# SUPREME COURT OF QUEENSLAND

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| CITATION: | *The King v Neary* [2022] QSCPR 18 |
| PARTIES: | **THE KING**<br>(respondent)<br>**v**<br>**ADRIAN NEARY**<br>(applicant) |
| FILE NO/S: | Indictment No 679 of 2022 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 11 November 2022 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 12 October 2022 |
| JUDGE: | Kelly J |
| ORDER: | **The search of the applicant's car conducted on 5 March 2021 was unlawful and the evidence derived from, or obtained during, the search is excluded from his trial.** |
| CATCHWORDS: | CRIMINAL LAW – PROCEDURE – WARRANTS, ARREST, SEARCH, SEIZURE AND INCIDENTAL POWERS – SEARCH AND SEIZURE – where the applicant was charged on indictment with possessing dangerous drugs – where police searched the applicant's car, purportedly pursuant to ss. 31 and 32 of the *Police Powers and Responsibilities Act 2000* (Qld) – where prior to the search, a police officer walked around the applicant's car and commented to their partner that an item on the passenger seat looked like tobacco – where subsequently, the officer maintained that they believed the item was cannabis and the statement that the item looked like tobacco was sarcastic – where the officer offered an explanation to the applicant of the basis for their reasonable suspicion that the vehicle contained illegal drugs – where the officer explained that the basis for the suspicion was the applicant being found in a car, on private property, in a state where a neighbour felt the applicant was unable to drive the vehicle – whether the officer saw something they believed resembled cannabis – whether the officer reasonably suspected that the car contained something that may have been an unlawful dangerous drug – whether the search was unlawful |

CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – where the applicant sought an order excluding evidence obtained in the search – whether, if the search was unlawful, the evidence derived from or obtained during the search should be excluded from the applicant's trial in the exercise of the court's discretion

*Police Powers and Responsibilities Act 2000* (Qld), s. 31, s. 32, sch. 6
*Police Service Administration Act 1990* (Qld), s. 4.9

*Bunning v Cross* (1978) 141 CLR 54; [1978] HCA 22, cited
*Commissioner of Police v Flanagan* [2019] 1 Qd R 249; [2018] QCA 109, cited
*George v Rockett* (1990) 170 CLR 104; [1990] HCA 26, cited
*Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266; [1966] HCA 21, cited
*Rowe v Kemper* [2009] 1 Qd R 247; [2008] QCA 175, cited
*R v Fuentes* (2012) 230 A Crim R 379; [2012] QSC 288, cited
*R v Hinds-Ravet* [2022] QSC 66, cited
*R v Keen* [2016] 2 Qd R 1; [2015] QSC 7, cited
*R v Kovacevic* [2020] QSC 399, cited
*R v P* (2016) 258 A Crim R 9; [2016] QSC 49, cited
*R v Ireland* (1970) 126 CLR 321; [1970] HCA 21, cited
*R v Versac* (2013) 227 A Crim R 569; [2013] QSC 46, cited

COUNSEL: J Underwood for the applicant
Z Kaplan for the respondent

SOLICITORS: Owens & Associates for the applicant
Director of Public Prosecutions (Qld) for the respondent

[1] The applicant is charged on indictment with one count of unlawful possession of a dangerous drug in excess of two grams (methylamphetamine) and one count of unlawful possession of a dangerous drug (cannabis). Each offence is alleged to have been committed on 5 March 2021 at Upper Coomera. The drugs were discovered when the applicant's car was searched by police without a warrant. The applicant submits that the search was unlawful and seeks the exclusion of the evidence obtained from the search.

[2] The Crown submits that the search was lawful and that, even if the Court were to determine otherwise, the evidence obtained should be admitted in the exercise of the Court's discretion.

**Some background matters**

[3] On 5 March 2021, at approximately 3.00 pm, police and ambulance were called to an address in Upper Coomera where the applicant had been observed to be asleep at the wheel of a parked car. The car was parked in the vicinity of the front lawn of a property

which had no connection to the applicant. The evidence established that the car may well have been parked on a nature strip.[1]

[4] Paramedics were first to arrive at the scene. They began to assess the applicant and took his blood pressure and pulse. The police officers tasked to attend the scene were Constable Edwards ("C Edwards") and Constable Greenaway ("C Greenaway"). C Edwards has since been promoted to Senior Constable. He gave evidence on this application. C Greenaway was not called as a witness. No explanation was offered as to why she was not called as a witness.

[5] When the police officers arrived at the scene, the applicant was sitting in the driver's seat of the car and was being checked and observed by the paramedics. Upon arriving at the scene, C Edwards activated his body worn camera device. Later, C Edwards would deliberately[2] turn off his body worn camera and the camera would remain off for approximately one and a half minutes before being turned back on. The evidence established that, in turning off his body worn camera, C Edwards failed to comply with part 4.4 of the Digital Electronic Recording of Interviews and Evidence Manual despite being required to comply with that manual by s. 4.9 of the *Police Service Administration Act 1990* (Qld).[3] Relevantly, when C Edwards deliberately turned off the camera, the incident had not been finalised, he had not been directed by a senior officer and no reasons were stated for turning off the camera.

[6] Whilst the applicant was being checked and observed by the paramedics, C Edwards walked around the car and inspected the interior of the car by looking through its windows. At a later point in time, C Greenaway conducted her own walk around the car.

[7] Paramedics cleared the applicant of needing any further medical assessment or treatment. He was then breath tested by C Greenaway. There was no alcohol present on his breath.

[8] The applicant was questioned by C Edwards in the lead up to the search. C Edwards accepted that at no point was the applicant evasive and that he was forthcoming with information.[4] It was also accepted that the applicant had been cooperative, and not aggressive in any way, with the police.[5] The applicant was detained and the car was searched by the police. In searching the car, C Edwards purported to act under ss. 31 and 32 of the *Police Powers and Responsibilities Act 2000* (Qld) ("the Act"). Those sections required him to reasonably suspect that any of the prescribed circumstances for searching a vehicle without a warrant existed, one such prescribed circumstance being that "there is something in the vehicle that … may be an unlawful dangerous drug."

[9] During the search the following items were found in the car:

(a) one large clip seal bag of cannabis and a pair of scissors;

(b) an empty cigarette packet containing two clip seals bags of methylamphetamine;

(c) a blue stationery container full of clip seal bags containing cannabis; and

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1 T 1-22 l 45 - T 1-23 l 4.
2 T 1-13 l 7.
3 T 1-13 ll 9-16.
4 Affidavit of E Craw, Ex A, p 15 ll 20-25; T 1-15 ll 1-16.
5 T 1-35 ll 1-30.

(d) an empty cigarette packet, a quantity of clip seal bags and a blue zip up stationery case.

[10] The drugs were seized and analysed. The analysis revealed 9.912 grams of pure methylamphetamine contained in 15.694 grams of substance at 63.3% purity and 93 grams of cannabis.

**"A police officers who reasonably suspects…"**

[11] Section 31 of the Act relevantly provides:

> "(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.
>
> (2) Also, a police officer may stop, detain and search a vehicle and anything in it if the police officer reasonably suspects—
>
> (a) the vehicle is being used unlawfully; or
>
> (b) a person in the vehicle may be arrested without warrant under section 365 or under a warrant under the *Corrective Services Act 2006*.
>
> (3) If the driver or a passenger in the vehicle is arrested for an offence involving something the police officer may search for under this part without a warrant, a police officer may also detain the vehicle and anyone in it and search the vehicle and anything in it.
>
> (4) If it is impracticable to search for a thing that may be concealed in a vehicle at the place where the vehicle is stopped, the police officer may take the vehicle to a place with appropriate facilities for searching the vehicle and search the vehicle at that place.
>
> (5) The police officer may seize all or part of a thing—
>
> (a) that may provide evidence of the commission of an offence; or
>
> (b) that the person intends to use to cause harm to himself, herself or someone else; or
>
> (c) if section 32(1)(b) applies, that is an antique firearm.
>
> (6) Power under this section to search a vehicle includes power to enter the vehicle, stay in it and re-enter it as often as necessary to remove from it a thing seized under subsection (5)."

[12] The "prescribed circumstances for searching a vehicle without a warrant" are those specified in s. 32 of the Act. They relevantly include "that there is something in the vehicle that… may be an unlawful dangerous drug".[6] The expression "reasonably suspects" is defined in Schedule 6 (Dictionary) to the Act to mean "suspects on grounds that are reasonable in the circumstances."

[13] The following relevant propositions can be distilled from the authorities:

(a) Suspicion and belief are different states of mind.[7]

(b) The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief.[8]

(c) Suspicion is a state of conjecture or surmise where proof is lacking.[9] It is more than a mere idle wondering and is a positive feeling of actual apprehension.[10] Hence, a reason to suspect that a fact exists, is more than a reason to consider or look into the possibility of that fact's existence.[11] The suspected fact or facts must be more than a mere possibility.[12]

(d) There are two elements to a "reasonable suspicion". One element is subjective and the other objective.[13]

(e) A suspicion is a state of mind concerned with the circumstances as they appear to the holder to be at the relevant time rather than the circumstances as they actually are at that time.[14]

(f) Not only must the police officer personally form the suspicion at the time when the decision is made to detain and search, the suspicion must be objectively reasonable in that it must be based on facts which would create a reasonable suspicion in the mind of a reasonable person.[15]

(g) The statutory language "reasonably suspects" means that there must be reasonable grounds for the state of mind, suspicion. That is, sufficient facts must exist to induce that state of mind in a reasonable person.[16] Whilst there must be a factual basis to reasonably ground the suspicion, it is not necessary for there to exist proof of the fact reasonably suspected.[17] The suspicion must be reasonable as opposed to arbitrary.[18]

(h) The onus is on the Crown to prove the existence of a proper factual basis for the suspicion and to do so on the balance of probabilities.[19]

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6 *Police Powers and Responsibilities Act 2000* (Qld) s. 32(1)(c).
7 *George v Rockett* (1990) 170 CLR 104, 115.
8 Ibid.
9 Ibid.
10 *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266, 303.
11 Ibid.
12 *R v Kovacevic* [2020] QSC 399 [18].
13 *R v Hinds-Ravet* [2022] QSC 66 [38].
14 *R v Kovacevic* [2020] QSC 399 [19]; *Commissioner of Police v Flanagan* [2019] 1 Qd R 249, 264 [45].
15 *R v Kovacevic* [2020] QSC 399 [19]; *Rowe v Kemper* [2009] 1 Qd R 247, 254 [6].
16 *George v Rockett* (1990) 170 CLR 104, 112.
17 *R v Kovacevic* [2020] QSC 399 [18].
18 *R v Fuentes* (2012) 230 A Crim R 379, 385 [21]; *George v Rockett* (1990) 170 CLR 104, 112.
19 *R v Keen* [2016] 2 Qd R 1, 4-6 [18]-[21]; *R v Kovacevic* [2020] QSC 399 [19].

**The evidence from C Edwards**

[14] The tendered evidence included a written statement provided by C Edwards dated 14 March 2021, a copy of the transcript of his evidence at the committal hearing and a video and sound recording from his body worn camera ("the recording"). He also gave oral evidence before this Court.

[15] In his written statement, C Edwards relevantly said:[20]

> "As QAS continued their assessment of [the applicant], I moved around the vehicle and looked through the closed windows. I observed the inside of the vehicle to be untidy and full of property. On the front passenger's seat, I observed a large clip seal bag which contained something that resembled Cannabis."

[16] In his evidence in chief, C Edwards adopted that statement as correct.[21]

[17] After having walked around the car, C Edwards had a conversation with C Greenaway. It was accepted that this conversation occurred out of ear shot of the applicant.[22] In his evidence in chief, C Edwards said that he could not recall the exact words that he had used but the effect of what he had said was "Have a look on the front passenger seat. There's something there that looks like tobacco".[23] The recording, as far as it was audible, suggested that during this exchange C Greenaway said words to the effect "do you want to do bloods instead?"[24] and C Edwards had relevantly said words to the effect "what's on… it just looks like tobacco is it?".[25]

[18] In evidence in chief, C Edwards was asked to explain why in his statement he said that he had observed a large clip seal bag which contained something that resembled cannabis and yet, at the scene, he had said to C Greenaway words to the effect that what he had seen looked like tobacco.

[19] His explanation in chief was as follows:[26]

> "Yeah. So at the time I made the comment to my partner, who was in the process of waiting for QAS to finish their assessment and she was ready to provide a roadside breath test. Now, I was – before she did that, I wanted her – to give her the opportunity to go round and have a look through the window for herself. So that's why I said, 'There's something on the front passenger seat'. The next comment I made about it being tobacco was said in a manner which was a bit sarcastic, a bit in jest, as … I believed it was cannabis, but I wanted to, sort of, make some sort of a remark to her that it could be tobacco. And it was said with, like I said previously, like, eye-roll fashion."

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20 Affidavit of E Craw, Ex A, p 4 [7].
21 T 1-9 ll 36-44.
22 T 1-20 ll 25-45.
23 T 1-10 ll 6-10.
24 Ex 4, recording 1, 01:33 (in-recording timestamp T05:11:49).
25 Ex 4, recording 1, 01:46 (in-recording timestamp T05:12:03).
26 T 1-10 ll 28-36.

[20] His reference to "like I said previously" was a reference to his evidence at the committal hearing. On that occasion, C Edwards had relevantly given this evidence:[27]

> "That comment that I made to my partner was made directly to her, not to anybody else. I would pretence that by saying it was a sarcastic remark in relation to it being tobacco. There was no way that I believed that that was tobacco on the front seat. It was – with – presented with an eyeroll, which obviously can't see on this body-worn. I do not believe that it was tobacco at any stage. What I said on there, like I said, was a sarcastic comment to my partner, pretensed with an eyeroll."

[21] It was not at all apparent from the recording that the words "…it just looks like tobacco is it?" were said in sarcasm or intended to be sarcastic. To the contrary, listening to the recording, the words appear to have been uttered in a very matter of fact, entirely unexceptional way. Further, C Edwards accepted in cross examination that, when he said these words, he was wearing sunglasses and his eyeroll, if made, would not have been detected by C Greenaway.[28]

[22] C Greenaway then conducted her own walk around the car. There is no evidence about what she observed or of any subsequent discussion with C Edwards about her observations.

[23] Shortly thereafter C Edwards deliberately turned his body worn camera off and the camera remained off for approximately one and a half minutes. In re-examination, C Edwards said that he had deliberately turned off the camera because he was discussing with C Greenaway the applicant's traffic history which he did not consider to be relevant to the incident. Immediately prior to the camera being turned off, C Edwards had been looking at his QLite device which revealed that the applicant had some outstanding charges. He said to C Greenaway whilst the camera remained on:[29]

> "He's got a couple of outstanding charges and stuff, but there's a lot of traffic stuff, like unlicensed and unregistered and stuff, which he's obviously cleared up since then because he's registered and licensed current."

[24] C Edwards asked the applicant to exit the car and he re-activated his body worn camera device. The paramedics had informed C Edwards that they had completed their assessment and the applicant had been cleared of needing any further medical treatment. The recording has C Edwards acknowledging this by saying to the applicant "These guys have checked you out, and they're happy with your condition, and they're saying that you're ok to be here."[30]

[25] At the point when the applicant is out of his car, the recording includes the following conversations:[31]

> "C Edwards: … Ok so, we've obviously been called here today because one of the neighbours has been concerned about

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27 Affidavit of E Craw, Ex A, p 14 ll 6-11.
28 T 1-29 ll 35-41.
29 Ex 4, recording 1, 04:20 – 04:37 (in-recording timestamp T05:14:36 – T05:14:53).
30 Ex 4, recording 2, 01:06 – 01:10 (in-recording timestamp T05:17:39 – T05:17:43).
31 Ex 4, recording 2, 00:42 – 01:05 (in-recording timestamp T05:17:15 – T05:17:39).

the fact that you've been slumped over your car there in hot conditions---

Applicant: Is this private property, or?

C Edwards: Yes, it is, mate, that's some – is this your house, here?

Applicant: No.

C Edwards: No. So, yeah, this is private land, so you can't park your car here---

Applicant: Ok.

C Edwards: ---that's the first one. The second thing is, the condition that you're in when the neighbour saw you, they were worried about you, so they contacted these guys and they've also contacted us, ok?"

[26] C Edwards questioned the applicant about his location and whether he had any illicit substances in his car. The recording includes these exchanges:[32]

"C Edwards: …I asked you before if you had taken any alcohol or drugs today and you answered … 'No', is that correct?

Applicant: That's correct.

C Edwards: Ok, is there anything in the car, mate, that you shouldn't have?

Applicant: No, there's nothing at all like that.

C Edwards: No? Any drugs or alcohol, that's, alcohol's obviously not illegal, but drugs, have you got any drugs within the vehicle?

Applicant: No, there's no drugs at all.

C Edwards: No, ok."

[27] The recording then includes the following exchange before the breath test was administered:[33]

"C Edwards: Righto, mate, what we're going to do is, because we've found you in the state we have today, we'll give you a breath test, ok, and then, like I said to you before, you said that there's nothing in the car, so we're going to detain you for the search of the vehicle to ensure that that's true and correct, ok? Before we do that, we'll give

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32 Ex 4, recording 2, 01:10 – 01:27 (in-recording timestamp T05:17:44 – T05:18:00).

33 Ex 4, recording 2, 03:39 – 03:59 (in-recording timestamp T05:20:13 – T05:20:32).

you the opportunity again to disclose anything that may be in the vehicle, but we'll start with the breath test, ok?

Applicant: Yeah, sure."

[28] The breath test was then administered.

[29] Following the breath test, the recording includes this exchange:[34]

"Applicant: … so when you say 'in the state that you've found me', -

C Edwards: Yeah, which was one of –

Applicant: was I intoxicated or overheated?

C Edwards: Well, this is the thing, mate. Unfortunately, in our line of work, we're confronted with many different situations, ok. When somebody's in the situation you were, all we're doing is eliminate anything that may suggest that you were here, under the influence of some sort a subject or substance, ok?

Applicant: Yep, yep."

[30] The applicant was by this point objecting to his car being searched. The recording has C Edwards saying "All we're doing is searching for something that may be in this vehicle which may indicate a reason as to why you were located how you were today, ok?"[35]

[31] The applicant said words to the effect that he believed any proposed search would be unlawful. The recording then includes the following conversation:[36]

"C Edwards: Ok, can I please explain to you why we are doing this search, and how it is lawful. Ok, I'll explain it to you one time, ok?

Applicant: Uh-huh.

C Edwards: The only lawful reason that I need to search a vehicle is if I reasonably suspect that the vehicle contains an illegal drug or paraphernalia associated with illegal drugs, ok? All I need to form is a reasonable suspicion. Ok? I don't even have to explain to you what that reasonable suspicion is, but I will do it, just on the grounds that you've been cooperative with us, and I'm more than happy to explain it to you. Ok? We have found you in a location today, which is not your address; you're on private property inside your vehicle and you

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34 Ex 4, recording 2, 04:13 – 04:37 (in-recording timestamp T05:20:47 – T05:21:11).
35 Ex 4, recording 2, 05:42 – 05:50 (in-recording timestamp T05:22:15 – T05:22:23).
36 Ex 4, recording 2, 07:04 – 07:58 (in-recording timestamp T05:23:37 – T05:24:31).

were in a state which the neighbour felt that you were unable to drive this vehicle. So, it would be my reasonable suspicion that you may have taken some sort of substance that is located within this vehicle which would be an illegal substance. That has formed my reasonable suspicions which are grounds to search your vehicle, ok? So that's all we have to do."

[32] One noteworthy aspect of this conversation is that C Edwards volunteered to the applicant that because the applicant had been cooperative with the police, C Edwards was happy to explain to the applicant the basis for his reasonable suspicion. C Edwards was cross examined about this aspect of the conversation. The relevant part of his cross examination warrants setting out in full:[37]

> "Can I repeat to you what you said to the defendant? It was, 'We found you in a location today which is not your address. You're on private property inside your vehicle and you are in a state which the neighbour felt that you are unable to drive this vehicle. So it would be my reasonable suspicion that you may have taken some sort of substance that is located within this vehicle which would be an illegal substance. That has formed by reasonable suspicions which are grounds to search your vehicle, okay? So that's all we have to do.' You've answered already that that was an accurate reproduction of what you said on the body worn footage?---Correct.
>
> What I put to you is that, in fact, those were the reasonable suspicions that you held – I'll start that again. In fact, that was the basis for the reasonable suspicion that you said you held at the time?---My response to that is, it was part of the reasonable suspicions but not the sole reason.
>
> Right?---It was the sole reason that I explained to the defendant, but not my sole reason.
>
> So you didn't explain to the defendant that part of the basis of your reasonable suspicion was that you thought you had seen cannabis?---Correct.
>
> And - - -
>
> HIS HONOUR: Didn't – I understood you to be saying, though, to this person that because he'd been cooperative with you, you were going to be revealing to him the reasons why you were about to search his vehicle?---That was – but, basically, what's happened was – is that as soon as I felt that he was confronting me, then I didn't feel that by saying 'I've seen cannabis on your front seat' that – I thought that might escalate the situation and he may become more of a hindrance to the search.
>
> MR UNDERWOOD: Officer, you're – you will accept that immediately before you gave that explanation, you said to the defendant, 'I don't even have to explain to you what the reasonable suspicion is, but I will do it, just on the grounds that you've been cooperative with us and I'm more

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[37] T 1-34 l 24 – T 1-36 l 24.

than happy to explain it to you'. That's right, isn't it? You said that?---Yeah, until that point. Yeah.

So he had been cooperative with you up until that point?---In ask – in answering the questions that I've asked, yeah.

You didn't have any basis to suspect that he would be aggravated by telling him truthfully what the basis of your reasonable suspicion was?---He was challenging me onto my power of to do – when he challenged my power to do it, was when I made the decision not to explain the full extent as to why I made that decision to detain him for the vehicle search.

And that was after you actually explained the basis of your reasonable suspicion?---The – the part where I said to him, 'I'm going to search your vehicle' was when he then said, you know, came up with reasons as to 'is it lawful, is it lawful?'

That's not right, Officer. You said, 'You've been cooperative with us'?---In answering the questions about where he'd been and where he'd come to, yes.

He had not been aggressive with you, he had been cooperative with you?---Correct. He hadn't been aggressive, no.

And so I suggest to you, Officer, that there was no reason for you to think that it would escalate the situation if you told him the reason for your reasonable suspicion was that you'd seen cannabis?---[indistinct]

Do you disagree with that?---Yeah. I never – I never said that if I was to explain to him that I'd seen the cannabis that it was going to turn into a fist fight. I never said that he was aggressive. I felt that if I explained further that what I'd seen in the vehicle, that he may provide more resistance to me executing the search.

You accept, don't you, Officer, that the questions that the defendant were asking were questions about what the lawful basis for your search was. Isn't that right?---Yes.

What better answer to provide the defendant than to say you thought you'd seen cannabis on the front seat?---Correct.

That's an obvious response to that sort of question?---It is.

He'd been cooperative with you up until that time?---Yes.

And so an ordinary officer, Officer, would have given that explanation when asked for it?---That's your opinion.

Well, it's not just my opinion, I need you to answer the question?---Well, I didn't give that explanation at the time.

No. And the proposition I'm putting to you, Officer, is that there was no basis to refuse to give that information because he'd been cooperative with you up until that time?---Sure.

> The only basis in which you – the only basis on which you did not give that information is that you hadn't actually seen cannabis on the front seat?---I disagree with.
>
> Finally, Officer, I just suggest to you that when you were explaining to the defendant at the scene the basis for your reasonable suspicion, you were actually being honest and accurate with him when you said that the basis was, 'You're on private property inside your vehicle, you're in a state in which a neighbour felt you were unable to drive the vehicle'. Those, in fact, were the reasons you had for your suspicion?---Those were, in fact, part of the reasons, yes."

[33] To the extent that the abovementioned conversation included C Edwards saying to the applicant that "You're on private property inside your vehicle", C Edwards accepted in cross examination that he had made an assumption that the car was on private property when in fact it might have been on a nature strip rather than on private property.[38]

[34] The recording then has C Edwards saying "I appreciate that you've been cooperative with us, but we're trying to eliminate the fact that you're in possession of something that you shouldn't be."[39]

[35] C Edwards directed the applicant to sit on the grass and warned him that, if he did not, he would be arrested and charged with obstructing police. The applicant sat on the grass while his car was searched.

[36] In his evidence in chief, C Edwards said that he executed the search "after reasonably suspecting that the car contained cannabis, which I'd sighted through the front window…".[40]

[37] The following exchange then occurred in his evidence in chief:[41]

> "Was there anything else that informed your reasonable suspicion other than the cannabis?---There was a circumstance which we alluded to before about arriving to the scene, being called by a member of the public that sighted Mr Neary slumped in his vehicle, then removing himself and laying on the ground on a residential street, parked up on someone's street. That obviously didn't sit right with me that that was the circumstances that I found myself in. Mr Neary was also very sort of – took a long time to answer his questions to me, and was very sort of like he had to concentrate very hard on his answers, which made me think that he may be under the effects of an illicit substance.
>
> And that belief, or the suspicion that he could've been under the influence of a – of an intoxicating substance – did you form that view before or after the breathalyser had been administered?---Before.
>
> And so then obviously the breathalyser result came back and it was communicated to you that it was negative?---Correct.

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38 T 1-22 l 45 – T 1-23 l 4.
39 Ex 4, recording 2, 09:32 – 09:38 (in-recording timestamp T05:26:06 – T05:26:12).
40 T 1-11 ll 5-7.
41 T 1-11 ll 9-28.

> Did you obtain any, or were you informed of any police intelligence in relation to Mr Neary, and any link to the possession of dangerous drugs, or anything of that regard?---No."

**Findings**

[38] The relevant contemporaneous, objective facts are that, at the scene of the incident, C Edwards:

(a) did not advise C Greenaway that he had observed something which he believed resembled cannabis;

(b) did not advise the applicant that he had observed something which he believed resembled cannabis; and

(c) said words to the effect to C Greenaway that he had observed something which he considered to be tobacco.

[39] C Greenaway was not called as a witness on behalf of the respondent. I infer from her unexplained absence that any evidence that she was capable of giving would not have assisted the respondent.[42]

[40] I reject C Edwards' explanation that his reference to tobacco was intended to be sarcastic. The recording of the relevant comment was not in any way suggestive of sarcasm. I also reject that C Edwards made an eyeroll when he made the comment. I find the suggestion that he did to be an instance of self-serving reconstruction. At the committal, C Edwards was careful to point out that his eyeroll "obviously" couldn't be seen on the recording. Yet, given that he was wearing sunglasses, it was also obvious, and ultimately accepted, that the eyeroll, if made, would not have been observed by C Greenaway. The relevant conversation occurred out of the earshot of the applicant and, as C Edwards said at the committal, it was a comment made "directly to [C Greenaway], not anybody else". Given that there were no other participants in the conversation, and it was not being overheard, there was no logical reason for C Edwards to be speaking in code or sarcastically. Rather, in those circumstances, he could have been expected to speak frankly and candidly to his partner. C Edwards was also someone who was apparently conscious of ensuring that only information relevant to the incident was being recorded by his body camera and yet, in this particular instance, according to his version, he is meant to have allowed false and misleading information in relation to the presence of tobacco to be recorded. As to this last matter, at the committal he had emphatically said "[t]here was no way that I believed that that was tobacco on the front seat".[43]

[41] The recording revealed that C Edwards had said to the applicant words to the effect that, because the applicant had been cooperative with the police, C Edwards was "more than happy to explain" his reasonable suspicion that the car contained an illegal drug or paraphernalia associated with illegal drugs.[44] However, when C Edwards provided his explanation, it contained no reference to cannabis having been observed inside the car. It was fairly put to him in cross examination that, in circumstances where the applicant was asking for C Edwards to identify the lawful basis for the proposed search, had he in fact observed cannabis within the car, there was no better answer to provide than that he

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42 *Jones v Dunkel* (1958-9) 101 CLR 298, 308

43 Affidavit of E Craw, Ex A, p 14 ll 8-9.

44 Ex 4, recording 2, 07:31 (in-recording timestamp T05:24:06).

had seen the cannabis. C Edwards agreed with this proposition and accepted that would have been an obvious response. He provided no cogent or logical reason why he had not provided that obvious response. The position in which C Edwards was left in cross examination was one whereby, although he had represented to the applicant that he would explain to him the basis for his reasonable suspicion, he had apparently withheld the main reason for his suspicion for no obvious or logical reason. I find that the reason why C Edwards did not refer to the existence of something resembling cannabis in the car when explaining the basis for his reasonable suspicion is that he had not observed something which he believed resembled cannabis but rather had observed something which he believed was tobacco.

[42] I did not find C Edwards to be an impressive or reliable witness. He appeared to be more intent on providing a self-serving reconstruction of what had occurred rather than his honest recollection of the material events. I formed the view that his evidence that he had seen something which he believed resembled cannabis was untruthful. It did not sit comfortably alongside the objective facts but rather appeared to be an attempt, well after the event of the search, to raise a false ground in support of the legality of the search.

[43] I am not prepared to find that C Edwards suspected that drugs were within the car. Rather, I find that he merely had an idle wondering, rather than a positive feeling of actual apprehension, about the presence of drugs in the car.[45] In this regard, I place particular reliance upon the following statements he made in the recording:

(a) "You said that there's nothing in the car, so we're going to detain you for the search of the vehicle to ensure that that's true and correct, ok?"[46]

(b) "All we're doing is eliminate anything that may suggest that you were here, under the influence of some sort a subject or substance, ok?" [47]

(c) "All we're doing is searching for something that may be in this vehicle which may indicate a reason as to why you were located how you were today, ok?"[48]

[44] Further, I find that although C Edwards was conscious of the need to have a reasonable suspicion before he could lawfully search the car, he acted, at best for him, in reckless disregard of that requirement by pursuing a high handed, over-zealous approach which offered arbitrary and specious reasons for searching the car. This conduct at the scene was less than honest and gave mere lip service to important legislative restrictions on the power to search, which restrictions were well known to the relevant officer. In this regard, at the time that the search was conducted the applicant:

(a) had been cleared by the paramedics of needing any further medical assessment or treatment. The position was, as stated by C Edwards on the recording, "[t]hese guys have checked you out, and they're happy with your condition, and they're saying that you're ok to be here";[49]

(b) had returned a breath test result which revealed no alcohol present on his breath;

(c) had been co-operative with the police;

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45 *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266, 303.
46 Ex 4, recording 2, 03:39 – 03:59 (in-recording timestamp T05:20:13 – T05:20:32).
47 Ex 4, recording 2, 04:13 – 04:37 (in-recording timestamp T05:20:47 – T05:21:11).
48 Ex 4, recording 2, 05:42 – 05:50 (in-recording timestamp T05:22:15 – T05:22:23).
49 Ex 4, recording 2, 01:06 – 01:10 (in-recording timestamp T05:17:39 – T05:17:43).

(d) had not been aggressive with police;

(e) had not been evasive, but rather had been forthcoming, in his responses to police; and

(f) was not linked by any intelligence to the previous possession or supply of dangerous drugs.

[45] Against the background of those existing facts at the time of the search, C Edwards suggested that the search was justified because the applicant had been found in a location which was not his address, was allegedly parked on private property and was in a state which the neighbour felt that he was unable to drive the car. Those reasons, taking account of the existing facts, were incapable of giving rise to anything more than a mere idle wondering, as distinct from a positive feeling of actual apprehension, as to the presence of drugs in the car.

[46] I find that the further reasons suggested by C Edwards in evidence in chief as to the basis for his suspicion and which extended beyond the suggested presence of cannabis in the car were the product of reconstruction rather than genuine recollection. I do not accept that C Edwards was at any stage concerned that the applicant took a long time to answer his questions and had to concentrate very hard on his answers.

[47] I find that the search was unlawful because C Edwards did not suspect that a prescribed circumstance for searching the car without a warrant existed.

[48] Alternatively, against the background of the existing facts at the time of the search as identified in [44], and where the applicant was parked either on private property or a nature strip in an area removed from his domicile and a neighbour had expressed some concern about his behaviour, there were no reasonable grounds for any suspicion that a prescribed circumstance for searching the car without a warrant existed.

**Exercise of Discretion**

[49] Despite the evidence having been unlawfully obtained, whether it is inadmissible depends upon the exercise of a discretion.

[50] The public policy discretion to exclude unlawfully obtained evidence requires the weighing of competing public interests. In *R v P*,[50] Applegarth J observed:

> "The public policy discretion to exclude unlawfully obtained evidence weighs competing public interests. One is 'the desirable goal of bringing to conviction the wrongdoer.' 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.'
>
> The discretion 'is necessary to protect the processes of the courts of law in administering the criminal justice system.' 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. The discretion also serves the policy of deterring unlawful conduct by those entrusted with powers of law enforcement."

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50 (2016) 258 A Crim R 9, 21-22 [61]-[62].

[51] In *R v Ireland*,[51] Barwick CJ said:

> "Whenever such unlawfulness or unfairness appears, the judge has a discretion to reject the evidence. He must consider its exercise. In the exercise of it, the competing public requirements must be considered and weighed against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand there is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion."

[52] In *Bunning v Cross*,[52] Stephen and Aickin JJ listed a number of considerations which arise in the exercise of the discretion to exclude unlawfully obtained evidence. The joint judgment in *Bunning v Cross*[53] emphasises that the judicial discretion is not to be fettered by rules and cannot be considered in the abstract divorced from the circumstances of any given case. Some of the considerations which have usually been considered relevant, may be set out as follows:[54]

(a) was the unlawful act inadvertent; or

(b) was it a deliberate flouting of the law; and

(c) was the misconduct serious; and

(d) does the failure to comply with the law affect the cogency of the evidence; and

(e) how serious is the offence charged; and

(f) are the powers of the police deliberately circumscribed by the legislation to protect the public.

[53] The weight given to any particular factor, again depends on the circumstances of the case. In *R v Versac,*[55] Applegarth J observed:

> "Australian courts have recognised a number of relevant factors in the exercise of the public policy discretion to exclude evidence. Some factors support exclusion, whilst others support admission. The factors 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;
>
> (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;

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51 (1970) 126 CLR 321, 335.
52 (1978) 141 CLR 54, 78-80.
53 Ibid 77.
54 *R v Hinds-Ravet* [2022] QSC 66 [64].
55 (2013) 227 A Crim R 569, 571-2 [6].

(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."

[54] I have found that C Edwards was conscious of the need to have a reasonable suspicion before he could lawfully search the car and that he acted, at best for him, in reckless disregard of that requirement by pursuing a high handed, over-zealous approach which offered arbitrary and specious reasons for searching the car. I have found that his conduct at the scene was less than honest and gave mere lip service to important legislative restrictions on the power to search, which restrictions were well known to the relevant officer. His conduct after the search should also be noted. Rather than appear as a frank and candid witness who was prepared to give a truthful account of his recollection, he engaged in self-serving reconstruction. I have found that his evidence about observing cannabis was untruthful. His conduct at the scene of the incident also involved a breach of s. 4.9 of the *Police Service Administration Act 1990* (Qld).

[55] The drugs seized comprised 9.912 grams of pure methylamphetamine contained in 15.694 grams of substance and 93 grams of cannabis. As I have indicated, I accept the Crown's submission that given the quantities found, the alleged offending might attract a head sentence in the range of 18 months to 2.5 years imprisonment. The offending may be regarded as serious.

[56] The evidence obtained on the search is clearly important to the prosecution. The importance of the evidence is a factor favouring its admission.

[57] The evidence obtained is cogent and not affected by the unlawful nature of the search. In the circumstances of this case, I have formed the view that this should be given some weight in favour of its admission. In forming this view I have had careful regard to what was said by Applegarth J in *R v P*.[56]

[58] Ultimately the competing public interests have to be weighed. There is a public interest in convicting those who commit criminal offences. There is also a public interest in ensuring that police observe the law. As Applegarth J observed in *R v P*,[57] the diminution in respect for the law and the loss of public confidence in the courts is greater where the unlawful conduct is deliberate or reckless. Here the conduct at the scene was less than honest and involved, at best for the Crown, a reckless indifference to the satisfaction of known legal requirements which curtailed the power to search the car. Subsequently, there was no acknowledgement of wrongdoing by the police officer but rather an unedifying attempt to bolster the prospects of the search being found to be lawful through the giving of self-serving reconstructed accounts of what had transpired. Ultimately, I have formed the view that, taking all of the circumstances into account, and weighing the competing considerations, in this particular case it is more important that the Court should not be seen to be giving its approval to the unlawful search than it is that the applicant be convicted and punished for his apparent drug offences.

**Order**

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56 (2016) 258 A Crim R 9, 25-26 [75]-[83].

57 Ibid 29 [103].

[59] The search of the applicant's car conducted on 5 March 2021 was unlawful and the evidence derived from, or obtained during, the search is excluded from his trial.