct in the future. If such unlawful conduct is tolerated by those in higher authority, then the case for exclusion will be stronger.[23]"

The parties' submissions

[65] The applicants place particular reliance on the nature of the unlawful conduct of the police. To adopt the words of Holmes J (as her Honour then was), the unlawful conduct had "so little regard for what was actually permitted by the statutory provisions"[24] as to tilt the balance of the public interest against the receipt of the evidence so obtained.

[66] The respondent submits that both officers acted in good faith and "with consciousness of the proper procedures for the searching of vehicles and persons." The respondent submits that there was no reckless disregard for the law or any of the other vices encountered in cases in which evidence is excluded as a result of an unlawful search. According to the respondent, the evidence ought to be admitted on the basis that "the public interest in bringing to justice those who commit serious offences outweighs any public harm associated with defects in the execution of the relevant provision of the *PPRA*, when done in good faith."

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21 *R v Versac* (2013) 227 A Crim R 569; [2013] QSC 46 at [6].
22 Ibid at [7].
23 *Ridgeway v The Queen* (1995) 184 CLR 19 at 39.
24 *R v Christensen* (2005) 156 A Crim R 397 at [12].

The nature of the unlawful police conduct

[67] The various witness statements of the police officers and their oral evidence lead me to conclude that each assumed that it was sufficient to search the van if they reasonably suspected there were unlawful dangerous drugs in it. Reference, by implication, to s 160 appears to have been something of an afterthought. No mention was made of any threat of loss or destruction of evidence in the tape recorded conversations which commenced at 5.29 pm in which Campbell outlined what prompted the search of the vehicle. The original statements were premised on the fact that the police searched the van because they suspected drugs were in it. No reference was made at the time to the risk that the drugs would be concealed or destroyed if the van was not immediately searched. The post-search approval application reported that after N denied all knowledge of the Blackberry (a device frequently used by persons for drug supply), the police "declared an emergent search of the vehicle to prevent the loss of evidence." Why the vehicle had to be searched to prevent a loss of evidence was not explained in the application.

[68] Each of the officers said that they were aware of the requirements of s 160, but each had difficulty in explaining the grounds upon which they suspected evidence might be concealed or destroyed once P and N were detained. Campbell's addendum witness statement of 13 October 2015 referred to s 31 of the *PPRA*, not to s 160.

[69] This is not a case in which a police officer, aware of his power to conduct a so-called "emergent search", made an understandable error of judgment in concluding that evidence might be lost or destroyed if a search was not immediately conducted. It is a case in which the police officers apparently were ignorant of the limited power to search a vehicle which has no occupants. They wrongly assumed that they could search an unoccupied car because they suspected there was drugs in it. To repeat what was said in *Versac*:

> "They were not mistaken in their assessment of whether the facts satisfied a known legal requirement. They were in ignorance of the legal requirement, and they were in ignorance of it because they did not consider the constraints or requirements imposed by s 31(1) in the situation that confronted them."[25]

[70] The officers, through ignorance of the law governing searches of vehicles without a warrant, assumed that a search without warrant was justified. This may not constitute a "deliberate disregard" for the law. It does bespeak a "reckless disregard" for the law.[26] I respectfully adopt what was said by Henry J in *Toon*:

> "It is true the officer had some appreciation of the law relating to searches, but the error here was very elementary for an experienced police officer, as this officer was. The Court does not expect police, even plainclothes officers, to have broad legal knowledge of the kind that a legally qualified practitioner does, but it is not unreasonable to expect that police ought know the laws which regulate their own powers as police to search the property of citizens."[27]

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[25] *R v Versac* (2013) 227 A Crim R 569; [2013] QSC 46 at [50].

[26] *R v Pohl* [2014] QSC 173 at [26]; *R v Toon* [2015] QSC 117 at [28] – [29]; *R v Barbaro* [2015] QSC 346 at [18].

[27] [2015] QSC 117 at [28].

[71] I do not accept the respondent's submission that the police acted "with consciousness of the proper procedures for the searching of vehicles and persons." Their conduct on the day tends to suggest that they were ignorant of proper procedures. Their original attempt in this proceeding to justify the search on the basis of s 31 confirms this. Section 31 contains an explicit constraint upon the power to search a car without a warrant. If the police were in fact conscious of the extent of their power under s 31, then they seemingly acted in deliberate disregard of their powers. I would prefer to find that they were not conscious of the constraint which s 31(1)(c) places upon the power to search a vehicle without a warrant and that, without giving any thought to the extent of their powers to conduct a search, they acted in the mistaken belief that they had power. They were reckless in the sense that there was a disregard of the relevant power. They failed to give any thought to whether there was a risk of the search being illegal in circumstances where, if any thought had been given, it would have been obvious that there was such a risk.[28]

[72] The police may be said to have acted in good faith, in the sense that they did not deliberately breach a requirement for a lawful search, conscious of the fact that they were doing so. They may have acted in good faith in the sense that they genuinely believed they were authorised to act as they did. But this does not alter the fact that they were reckless as to whether the law permitted a search without warrant of a van which had no occupants.

[73] I take account of the respondent's submission that the police observed proper procedures in conducting other searches that day. However, this simply makes their departure from the law in conducting the search of the van less serious than if it had been part of a course of unlawful conduct that day. The unlawful search still constituted a substantial departure from what the law required. The non-compliance was not some accidental or careless failure to comply with a point of procedure or an error of judgment made on the spur of the moment in assessing whether reasonable grounds existed. The unlawful search was the result of the officers' ignorance of the legal requirements imposed by s 31(1). Their failure to know of the requirements imposed by s 31(1) is a serious matter. It is made all the more serious because of the importance to the public of police lawfully securing evidence of major drug offences.

Cogency of evidence

[74] The evidence located in the van is cogent, and not affected by the unlawful nature of the search. This factor has some weight favouring admission, even if the officers' conduct was reckless in the sense earlier described.[29]

[75] I am conscious of the view that when the unlawful conduct of officials is intentional or reckless, cogency should generally play no part in the exercise of discretion. In *Bunning v Cross*, Stephen and Aickin JJ observed:

> "To treat cogency of evidence as a factor favouring admission, where the illegality in obtaining it has been either deliberate or reckless, may serve to foster the quite erroneous view that if such evidence be but damning enough

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[28] *Versac* at [46].
[29] *Versac* at [60]; *Pohl* at [27]; *Barbaro* at [19]; cf *Toon* at [24].

> that will of itself suffice to atone for the illegality involved in procuring it. For this reason cogency should, generally, be allowed to play no part in the exercise of discretion where the illegality involved in procuring it is intentional or reckless. To this there will no doubt be exceptions: for example where the evidence is both vital to conviction and is of a perishable or evanescent nature, so that if there be any delay in securing it, it will have ceased to exist."[30]

[76] Another view is that cogency is a relevant factor, even in cases of reckless conduct by police. There is a public interest in admitting reliable and cogent evidence so as to secure the conviction of offenders. Any inducement for police to act illegally in order to secure cogent evidence should be countered by appropriate action by authorities, not by courts acting as de facto police disciplinary tribunals.

[77] The approach of admitting cogent evidence, despite the unlawful means by which it was obtained, is reflected in some legal systems.[31] Such an approach avoids the administration of justice being brought into disrepute when cogent evidence, which probably would have secured a conviction for a serious offence, is excluded and a prosecution collapses. Exclusion of cogent evidence may be seen as "judicial abdication of an obligation to punish proven criminal misbehaviour".[32] Confidence in the justice system may be undermined by the exclusion of cogent evidence, at least where the illegal conduct of officials was neither deliberate nor reckless. It also may be undermined by public perceptions that courts condone or encourage illegal conduct by law enforcement agencies. As McHugh J stated in *Ridgeway v The Queen*:

> "… the judge must weigh the admission of the evidence against the public interest in ensuring that public confidence in the justice system is not undermined by the perception that the courts of law condone or encourage unlawful or improper conduct on the part of those who have the duty to enforce the law."[33]

[78] If the cogency of illegally obtained evidence was a decisive factor, or one accorded great weight, in cases where the official illegality was deliberate or reckless, then the public might perceive the courts as condoning or encouraging such deliberate or reckless conduct by officials. This would be particularly so if the illegal conduct of officials was tolerated by those in higher authority, and not subject to any disciplinary measures or others processes to avoid its repetition.

[79] If, however, such conduct is not tolerated by those in higher authority and is subject to appropriate official action, then a perception that courts condone or encourage such conduct would be misplaced. The courts simply would be leaving others to sanction official misconduct and to avoid its repetition.

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30 *Bunning v Cross* (1979) 141 CLR 54 at 79.

31 The approaches of different legal systems are surveyed in Dr Melliforn't's work *Fruits of the Poisonous Tree* Federation Press, 2010; and were summarised recently by Chief Justice Bathurst in a paper "Illegally or Improperly Obtained Evidence: In Defence of Australia's Discretionary Approach", http://www.supremecourt.justice.nsw.gov.au/Documents/Speeches/2016%20Speeches/Bathurst_20160302.pdf.

32 Davies "Exclusion of Illegally or Improperly Obtained Evidence" (2002) 76 *ALJ* 170, 179.

33 (1995) 184 CLR 19 at 82-83.

[80] The reception of cogent evidence that was unlawfully obtained does not automatically undermine confidence in the justice system. Depending on the circumstances, confidence in the justice system may be preserved by cogent evidence being admitted so as to secure the conviction of the guilty, and by action being taken by authorities to sanction official misconduct and to prevent its repetition.

[81] I do not make the assumption that in all cases the reception of cogent evidence that was unlawfully and recklessly obtained will risk public confidence in the courts. Therefore, I do not adopt a general rule that that the cogency of evidence should be given no weight where the conduct was reckless.

[82] Moreover, to give the cogency of the evidence no weight does not accord with the principle that the discretion should take account of the public interest in convicting those who break the law on the basis of relevant and reliable evidence.

[83] As a result, the cogency of the evidence, and the fact that its reliability was not affected by the unlawful conduct of the search, is a factor which should be accorded some weight.

The importance of the evidence

[84] The evidence is important to the prosecution. For the reasons appearing at the conclusion of this judgment, there may be no untainted evidence obtained in execution of the search warrant which was later obtained which can stand in its place. The importance of the evidence is a factor favouring admission.

The nature and seriousness of the offence

[85] The packets contained 52.639 grams of cocaine (16.755g pure), 295.683 grams of heroin (97.509g pure) and 281.236 grams of methylamphetamine (130.956g pure). If convicted on Counts 2 to 4 (which relate to these drugs) each applicant would be required to serve a substantial period of imprisonment, given the quantity of drugs involved and the fact that it appears to have been part of a sophisticated and organised operation.

[86] The more serious the offence, the more likely it is that the public interest requires the admission of the evidence.[34]

Toleration of unlawful police conduct by those in higher authority

[87] If, as I have found, senior and experienced police were ignorant of the law governing searches of unoccupied vehicles, then their ignorance is seemingly attributable to a lack of education and training of officers.

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[34] *Bunning v Cross* (1979) 141 CLR 54 at 80; see *R v Dalley* (2002) 132 A Crim R 169 at 171-172 [3] – [7], at 189 [102], cf per Simpson J at 188-189 [95] – [97] in the context of s 138(3)(c) of the *Evidence Act* 1995 (NSW).

[88] The issue about the limit on the power to conduct a search without warrant of a vehicle under s 31 is hardly novel. A series of decisions of this Court have involved the same or similar issues: *Versac*, *Pohl*, *Toon* and *Barbaro*.

[89] DSC Webster's evidence about the training and instruction police are given about searching in such a situation was vague. He said that since he had been in the police force "the landscape has changed" and "expectations are different". He understood as a "broad rule" you ought to get a warrant to search a vehicle, but that "every situation is different". He was not aware of any training sessions. Instead, an officer might get notified by a general email of a case that happened.

[90] DS Campbell claimed to be fairly aware of the statutory framework for searching vehicles. He was aware of one case (the details of which he could not recall) in which the lawfulness of a police search had been challenged and he thought that the evidence was allowed in the public interest. He was not sure if the court found the search was unlawful. He said there had been no training to assist officers in his situation to conduct themselves lawfully.

[91] The respondent called no evidence to explain what education or training had been given to police in recent years about the law governing searches of unoccupied vehicles, or the implications of court decisions which have confirmed the express limitation on the power to search under s 31(1)(c).

[92] That the respondent's original written submissions relied upon s 31 gives me no confidence that the limits of s 31 are understood by the police. If they are understood by the police, but disregarded by them, then the situation would be worse.

[93] *Versac*, a decision given on 1 March 2013, stated:

> "The misapprehension of the extent of their powers by officers Peek and Ricardo does not appear to be isolated. Because their misapprehension about the extent of their powers has not been corrected by education or some other remedy, it is entirely possible that many other officers, including experienced officers like them, will exceed their powers by conducting searches of unattended vehicles without a warrant. Toleration of the conduct in question by those in higher authority, and the absence of corrective action to remedy matters, supports the case for exclusion."[35]

[94] The position apparently has not improved in the following years. It suggests a continuing or systemic failure by police to observe the limit on the power to search under s 31. The respondent did not call evidence to counter the conclusion that the misapprehension by police of their power to search under s 31, and therefore their failure to observe the law, is continuing and has not been addressed by appropriate instruction by those in higher authority in the police force.

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[35] *R v Versac* (2013) 227 A Crim R 569; [2013] QSC 46 at [78].

[95] The Court may take into account a continuing or systemic failure by police to observe the limit on the power to search under s 31.[36]

Ease of compliance with the law

[96] It would have been relatively easy for the police to maintain control of the situation for the few minutes it took for other police to arrive, to then post a guard on the van and then await an hour or two for the kind of search warrant which in fact issued at 7.40 pm. The officers knew that other police were on the way. They were not in a remote location. A police station at which the application for a search warrant could be prepared was only a few moments away.

[97] The ease with which the officers might have complied with the law and secured the evidence lawfully without substantial delay or inconvenience is a factor which favours exclusion. As Henry J observed in *R v Toon*:

> "… given the ease with which police could have behaved lawfully, the Court ought be reluctant to signal that in such a situation the Court will settle for such a lax approach to compliance with legislative requirements that bear upon the government's interference with the property of citizenry."[37]

The balance

[98] Ultimately, competing public interests have to be weighed. One is the public interest in convicting those who commit criminal offences. Another is that police and other government agents observe the law. If courts give implicit encouragement to unlawful conduct by those whose task it is to enforce the law then the courts may be perceived to be approving of such conduct and the administration of justice may be brought into disrepute. Of course, courts also may be brought into disrepute by excluding cogent evidence which would convict offenders, but this is more likely to be the case where the unlawful conduct of the police is neither deliberate nor reckless.

[99] In *Versac*, I stated:

> "In circumstances in which a warrant could have been easily obtained with no substantial delay, the court should avoid the undesirable effect of curial approval, or even encouragement, being given to a failure to comply with the law. Exclusion also serves the policy of deterring unlawful conduct and avoiding any assumption by law enforcement agencies that they can disregard requirements that constrain the power to search without a warrant without suffering the consequence of evidence being excluded."[38]

Notwithstanding the decisions in *Versac*, *Pohl*, *Toon* and *Barbaro*, there is an apparent absence of training and instruction to police about the extent of their legal authority. The

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[36] *R v Keen* [2015] QSC 7 at [72].
[37] [2015] QSC 117 at [26].
[38] *Versac* at [79].

apparent failure to address the situation suggests that unlawful conduct is tolerated by those in higher authority in the police force.

[100] The primary function of the judicial discretion to exclude illegally obtained evidence is to protect the processes of the courts of law in administering the criminal justice system. It is not to punish or discipline police officers who conduct unlawful searches.

[101] More important public policies are at stake than courts attempting to educate police about the extent of their legal powers to search homes, cars and other places without a warrant. The public policy which favours exclusion is based on more than a policy of deterrence: the theory that by excluding evidence in an appropriate case the police will be deterred from conducting unlawful searches in the future. The public policy which supports exclusion is concerned with subjecting government officials to the rule of law. It is also concerned with the consequences for the administration of justice if courts fail to do so.

[102] Brandeis J wrote:

> "At the foundation of our civil liberty lies the principle which denies to government officials an exceptional position before the law and which subjects them to the same rules of conduct that are commands to the citizen."[39]

He also wrote "if the government becomes a lawbreaker, it breeds contempt for law", and warned of the consequences of declaring that in the administration of the criminal law the end justifies the means.[40]

[103] If government agencies with a duty to enforce the law engage in unlawful conduct, then the government has diminished authority to demand that citizens observe the law. If courts are seen to condone, or even to encourage, unlawful or improper conduct by those who have a duty to enforce the law, their own authority is diminished. The diminution in respect for the law and the loss of public confidence in the courts is greater where the unlawful government conduct is deliberate or reckless.

[104] In this case, the principle that courts should not admit the tainted fruits of unlawful conduct, lest the administration of justice be brought into disrepute, is not engaged by unlawful conduct that resulted from a deliberate disregard of the law. The unlawful conduct was, however, reckless.

[105] I am loathe to be too critical of Officers Webster and Campbell when their conduct on the day was apparently the result of not knowing the true extent of their powers. Still, experienced officers should be expected to know the circumstances under which unoccupied vehicles can be searched without a warrant. Their conduct in undertaking a warrantless search without giving any proper regard to whether the search was illegal seemingly is the result of a system in which police officers do not know any better. The respondent did not lead any informative evidence about what steps had been taken in recent years to educate or re-educate police officers about the limits of their power to

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[39] *Burdeau v McDowell*, 256 U.S. 465, 477 (1921).
[40] *Olmstead v United States*, 277 U.S. 438, 485 (1928).

conduct warrantless searches of vehicles. The need to search vehicles, both occupied and unoccupied, is a routine part of police work. The limit on the power to search under s 31 is not an obscure point of law. That experienced police officers should conduct unlawful searches of vehicles because, seemingly, they know no better may explain their conduct. However, it places the focus on those in higher authority in the police force who apparently tolerate such unlawful conduct. That such conduct is apparently tolerated by those in higher authority in the police force is a factor which supports exclusion.

[106] The case for exclusion is also supported by the lax behaviour of police in this case in seeking post-search approval. The belated application did little to explain why, in the circumstances, an immediate search was embarked upon. The inability or failure of the relevant officers to adequately explain their reasons for thinking that an immediate search was necessary after P and N had been detained tends to highlight the fact that the police simply assumed a right to search the van because they reasonably suspected that drugs were in it. The evidence of the police does not persuade me that they gave any thought at the time of the search to their powers under s 160. The application to obtain post-search approval was very late in being made. This provides another reason to conclude that the search was unlawful.

[107] The exclusion of the evidence has the potential to deprive the prosecution of important and cogent evidence in proceedings involving a serious offence. It is contrary to the public interest that the possession of dangerous drugs in the quantities found in the van should go unpunished. These factors support admission.

[108] On balance, in the circumstances of this case, the public interest in bringing drug offenders to justice and the factors favouring the admission of the evidence are outweighed by the factors supporting its exclusion. Although the unlawful police conduct was reckless, not deliberate, admitting such illegally obtained evidence has the potential to suggest that courts are prepared to overlook unlawful conduct by those whose task it is to enforce the law. The potential to bring the administration of justice into disrepute is heightened in a case in which the evidence might easily have been obtained legally.

The evidence to be excluded

[109] Each application sought a direction or ruling that "Evidence obtained from and as a result of a search by police of a motor vehicle viz a Toyota Hi-Ace van, located parked in the driveway of a residence at 62 Jordan Street Richlands in the State of Queensland on 11 July 2014, be excluded from evidence to be admitted at the applicant's trial." Such a direction or ruling would render inadmissible at least the evidence obtained by Officer Campbell during his search and evidence of what he and others observed during the search without warrant. It would not necessarily render inadmissible evidence obtained as a result of a subsequent lawful search which would have been carried out in any event. It is not obvious that the discretion to exclude should extend to evidence obtained during later searches, including any search of the van that was undertaken pursuant to the search warrant that was obtained at 7.40 pm.

[110] There are some cases in which an unlawful search leads to the discovery of evidence which would not have otherwise been discovered. In other cases, evidence is obtained as

the result of an independent process. In some cases an unlawful search may play a minor role in a subsequent lawful search, which would have been carried out in any event.

[111] Presently, I am not in a position to reach a conclusion about the extent to which evidence about drugs in the van was obtained as a result of a lawful search conducted pursuant to the search warrant which was obtained by Officer McCarthy at 7.40 pm on 11 July 2014. That is a question for another day.

[112] The evidence before me leaves uncertain whether the drugs in question were removed from the van before the search warrant was obtained and executed. There is evidence that the drugs were "originally left in the vehicle" until around the time that Detective Sergeant Durre arrived. DS Campbell gave evidence that after they briefed Durre, and the emergency finished, they did not have to continue with any "emergent search" and they "just finished clearing that van and … waited for the search warrant." Other evidence suggests that the search of the van may have continued before the search warrant arrived. DCS Webster's witness statement dated 9 December 2014 at [19] and his oral evidence indicates that he assisted the Scenes of Crime Officers in photographing items "that were seized". This begs the question of whether the drugs were removed from the van in order to be photographed.

[113] DS Campbell gave evidence that the warrant was obtained in order to do "a full and comprehensive search" of the van. He thought that once the other police had arrived the urgency to continue searching had ceased. He was unsure whether the vehicles had to be taken away for further examination.

[114] DS Campbell provided information about what had occurred and what had been found to Officer McCarthy to enable him to seek a warrant. The search warrant was obtained at 7.40 pm. The van was included in the search warrant for reasons that DSC Webster could not explain.

[115] DS Durre's statement dated 23 September 2014 at paragraph [18] is not clear as to whether the items which had been located in the van were removed from it in order for them to be photographed by the Scenes of Crime officers who attended, apparently before the arrival of a search warrant for the premises.

[116] The depositions before me tend to suggest that the execution of the search warrant that was obtained concentrated on the house that night, rather than the van.

[117] It is possible that if drugs remained in the van for the purpose of being photographed and were the subject of search and seizure pursuant to a search warrant, then evidence of that search and seizure is admissible. This would be because it was not obtained as a result of an unlawful search, but by the execution of a search warrant which was obtained as a result of substantial evidence obtained prior to the conduct of the unlawful search. It is clear that police had more than sufficient grounds to obtain a warrant to search the van based upon the criminal intelligence they had obtained, the results of the search of 28 Firth Street and the observations made shortly before P and N were detained, including P's nervous glances at the van.

[118] Depending upon the state of the evidence, which is presently uncertain, interesting questions may arise about the role played by any information obtained in the course of the unlawful search in obtaining the warrant. However, those questions may not arise if it proves to be the case that the drugs were removed from the van. Because it is possible, depending upon further inquiries, that certain evidence, including evidence of drugs in the van was obtained lawfully after the search warrant was obtained, it is inappropriate to make a direction or ruling in the terms of the application. I will grant liberty to apply. In the meantime, and subject to hearing submissions as to the form of the order, I propose to direct as follows:

> The evidence obtained from and during a search by police of a Toyota Hi-Ace van, parked in the driveway of 62 Jordan Street, Richlands in the State of Queensland on 11 July 2014, and prior to the execution of the search warrant obtained at around 7.40 pm on 11 July 2014, be excluded from evidence to be admitted at the applicants' trial. The evidence so excluded includes evidence of police officers of what was observed or seized by them in the course of carrying out a search of the vehicle without a warrant on the afternoon and evening of 11 July 2014.