IN THE DISTRICT COURT
AT TAUPO

I TE KŌTI-Ā-ROHE
KI TAUPŌ-NUI-A-TIA

CRI-2020-069-000670
[2021] NZDC 13615

NEW ZEALAND POLICE
Prosecutor

v

PATRICK HENRY LOWRY
MARK QUENTIN SARGENT
Defendant

Hearing:	15 March 2021
Submissions:	29 and 30 March 2021
Appearances:	Sergeant T Morgan for the Prosecutor N Taylor for the Defendants
Judgment:	28 July 2021

JUDGMENT OF JUDGE M A MacKENZIE

Introduction

[1] Patrick Lowry and Mark Sargent face charges of unlawful possession of a firearm.[1]

[2] In respect of Mr Lowry, it is the police case that Mr Lowry was in possession of a shotgun except for some lawful, proper and sufficient purpose. In relation to

[1] Arms Act 1983, s 45(1).

Mr Sargent, the police case is that Mr Sargent was in possession of two rifles except for some lawful, proper and sufficient purpose.

[3] At the conclusion of the prosecution case, three issues were identified:

(a) Can I be sure that the items located are firearms as defined in s 2 of the Arms Act 1983 ("Arms Act")?

(b) Are the warrantless searches of Mr Lowry and Mr Sergeant's vehicles lawful?

(c) If I am sure that the defendants were in possession of firearms, where does the onus lie in terms of proving the existence of a lawful, proper and sufficient purpose under s 45(2) of the Arms Act?

Factual background

[4] In the early hours of 11 April 2020, police received a call from Mr Lowry about poachers on his farm. The information passed onto Taupo police by the communication centre was that farmers had firearms with them and they were containing or chasing poachers. After receiving this information, Sergeant Shane McNally of Taupo police asked the communications centre to transfer the caller through to his cellphone so that he could speak directly to the caller. Sergeant McNally spoke to the caller, Mr Lowry and asked Mr Lowry to come off his farm and meet police at his home. The purpose of that request was to eliminate risk.

[5] The police wanted to obtain accurate intelligence about what was actually occurring so that they could formulate, run a TENR process and make an appropriate and measured response.[2] Mr Lowry's response was unenthusiastic about the way Sergeant McNally was proposing to deal with the matter and said that the police had better get out here now before something bad happens. He then hung up.[3]

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2 NOE, p 3. (Unless otherwise referred to, I am referring to the NOE relating to the substantive issue. There was also a brief pre-trial admissibility hearing and oral evidence was given).

3 NOE, p 3.

[6] Sergeant McNally then briefed other officers and headed out to Mr Lowry's farm. The next time Sergeant McNally spoke to Mr Lowry was at the farm property. He had given Sergeant McNally concise instructions which led police to an area about a couple of hundred metres away from the bush area. This was about five kilometres approximately into the farm. Sergeant McNally said that Mr Lowry approached in his vehicle. Mr Lowry was asked about firearms and denied having firearms. Sergeant McNally said that drew immediate suspicion, because it was contradictory to the information received from the communications centre.[4]

[7] As Sergeant McNally said, the information being relayed to police was second-hand, because the person with first-hand information was Mr Lowry's son, who was up on an area surrounding the bush. Police had been told that the suspected poacher had gone into an area of bush. This was where people were maintaining a "cordon". Mr Sargent was one of those people. Police had also been told of his experience being a hunter or poacher catcher in South Africa.

[8] An arrangement was made for Mr Lowry's son to come and speak to police. Mr Lowry's son, Harry Lowry, did not give evidence. As such, anything he told police is hearsay. But Sergeant McNally said that as a result of the conversation with Harry Lowry, police did not believe that any shots had been fired towards him by the potential poacher. No firearm had been sighted but a headlamp had been seen. After receiving this information, police formed the view that risk was declining. As such, police made a tactical decision not to enter the bush area, which was of concern to Mr Lowry and Mr Sargent.[5]

[9] Sergeant McNally's evidence is that Mr Lowry did not take the decision well. He made comments about police being soft. From the perspective of the police, there was a staff safety aspect around the situation, but the police would be following-up matters.[6]

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4 NOE, p 4.
5 NOE, p 5.
6 NOE, p 6.

[10] Mr Sargent was apparently refusing to come down from the bush area, but once Sergeant McNally spoke to Mr Sargent, he complied with the request to do so.

[11] Sergeant McNally told Mr Lowry and others that police were not going to enter into a bush area to look for a possible poacher. It was dark, it was in the middle of the farm and there was no natural lighting. Then Sergeant McNally was alerted to a firearm being seen in the back of Mr Sargent's vehicle by Sergeant Meharry.

[12] At that point, Sergeant McNally decided to invoke the Search and Surveillance Act 2012 ("SSA") to search the vehicles and communicated this to Mr Lowry and Mr Sargent. This was based on all the circumstances, including that there were licensed firearm holders taking firearms to contain and look for a person unlawfully hunting on their property. His thought process was that this was not proper for firearm licence holders to be doing this.[7] Prior to the search, there had been a denial of firearms being present, except for the firearm belonging to Mr Lowry's son. Police knew about this firearm and that Harry Lowry had been out hunting.

[13] Bill of Rights advice was given to Mr Lowry and Mr Sargent. There is no evidence though, that Mr Lowry and Mr Sargent were told the reason for the search.[8] Two firearms were located in Mr Sargent's vehicle. They were on the backseat of the vehicle. Mr Sargent said that he was going out hunting the next day. He had put them in his car so that they were ready to go.

[14] Police then moved onto Mr Lowry's vehicle. Police were aware of one of the firearms, a dark coloured rifle with a scope. Police approached the canopy of the ute. Mr Lowry told the police there was a shotgun in there. The shotgun was removed from the vehicle along with a box of shells.

[15] Sergeant McNally said[9] that Mr Lowry definitely made admissions that once he had received the phone call advising the situation, he went to his gun safe and removed the shotgun and ammunition and took it to the scene. Sergeant McNally was asked about that by Mr Taylor in cross-examination. Sergeant McNally conceded that

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7 NOE, p 7.
8 Search and Surveillance Act 2021, s 131(1)(b)(ii).
9 NOE, p 8.

those admissions were not referred to in the notes being taken at the time by Constable Tasker.

[16] Police then made a decision that the risk issue had abated with respect to the potential poachers, that Mr Lowry and Mr Sargent are licensed firearm holders and as such, firearms were not removed from the property. The firearms were handed back to Mr Lowry and Mr Sargent. Sergeant McNally said that he would follow through with a referral to the arms officer. Specifically, Sergeant McNally said, "Hey look you're firearm licence holders, we'll be doing further work in relation to unlawful hunting complaint but we'll also be looking at the state, status of your firearm's licences."[10]

Burden and standard of proof

[17] The starting point is the presumption of innocence. The onus of proof is on the police. The onus of proof rests on the police from beginning to end. I remind myself that there is no onus on either defendants at any stage to prove their innocence. The presumption of innocence means that the defendants do not have to give or call any evidence and do not have to establish their innocence.

[18] The police must prove that the defendants are guilty of the charge beyond reasonable doubt. This is a very high standard of proof which the police will have met only if, at the end of case, I am sure that the defendants are guilty.

[19] It is not enough for the police to persuade me that the defendants are probably guilty or even that they are very likely guilty. On the other hand, it is virtually impossible to prove anything to an absolute certainty when dealing with the reconstruction of past events, and the police do not have to do so.

[20] What then is reasonable doubt? Reasonable doubt is an honest and reasonable uncertainty about the guilt of the defendants after giving careful and impartial consideration to all the evidence.

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10 NOE pre-trial hearing, p 7.

[21] In summary, if after careful and impartial consideration of the evidence, I am sure that the defendants are guilty, then I must find them guilty. On the other hand, if I am not sure that they are guilty, I must find them not guilty.

[22] There is an issue in this case about the point at which an evidential burden shifts to the defendants to establish lawful, proper and sufficient purpose. I do not need to address this, though, at this point, for reasons which become evident from the judgment.

Reliability/credibility

[23] It is important to distinguish between credibility and reliability. Credibility is about truthfulness. Whether a witness can be believed? Reliability is about the accuracy of evidence which is honestly given. The first involves an intention to mislead or lie. The second involves error or mistake. Even the most honest witnesses capable of being mistaken, particularly when being asked to recall events which occurred three years ago. But a witness who sets out to give false evidence is an entirely different position. All of what is said may be called into question if the witness is setting out to be dishonesty in some or all respects.

[24] I may accept everything a witness has said. On the other hand, I may reject everything a witness has said. There is a middle ground, which is that I can accept some parts of what a witness has said and reject other parts.

[25] It is important that before relying on evidence, I am able to conclude that it was honestly given, but also that it is reliable.

Approach to assessing evidence

[26] How is evidence assessed? It is best to assess evidence by taking into account the following types of considerations:

(a) Whether the witness's evidence is consistent with the evidence of other witnesses;

(b) Whether the witness's evidence is consistent with objective evidence and if it is not, what explanation is offered for any inconsistencies;

(c) Whether the witness' account is inherently plausible - does it make sense when I run the ruler of common sense over it? Is it likely that people would have acted in the way suggested? Does it have the ring of truth?

(d) Sometimes small details stand out which might give evidence the ring of truth.

(e) Whether the witness has been consistent in their account over time and if not, why not?

(f) The nature of any consistencies in a witness' evidence may well affect the assessment of reliability and credibility of evidence. If there is an acceptable explanation for an inconsistency, then the assessment of the evidence may well be unaffected. The opposite conclusion might be drawn if there is no acceptable explanation for a significant inconsistency.

[27] It is important that I consider each witness' evidence in the context of all the evidence in the case.

[28] Simply observing witnesses and watching their demeanour as they give evidence is not a good way to assess the truth or falsity of their evidence. For example, a witness may not appear confident or may hesitate, fidget or look away when giving evidence. That does not necessarily mean that their evidence is untruthful. The witness may be understandably nervous giving evidence in an unfamiliar environment in front of unknown people. Or there may be cultural reasons for the way a witness presents. On the other hand, a witness may appear confident, open and persuasive, but nevertheless be untruthful. Also, an honest witness can be mistaken.

[29] Things like gestures or tone of voice may sometimes help to understand what the witness actually means, but caution needs to be applied about thinking that body language will help much in determining whether or not the witness is telling the truth.

Preliminary issue

[30] In his written submissions, Mr Taylor addressed the lawfulness of the searches first. I acknowledge that it is something of a circular argument. On the one hand it is arguable that in order to consider the lawfulness of the searches, a decision is first required as to whether the items in question are firearms within s 2 of the Act. This is because the issue in terms of the lawfulness of the searches of the vehicles turns on whether there were reasonable grounds to suspect that the defendants were unlawfully in possession of firearms. If they are not firearms, the lawfulness of the searches is a moot point. On the other hand, as can be seen from what I set out below, I have taken into account the totality of the evidence in considering the issue of whether the items located by police meet the definition of a firearm. To do anything else would be to predetermine that outcome of the search issue.

[31] In summary, it is something of a circular issue. The findings in relation to whether the items are firearms is therefore provisionally made, and will depend on the search issue, ultimately.

Issue 1 – Am I sure that the items located are firearms?

[32] Section 45(1) of the Arms Act says:

> **45 Carrying or possessing firearms, etc, except for lawful, proper, and sufficient purpose**
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> (1) Every person commits an offence and is liable on conviction to imprisonment for a term not exceeding 4 years or to a fine not exceeding $5,000 or to both who, except for some lawful, proper, and sufficient purpose,—
>
> (a) carries; or
>
> (b) is in possession of—
>
> any firearm, airgun, pistol, prohibited magazine, restricted weapon, or explosive.

[33] A "firearm" is defined in s 2 of the Arms Act as follows:

> **firearm**—
>
> (a) means anything from which any shot, bullet, missile, or other projectile can be discharged by force of explosive; and
>
> (b) includes—
>
> (i) anything that has been adapted so that it can be used to discharge a shot, bullet, missile, or other projectile by force of explosive; and
>
> (ii) anything which is not for the time being capable of discharging any shot, bullet, missile, or other projectile but which, by its completion or the replacement of any component part or parts or the correction or repair of any defect or defects, would be a firearm within the meaning of paragraph (a) or subparagraph (i); and
>
> (iii) anything (being a firearm within the meaning of paragraph (a) or subparagraph (i)) which is for the time being dismantled or partially dismantled; and
>
> (iv) any specially dangerous airgun

[34] The defence case is that I cannot be sure that the items located at the farm property are, as found, capable of discharging the projectile through force of explosion. Mr Taylor submits that an expert police armourer is normally required to test the firearm with live ammunition and report that it is in fact a firearm under the strict criteria in s 2 in order to meet the burden of proof.

[35] Mr Taylor acknowledges in his written submissions that this is a technical defence being put forward to the Court, but it is critical in this matter as the police have the burden of proving that the items found in the vehicles were in fact firearms as defined in s 2 of the Act.

[36] Mr Taylor submits that there are not inferences capable of supporting a conclusion that the items located are firearms. He submits:

(a) While the 111 call refers to firearms, they are not clearly identified in the call or the search conducted.

(b) The police have not conducted any test of the firearms found in the vehicle. In that regard, Mr Taylor relies on *R v Payne*.[11]

(c) The police have not noted the make, model and calibre of the items found.

(d) The police do not know if these items are other definable items in s 2 of the Arms Act, namely an airgun, imitation gun, antique firearm, prohibited firearm or pistol. If the items are one of the separately defined entities, then the charge under s 45(1) would not be proven.

(e) The police are relying on admissions made by the defendants without receiving Bill of Rights warnings and having not signed notebook statements.

(f) Airguns, antique firearms, pistols and prohibited firearms are technically still capable of being used to hunt with.

[37] In the round, Mr Taylor submits that the police have failed to meet the specific test under the Arms Act that these items found are in fact firearms.

[38] On the other hand, the police case is that the items located are firearms on a common-sense basis. Sergeant Morgan submits that the Court can draw logical inferences and apply common-sense to find that the items are indeed firearms. The police accept that the items were not tested, but submit that there are a number of strands of evidence which mean that the Court can be sure that the items were firearms. These strands of evidence are:

(a) photographs exhibited by Sergeant McNally that appear to show firearms;

(b) the evidence of Sergeant McNally and Constable Robertson who both handled the firearms and had no doubt that they were firearms;

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[11] *R v Payne* CA69/03, 26 March 2003.

(c) uncontested evidence of Sergeant McNally that Mr Sargent said to him that he was going hunting tomorrow so he put them in his car so "they are in my car ready to go";

(d) the uncontested evidence of Sergeant McNally that Mr Lowry acknowledged that there was a shotgun in the vehicle;

(e) Sergeant McNally's evidence that Mr Lowry acknowledged that he went to the gun safe, removed the shotgun and ammunition and took it to the scene;

(f) when reporting the matter to the communication centre, the evidence is that Mr Lowry said words to the effect that, "I do, or probably others do", when asked if he had guns.

[39] The police submit that the items have the appearance of firearms and as such must either be imitation firearms, blank firing firearms, airguns or firearms.

Analysis

[40] The critical question is whether these are items from which any shot, bullet, missile, or other projectile can be discharged by force of explosive?

[41] I accept the submission that the items located as result of the search by police certainly have the appearance of firearms.

[42] Section 2 of the Arms Act contains a comprehensive interpretation of the term "firearm". The first part reflects the commonly understood meaning of the word and the second provides an extension to cover various types of weapon.[12]

[43] Initially the term "firearm" was not defined in the Arms Act 1958. In *Dickey v Police*,[13] a rifle without a bolt or magazine was held not to be a firearm as that word was commonly understood. Section 2 of the Arms Amendment Act 1966 introduced

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12 Westlaw Commentary AA2.07.02.
13 *Dickey v Police* [1964] NZLR 503 (SC).

a definition of firearm, but it only extended the common usage of the word to include temporarily inoperable weapons.

[44] In terms of the definition of a firearm as contained in s 2 of the Arms Act, the two parts are disjunctive and stand independently.[14]

[45] As the Westlaw Commentary notes,[15] evidence describing a firearm and proving that it is operational is commonly given. In *R v Payne*, the Court of Appeal held that evidence of the nature and characteristics of firearms was clearly relevant.

[46] There is evidence pointing towards the items being firearms within the definition of s 2, as recognised by Sergeant Morgan, being:

(a) photographs showing items that appear to be firearms;

(b) the evidence of Sergeant McNally and Constable Robertson who had no doubt that the items were firearms.

(c) Mr Lowry and Mr Sargent themselves made comments to police that indicate that the items are firearms.[16]

[47] Mr Taylor, as noted, submitted that the police are relying on admissions made by Mr Lowry and Mr Sargent without receiving a Bill of Rights warning and have not signed notebook statements in regards to the items found or about hunting the next day. Allied to that, airguns, antique firearms, pistols and prohibited firearms are technically still capable of being used to hunt with.

[48] Based on the evidence, the only undisputed statement made by either defendant prior to the Bill of Rights being given to them, was Mr Lowry's response to the question asked by the 111 call operator. There cannot be any question about the

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14 *Tipple v Chief Executive of the New Zealand Customs Service* [2014] NZHC 2356.

15 Westlaw Commentary AA2.07.06.

16 Note: pursuant to s 27(1) of the Evidence Act 2006, statements made by either defendant are only admissible against that defendant and not the other. Anything said by Mr Lowry is only admissible against him and not Mr Sargent. The same applies in reverse in relation to Mr Sargent.

admissibility of what Mr Lowry said to the 111 call operator. There can be no realistic suggestion that he was either arrested or detained.[17]

[49] Then there is the disputed evidence that Mr Lowry made admissions that he went to his gun safe and removed the shotgun and ammunition and took it up to the scene, once he had been advised of the situation.[18] Sergeant McNally was challenged about that. He conceded that it was not recorded in his notebook. The evidence was that another police officer was taking the notes whilst Sergeant McNally spoke to those at the scene. It was suggested to him by Mr Taylor that in fact it was Sergeant McNally who asked Mr Lowry if he had gone to the gun safe and retrieved the firearm, and that Mr Lowry had replied, "No." Sergeant McNally did not accept that.[19]

[50] It seems odd that such an important point would not be recorded in a police officer's notebook. Afterall, this situation, as was stressed by the police officers, was a situation of potential danger on all fronts. I assess that the police were concerned not only about the potential risk presented by a poacher, but by the prospect of potential vigilante action by those at the farm. As such, I have reservations about what was said, if anything, by Mr Lowry about retrieving a firearm from his gun safe. While I accept it was a fast moving situation, it is surprising a matter of such potential significance would not be accurately recorded at the scene, particularly as Sergeant McNally had arranged for another police officer to be taking notes of the discussions.

[51] Mr Lowry's comment about having a shotgun and Mr Sargent's comment about going hunting were made after Sergeant McNally had given them Bill of Rights advice. Bill of Rights advice was given to both Mr Lowry and Mr Sargent after Sergeant McNally had invoked the SSA to search the vehicles.[20] As such, anything said to police, at this point, is admissible. Whether or not there are signed notebook statements or otherwise is a matter of weight, not admissibility.

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17 Refer s 23(4) of the New Zealand Bill of Rights Act 1990 ("NZBORA").
18 NOE, p 8.
19 NOE, p 10.
20 NOE, p 7.

[52] In *Beckham v Police*,[21] it was argued on appeal that in the absence of expert evidence from an armourer, the police could not establish beyond reasonable doubt that the shotgun and .22 calibre cartridges contained explosives. Miller J held that the submission failed on its facts. Proof beyond reasonable doubt could be established by inference from the evidence that the cartridges had not been fired, dismantled, or otherwise tampered with.

[53] As there is no evidence from an armourer, the issue of whether the items located are firearms requires me to consider what inferences can be drawn from the evidence that the items are firearms in accordance with s 2.

[54] An inference is a conclusion drawn from facts I accept are reliably established. It is not a guess or speculation. The facts that I accept as reliably established are:

(a) Mr Lowry and Mr Sargent are licensed firearm holders. Of course, that would not preclude them from having other types of firearms (eg, prohibited firearms), but I think that is rather implausible. That they are licensed firearms holders is a compelling fact pointing towards the items being firearms as defined in s 2.

(b) Constable Robertson's evidence that Mr Sargent said he was going hunting that next day, but he should not say that because it is COVID-19 Level 4 lockdown and that would not be a good look. The submission that other types of firearms (airguns, antique firearms, pistols and prohibited firearms) are technically capable of being used to hunt with is not an attractive submission, as what the police are required to prove, in my view, is that the two firearms in Mr Sargent's possession meet the definition in s 2(a), as opposed to embarking upon a process of elimination.

(c) Constable Robertson's evidence that he cleared both firearms to make sure there were no rounds in the chamber. He said he opened them up so "if there's a bolt in this one, pulled the bolt back, cleared them, made

[21] *Beckham v Police* HC Whangarei CRI-2006-488-34, 18 October 2006, Miller J.

sure there were no rounds in the chamber with both of them and there weren't." There were no rounds with the firearms. There was nothing to make him think that these were not firearms. Constable Robertson is a member of the Armed Defenders Squad. Everyday he deals with a firearm through his role as a GDB dog handler with a glock or clearing, checking the rifle in the car.

(d) Sergeant McNally's evidence that he was 100 per cent positive that the items in question were firearms.

(e) Mr Lowry's comment to police that there was a shotgun in his vehicle, combined with the evidence that he confirmed that he or others had guns, when speaking to the communications centre.

[55] A common sense approach needs to be taken to this. I do not intend any criticism of how the evidence was approached, but it is apparent that the police officers could have given some more direct evidence in terms of s 2(a).

[56] However, the evidence of both experienced police officers (including a police officer in the Armed Offenders Squad) that they had no doubt they were dealing with firearms, the comments made by the defendants following Bill of Rights advice, that Mr Lowry and Mr Sergeant are both licensed firearms holders mean that I am sure that the items in question were firearms, in that the items located in both vehicles are items from which any shot, bullet, missile, or other projectile can be discharged by force of explosive, having drawn together the various strands of evidence that I accept as reliably established.

[57] As noted though, at [30] above, this finding is provisionally made as it is dependent on the ultimate outcome of the search.

The search

[58] After Sergeant Meharry saw what she believed to be a firearm in Mr Sargent's car, Sergeant McNally invoked the SSA. The search of both Mr Sargent and Mr Lowry's vehicles was initiated pursuant to s 18 of the SSA.

[59] Section 18 says:

> **18 Warrantless searches associated with arms**
>
> (1) A constable who has reasonable grounds to suspect that any 1 or more of the circumstances in subsection (2) exist in relation to a person may, without a warrant, do any or all of the following:
>
> (a) search the person:
>
> (b) search any thing in the person's possession or under his or her control (including a vehicle):
>
> (c) enter a place or vehicle to carry out any activity under paragraph (a) or (b):
>
> (d) seize and detain any arms found:
>
> (e) seize and detain any licence under the Arms Act 1983 that is found.
>
> (2) The circumstances are that the person is carrying arms, or is in possession of them, or has them under his or her control, and—
>
> (a) he or she is in breach of the Arms Act 1983; or
>
> (b) he or she, by reason of his or her physical or mental condition (however caused),—
>
> (i) is incapable of having proper control of the arms; or
>
> (ii) may kill or cause bodily injury to any person; or
>
> (c) that, under the Family Violence Act 2018,—
>
> (i) a protection order or a police safety order is in force against the person; or
>
> (ii) there are grounds to make an application against him or her for a protection order.
>
> (3) A constable may, without a warrant, enter a place or vehicle, search it, seize any arms or any licence under the Arms Act 1983 found there, and detain the arms or licence if he or she has reasonable grounds to suspect that there are arms in the place or vehicle—

(a) in respect of which a category 3 offence, a category 4 offence, or an offence against the Arms Act 1983 has been committed, or is being committed, or is about to be committed; or

(b) that may be evidential material in relation to a category 3 offence, a category 4 offence, or an offence against the Arms Act 1983.

Are the searches lawful?

[60] The circumstances in which police can enter a vehicle, search it and seize any arms without a warrant are set out in s 18(2) and (3). The prosecutor and Mr Taylor appear to have based their submissions on a warrantless search under s 18(2)(a). Equally, s 18(3) could apply.

[61] One view is that s 18(2)(a) is more relevant to a situation where is a search in circumstances where the person in possession of the firearm does not hold a firearms licence.[22]

[62] The phrase "reasonable grounds to suspect" has been considered in a number of cases.[23]

[63] In *Rimine v R*, the Court of Appeal confirmed that "reasonable grounds to suspect" requirement is a lesser standard than "reasonable grounds to believe". The assessment of what constitutes grounds to suspect involves a consideration of all relevant material whether derived from personal observation or inquiry or hearsay reports.[24]

[64] The Court of Appeal in *Ward v R* said:[25]

> [42] Given that s 18 of the SSA is couched in materially identical language to s 18 of the MDA, we are satisfied that the power to conduct warrantless searches under s 18 continues to be subject to the requirements that (1) a constable exercising a warrantless power of search actually believes that there are reasonable grounds to suspect a breach of the Arms Act; and (2) the grounds for the suspicion are objectively reasonable.

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22 *Collett v Police* [2014] NZHC 3077 and *Ward v R* [2016] NZCA 580.
23 *Rimine v R* [2010] NZCA 462 at [17]; *Ward v R* at [41] and [42]; *Smith v Police* [2019] NZHC 2371 at [38].
24 *Rimine v R* at [17].
25 *Ward v R*, above n 22, at [42].

[65] There is a helpful summary in *Smith v Police*[26] of the phrase "reasonable grounds to suspect":

> It amounts to a ground of suspicion upon which a reasonable person may act; that something is "possible" or likely or "inherently likely." It is an objective standard. Circumstances giving rise to speculation or concern are not enough to constitute reasonable suspicion. In considering whether there is a reasonable cause to suspect, the Court is entitled to take into account all relevant factors, which are to be considered cumulatively rather than by way of individual dissection of particular matters. Finally, the term imports a lesser standard than "reasonable grounds to believe".

[66] Because the evidence establishes that Mr Lowry and Mr Sargent are licensed firearms holders, police initiating this warrantless search must have reasonable grounds to suspect a breach of the Arms Act or that an offence is being committed. It is not enough for them to have reasonable grounds to suspect that each defendant was in possession of firearms.

[67] There is an allied issue in terms of the search of Mr Lowry's vehicle. There was a suggestion in the evidence that there was not a separate search initiated in respect of Mr Lowry's vehicle.

[68] The issue is not whether there was a separate search under the SSA in relation to Mr Lowry's vehicle, but whether there were reasonable grounds to suspect that Mr Lowry and Mr Sargent were committing an offence under the Arms Act; being in possession of a firearm, except for some lawful, proper and sufficient purpose.

[69] The factor precipitating a search of Mr Sargent's vehicle was Sergeant Meharry seeing what she believed to be a firearm in Mr Sargent's vehicle. On its own, that would not be sufficient grounds for a search of either vehicle to be initiated, given that Mr Sargent and Mr Lowry are licensed firearms holders.

[70] By the time the search was initiated, any urgency had dissipated, as Sergeant McNally noted. Urgency was a factor considered in respect of s 18 SSA in *Smith v Police*. As noted though, the authorities are less than clear on whether circumstances of urgency ought to be considered in assessing the lawfulness of the use

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[26] *Smith v Police,* above n 23, at [38].

of the warrantless power, or the reasonableness of its use. Cull J addressed them in relation to both.[27]

[71] As was noted in *Smith v Police*, the Law Commission's introductory remarks in its report on Search and Surveillance Powers emphasise that recourse to such powers is to occur in exceptional and urgent circumstances.[28]

[72] It is worth setting out what Cull J said about the Law Commission's report:

> [52] The Law Commission's discussion as to whether the warrantless power to search for firearms ought to be retained is also instructive as to the scope and intended application of the current s 18 warrantless search power. The Law Commission accepted that there was a need to retain the warrantless search power in respect of both drugs and firearms searches. However, in relation to drug-related searches, the Commission noted there should be a specific statutory provision that proscribes the use of warrantless powers unless the police officer exercising the power believes on reasonable grounds that it is not practicable to obtain a warrant.
>
> [53] The Commission recommended that such a requirement should not extend to the warrantless powers under the Arms Act, for two reasons. First, the "rapidly evolving nature of the circumstances means that the basis for exercising the power can change in a matter of minutes; they do not crystallise in a way that is conducive to accurate presentation to, or timely judicial assessment by, an issuing officer." Secondly, the decision often needs to be made in an instant; its timing cannot be anticipated. Safety would be compromised if the entry decision were predicated on the availability of a warrant. The Commission concluded:
>
> > 5.67 We accept that, consistent with the public safety rationale for the existence of the Arms Act powers, it is most unlikely to be practicable for a warrant to be obtained before the power of entry and search can or should be exercised.

[73] The decision of the police to initiate a search was predicated on Sergeant McNally's view that licensed firearms holders were taking firearms to contain and look for a person unlawfully hunting on their property. It is his view that this is not right for firearms licence holders to be doing this. During the pre-trial hearing, Sergeant McNally said that after the firearm was seen in the back of Mr Sergant's vehicle, he "did not think it was a prudent, a fit or proper or have any

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27 At [49].
28 At [51].

reasonable lawful reason to have firearms with them at that time so Search and Surveillance Act was invoked on them."[29]

[74] In terms of unlawful purpose, as the Court of Appeal said in *Iti v R*,[30] it has to be one that is not criminal. There is a helpful summary of the meaning of the phrase "lawful, proper and sufficient" in *Sargeant v Police*:[31]

> [13] *Brocas v Police* HC Auckland AP279/97, 2 February 1998, Randerson J, is one of a number of decisions which has considered the meaning of the phrase "lawful, proper and sufficient". Others include *R v Macpherson* HC Hamilton CRI-2006-419-000168, 7 March 2007, Lang J; *Daly v Police* (2005) 22 CRNZ 10; and *Sharp v District Court at Whangarei* [1999] NZAR 221. Unfortunately, none of the cases are directly on point. However, it is possible to distil the following general principles:
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> i) In construing and applying the section, the Court should have regard to the underlying policy of the Arms Act, which is to promote the safe use and control of firearms and other weapons.
>
> ii) The word 'purpose' in s 45(1) refers to the object or end in view.
>
> iii) The words "lawful, proper and sufficient" are to be read cumulatively, so it is possible for a purpose to be lawful but not sufficient.
>
> iv) A" lawful" purpose is one that is not criminal.
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> v) Because the section focuses on purpose rather than possession, the fact a defendant may hold the relevant licence does not mean in itself that the purpose is lawful. A firearm in lawful possession may be possessed for an unlawful purpose, and vice versa.
>
> vi) In every case it will be a question of fact and degree whether the defendant has established some lawful, proper and sufficient purpose. In approaching the question of purpose, all of the surrounding circumstances must be considered, including storage.
>
> vii) The focus must be on the purpose for which the items were in the defendant's possession on the date and at the time specified by the charge.

[75] In relation to the searches of both vehicles, the information Sergeant McNally had to inform reasonable grounds to suspect that Mr Lowry and Mr Sargent were in possession of firearms included:

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29 NOE pre-trial hearing, p 6.
30 *Iti v R* [2012] NZCA 492 at [95].
31 *Sargeant v Police* HC Christchurch CRI-2009-409-170, 20 November 2009 at [13].

(a) The search of both vehicles appears to have been triggered by the police seeing a firearm in Mr Sargent's vehicle, although police suspected all along that there were firearms present.

(b) The information from the communications centre was that there were unlawful hunters on the property with firearms and that Mr Lowry had friends with him who were armed.[32] There was also information that they were containing or chasing poachers.[33]

(c) Mr Lowry and Mr Sargent are licensed firearms holders.

(d) Whether or not Mr Lowry was lying to police about the presence of a firearm is not really relevant. As said, police suspected right from the outset that he had a firearm with him.

[76] I assess that police had reasonable grounds to suspect that Mr Lowry and Mr Sargent were in possession of firearms. But that is not enough for a search to be initiated.

[77] The real issue is whether Sergeant McNally had reasonable grounds to suspect that Mr Lowry and Mr Sargent were in possession of the firearms, except for some lawful, proper and sufficient purpose? I consider the following to be relevant:

(a) There is no evidence whatsoever that Mr Lowry had been participating in the suspected "vigilante" action with a firearm. He was not seen with a firearm and it was not suggested in the evidence that he was at the bush line, other than when he went to swap places with his son, so that police could speak to Harry Lowry.

(b) In assessing reasonable grounds to suspect, police can rely on hearsay information, but anything Mr Lowry said to the police about

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32 Pre-trial hearing NOE, p 5.
33 NOE, p 2.

Mr Sargent is not admissible against Mr Sargent. So, the evidence about Mr Sargent being a "poacher catcher" overseas is not admissible.

(c) Mr Sargent was apparently at the cordon, but there is no evidence as to precisely what he was doing there, or if he was armed.

(d) Mr Lowry and Mr Sargent were on private property, a farm property, where it is not unusual for firearms to be in vehicles, although acknowledging the time of day. But, for example, Mr Sargent said that his firearm was in his vehicle because he was going hunting the next day.

(e) I am not prepared to say that Mr Lowry did deliberately remove his firearm from his gun safe as a direct response to the poaching situation, for reasons already set out.

(f) Whilst vigilante action is criminal in nature, and can never be condoned, under the law every person is entitled to defend themselves or another. The wisdom of that, is an entirely different matter.[34]

(g) At the point of the search, there was no urgency, because Sergeant McNally had spoken to Harry Lowry, and the information was that the hunter did not have a firearm.

(h) The most compelling factor is that the police left the firearms with Mr Lowry and Mr Sargent. The evidence establishes that Mr Lowry was angry and was not behaving in a reasonable manner towards the police officers. I am sure that he wanted them to do more and that their response, at least from his perspective, was most unsatisfactory. To then hand a shotgun back to him, knowing his concern, and with the poaching situation unresolved, at least from Mr Lowry's perspective

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[34] Mr Lowry and Mr Sargent are entitled to defend themselves or others under s 48 of the Crimes Act 1961. I do not intend to embark upon a detailed analysis of self-defence, which includes issues as to immediacy and the availability of other alternatives – the obvious being calling the police.

counts against a reasonable ground to suspect that an offence was being committed. It makes no sense. To state the obvious, a firearm in the hands of an angry man, is potentially dangerous, with or without a firearms licence.

(i) Of course, what is relevant is what was in Sergeant McNally's mind at the time of initiating the search. But his subsequent actions must be relevant to assessing whether the suspicion is objectively reasonable. That police virtually immediately handed back the firearms, knowing that Mr Lowry was angry about how police had handled the situation, points away from reasonable grounds to suspect that Mr Lowry and Mr Sargent were unlawfully in possession of firearms. I intend no criticism of police because this was clearly a difficult situation, but I cannot see how firearms could be left with the defendants if police truly had reasonable grounds to suspect that the defendants were unlawfully in possession of them. That they are licensed firearms holders cannot legitimise an unlawful purpose.

[78] Taking all the above factors into account, police had reasonable grounds to suspect that both were in possession of firearms, but I do not think that police had reasonable grounds to suspect that Mr Lowry and Mr Sargent were unlawfully in possession of the firearms. The most significant factor was the decision of the police virtually immediately to leave the firearms with each defendant and not seize them as they could have, for the reasons set out at [77](h)-(i) above. One view is that locating firearms, as suspected, would elevate rather than decrease concerns.

[79] Therefore, I consider for all the reasons set out above, that the searches of the vehicles were unlawful.

Were the searches unreasonable?

[80] In case I am wrong about the lawfulness of the searches, I will consider whether they were reasonable.

[81] A search, even if lawful, can be exercised unreasonably.[35] In *R v Williams*, the Court of Appeal has recognised that legality and reasonableness, while related, are distinct concepts.[36]

[82] In my view, this turns on the question of urgency and why police left the firearms with Mr Lowry and Mr Sargent. There cannot have been urgency, given:

(a) the police left the firearms with Mr Lowry and Mr Sargent; and

(b) the police had information by that stage that the hunter was not armed, and had decided that the risk had de-escalated.

[83] By that stage, Sergeant McNally must have formed a view that there was not a public safety issue. Otherwise he would have taken the firearms. His reasoning was that both defendants were licensed firearms holders. As noted, that they are licensed firearms holders cannot legitimise an unlawful purpose. But the search had been initiated on the basis that Sergeant McNally had formed the view that they, at that point, were in possession of their firearms for an unlawful purpose. The fact that the firearms had been located presumably would have elevated that concern, if genuine, rather than decreasing it, and led police to seize the firearms.

[84] Therefore, I consider that the searches were unreasonable.

Next steps

[85] The next matter to consider then is the s 30 balancing test. In the event that the Court found the searches were unlawful or unreasonable, Sergeant Morgan asked for an opportunity to make submissions.

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35 *R v Williams* [2007] NZCA 52 at [24]; *Smith v Police,* above n 23 at [82].
36 At [12].

[86] Therefore, I direct that submissions in relation to s 30 are filed within 14 days.

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Judge MA MacKenzie
District Court Judge

Date of authentication: 26/07/2021
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.