IN THE DISTRICT COURT
AT TAUPO

I TE KŌTI-Ā-ROHE
KI TAUPŌ-NUI-A-TIA

CRI-2020-069-000670
[2021] NZDC 17802

NEW ZEALAND POLICE
Prosecutor

v

PATRICK HENRY LOWRY
MARK QUENTIN SARGENT
Defendants

Hearing:	7 September 2021 (On the Papers in Chambers)
Submissions:	20 and 23 August 2021
Appearances:	Sergeant T Morgan for the Prosecutor N Taylor for the Defendants
Judgment:	7 September 2021

RULING OF JUDGE M A MacKENZIE
[As to s 30 balancing test]

Introduction

[1] In a judgment dated 28 July 2021, ("the judgment") I found that the search of Mr Lowry and Mr Sargent's vehicles was unlawful and unreasonable, for the reasons set out in the judgment. That means that the evidence was improperly obtained.

[2] Therefore, I must determine whether or not exclusion of the evidence is proportionate to the impropriety by undertaking the balancing process required by s 30 of the Evidence Act 2006. In doing so, I must give appropriate weight to the

impropriety and take proper account of the need for an effective and credible system of justice.

[3] In written submissions, Sergeant Morgan sought an opportunity to address the Court in relation to the reasonableness of the searches. That was a reasonable submission. Sergeant Morgan filed brief submissions. The police do not seek to make any further submissions in light of my finding that the search of the vehicles was unreasonable. Mr Taylor asks the Court, in considering the s 30 balancing test, to exclude the evidence, for the reasons set out in his written submissions.

[4] Simply because a search is unreasonable does not mean that evidence should be ruled inadmissible. *Smith v Police*[1] is illustrative of this. Although the search was held to be unreasonable, the evidence relating to the firearms was nevertheless admissible, as seizure of the firearms in the circumstances was necessary in the interests of public safety, and the possession by Mr Smith of semi-automatic weapons in breach of the terms of his firearms licence meant there was a risk and danger to others.[2]

Section 30 Evidence Act 2006

[5] Section 30 says:

> **30 Improperly obtained evidence**
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> (1) This section applies to a criminal proceeding in which the prosecution offers or proposes to offer evidence if—
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> (a) the defendant [or, if applicable, a co-defendant] against whom the evidence is offered raises, on the basis of an evidential foundation, the issue of whether the evidence was improperly obtained and informs the prosecution of the grounds for raising the issue; or
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> (b) the Judge raises the issue of whether the evidence was improperly obtained and informs the prosecution of the grounds for raising the issue.
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> (2) The Judge must—

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1 *Smith v Police* [2019] NZHC 2371.
2 At [91].

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

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

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

(a) the importance of any right breached by the impropriety and the seriousness of the intrusion on it:

(b) the nature of the impropriety, in particular, whether it was deliberate, reckless, or done in bad faith:

(c) the nature and quality of the improperly obtained evidence:

(d) the seriousness of the offence with which the defendant is charged:

(e) whether there were any other investigatory techniques not involving any breach of the rights that were known to be available but were not used:

(f) whether there are alternative remedies to exclusion of the evidence which can adequately provide redress to the defendant:

(g) whether the impropriety was necessary to avoid apprehended physical danger to the police or others:

(h) whether there was any urgency in obtaining the improperly obtained evidence.

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

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

(a) in consequence of a breach of any enactment or rule of law by a person to whom section 3 of the New Zealand Bill of Rights Act 1990 applies; or

(b) in consequence of a statement made by a defendant that is or would be inadmissible if it were offered in evidence by the prosecution; or

(c) unfairly.

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

[6] Section 30(2) sets out a balancing process. A number of non-exhaustive factors are set out at s 30(3).

Discussion

[7] In assessing whether or not to exclude the evidence, I will address relevant s 30 factors.

Importance of the rights breached

[8] The right breached is the freedom from unreasonable search and seizure in s 21 of the New Zealand Bill of Rights Act 1990. It is a fundamental right. As was noted in *Hamed v R*,[3] s 21 "holds a constitutional balance between the State and citizen by preserving space for individual freedom and protection against unlawful and arbitrary intrusion by State agents."

[9] The question of privacy expectations depends on the nature of the property or thing searched.[4] In terms of searches of property, residential property will have the highest expectation of privacy attached to it.[5] The authorities recognise that the privacy expectation in terms of a vehicle is lower than a residential dwelling.[6] That said, the Court of Appeal noted in *Rimine v R,*[7] that the right of privacy protected by s 21 has greater resonance in relation to a home than a vehicle, but the expectation of privacy is still important in relation to a vehicle. This point was also made in *Tweeddale v Police*.[8]

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3 *Hamed v R* [2011] NZSC 101 at [10].
4 *R v Williams* [2007] NZCA 52 at [113] and [114].
5 *R v Williams* at [113]; *F v R* [2014] NZCA 313 at [23]; *Kalekale v R* [2016] NZCA 259 at [33].
6 *Alamoti v R* [2016] NZCA 402 at [56]; *Maihi v R* [2015] NZCA 438 at [31].
7 *Rimine v R* [2010] NZCA 462 at [27].
8 *Tweeddale v Police* [2015] NZHC 1298 at [48].

[10] Here, the vehicles searched were not on a public road, as is often the case. As was said in *Swain v R*,[9] the privacy expectation in relation to a vehicle on a public road may be less than enjoyed by a person inside their home. It is relevant that here the vehicles were on private property, a point validly made by Mr Taylor in his written submissions. I do not need to consider the issue of trespass or potential trespass as I assess there to be at least a moderately serious breach of privacy, given that it is an important right and that the search took place on private property. I do accept that the search of the vehicles was not overly intrusive, in the sense that the firearms were located in the vehicles, and were not difficult to locate.

The nature of impropriety

[11] The search of the vehicles was deliberate. I do not think that the search of the vehicles was undertaken in bad faith or was reckless, but it was certainly deliberate. Sergeant McNally was suspicious that he was not being told the truth about the presence of firearms, and so when the firearm was sighted in Mr Sargent's vehicle, a warrantless search of Mr Sargent and Mr Lowry's vehicles was initiated. Sergeant McNally said he had reasonable grounds to suspect the Mr Lowry and Mr Sargent were unlawfully in possession of firearms, but by that point any urgency had dissipated.

[12] The deliberate nature of the search also needs to be considered through a lens of what then happened, as detailed in the judgment. Rather than seizing the firearms, police left the firearms with Mr Lowry and Mr Sargent, ostensibly on the basis that they were licensed firearms holders. That decision is difficult to understand in light of Mr Lowry's evident anger and concern about how police were dealing with the alleged poacher, and that at least from Mr Lowry's perspective, the poaching situation was not resolved. That Mr Lowry and Mr Sargent are licensed firearms holders cannot legitimise an unlawful purpose. As I have already said,[10] Sergeant McNally must have formed that view that there was not a public safety issue.

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9 *Swain v R* [2014] NZCA 194 at [28].
10 Judgment at [83].

Nature and quality of improperly obtained evidence

[13] The evidence obtained as a result of the search includes photographs of the firearms, the evidence of the police officers about the firearms and evidence of what Mr Lowry and Mr Sargent told police about the firearms. It is real evidence and is critical to the prosecution case. The evidence does not include the firearms, as they were not seized by police.

Seriousness of the charges

[14] Mr Lowry and Mr Sargent face charges of unlawful possession of a firearm.[11] In *Collett v Police*,[12] Venning J said that firearms offences would be regarded as moderately serious.

Other investigatory techniques

[15] There were other investigatory techniques Sergeant McNally could have used once the firearm was sighted in Mr Sargent's vehicle. One option was to ask both Mr Lowry and Mr Sargent, once again, whether there were firearms at the location, once they were confronted with sighting of the firearm in Mr Sargent's vehicle. I can understand why Sergeant McNally did not adopt that course, after having asked Mr Lowry more than once about this issue, which resulted in denials about the presence of firearms.

[16] Sergeant McNally could have secured the vehicles pursuant to s 117 of the Search and Surveillance Act 2012 ("SSA"), and applied urgently on an oral basis for a search warrant to be issued, as per *Lethbridge v Police*.[13] But the practical reality of such a course could be thought questionable given the time, being the early hours of the morning.

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11 Arms Act 1983, s 45, maximum penalty four years imprisonment.
12 *Collett v Police* [2014] NZHC 3077 at [33].
13 *Lethbridge v Police* [2018] NZHC 2240 at [26].

Alternative remedies to exclusion

[17] This is not particularly relevant. There are no alternative remedies to exclusion.

Whether impropriety is necessary to avoid apprehended physical danger/apprehended urgency

[18] I deal with these issues together, as they overlap. This is not a case where the impropriety was necessary to avoid apprehended physical danger, notwithstanding the underpinning purpose of the Arms Act.[14] Nor, as I have already found, was the situation one of urgency. I have addressed these matters in some detail in the judgment. These are the most compelling factors pointing away from inclusion of the evidence.

[19] I reiterate the findings already made about urgency, and risk set out at [77](h) and (i), [82] and [83] of the judgment. Any urgency had dissipated by the time of the search. Police had decided to follow matters in relation to the alleged poaching up and had established from Harry Lowry that the alleged poacher did not have a firearm. Also, as I said, police cannot have thought that there was apprehended physical danger given that the firearms were not seized but rather handed back to Mr Lowry and Mr Sargent virtually immediately following the search. It makes no sense to do so if police genuinely believed there was apprehended physical danger, given that Mr Lowry was angry about the way police had handled the situation.[15] As previously noted, that Mr Lowry and Mr Sargent are licensed firearms holders cannot legitimise an unlawful purpose.

[20] On balance, there are factors which favour inclusion and factors which point away. The factors which point towards exclusion are the moderately serious nature of the charges, that the search was not reckless or conducted in bad faith, and that the evidence is critical to the prosecution case. On the other hand, the right breached is important, and importantly, there was no apprehended danger and no urgency.

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14 Arms Act 1983, s 1A.

15 Which appears to have been an entirely appropriate response in all the circumstances.

[21] Ultimately, I have decided that exclusion of the improperly obtained evidence is proportionate the level of impropriety, after undertaking a balancing exercise. I accept that the evidence is critical to the case, but the right to be free from unreasonable search and seizure is still important in respect of a vehicle. I accept the search was not reckless or undertaken in bad faith. But it was a deliberate search at a point where there was no urgency and in circumstances where police made a conscious decision not to seize the firearms, and as such, there cannot have been apprehended danger, viewed objectively. Otherwise, the police would have seized the firearms and had the power to do so.

[22] I do acknowledge that it was a difficult situation for police and that Mr Lowry was concerned about what he perceived to be an inadequate response by police to the alleged poaching situation, which makes the decision of police to leave the firearms all the more difficult to reconcile with risk, danger and public safety concerns, and that public safety is an important rationale in terms of the Arms Act, having regard to the purpose of the Act.

[23] Therefore, after balancing the factors in s 30, I exclude the evidence obtained as a result of the search on the basis exclusion is proportionate to the impropriety.

[24] The evidence obtained as a result of the search is therefore inadmissible.

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Judge MA MacKenzie
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 07/09/2021